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# THE LAWYERS REPORTS ANNOTATED

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BURDETT A. RICH, HENRY P. FARNHAM, AND  
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# LAWYERS REPORTS

## ANNOTATED

### NEW SERIES.

#### MICHIGAN SUPREME COURT.

GRANT E. MARTINDALE

v.

LOBDELL-EMERY MANUFACTURING  
COMPANY, Plff. in Err.

(189 Mich. 477, 155 N. W. 559.)

#### Contract for extra work — liability.

1. One contracting to cut and load timber on cars may recover for extra services in laying siding and decking logs, made necessary by the failure of the railroad company to furnish the cars necessary to take care of the timber as cut.

*For other cases, see Contracts, IV. a, in Dig. 1-52 N. S.*

#### Principal and agent — authority of agent to contract.

2. The woods superintendent of a manufacturing company, having authority to oversee, supervise, manage, and control the outside operations of the concern in the woods, may be found to have authority to agree to pay one who has contracted to cut and load on cars timber belonging to the concern, an extra amount for laying siding and decking logs, when the railroad company fails to furnish cars as fast as necessary to care for the timber cut; at least, where the principal has previously recognized such authority under similar circumstances.

*For other cases, see Principal and Agent, II. a, in Dig. 1-52 N. S.*

#### Contracts — preventing performance — liability.

3. One who is stopped in the performance of his contract to cut timber before he has cut all that he can care for within the required time may hold the other contracting party liable for the profit he would have

made on the portion of the work which he was prevented from doing.

*For other cases, see Damages, III. p, 2, in Dig. 1-52 N. S.*

(December 22, 1915.)

**E**RROR to the Circuit Court for Montmorency County to review a judgment in plaintiff's favor in an action brought to recover for extra services performed under a timber cutting contract. Affirmed.

#### Statement by Brooke, Ch. J.:

Originally the relations between the parties to this action were set forth in two separate contracts, as follows:

"This agreement, made and entered into this 15th day of July, A. D. 1911, by and between the Lobdell & Churchill Manufacturing Company of Onaway, Michigan, party of the first part, and Grant E. Martindale, of Onaway, Michigan, party of the second part, witnesseth:

"The second party agrees to lumber, cut, remove and deliver, on the conditions and terms hereinafter mentioned, a part or all of the timber now growing, standing, lying and being on the following lands: Section 32, township 31 north, range 1 west, Otsego county, Michigan.

"It is further understood and agreed that all of the timber is to be cut low on the stump and in the most economical manner for the saving of the timber, and from such portions of the section and in such kinds of timber and in such quantities as the first party may direct from time to time.

"The second party further agrees that the work shall be done in a good workmanlike manner, and that the instructions as to the manner in which this work shall be done shall be lived up to and carried out by the second party in all its details, and all the balance of the logs not specified above shall

**Note.** — As to liability of a principal for services performed, under contract with his agent, by persons other than subagents or servants, see annotation following *Chesson v. Richmond Cedar Works*, post, 8.

be cut in the standard lengths, from 8 to 16 feet.

"It is further understood and agreed that all logs are to be delivered free on board cars on the McGraw Branch of the Michigan Central Railroad, assorted as follows: All hemlock to be loaded by itself for distinct shipment. All basswood to be loaded by itself for distinct shipment. All elm to be loaded by itself for distinct shipment, if called for.

"An assortment in loading maple, beech and birch, if found necessary later by the first party.

"It is understood and agreed, further, that said party of the second part is to receive from the first party a price of \$4.50 per M, log scale, and the official scale of the Michigan Central Railroad Company shall be accepted as the final scale.

"It is understood and agreed further that the terms of settlement shall be as follows: Payment to be made to the party of the second part by the party of the first part on the 15th day of each month for all stock delivered during each previous month.

"The second party agrees to commence operation immediately, and to commence shipping logs about the 5th or the 10th of August.

"And the second party further agrees and understands that, should this work not be done satisfactorily to the first party, they, the first party, have the option of terminating this contract at any time.

"This contract shall be in force for so long a time as the work is done satisfactorily to the party of the first part, as stated above.

"By E. J. Lobdell, President.

"G. E. Martindale.

"Witnesses:

"G. E. Trimm.

"M. E. Cruse."

"Memorandum of agreement entered into this 9th day of September, A. D. 1912, between the Lobdell & Churchill Manufacturing Company, of Onaway, Michigan, party of the first part, and Grant Martindale, of Onaway, Michigan, witnesseth:

"The said party of the second part is to log, cut, remove and clean all of the dead hemlock timber now lying, being, growing, or standing, which is marked and stamped to the boundaries on the outside of the burnt and dead wood timber on the following described land, which is included; hemlock timber blown over or lying flat throughout the lands as described herein.

"Second party agrees to cut all of the above timber low on the stump and to take the trees and logs clean from the smallest to largest, in exact accordance with instruc-

tions given by the Island Mill Lumber Company, of Alpena, Michigan. The same to be cut in as economical manner as possible by the first party, and the second party agrees to cut the hardwood logs as far as possible into 15-foot lengths, all logs which will make clear and clean logs.

"The second party further agrees that all work shall be done in a good and workmanlike manner, and to the entire satisfaction of the first party. It is fully understood and agreed between the first and second parties that should any part of this work not be properly done by the second party the first party has the right to stop the work, and the second party agrees to vacate the premises at once without recourse, upon settlement being made for all work done in exact accordance with this contract and any timber which has been so cut by the second party not in exact accordance with the above instructions and contract, a reasonable price shall be deducted for cleaning up of said lands and for the work done in cutting such timber.

"It is further agreed that the delivery of all the above-mentioned timber and logs shall be made before April 1, 1913.

"The second party further agrees to furnish the first party with an accurate time sheet of men's names and time worked each week, and a settlement shall be made for all labor performed on the premises delivering logs for the second party on the last Saturday of each and every month, and it is further agreed and understood that the party of the first part shall pay to the second party for all logs delivered on the banks of the river at Rea's Landing and Hunt creek the sum of \$4 per 1,000 feet, Scribner's rule, merchantable scale, and that payment shall be made for all work done the last Saturday of each and every month as follows: \$2.50 shall be paid for all logs delivered or skidded and the roads made to them, and the balance of \$1.50 is to be paid when the logs are delivered at Rea's Landing and Hunt creek.

"It is further understood and agreed that the second party shall have the balance of lumbering of hemlock timber on the above-described lands, provided the prices for hemlock timber continue favorable and the railroad switch is put in to this timber, as talked and agreed to between the Boyne City, Gaylord, & Alpena Railway Company.

"And it is further understood and agreed that the second party shall have the lumber, hard and soft wood timber, at such time as first party shall desire to have the same delivered, to be manufactured at Onaway, Michigan, into their various manufactured products.

"The above price is to include any decking that may be required.

"On each and every car loaded the second party is to furnish party of the first part with the number of each and every log on same.

"The Lobdell & Churchill Mfg. Co.

"By E. J. Lobdell, Pres.

"G. E. Martindale.

"Witnesses:

"D. Bertrand."

Prior to the execution of either contract the plaintiff had performed two or more lumbering contracts for the defendant under oral agreements. Before the first of the contracts in question was executed, the plaintiff went over the ground to be lumbered with Mr. A. H. Blanchard, who was woods superintendent for the defendant company, and at whose request the first contract was made. Subsequently, Mr. Lobdell, president of the defendant company, Mr. Blanchard, and the plaintiff, met in the office of the defendant company, where, after a conversation, the first contract was executed. Plaintiff seems to have immediately prepared for operations, and started the shipment of timber under the contract, early in August, 1911. There is no doubt that it was contemplated between the parties that the operation should be carried on as a "hot-logging" operation. That is to say, it was expected that the trees would be cut down, immediately thereafter "swamped," "skidded," and hauled to the McGraw Branch for loading, where they were to be immediately loaded upon cars furnished by the railroad company, for the purpose of transportation to Bay City, where the defendant had contracts of sale covering the product. From early in August to about the 8th day of January, the Michigan Central Railroad Company supplied sufficient cars to permit the operation to proceed under the "hot-logging" practice. From that time forward, the cars were not furnished in adequate numbers by the railroad company. When this situation arose, the plaintiff and Mr. Blanchard, defendant's woods superintendent, went to Bay City, and there interviewed the railway officials for the purpose of securing adequate car service. This, however, they were unable to accomplish. Whereupon, it is undisputed on the record that Blanchard directed plaintiff to continue the operations, and deck all logs at the branch where they were to be loaded, and where they should lie until cars should be furnished later. In carrying out these instructions, plaintiff built 1,000 feet of extra sidetrack, and thereafter decked about 1,500,000 feet of logs. These were not all decked at the same time, plaintiff loading

from day to day such cars as were furnished, with logs as they came from the cutting grounds. For extra labor in building the sidetrack and decking these logs, plaintiff claimed the sum of \$750, being 50 cents per thousand. The record discloses that the value of the extra services performed in this behalf was from \$1 to \$1.50 per thousand, but plaintiff and Blanchard agreed that the compensation should be 50 cents per thousand, Blanchard, defendant's woods superintendent, as well as plaintiff, testified to this agreement. While defendant does not deny the making of this agreement between Blanchard and plaintiff, it does deny the authority of Blanchard to act as its agent and bind it.

A second controversy, arising under the first contract, involves the question of the payment of the wages of a scaler. The total amount paid by the plaintiff as the wages of a scaler was \$700, one half of which, \$350, plaintiff claimed from defendant. Touching this item, it was the claim of the plaintiff that, after the first contract was entered into, it was agreed between himself and Mr. Blanchard, in the presence of Mr. Lobdell, who consented to the arrangement, that a scaler should be employed, mutually satisfactory to the parties, whose scale should be used as a check upon the scaler of the Michigan Central Railway, and that the wages of said scaler should be borne, one half by each party to the contract. This arrangement, testified to by plaintiff and Mr. Blanchard, was denied by Mr. Lobdell.

The third item of plaintiff's claim arises under the second contract, and grows out of the fact that on February 4th defendant ordered plaintiff to discontinue cutting on a portion of the so-called Montmorency contract. It is plaintiff's claim, in this regard, that he had built roads to the timber to be lumbered under the contract, and that he could have lumbered some 600,000 or 700,000 feet more timber, had he not been unlawfully ordered to discontinue that operation. Plaintiff claims that, by reason of defendant's unlawful act in ordering him to stop, he lost a prospective profit of \$1,200.

A second dispute arose between the parties growing out of the second contract. That contract provides: "Two dollars and 50 cents shall be paid for all logs delivered or skidded and the roads made to them, and the balance of \$1.50 is to be paid when the logs are delivered at Rea's Landing and Hunt creek."

Early in the performance of this contract, a dispute arose between plaintiff and defendant as to the location of Ren's Landing. It was the contention of plaintiff that Rea's

Landing was located upon the river about 1½ miles above Hunt creek, whereas the defendant claimed that it was located at a place called the "spout," very close to Hunt creek. Defendant held back a part of the contract price, thus compelling plaintiff to deliver the logs where defendant claims Rea's Landing was. This necessitated the watering and driving of the logs from the place where plaintiff had banked them on the river to the point claimed as Rea's Landing by defendant. For the extra services plaintiff demanded the sum of \$500.

Plaintiff made four other claims against defendant under the two contracts, but, as these were not submitted to the jury by the trial court, they may be disregarded.

Plaintiff's original bill of particulars was as follows:

1911-1912. Building 1,000 feet rail-road track, clearing ground for decking, and decking 1,500,000 feet logs at 50¢ per M.....	\$750 00
1911-1912. Sorting 300,000 feet beech logs .....	50 00
1911-1912. ½ scaler's wages 14 mo. at \$50 .....	350 00
1911-1912. Delay caused by not having sufficient cars .....	250 00
1911-1912. Cutting 44,000 feet logs at \$4.50 per M.....	198 00
1911-1912. Going over grounds a second time .....	44 00

Later an amended bill was filed in which the following items were claimed:

Damage for profits on 6,000,000 feet hemlock at \$2.00 per thousand .....	\$1,200 00
Driving logs .....	500 00

Defendant pleaded the general issue, and gave notices of set-off and recoupment, the general tenor of which was that the plaintiff had carelessly and incompetently performed the contract, to defendant's damage, the items of defendant's demand being as follows:

1918. To damages account of logs left undelivered, under contract of September, 1912....	\$269 49
To improper cutting of logs, same being cut too long and too short .....	1,000 00
To balance of maple, beech and elm logs and standing trees left in woods on Otsego job..	600 00
	<hr/>
	\$1,869 49

After an exhaustive trial of the issues so framed, plaintiff recovered a judgment in the sum of \$1,580.42, which defendant now reviews in this court by writ of error.

Messrs. Henry, Henry, & Henry for appellant.

Messrs. Elmer G. Smith and Joseph H. Cobb for appellee.

Brooke, Ch. J., delivered the opinion of the court:

The first item upon which the jury was permitted to pass was the sum of \$750, the price agreed upon between Blanchard and plaintiff to be paid for the building of the 1,000 feet of sidetrack, and the decking of the logs, caused by the failure of the railroad company to furnish sufficient cars to permit plaintiff to conduct the operation, after January 8th, as a "hot-logging" proposition, which, it is clear, was the method of handling the job contemplated by the parties at the time the contract was made. As pointed out in the statement of facts, Blanchard, defendant's woods superintendent, testified to the fact of making the agreement for the extra compensation exactly in accordance with the claim of plaintiff. On behalf of defendant it is urged that Blanchard was without authority, under the evidence, to modify the contract imposing an additional liability upon it. The contract provides: "The second party further agrees that the work shall be done in a good workmanlike manner, and that the instructions as to the manner in which this work shall be done shall be lived up to and carried out by the second party in all its details."

There can be no doubt, under this section of the contract, that the defendant, through its woods superintendent Blanchard, the contingency of the shortage of cars having arisen, ordered plaintiff to continue the operation, and deck the logs at the siding. It should be borne in mind that the operation in question was being carried on in timber which had been injured by fire, and that it was necessary to have it cut and marketed speedily in order to prevent serious depreciation and loss. The authority of Blanchard to meet the exigency and to order a change in the method of operation being unquestioned, it seems to us that plaintiff would have a clear right to recover the value of the extra services performed, under the common counts in his declaration, and under the uncontradicted testimony as to the value of such services contained in the record. Upon this question the court charged in part:

"And I charge you further, gentlemen, that if what Mr. Martindale claims for that service, that is to say, one-half dollar a thousand for 1,500,000 feet—if these services were fairly and reasonably worth that sum, he would be entitled to recover this

sum of \$750, which is his first claim in this case. Otherwise, not.

"If you do not find that Mr. Blanchard had this authority, which I have spoken of, to oversee, supervise, manage, and control the outside operations in the woods of this concern, then Mr. Martindale hasn't a look-in on that claim. But, if he had, then I charge you equally, as the law, that he had a right to make this arrangement, which he says he made, to have Mr. Martindale put this excess of logs into these skidways, and thereafter load them out. And if he promised that he should be paid for those services, then Mr. Martindale would be entitled to recover what those services—that is, the extra cost in loading out the skidded logs—what it was fairly and reasonably worth. He claims \$750. It is for you to say whether he is entitled to that sum."

The first paragraph quoted above would seem to permit a recovery on the quantum meruit. The second predicates the plaintiff's right to recover, upon the authority of Mr. Blanchard to fix the value of the extra service and bind his principal to pay the agreed sum. As indicated, we believe the first paragraph above quoted states the law applicable to the case, but we are further of the opinion that no error was committed by the court in submitting the question of Blanchard's agency to the jury, under the testimony contained in the record. From Blanchard's testimony, it fairly appears, we think, that he had, on various occasions during the period of his service with defendant, assumed to direct the performance of similar contracts, and that his principal, the defendant, had recognized his authority so to do. The testimony of plaintiff and Blanchard as to the method of doing business, and as to the exercise of authority by Blanchard in this as well as in other similar contracts, was, in our opinion, quite sufficient to carry to the jury the question as to whether Blanchard had authority to agree to pay the extra compensation. *Marx v. King*, 162 Mich. 258, 127 N. W. 341.

With reference to the second item of plaintiff's claim, one half the scaler's wages, it seems to be defendant's contention that the oral agreement to divide the expense, testified to by Blanchard and plaintiff, was made prior to the execution of the written contract, which provides that "the official scale of the Michigan Central Railroad Company shall be accepted as final."

Plaintiff himself clearly testified that the arrangement was made subsequent to the execution of the contract, and we think a fair consideration of the entire record leads to the conclusion that the weight of the

testimony is to that effect. Mr. Lobdell himself flatly denied the making of any such arrangement at any time.

As to the third item of plaintiff's damages, arising from the closing down of the so-called Montmorency operation, defendant claims that it was acting within its legal rights in so doing, in order to insure the delivery of all the logs then cut to the piling grounds designated in the contract, before the snow should vanish in the spring. Counsel for defendant say: "The defendant's position, for the reasons indicated above, and to insure the delivery of the logs already decked, was simply that Martindale should stop cutting any more timber until he had hauled this 1,500,000 feet which was decked, and that he should use his dray haul force in hastening the delivery of these sleigh haul logs."

Upon this point the learned trial judge instructed the jury as follows:

"If you find from the evidence, gentlemen, in this case, by a fair weight and preponderance, that if Grant Martindale had not been stopped by the defendant, he could have hauled out his sleigh haul logs, and also could have cut and put in this quantity of dead hemlock which he was using for his dray haul; that if he had not been stopped he could have completed the job on both kinds of timber—then I charge you that he would be entitled to such damages as I shall instruct you in a few moments. But, on the other hand, gentlemen, and from the different standpoint, I charge you expressly that, if an honest fair-minded lumberman, of ordinary intelligence, experience, and prudence, would not have believed that the plaintiff, under the circumstances then existing, could put his sleigh haul logs then on skids to the river before April 1, 1913, and also put in the remaining dray haul timber, and that the defendant did not so believe, then the defendant had the right to instruct the plaintiff to stop cutting dray haul logs, and use his force to get all the logs ready cut to the river before cutting any more logs of either kind.

"Now, gentlemen, if, under these instructions, you find that the plaintiff would be entitled to recover damages for being prevented from continuing his operation in cutting and hauling the dray haul logs, I must tell you what you might award him. It is the claim of the plaintiff, and he has given evidence tending to show that state of facts, that before this time he had constructed all necessary or useful roads for the purpose of taking out the remaining standing dead hemlock timber, standing and lying dead hemlock timber, on section 28; that there was a quantity of that of about 600,000

feet; that he had built all necessary roads and landings; and that he could have done that work for \$2 per 1,000 feet. The contract price was \$4 a thousand, and he claims to recover, as the measure of damage, \$2 a thousand, or the difference between the cost of putting in the logs and the contract price; and I charge you, gentlemen of the jury, that if you believe he is entitled to recover, under these instructions which I have just stated to you and repeated, that that would be the measure of his damage. Not \$2 necessarily—I do not say \$2. It is for you to say, first, how much timber there was there that he could have put in before the 1st of April. Not just 600,000, because

he says so, unless you are convinced from the evidence that that is true—but he could recover the difference between the cost of putting in such timber as he could and would have put in, and the contract price. That would be the measure of damages.”

This instruction, we think, correctly states the law applicable to the facts. *Atkinson v. Morse*, 63 Mich. 276, 29 N. W. 711.

The last item involves a pure question of fact, and was submitted to the jury under appropriate instructions.

The judgment is affirmed.

The late Justice McAlvay took no part in this decision.

### NORTH CAROLINA SUPREME COURT.

W. S. CHESSON

v.

RICHMOND CEDAR WORKS, Appt.

(172 N. C. 32, 89 S. E. 800.)

#### Principal and agent — implied authority of wood boss.

No authority of a temporary wood boss of a manufacturing company can be implied, to contract for the cutting of timber from 5,000 acres of land, the performance of which will extend over many years and involve many thousands of dollars.

*For other cases, see Principal and Agent, II. a, in Dig. 1-52 N. S.*

(September 13, 1916.)

**A**PPEAL by defendant from a judgment of the Superior Court for Tyrrell County in plaintiff's favor in an action brought to recover damages for the wrongful breaking of an oral contract for the cutting of timber. Reversed.

The facts are stated in the opinion.

Messrs. Ward & Thompson and Winston & Biggs, for appellant:

The alleged contract is, on its face, so unusual, extraordinary, and unique as to put the plaintiff on notice that the wood boss or field foreman could not make it.

*Newberry v. Seaboard Air Line R. Co.* 160 N. C. 156, 76 S. E. 238; *Stephens v. John L. Roper Lumber Co.* 160 N. C. 107, 41 L.R.A.(N.S.) 1141, 75 S. E. 933; *Gardner*

**Note.** — As to liability of a principal for services performed, under contract with his agent, by persons other than subagents or servants, see annotation following this case, post, 8.

L.R.A.1918F.

*v. Deeds*, 116 Tenn. 128, 4 L.R.A.(N.S.) 744, 92 S. W. 518, 7 Ann. Cas. 1172.

Plaintiff knew that the powers of the wood boss were restricted to those acts and contracts usually exercised by other agents in the same line of business, under similar circumstances, and that he must conduct the particular business of the principal in the manner usually employed by other agents of the same kind.

*Clark & S. Agency*, § 203, p. 475; *Mechem, Agency*, § 289.

If the character assumed by the agent is of such a suspicious or unreasonable nature, or if the authority which he seeks to exercise is of such an unusual or improbable character, as would suffice to put an ordinarily prudent man upon his guard, the party dealing with him may not shut his eyes to the real state of the case; but should either refuse to deal with the agent at all, or should ascertain from the principal the true condition of affairs.

*Stephens v. John L. Roper Lumber Co.* 160 N. C. 107, 41 L.R.A.(N.S.) 1141, 75 S. E. 933; *Ring Furniture Co. v. Bussell*, 171 N. C. 474, 88 S. E. 487; *Whitehurst v. Kerr*, 153 N. C. 76, 68 S. E. 913; *Newberry v. Seaboard Air Line R. Co.* 160 N. C. 156, 76 S. E. 238, 31 Cyc. 1340; *Hurley v. Watson*, 68 Mich. 531, 36 N. W. 726.

The court could not lend the weight of his opinion to the case by charging that the defendant, by employing someone in plaintiff's place and refusing to let him cut the Dismal Swamp, thereby admitted that it broke the contract.

*Speer v. Perry*, 167 N. C. 122, 83 S. E. 176; *Swan v. Carawan*, 168 N. C. 472, 84 S. E. 699; *State v. Fenner*, 166 N. C. 248, 80 S. E. 970, 11 Enc. Pl. & Pr. 97.

Messrs. I. M. Meekins and P. W. McMullan for appellee.

Clark, Ch. J., delivered the opinion of the court:

This action is based upon the complaint that the defendant company, through its agent, one L. E. Shucker, made a verbal contract with the plaintiff to cut and top all the merchantable juniper timber of the defendant, in that part of the Dismal Swamp owned by the defendant, containing some 5,000 or more acres, at the rate of 6½ cents per tree. The defendant denied that Shucker made such contract, and that he had any authority to do so, and averred that the timber cut by the plaintiff was under a contract to cut the same, restricted to the service as performed from time to time, and the plaintiff admits that he was paid up to the time of his discharge.

The evidence shows that the alleged contract was indefinite as to the time of cutting, and that the quantity of timber to be cut, with the force which the plaintiff employed, would require several years. The plaintiff estimates three years, and the defendant's estimate is from ten to twenty years.

The plaintiff testifies that he made such verbal contract with Shucker, the wood boss or field manager of the defendant; that it was to cover the cutting of the entire area of the Dismal Swamp owned by the defendant; that this verbal contract was made in a blacksmith's shop, no one being present except the plaintiff and the agent, Shucker. It was further in evidence that the plaintiff had little experience with such work, and had only worked for the defendant one month previously, and that said Shucker had been in the employment of the company himself for only seven months, and was subject to discharge at any time. Shucker denied having made such contract.

The defendant had a general manager, Mr. Warwick, which fact was known to the plaintiff. Shucker was not an officer of the company, nor its general superintendent, and denied that he had any authority to make such contract or any contract for a definite time, or that was not subject to the approval of the general manager; and testified that he was merely a field superintendent of logging operations, with authority to have timber cut from time to time as needed.

The alleged contract is so unusual, extraordinary, and unique that it is not to be assumed that said Shucker had authority to make it. It was no function of his position. If it were, Shucker, a superintendent of logging holding at will, with authority to have the timber cut as needed, could bind his employers by a verbal contract not approved by the company or its general manager, which might last for twenty years,

and involved the expenditure of many thousands of dollars, without any bond or guaranty given by the plaintiff for the faithful performance of his work, and such contract would bind the company, should it sell its timber to another party. There is no testimony of any express authority given to Shucker to make such contract or any ratification of such contract by the company.

In *Mechem on Agency*, § 290, it is said: "The person dealing with the agent must also act with ordinary prudence and reasonable diligence. If the character assumed by the agent is of such a suspicious or unreasonable nature, or if the authority which he seeks to exercise is of such an unusual or improbable character, as would suffice to put an ordinarily prudent man upon his guard, the party dealing with him may not shut his eyes to the real state of the case, but should either refuse to deal with the agent at all, or should ascertain from the principal the true condition of affairs."

In *Stephens v. John L. Roper Lumber Co.* 160 N. C. 107, 41 L.R.A. (N.S.) 1141, 75 S. E. 933, it is said that a principal is not bound by the act of the general agent, unauthorized by him, so unusual and remarkable as to arouse the inquiry of a man of average business prudence as to whether the authority had actually been conferred; for third persons cannot assume that an agent's acts are authorized, unless they are within the scope of the duties ordinarily conferred upon agencies of that character, nor when the transaction is of a nature so unusual that the other party should be put upon inquiry, to ascertain the actual authority of the agent of the company to make a contract of that nature. This opinion by Judge Hoke discusses the proposition so thoroughly (with the citation of many precedents in point), that it is unnecessary for us to do more than refer to what is there so well said. To the same purport, *Newberry v. Seaboard Air Line R. Co.* 160 N. C. 156, 76 S. E. 238; *King Furniture Co. v. Bussell*, 171 N. C. 474, 88 S. E. 484. In *Gooding v. Moore*, 150 N. C. 195, 63 S. E. 895, the agent was "a general agent not only in purchasing the plant and timber, but in managing the business." The contract was within the apparent scope of such agency, and it was held that the other party was not bound by restrictions which were not made known to him.

In this case, the extent of the contract, which may be twenty years, and the amount of the compensation which, it is claimed by the defendant, may aggregate \$80,000, and the admission of the plaintiff that the duration and amount are not limited in the terms of the contract, on its face requires such unusual authority in the temporary

agent of the company that the plaintiff should have ascertained, by inquiry of the officials of the company, of those "higher up," whether the alleged agent was possessed of such extraordinary powers. Not having done so, it was incumbent upon him, in this trial, to show that Shucker, in fact, possessed such authority. On the contrary, there is absolute denial by Shucker and by the company that he possessed such authority, and the testimony of Shucker that he did not make the contract. There is no evi-

dence tending to show knowledge by the company of such unusual contract or ratification.

Whether Shucker, in fact, made such contract was a matter for the jury, but, in the absence of any scintilla of evidence that Shucker had authority to make such an unusual contract, which power could not be implied merely from his position as local wood boss, the motion for a nonsuit should have been granted.

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*Introductory.*

As is indicated by its title, the following monograph contains a review of the cases which belong to one subdivision of that general category which has been discussed, with relation to another of its subdivisions, in the note appended to *Brutinel v. Nygren*, post, —. That is to say, it deals with the circumstances under which an action to recover compensation for services may be maintained by a person whose claim is based upon a contract of employment which was made with an agent of the party benefited, and which was of such a nature that it did not place the claimant in the position either of a subagent or of a servant.<sup>1</sup>

It is believed that, as a complement to the other monograph just mentioned, one which discusses fully the decisions relating to the operation of certain general principles of the law of agency in their application to an unusually important description of contracts will be found to be of much practical value to the profession, affording, as it does, a ready means of consulting, within the limits of a single dissertation, an immense body of cases which hitherto have been scattered through a large number of separate treatises. In the effort to render the collection of authorities as exhaustive as possible no labor has been spared.

The writer wishes to direct particular attention to that large and important class of cases in which the subject considered was the right of recovery in respect of medical or similar services rendered, in pursuance of a contract with an agent of the defendant, to a person injured by reason of conditions or events incidental to the operation of the defendant's business.<sup>2</sup> An examination of the American cases belonging to this class indicates that those which have a bearing upon the extent of the power of an inferior agent to bind his principal by a contract of this descrip-

tion are founded, either directly or indirectly, on an English decision.<sup>3</sup> In so far as it turned upon the conception that such a contract is, under ordinary circumstances, beyond the powers of an inferior agent like the one in question (a station master), that decision has never been impugned in England. But in so far as it constituted a precedent adverse to the theory that those powers may be enlarged by the existence of an emergency creating a necessity for prompt action, it has been discredited by remarks made by Bramwell, B., Grove, J., and Denman, J., in a case which came before the Exchequer Chamber.<sup>4</sup> Strangely enough, that case has been almost entirely overlooked by American judges.<sup>5</sup> It was one in which a district inspector of police, named Locke, who is said to have been a superior of the station master and representative of the railway company, promised payment to an innkeeper for care of persons injured in a railway accident. Bramwell, B., in discussing the question of liability, said: "I think there is very little doubt that what Locke did was done with the object of binding the railway company if he had power to do so." "The question is, had he authority to do so?" He had what might be called a necessary authority to do so. He was the chief person there. It was the interest of the company that the mischief resulting from the accident should be the smallest possible, if the company were liable, and the company might be. Then there is a necessity, under circumstances such as these, for what might be called instantaneous action." It will be observed that the essence of the conception which this passage reflects is that the implied power of the agent in question might warrantably be regarded as a necessary incident of a duty, assumed to be incumbent upon him, of protecting the defendant company provisionally against a purely contingent liability to which it might or might not be found

<sup>1</sup> For full information as to cases involving the remedial rights of servants hired by agents the practitioner is referred to 2 Labatt's Master & Servant, 114-122.

<sup>2</sup> These cases form a portion of the matter included in §§ 6, 8, and 22 to 42 and 52, infra.

<sup>3</sup> *Cox v. Midland Counties R. Co.* (1849) 3 Exch. 268, 154 Eng. Reprint, 844, 18 L. J. Exch. N. S. 65, 13 Jur. 65. See § 33, infra.

<sup>4</sup> *Langan v. Great Western R. Co.* (1874; Exch. Ch.) 30 L. T. N. S. 173. See §§ 38 and 52(d), infra.

<sup>5</sup> The Citation Department of the Law-

yers' Co-op. Pub. Co. has recorded only a single case in which it has been mentioned,—*Vandalia R. Co. v. Bryan* (1915) 60 Ind. App. 223, 110 N. E. 218; and this, it will be observed, is one of very recent date. That there should have been no reference to it in any of the numerous cases in which, during a period of more than thirty years after it was decided, the questions upon which it has a bearing were frequently considered, is a very remarkable fact, which can be only partially accounted for by the circumstance that it is not reported in any series except the Law Times

amenable after the circumstances had been further investigated.<sup>6</sup> It is not wholly clear from the language used by Grove, J., and Denman, J., whether they adopted a theory of this broad scope; but the effect of an emergency in enlarging the normal authority of an employing agent was distinctly recognized by him.

It is certainly not an unreasonable supposition that the views of at least some of the American courts would have been greatly modified if they had been aware that a conception of so broad a scope as that which is embodied in the passage quoted above had been treated by one, if not, two, eminent English judges as the rationale of the agent's implied authority in cases of this type. How profoundly the leavening effect of such a conception might have influenced the development of the law will be at once realized if we advert to the fact that its adoption would have excluded all controversy as to any of the subsidiary but much mooted questions of which each one of the following considerations is suggestive: (1) That the conception, although it was invoked in the English case merely as the basis of the specific doctrine that the powers of inferior agents are enlarged by an emergency, is equally appropriate as a criterion of the extent of the powers of managing agents; (2) that, although it was applied with reference to an action in which the defendant was a railway company, it is so entirely general in its character as to be relevant, irrespective of the nature of the business carried on by the defendant; (3) that this generality also serves to render it relevant irrespective of whether the injured person was or was not an employee of the defendant; and (4) that it operates so as to render wholly immaterial the question whether the injury treated by the claimant was

or was not caused by negligence imputable to the defendant. If the tests of liability which it furnishes had been adopted by the American courts, a notable simplification of the whole subject would have resulted, and the accumulation of extraordinarily conflicting decisions by which the practitioner is now embarrassed would have been notably diminished. The responsibility of the principal would have been determined with reference to a single fundamental consideration, without any regard to the question whether the contracting party was a managing or an inferior agent; and the only difference recognized in respect of the binding quality of the contracts of each description of agent would have been that predicated on the theory that, in a case where a contract of the kind now under discussion was shown to have been made by a managing agent, the power so exercised would have been viewed as an ordinary incident of the functions delegated to him; while, in a case where the claimant was employed by an inferior agent, the validity of the contract would have been regarded as being conditioned upon the existence of an emergency necessitating immediate action.

*I. Right of recovery considered with reference to the scope of the powers of the agents who contracted for the services in question.*

*§ 2. General agent in respect of real estate transactions.*

The right to maintain against the principal an action for legal services rendered with respect to matters arising in the course of the business intrusted to an agent of this description was affirmed in the cases reviewed below.<sup>1</sup>

<sup>6</sup> The notion that the prospect of a merely contingent liability might be sufficient to invest an agent with the power to engage a doctor was evidently not present to the mind of the court when it remarked, in *Spelman v. Gold Coin Min. & Mill Co.* (1901) 26 Mont. 76, 55 L.R.A. 640, 91 Am. St. Rep. 402, 66 Pac. 597, that, if a manager has the power to enter into a contract when the injured person has a valid claim for damages, this power must "rest upon the assumption or theory that, in appointing a general manager, the company impliedly delegates to him authority to lessen the extent of the injuries inflicted by the principal's wrong, and thereby diminish the amount of damages for which the latter would otherwise be liable."

<sup>1</sup> In *Mason v. Taylor* (1887) 38 Minn. 32, 35 N. W. 474, the action was brought for compensation in respect of legal services, rendered at the request of the firm of M. & M., who had been appointed as the American agents of a resident of Scotland, under a written contract which was construed by the court as bestowing upon the firm plenary power to invest in town lots and farm lands in Minnesota and Dakota such sums of money as defendant and his undisclosed constituents might see fit to transmit through one H.; to erect buildings thereon, rent the same, and collect said rents; to insure said buildings; and to sell such property, without consulting their principal, whenever they could do so at a profit. The right of the claimant to

**§ 3. Agent in respect of the sale of real property.**

One of the grounds upon which it was held that a mechanics' lien could not be enforced was, that an agent appointed to "look after" the defendant's property, and "close a deal for its sale," had exceeded his powers in granting to a prospective vendee, who had gone into possession, authority to contract with the plaintiff for the making of valuable improvements, which cost about \$500, for the purpose of enabling him to effect a loan of money to be used in paying the purchase price.<sup>1</sup>

In a case where the right to recover for legal services was affirmed the ratio

recover was affirmed on two grounds; viz. (1) that this contract constituted M. & M. the general agents of Taylor, the defendant; and (2) that, independently of this fact, the plaintiff, having no knowledge whatever of the contract, was justified in relying upon the apparent authority enjoyed by defendant's agents. With regard to the second of these grounds the court said: "The principal resided in Scotland, and carried on his large business through the firm of Miller & McMaster for over three years. They bought and sold, they built and leased houses, they did a general real estate business in his name, investing about \$200,000. Titles were examined by plaintiff; he was consulted generally in regard to the matters that might be expected to arise in such an extensive business; and lawsuits in which Taylor was defendant as well as plaintiff were managed by him professionally from the beginning of such agency to its termination. In so employing plaintiff, the agents were acting within their apparent authority, and their principal is liable."

In *Egan v. DeJonge* (1908; Sup. App. T.) 113 N. Y. Supp. 737, the court said: The plaintiff's employer "was evidently the authorized general agent of the defendant in connection with her real estate transactions. He acted for her in prior transactions, and had engaged her attorneys for her in matters relating to such transactions. He certainly acted for her on the occasion in question, negotiated for the purchase, signed the contract, and had the agreement in suit witnessed by her own attorney. If there was no express authorization given to him to engage the plaintiffs as her attorneys for closing the title to the purchased premises, in this instance such an employment was a power incidental to the agency by reason of the general rule that an agent employed to do an act is deemed authorized to do it in a manner in which the business is usually done." The language thus used leaves somewhat uncertain whether the powers ascribed to the employing agent would have been predicated if he had not been habitually

decidendi was, that the plaintiff's employer appeared from the evidence to have been appointed, not as a real estate agent, but as an attorney in certain eminent domain proceedings, and that the services of the claimant had been rendered with relation to these proceedings.<sup>2</sup>

In another case the liability of the principal for the compensation of an attorney at law, employed by an agent of this description, was denied on the ground that the written contract defining his powers did not cover transactions such as the one with respect to which the services in question were rendered.<sup>3</sup>

acting for the defendant in previous transactions of a similar character, and had consequently been merely a special agent, so far as the particular transaction under review was concerned. But the latter portion of the extract may apparently be construed as importing that, in the view of the court, the extent of authority was not dependent upon the anterior relations existing between him and the defendant.

<sup>1</sup> *Daly v. Arkadelphia Mill. Co.* (1916) 126 Ark. 405, 189 S. W. 1053.

<sup>2</sup> *Whitham v. Hilton* (1914) 78 Wash. 446, 139 Pac. 209, Ann. Cas. 1916B, 260. There the evidence showed that, after eminent domain proceedings had been instituted for the expropriation of the land of a resident in another state, Hollowell was sent by the owner with a power of attorney, authorizing him to convey the property, and that, after having received an offer, which was deemed satisfactory, he placed the summons in the hands of the plaintiff. The contention that Hollowell had no authority to employ an attorney was thus dealt with: "It seems to us that the following are convincing facts pointing to Hollowell's authority to employ the defendant as attorney: the attempt to agree upon the purchase price of the land between the school board and the defendant before the commencement of the eminent domain proceeding; the commencement of the eminent domain proceeding thereafter; the execution of the power of attorney by the defendant to Hollowell; the placing of the summons and petition in the hands of Hollowell by the defendant; and the sending of Hollowell from Denver to Seattle for the apparent express purpose of settlement of the controversy out of court if possible, or to secure as favorable an award as possible in the proceedings. . . . In any event, these facts were sufficient to show such an apparent authority in that regard that the plaintiff was entitled to rely thereon."

<sup>3</sup> In *Harnett v. Garvey* (1873) 4 Jones & S. (N. Y.) 326, the defendants constituted one Garvey their attorney "to sell, assign, transfer, pledge, mortgage, lease, and convey, and to make contracts for the sale of

§ 4. *Agent in respect of the leasing of real property.*

An agent who is merely authorized to rent premises is not impliedly empowered to bind his principal by a contract for repairs or improvements with respect thereto.<sup>1</sup>

§ 5. *Agent in respect of the sale of personal property.*

There is authority for the doctrine

that the local agent of a foreign mercantile company is impliedly empowered to enter into reasonable contracts with respect to advertising the goods of his principals.<sup>1</sup> But the decisions, as they stand, are all adverse to the implication of any such authority as a normal incident of the functions of employees who are engaged merely for the purpose of making sales.<sup>2</sup>

all or any estate, etc., and to execute and deliver all deeds, etc., and to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, etc." Discussing this instrument the court said that it did "not by its terms authorize him to retain, consult, and employ counsel, except so far as may be necessary to prepare such instruments of conveyance, mortgage, lease, and contract as it authorizes him to execute." As the plaintiff's claim related to "other matters affecting the defendants' interests," it could not be enforced.

<sup>1</sup> Halbut v. Forrest City (1879) 34 Ark. 246; McMichen v. Brown (1911) 10 Ga. App. 506, 73 S. E. 691; Peddicord v. Berk (1906) 74 Kan. 236, 86 Pac. 465 (where the contention of the defendants in an action of forcible detainer was that, if they were credited with the value of the improvements authorized by the agent, they would not be in arrears for the rent).

<sup>1</sup> In St. Louis Gunning Advertising Co. v. Wanamaker & Brown (1905) 115 Mo. App. 270, 90 S. W. 737, where the agent by whom the contract in question was made with the plaintiff was a person who conducted a tailoring establishment in the name of the defendant, and took orders on its behalf, it was laid down, with reference to a new trial, that, in order to warrant the jury in declaring the defendant liable on the ground that the agent had, as an incident of his duties as selling agent, authority to contract in defendant's name for advertising, they must find the advertising in question to have been reasonable in amount and necessary, in view of all the circumstances in which he was placed, and not merely appropriate or useful; and that, if they so found, the plaintiff would be justified in relying on his apparent authority to contract for the advertising, unless it was known to the plaintiff that he did not possess the authority, or the facts were such that a prudent man, in the exercise of ordinary diligence, would not have relied on his apparent authority.

<sup>2</sup> In United States Bedding Co. v. Andre (1912) 105 Ark. 111, 41 L.R.A.(N.S.) 1019, 150 S. W. 413, Ann. Cas. 1914D, 800, the defendant, a mercantile corporation in the city of Memphis, had in its employ a traveling salesman, who was authorized to solicit orders for and make sales of its goods. Among its customers in Osceola, a city in Arkansas, was a retail firm, to whom, when shipping goods, it also sent

large printed advertisements, which could be posted on billboards. The plaintiff sued upon a contract alleged to have been made with appellant's salesman, whereby he was employed to post these advertisements on his billboards. The testimony tended to prove that a day or two after this contract had been entered into, the manager of the Osceola firm received a letter from the defendant, stating that its traveling salesman had advised it of the price plaintiff wanted for posting the advertisements, and that it refused to make such contract. As soon as he received this letter, Swift notified plaintiff that defendant refused to make the contract, or that it did not consider that it had a contract with him. It also appeared that plaintiff began posting the advertisements, probably a day or two before receiving this notice, and went on posting them for a short time thereafter, and that the only reason for discontinuing the work was that Swift had no more advertisements on hand. A judgment in favor of the plaintiff was reversed.

In Tarpy v. Bernheimer (1892; N. Y. C. P.) 42 N. Y. S. R. 184, 16 N. Y. Supp. 870, it was held that no right to recover for inserting an advertisement of the defendant's business in plaintiff's paper was shown by evidence that the plaintiff received the order from a person who was agent for the defendants only for the purpose of selling beer, collecting bills, and representing the defendants before the board of excise.

In Brooklyn Daily Eagle v. Dellmar (1900; Sup. App. T.) 30 Misc. 747, 62 N. Y. Supp. 1041, it was held that the salesman of a person who manufactured and sold a preparation for the hair had no implied authority to make, with a firm to which he sold a quantity of this article, an agreement that the defendant would advertise the wares in the plaintiff's newspaper. The court observed that, even if the agent had been authorized to make the contract, "it was not made for the plaintiff's benefit, and it obtained no rights thereunder. Neither had Grotty any authority to bind the defendant by his unauthorized act in inserting the advertisement; for he had not even apparent authority to make advertising contracts for it. The defendant was not to profit by the advertisement, except in the very indirect sense that, if Abraham & Strauss had sold all of the preparation which they had bought, they might have purchased more from the defendant."

In a Quebec case where an advertising agency was held to be entitled to recover from a company the price of certain advertisements, inserted in pursuance of an arrangement with a financial agent appointed for the purpose of promoting the sale of its stock, the ratio decidendi was, that, while that agent was only a broker, and did not act within the scope of the powers which had been given him, the company was still liable, because he had been held out to the public as the company's agent, having authority to bind the company by the contracts which he entered into.<sup>3</sup>

It has been held that the agent of a foreign brewing corporation has no implied authority to engage counsel at its expense to defend him in criminal proceedings instituted against him for failing to pay the privilege tax imposed upon dealers in malt liquors;<sup>4</sup> and that an agent authorized to sell machinery on commission in certain designated counties of a state has no power to bind his principal by a contract under which the services of an attorney are retained generally as regards all matters relating to the business of the corporation.<sup>5</sup>

A salesman employed to travel about the country with samples of merchandise, contained in trunks, which require teams and carriages for their transportation, is invested with an implied power to hire the necessary vehicles and pay for them out of the funds in his hands belonging to his principal. Where such an agent, having in his possession money supplied by the principal for the purpose of making such a payment, fails to do so, the principal is liable for the cost of any vehicle which may be furnished by a person who was ignorant that the money had been so supplied, and that the principal had forbidden the agent to pledge his credit.<sup>6</sup>

### § 6. Agent in respect of the purchase of personal property.

An agent authorized to give an order for a new kind of machine, which appears to have been an experiment, may properly be found by a jury to be also invested with authority to direct the performance of extra work upon it. The court was of opinion that the principal might well have foreseen this, and if he had intended to limit the agent's authority, he ought to have notified the plaintiff. In such a case "it was not an unnatural or unusual circumstance that something more might be required to be done upon it than was indicated by the original plans and model."<sup>1</sup>

In the case cited below it was laid down that an employee in the office of a foreign corporation, whose duties were to purchase cotton, make repairs, and to make requisitions for supplies or other things needed in the office, was not authorized, by virtue of his position alone, to engage a physician to attend an injured servant.<sup>2</sup> But his authority in that regard was held to be a warrantable inference from evidence which showed that he was in charge of the office, that he communicated to the company the fact that the claimant was the attending physician of the injured servant, and that the company paid for medicines for him. Evidence of this character, however, would seem to be rather relevant on the question of an adoption of the act of the employee, than on the question of his pre-existing authority.

### § 7. Agent for collection of debt.

One employed as attorney at law to collect a claim for rent cannot bind the landlord by a contract to pay for improvements made on the rented premises.<sup>1</sup>

<sup>3</sup> French Gas Saving Co. v. Desbarats Advertising Agency (1912; K. B.) — Quebec, —, 1 D. L. R. 136, applying art. 1730 of the Quebec Civil Code concerning ostensible agency.

<sup>4</sup> Bush v. Southern Brewing Co. (1891) 69 Miss. 200, 13 So. 856. The ratio decidendi was that, if the business of the principal was an unlawful one, because the tax had not been paid, the agent was entitled neither to indemnity against the consequences of indictment and conviction, nor to indemnity against the expense incurred for fees of counsel; while, on the other hand, if the business was a lawful one, the principal was under no obligation, express

or implied, to defend the agent against an unjust and baseless prosecution for engaging in it.

<sup>5</sup> Kirby v. Western Wheeled Scraper Co. (1897) 9 S. D. 623, 70 N. W. 1052.

<sup>6</sup> Bentley v. Doggett (1881) 51 Wis. 224, 37 Am. Rep. 827, 8 N. W. 155.

<sup>1</sup> Benton v. Moss (1905; Sup. App. T.) 47 Misc. 376, 93 N. Y. Supp. 1113.

<sup>2</sup> Roff Oil & Cotton Co. v. King (1915) 46 Okla. 31, 148 Pac. 9.

<sup>1</sup> McMichen v. Brown (1911) 10 Ga. App. 506, 73 S. E. 691 (court did not err in directing a verdict for the plaintiff in distress-warrant proceeding).

§ 8. *Agent of insurance company.*

On the ground that the appointment of a general agent by an insurance company "carries on its face general authority to act for and bind the principal in the line of the principal's business," it was held in the case cited below that he had ostensible authority to bind the company by a contract for the employment of attorneys to defend it against a claim, although such a contract was in fact outside the scope of his actual authority.<sup>1</sup>

It has recently been held that the resident manager of an English insurance company doing business in New York has no implied authority to engage an attorney to go with him to Europe to discuss with the home office the affairs of the American agency.<sup>2</sup>

Where several insurance companies joined in resisting certain death claims, and appointed a committee for the purpose of carrying out their object, the

right of the plaintiff to recover against the companies for services rendered by him as local counsel was affirmed on the ground that the evidence showed that he had been retained by the committee, that he had no notice of the resolutions by which its powers had been restricted, and that the circumstances brought to his knowledge were sufficient to warrant him in the belief that the defendants had made an arrangement to defend any and all of the actions pending when his services were solicited.<sup>3</sup>

§ 9. *Attorney at law.*

Where the authority of an attorney at law to employ another attorney was conferred by express language, and was general in its nature, the remedial rights of the person employed are obviously not affected by any limitations upon its scope of which he had no notice, either actual or constructive.<sup>1</sup>

<sup>1</sup> Fidelity & C. Co. v. Field (1902) 2 Neb. (Unof.) 442, 89 N. W. 249.

<sup>2</sup> Allen v. General Accl. Fire & Life Assur. Corp. (1917: Sup. Ct. App. Div.) 98 Misc. 206, 162 N. Y. Supp. 934 (Whitaker, J., dissenting). The court said: "An agent who is deputed with power to transact the business of his principal within a local territory is certainly without authority to bind his principal in the transaction of business with himself, yet the evidence in this case shows that the resident manager employed the plaintiff, not to transact any business in behalf of his principal, but to aid him in arranging with the home office details in regard to the administration of work here. When analyzed, therefore, it seems to me that the plaintiff's employment was not to do work in behalf of the corporation, but to do work with the defendant corporation. The resident manager here wished to make a report concerning his administration to the home office and to the stockholders of the corporation. It may well be that, in making such report, and in discussing the details, the plaintiff was of service to the resident agent, and, of course, incidentally to the defendant corporation; yet it does not follow that the resident agent was authorized to employ counsel or assistants to aid him to lay before his principal his report, or to discuss the details of the report with the officers of the company."

<sup>3</sup> Prindle v. Washington L. Ins. Co. (1893) 73 Hun, 448, 26 N. Y. Supp. 474 (judgment for defendant reversed).

<sup>1</sup> In Farrington v. Hayes (1893) 65 Vt. 153, 25 Atl. 1091, Hayes, one of the executors of a will, was recommended by Ballard, the attorney who represented them in the Vermont probate court, to employ the plaintiffs for certain proceedings in the

county court. In pursuance of this recommendation, Hayes sent Ballard the following telegram from New York city: "Employ Farrington & Post. Letter will follow." Upon the receipt of this Ballard showed it to the plaintiffs. They never inquired afterwards as to the letter, and were never informed as to its contents, the purport of which was that Hayes was not to employ the plaintiffs unless they would agree that under no circumstances should their fee exceed \$500. The amount allowed them by the auditor, with interest, was \$1,720.08. Ballard claimed that he never received the letter. The auditor did not determine this fact either way, but did find that the plaintiffs had no notice of its contents. The court said: "The plaintiffs knew that Ballard was the attorney of the defendants. It does not appear whether they knew he had written defendant Hayes on the subject of their employment. The telegram gave him power to employ the plaintiffs unconditionally. It was addressed to Ballard, presumably that he might make the employment before he could be communicated with by letter. The letter referred to in the telegram, presumably, was to be addressed to Ballard. Whether it would relate to what he was desired to do, or what the plaintiffs were desired to do, in preparing the suit which was soon coming on for trial, or to the employment of the plaintiff, or to some other matter about the suit, was wholly left to conjecture. The plaintiffs might as well conjecture the one as the other. It would be inconsistent with the terms of the telegram to suppose that the letter, if it related to the employment, imposed any conditions upon the authority thereby given without condition. No reasonably prudent business man would be led to think that it either contradicted or lim-

The general rule as to the implied power of an attorney at law to engage an assistant has been thus stated: "A party to a suit may intrust his cause to any counsel he thinks proper to employ; the person employed may manage the cause and charge him therefor according to the difficulty and importance of the case; the party may judge for himself whether any assistance is wanted; but the attorney cannot, without consulting his employer, employ anyone to assist him at the expense of his principal. It is not incident to the nature of his employment that he should have this power, unless it can be fairly inferred that such authority was given, from the facts in each particular case."<sup>2</sup>

Authority to employ a second attorney may be implied if the employment appears to have been in a reasonable sense necessary—as where the affairs in question were to be transacted at a place so remote from the one at which the employing attorney was carrying on business that it must have been understood by his client that he was not to attend to them in person.<sup>3</sup>

There is explicit authority for the doctrine that the appointment of an attorney as general counsel of a railroad company for a state presumptively car-

ries with it the power to appoint necessary assistants in the different counties to effectuate the purposes of his own appointment.<sup>4</sup>

It has also been laid down that an official of this description has no authority, by virtue of his office, to alter the terms of a contract made with other counsel by the corporation itself.<sup>5</sup>

In one case it was laid down that the "attorney" of a railroad company had no power to bind it by a contract for surgical attendance on an injured passenger.<sup>6</sup> The precise functions of the employing agent are not stated in the report.

In the case cited below, the plaintiff's right to maintain an action for services rendered by him with a view to ultimately obtaining a contract for the construction of the defendant's projected railroad was affirmed on the ground that the evidence (too voluminous to state here), justified the referee in finding that the defendant's chief engineer, its general counsel, and another counsel employed by it—the parties who had carried on the negotiations in the course of which the services were rendered—had authority to represent the company in that regard.<sup>7</sup>

ited the unlimited authority of the telegram. Hence the plaintiffs were not put upon inquiry in regard to the contents of the letter in respect of the authority which Ballard had to make a general employment, such as he did make."

\* *Paddock v. Colby* (1846) 18 Vt. 485, where recovery was denied on the ground that there was no evidence from which authority to engage the plaintiff could be inferred. Commenting upon *Briggs v. Georgia* (1838) 10 Vt. 68, relied on by the plaintiff, the court pointed out that it was merely an authority for the doctrine that an attorney might combine the character of an agent generally and of an attorney to attend to the cause in court, and so have power to employ assistant counsel; and that the power of an attorney at law, who only prosecutes or defends a suit, to employ assistant counsel, was not recognized.

See also *Pomeroy v. Pierce* (1875) 5 Hun (N. Y.), 119, where the point actually discussed was the admissibility of certain evidence.

<sup>3</sup> See, for example, *National Bank v. Old Town Bank* (1902) 50 C. C. A. 443, 112 Fed. 726 (attorney for estate engaged a law firm in a city where the estate was being administered).

<sup>4</sup> *Cross v. Atchison, T. & S. F. R. Co.* (1897) 141 Mo. 132, 42 S. W. 675 (affirming) (1895) 71 Mo. App. 585, where the actual ratio decidendi was that there was no evidence tending to show that the plain-

tiff had any notice of any limitations of the general counsel's authority to agree upon the compensation which the local attorneys were to receive for their services). A large part of the opinion of the supreme court was devoted to a refutation of the argument of counsel to the effect that the defendant's answer had been improperly treated by the trial court as admitting the fact of the plaintiff's employment by the defendant.

In *St. Louis & S. F. R. Co. v. Kirkpatrick* (1893) 52 Kan. 104, 34 Pac. 400, where an official who was both vice president and general counsel of a railroad company was held to be presumptively authorized to employ other counsel, it is not clear from the report whether the authority was regarded as being incident to the former or the latter of these offices.

For a case in which the court was "inclined to think" that the general counsel or head of the legal department in a railroad corporation would have the implied power to employ such special or local attorneys as might be necessary, see *Dublin & S. W. R. Co. v. Akerman* (1907) 2 Ga. App. 746, 59 S. E. 10.

<sup>5</sup> *Scott v. New York Filling Co.* (1910; Sup. Ct.) 79 N. J. L. 231, 75 Atl. 772.

<sup>6</sup> *St. Louis, A. & T. R. Co. v. Hoover* (1890) 53 Ark. 377, 13 S. W. 1092.

<sup>7</sup> *Wilson v. Kings County Elev. R. Co.* (1889) 114 N. Y. 487, 21 N. E. 1015.



**§ 10. Agent to procure persons to perform certain work.**

A resolution of the board of directors of a flume company, instructing its superintendent to proceed to a certain city "and enter into negotiations with contractors and others for work on the line of the flume, in his discretion, subject to the approval of this board," does not invest him with apparent authority to employ a broker to assist him in finding a contractor.<sup>1</sup>

A man employed merely to solicit prospectors to engage in respondent's service has no authority to make or modify contracts for their employment.<sup>2</sup>

**§ 11. Agent appointed to procure contracts for street work.**

In a case in which the plaintiff sought to recover for legal services rendered at the request of an agent appointed by a construction company to procure contracts for paving certain streets in a city, it was admitted that a part of his duty was to employ counsel to see that the resolutions and the ordinance providing for the work, and the contract for its performance, should in all respects comply with the law regulating the subject. Under these circumstances it was held that a claim for legal services rendered with respect to such matters at his request could not be resisted on the ground that there was an agreement between the agent and the com-

pany that he was to pay for such services.<sup>1</sup>

**§ 12. Caretaker of building.**

In a case where the court set aside a verdict in favor of a plumber who had, at the request of a caretaker, left in charge of a city house while its owner was absent in Europe, repaired a serious leak in the main waste pipe of the bathroom, it was laid down that the authority of an employee of this description "does not, in the absence of special authority, extend much beyond the duties of cleaning, keeping what is in the house in order, and of exercising watchfulness against trespass, intrusion, and waste. The duties are primarily to hold things in statu quo. A certain authority to repair is to be implied, but this, in a case like the one at bar, would seem to be strictly limited. It is confined, at the most, to what is immediately and imperatively necessary for the protection of the premises. There is nothing in the position of an ordinary caretaker, as that term is usually understood, to justify any inference beyond that."<sup>1</sup>

**§ 13. Employee permitted to occupy building free of rent.**

In a case where a person answering this description engaged a plumber to repair a furnace which had fallen to pieces, a verdict finding the owner of the building to be liable for the work performed was affirmed.<sup>1</sup>

<sup>1</sup> Harris v. San Diego Flume Co. (1891) 87 Cal. 526, 25 Pac. 758. Referring to the evidence of the plaintiff's son, an engineer in the employment of the company, who had testified that, on the eve of the superintendent's departure, the president of the company stated that he "had full authority" to enter into contracts, the court said that this statement afforded no ground for a decision in favor of plaintiff, because, so far as appeared, it had not been communicated to the plaintiff. It was conceded in favor of the plaintiff that the words "subject to the approval of this board," contained in the resolution of the directors, referred only to the contract for the construction of the flume, which was to be negotiated by Robinson. But the court declined to accept the contention that the employment of a high-priced broker was "necessary or proper and usual, in the ordinary course of business" (Cal. Civ. Code, § 2319), for finding a contractor to build a flume.

<sup>2</sup> Nielsen v. Northeastern Siberian Co. (1905) 40 Wash. 194, 82 Pac. 292.

<sup>1</sup> Flournoy v. Phoenix Brick & Constr. Co. (1911) 159 Mo. App. 376, 140 S. W. 752.

<sup>1</sup> Hill v. Coates (1901; Sup. App. T.) 34

Misc. 535, 69 N. Y. Supp. 964. It was observed that "where the mere turning off of the water in an apparently unused portion of the house would have prevented a deterioration or destruction, thus postponing until the owner's return the question of the advisability and extent of the permanent repairs, the caretaker's authority, as a matter of law, is measured by the minimum demands of emergency." The court added: "Even should there be any question as to this interpretation of the law, a construction recognizing a larger measure of authority would not avail the plaintiff, as the portions of his testimony cited conclusively show that from the outset he did not regard the caretaker authorized to bind her master, and that he partly looked elsewhere for authority, where there concededly was none." This remark was a reference to an inquiry which the claimant had addressed to one Wilson, who was an officer in the same company in which the defendant was vice president, but had no instructions or authority to represent him as to any of his private affairs.

<sup>1</sup> Whitcomb v. Oller (1913) 41 Okla. 331, 187 Pac. 709. The evidence relied upon was the testimony of Leoffler, the occupant of

§ 14. *Consignee of ship.*

In an early Massachusetts case it was declared that "there is no case which shows that a person to whom a ship is consigned can, by any act or contract of his, bind the owner of the ship, for any purpose different from that which may be intrusted to him by the consignment. He is a factor, employed to sell and dispose of the cargo, and to procure a new one; and he is limited by the instructions which he receives from his principal. He cannot make his principal liable for any debt which he may incur in the prosecution of his agency, beyond the authority expressly given to him, or what results from necessity, or the usage of the place where he acts. If he applies to mechanics and laborers to work upon the ship, he is liable to them for their compensation, and he charges his disbursements to the account of his employer."<sup>1</sup>

§ 15. *Master of ship.*

Under the maritime law the master of a ship is, under certain circumstances, authorized to bind the shipowner and the ship itself for necessary repairs done upon or supplies provided for it.<sup>1</sup>

the house, to the effect that the defendant was to pay for all repairs, and a letter from the defendant to Leoffler, stating that Leoffler had authority to act as the defendant's representative in causing repairs to be made.

<sup>1</sup>James v. Bixby (1814) 11 Mass. 34.

<sup>1</sup>James v. Bixby (1814) 11 Mass. 34 ("general principle that the owners of ships are accountable for necessary repairs done upon her is well established"); and the cases cited in the following notes.

In *The Aurora* (1816) 1 Wheat. (U. S.) 96, 4 L. ed. 45, Story, J., said: "The law in respect to maritime hypothecations is in general well settled. The master of the ship is the confidential servant or agent of the owners, and they are bound to the performance of all lawful contracts made by him, relative to the usual employment of the ship, and the repairs and other necessities furnished for her use."

As to the authority of the master with respect to bottomry bonds, see, generally, Abbott, Shipping, 14th ed. pp. 193 et seq; MacLachlan, Merchant Shipping, 5th ed. pp. 54 et seq.

<sup>2</sup>The *Fortitude* (1838) 3 Sumn. 228, Fed. Cas. No. 4,953, per Story, J., whose language is adopted in *The Grapeshot* (1869) 9 Wall. (U. S.) 129, 19 L. ed. 651.

The ruling to the contrary in the *nisi prius* case of *Wainwright v. Crawford* (1801) 3 Yeates (Pa.) 131, 4 Dall. (U. S.) 226, 1 L. ed. 810, is no longer good law.

Having regard to the fact that repairs are ordinarily executed by persons who fall within the category of independent contractors, some mention of this doctrine is appropriate in the present monograph. But, as it cannot be fully discussed without an examination of some of the peculiar rules of the branch of jurisprudence to which it belongs, anything more than a brief statement of its purport and scope would be out of place.

The expression "necessary" does not import an "absolute or indispensable necessity," but merely necessity "in a just sense."<sup>2</sup> The master's authority extends to the procuring of "such repairs or supplies as it may reasonably be supposed that the owners, if they had had an opportunity of deciding for themselves, would have ordered."<sup>3</sup> In other words, "necessity for repairs and supplies is proved where such circumstances of exigency are shown as would induce a prudent owner, if present, to order them, or to provide funds for the cost of them on the security of the ship."<sup>4</sup> The most numerous illustrations of the doctrine as to the master's implied authority are found in cases where the necessity for repairs supervened in a foreign port,<sup>5</sup> each of the American states being,

<sup>2</sup>Bayley, J., in *Webster v. Seekamp* (1821) 4 Barn. & Ald. 352, 106 Eng. Reprint, 966, 23 Revised Rep. 307.

<sup>4</sup>*The Grapeshot* (1869) 9 Wall. (U. S.) 129, 19 L. ed. 651. According to an earlier decision of the same court, "apparent necessity" is the criterion. *Thomas v. Osborn* (1856) 19 How. (U. S.) 22, 15 L. ed. 534.

For a case in which the right to enforce a bottomry bond was denied on the ground that the lenders had not inquired whether the repairs were "more than were necessary for the purposes of the voyage," see *The Pontida* (1884) L. R. 9 Prob. Div. (Eng.) 177, 53 L. J. Prob. N. S. 78, 51 L. T. N. S. 849, 33 Week. Rep. 38, 5 Asp. Mar. L. Cas. 330.

<sup>5</sup>See, for example, *Palmer v. Gooch* (1818) 2 Starkie (Eng.) 428 (plaintiffs themselves proved an advance of a much larger sum than was wanted for repairs, a circumstance held to be "conclusive to show that it was made without necessity"); *Stainbank v. Shepard* (1853, Exch. Ch.) 13 C. B. 418, 138 Eng. Reprint, 1262, 1 C. L. R. 609, 22 L. J. Exch. N. S. 341, 17 Jur. 1032, 1 Week. Rep. 505; *The Oriental* (1851) 7 Moore, P. C. C. 398, 13 Eng. Reprint, 934; *Duranty v. Hart* (1863) 2 Moore, P. C. C. N. S. 298, 15 Eng. Reprint, 911; *Thomas v. Osborn* (1856) 19 How. (U. S.) 22, 15 L. ed. 534; *Naylor v. Baltzell* (1841) Taney, 55, Fed. Cas. No. 10,061; *The H. C. Grady* (1898) 84 Fed. 226.

for the purposes of its application, foreign in respect of the others.<sup>6</sup>

That a contract made by the master in a home port is not binding on the shipowner has sometimes been laid down without qualification.<sup>7</sup> But the preferable rule seems to be that, in such a port, also, it is competent for the master, as a general agent of the owner, to make a binding contract, so far as the personal liability of that owner is concerned.<sup>8</sup> Even as regards a bottomry bond, the more modern rule is that the obligation is not invalidated by the mere fact of its having been executed in a home port. Its enforceability, irrespective of whether it was executed in a home or in a foreign port, is regarded as being dependent simply upon whether there was or was not a "power of communication with the owner, correspondent with the necessity."<sup>9</sup>

<sup>6</sup> The *Lulu* (1869) 10 Wall. (U. S.) 202, 19 L. ed. 908; The *William & Emmeline* (1828) Blatchf. & H. 66, Fed. Cas. No. 17,687; *Merwin v. Shaller* (1844) 16 Conn. 489; *Woodruff & B. Iron Works v. Stetson* (1862) 31 Conn. 51.

<sup>7</sup> *Jordan v. Young* (1853) 37 Me. 276; *Dyer v. Snow* (1859) 47 Me. 254. In both of these cases it was a question of the owner's personal liability.

<sup>8</sup> This doctrine was taken for granted in *Provost v. Patchin* (1853) 9 N. Y. 235; and in *Webster v. Seekamp* (1821) 4 Barn. & Ald. 352, 106 Eng. Reprint, 966, 23 Revised Rep. 307, where Abbott, Ch. J., said: "The general rule is that the master may bind his owners for repairs done, or supplies provided for the ship."

In *Provost v. Patchin* (N. Y.) supra, the law was thus laid down: "As I understand the master's power as agent for the owners in the home port, he may bind them for all reasonable contracts for fitting out, victualing, and repairing the ship, unless it be shown that the owners themselves or a ship's husband managed the vessel, and that the party contracting with the master was aware of this."

<sup>9</sup> The *Oriental* (1851) 7 Moore, P. C. C. 398, 13 Eng. Reprint, 934. There a ship belonging to a resident of Halifax, in Nova Scotia, was hypothecated in New York for repairs. The judicial committee of the Privy Council rejected the contention "that an authority exists as a matter of law in all cases where the ship is, with reference to the owner, in a foreign port," and, applying the doctrine that the master's authority is founded on the impossibility of a communication with the owner, held that no such authority could be predicated, because there were means of communication by telegraph.

For a later case in which the same tribunal laid it down that the question

### § 16. Co-owner of property.

The extent of the power of one co-owner of property to bind another by a contract for the employment of a third person to perform work with respect to it is a question to be determined in each instance from the particular facts in evidence.<sup>1</sup>

### § 17. Agent of mortgagor.

The consent of the agent of the mortgagor or his assignee to the employment, by the mortgagee in possession, of a person to take charge of the mortgaged estate, at a certain rate of compensation, is deemed in law to be the consent of the mortgagor, and is competent though not conclusive evidence that the same compensation should be allowed for the like services during the residue of the

whether the master must communicate with the owner is one to be decided by the circumstances of each particular case, see *Duranty v. Hart* (1863) 2 Moore, P. C. C. N. S. 289, 15 Eng. Reprint, 911, where the necessity for repairs arose in the West Indies.

The earliest case which broke in upon the original doctrine, under which there was no implication of authority except as regards foreign ports, was *La Ysabel* (1812) 1 Dodson, Adm. (Eng.) 273, where a bond executed for repairs done upon a ship which started for England from a port in the south of Spain, and was forced to put into Corunna, was held to be enforceable on the ground that, owing to the distracted state of the country (the Peninsular War was then raging), the master had no opportunity of applying to the owners for instructions.

<sup>1</sup> In *Tryon v. Clinch* (1917) 32 Cal. App. 150, 162 Pac. 428, one of the abutting owners of land on a city street, when he was about to begin a journey to a distant state, said to the other owners, "I will leave it (the improvement of the street) to you boys." Held, that these words could not be construed as an authorization to those co-owners to have the improvement made entirely at the speaker's expense.

In *Coggins v. Higbie* (1901) 83 Minn. 83, 85 N. W. 930, where one of two owners of a stack of wheat authorized the other to make arrangements for threshing it, and to have the work done by a particular person, it was held that, under the facts in evidence, the agency thus constituted was general, and consequently that a person other than the one designated was entitled, after the work had been performed by him in pursuance of a contract made with the agent, to recover the proportional amount of compensation due from each of the owners.

time that the mortgagee retains possession.<sup>1</sup>

§ 18. *Husband as agent of wife.*

In an action brought to recover for services performed with respect to the

separate property of a married woman, in pursuance of a contract made with her husband, the relationship between them is not sufficient of itself to justify the inference that he had authority to enter into the contract on her behalf.<sup>1</sup>

<sup>1</sup> *Cazenove v. Cutler* (1842) 4 Met. (Mass.) 246. The general principle with reference to which this decision was rendered was thus stated: "If the mortgagee in possession and the mortgagor or his assignee, having the immediate right to redeem, consent and agree to any particular measures in this respect, and the expenses attending them, such consent being given with a knowledge, or the means of knowledge, of the facts and circumstances, the expenses thus incurred must be reimbursed by the mortgagor or his assignee holding the equity, on redemption. Such expense must be considered, in point of law, a reasonable and necessary expense."

<sup>1</sup> *Rauer's Law & Collection Co. v. Berthiaume* (1913) 21 Cal. App. 670, 132 Pac. 596, 833 (rule affirmed in a case where the evidence, not stated in detail, was held to justify the inference that defendant's husband had acted as her agent in employing plaintiff as an architect to draw plans for a building on her land); *Dussoulas v. Thomas* (1906) 6 Penn. (Del.) 1, 65 Atl. 590 (legal services; rule laid down in charge to jury); *Cornelia Planing Mill Co. v. Wilcox* (1907) 129 Ga. 522, 59 S. E. 223 (non-suit properly granted); *Johnson v. Parker* (1858) 27 N. J. L. 239 (land of wife not liable for work done and materials furnished under contract made with husband for erection of building thereon); *Valentine v. Applebee* (1895) 87 Hun, 1, 33 N. Y. Supp. 762 (action held to have been properly dismissed, for the reason that the complaint did not contain any averment that the wife had authorized the husband to make the building contract in question, and that, so far as its allegations showed, the contract was that of the husband alone); *Sciolaro v. Asch* (1910) 137 App. Div. 667, 946, 122 N. Y. Supp. 518, 1151 (agreement by husband with wife's attorney regarding the amount of his fees not binding on her); *Hewey v. Andrews* (1916) 82 Or. 452, 159 Pac. 1149, 161 Pac. 108 (wife not liable on contract, signed by husband, to pay fees of broker for procuring purchaser for her land); *Cushman v. Masterson* (1901) — Tex. Civ. App. —, 64 S. W. 1031 (action for legal services in respect of the wife's separate estate, not maintainable).

"In the absence of evidence of any peculiar circumstances, no conclusive presumption arises, from proof of the relation of husband and wife, that a husband may not present his wife with a new bathtub, or that he may not have it put in the house for his own use and benefit, although the wife may own the real estate." *Porter v. Terrell* (1907) 2 Ga. App. 269, 58 S. E. 493.

The rule in the text is also taken for

granted in all the cases cited in the following notes.

In *McLaren v. Hall* (1868) 26 Iowa, 299, an instruction was held to have been improperly given with regard to the husband's agency, where the only evidence which bore upon that point was the statement of the plaintiff that, when he made the agreement with the husband to do some work on the house, the husband said he had bought it for his wife, and that they wanted some alterations made. "The jury would not be authorized to find from this evidence that the husband was acting or professing to act as the agent of his wife."

For cases in which a similar rule has been affirmed with reference to claims founded on the supply of materials, see *Blount v. Dugger* (1902) 115 Ga. 109, 41 S. E. 270; *Snyder v. Sloane* (1901) 65 App. Div. 543, 72 N. Y. Supp. 981.

The following statement, made with reference to a claim for the price of materials, is doubtless applicable, *mutatis mutandis*, in cases involving contracts for work and labor: "The agency must be construed as being limited by the provisions of the contract, which restricted the total cost of the house in question to \$3,300. The plaintiff did not show that this contract price of the house had not been paid in full; and if it was paid, the defendant cannot be held liable for the purchase price of the articles which it may have been necessary for the contractor to use in order to complete the house according to the contract, unless the defendant, as owner of the house, either expressly assented to modifications of the contract which imposed upon her liability for a larger amount, or expressly authorized her agent so to do. Authority to an agent to execute in behalf of the principal a definite specified contract does not, without more, imply or include authority in the agent to enter into independent contracts, even though the subject-matter of the latter contract be related to or the same as that of the contract in the execution of which the agent was empowered to act for his principal." *Crawley v. Watt-Holmes Hardware Co.* (1913) 12 Ga. App. 367, 77 S. E. 106 (syllabus of court).

The effect of § 1780 of the Mississippi Code 1871 is that orders for supplies to the wife's plantation, if filled, bind her separate property, whether bought by herself or her husband, with or without her consent, the husband being for that purpose the agent of the wife in invitum. *Bank of America v. Banks* (1879) 101 U. S. 240, 25 L. ed. 850, citing *Cook v. Ligon* (1876) 54 Miss. 368.

Under the Quebec doctrine, there would seem to be a presumed agency (mandat

To recover in such an action, therefore, the claimant must furnish some affirmative testimony from which the husband's authority may warrantably be inferred.<sup>2</sup>

Whether stronger evidence is needed to establish the fact of his agency than in cases where the existence of that relationship between two independent parties is in controversy is a question with regard to which the authorities are conflicting.<sup>3</sup>

The contract is, of course, binding upon the wife whenever the husband is shown to have been invested with the powers of a general agent in regard to the management of her property.<sup>4</sup>

tacite) of the husband in respect of materials purchased for the construction of a house belonging to her. See *Granger v. Sicotte* (1911) *Rap. Jud. Quebec*, 40 S. C. 247.

<sup>2</sup> In *Guenther v. Moffett* (1908; Sup. Ct.) 77 N. J. L. 206, 71 Atl. 153, where a written contract for the erection of a house on the wife's property contained a provision that no alterations in the plan should be made or extra work performed without a written order from her, a claim against her for extra work performed at the husband's request was disallowed on the ground that there was nothing in the evidence to show that she had any knowledge of this work, or had waived the provision in the contract relating to extra work, or had authorized her husband to waive it for her.

In *Western Carolina Realty Co. v. Rumbough* (1916) 172 N. C. 741, 90 S. E. 931, where the action was brought for the recovery of commissions alleged to be due to two of the plaintiffs, in respect of procuring a tenant for the defendant's property, the evidence (only partially stated in the report) was held to be sufficient to require the submission to the jury of the questions whether the defendant's husband was her agent with regard to the leasing of her property, and whether, as such agent, he was impliedly authorized to employ the plaintiffs to assist him.

See also the cases cited *passim* in the preceding and following notes.

<sup>3</sup> "The evidence must be cogent and strong, and more satisfactory than would be required between persons occupying different relations." *Eystra v. Capelle* (1876) 61 Mo. 578. Compare the similar doctrine which has been laid down with regard to ratification by a wife. § 52, note 5, *infra*.

That less evidence is needed was laid down in *Rauer's Law & Collection Co. v. Berthiaume* (1913) 21 Cal. App. 670, 132 Pac. 596, 833 (no authorities cited).

<sup>4</sup> In *Owen v. Cawley* (1867) 36 N. Y. 600, attorneys employed by a man who had the entire management of his wife's separate estate, were held to be entitled to an equitable lien thereon.

In *Cannon v. Bannon* (1912) 151 App. Div. 693, 136 N. Y. Supp. 139, the dismissal of

the complaint in an action brought for brokers' commissions alleged to be due for procuring a purchaser of the defendant's real property was held to be erroneous, in view of her testimony to the following effect: "My affairs were absolutely in Mr. Bannon's hands. Q. And he acted for you? A. Entirely and absolutely. . . . Q. What did you say to him? A. The authority that all wives should give their husbands. The authority that I think a wife should give a husband to take those matters in hand. I said nothing at all; it was in his hands; it was his business absolutely. I was the owner of that property. He handled it for me absolutely; it was bought with my money, and handled by Mr. Bannon absolutely. He did everything that was necessary."

The fact that the wife participated in the negotiations which preceded the making of the contract under which the work in question was performed.<sup>5</sup>

The fact that the husband "had the management of the wife's property, and

the complaint in an action brought for brokers' commissions alleged to be due for procuring a purchaser of the defendant's real property was held to be erroneous, in view of her testimony to the following effect: "My affairs were absolutely in Mr. Bannon's hands. Q. And he acted for you? A. Entirely and absolutely. . . . Q. What did you say to him? A. The authority that all wives should give their husbands. The authority that I think a wife should give a husband to take those matters in hand. I said nothing at all; it was in his hands; it was his business absolutely. I was the owner of that property. He handled it for me absolutely; it was bought with my money, and handled by Mr. Bannon absolutely. He did everything that was necessary."

When a husband has the general management of his wife's property, and, with her knowledge, orders lumber which is used in the erection or repair of buildings upon her land, a jury will be justified in finding that the husband acted as her agent. *Roberts v. Hartford* (1894) 86 Me. 460, 26 Atl. 1099.

In *Ainsley v. Mead* (1870) 3 Lans. (N. Y.) 116, it was held that neither a general agency for the wife, nor an agency to make a contract for the erection of a building on her land, could be inferred from evidence which merely showed that both the contract with the party from whom the land was purchased, and the contract with the party to whom it was sold after the plaintiff's claim accrued, were made with the husband.

<sup>5</sup> *Elliott v. Bodine* (1897; Err. & App.) 59 N. J. L. 567, 36 Atl. 1038. One of the items of testimony to which the court adverted as being indicative of the wife's liability for work performed by Bodine in building a barn was that, when she was informed, at the close of the negotiations between him and her husband, that the work could not be commenced for about two weeks, she replied: "Well, go on as soon as you can."

gave all necessary directions regarding the same."<sup>6</sup>

The fact that the wife undertook to control to some extent the actual performance of the work.<sup>7</sup>

The fact that the wife knew that the house in question was being built under the husband's management, and occupied it after it had been completed.<sup>8</sup>

The fact that the husband had previously transacted similar business with her approval and under circumstances showing that she recognized her responsibility in respect of the services performed.<sup>9</sup>

The fact that the husband had been his wife's agent in respect of the purchase and subsequent management of

the land upon which the construction work to which the claim has reference was performed.<sup>10</sup>

The fact that the wife, when she gave direction as to the manner in which a certain piece of work was to be done, told the claimant that the work was hers, and that she expected to pay for it.<sup>11</sup>

The fact that the wife took no measures to show that, although she was receiving the benefit of certain materials which, to her knowledge, were being furnished for the work, she was not to be liable for the cost of them.<sup>12</sup>

The wife's situation and the condition of her health at the time when the work was performed.<sup>13</sup>

<sup>6</sup> *Arnold v. Spurr* (1881) 130 Mass. 347. The court said: "It is not to be assumed that it was as an agent of the defendant that he had the management, nor are the acts which he did in such management, nor the directions and orders, to be presumed to be of such a character as to prove agency."

<sup>7</sup> A portion of the evidence which, in *Elliott v. Bodine* (N. J.) supra, was held to indicate liability on the part of the wife, was thus stated by the court: "About two days before the work was begun, it is admitted by the plaintiff in error that she went in a carriage to the shop of Bodine and again requested that the work should be commenced as soon as possible. It furthermore appears by the evidence that she was present frequently while the work was going on, and also gave some directions concerning it, and repeatedly urged that the building should be completed by a certain date in readiness for a party to be given."

In *Whipple v. Webb* (1904) 44 Misc. 332, 89 N. Y. Supp. 900, affirmed in (1905) 101 App. Div. 612, 92 N. Y. Supp. 1150, the right of a plumber to recover against a married woman for work done and materials furnished in a house which was being built under a contract with her husband was held to be inferable from evidence which showed that the house was being built for sale, not for residence; that the defendant knew the work was going on; and that she was around the house while the plumbing was being put in, and gave some directions as to alterations in it.

In *Porter v. Terrell* (1907) 2 Ga. App. 269, 58 S. E. 493, evidence that the wife was present for a part of the time while work on her house was being done at the instance of her husband, and made a suggestion as to putting in a certain wash basin, coupled, however, with the injunction that the claimant should see her husband about the matter first, was held to be insufficient to show that she was an undisclosed principal, and the husband merely her agent.

<sup>8</sup> *Arnold v. Spurr* (1881) 130 Mass. 347 (action for price of materials).

<sup>9</sup> *Lunge v. Abbott* (1915) 114 Me. 177, 95 Atl. 942.

<sup>10</sup> *Elliott v. Bodine* (1896; Err. & App.) 59 N. J. L. 567, 36 Atl. 1038.

<sup>11</sup> The normal significance of this fact was recognized in *Ainsley v. Mead* (1870) 3 Lans. (N. Y.) 116; but its effect was held to be overcome by the testimony of the husband and wife that the contract was made by the former for himself, and on his own responsibility; and by the testimony of the plaintiff, that he did not know, when the contract for doing the work was made, that the wife owned or had any interest in the farm; and that, instead of treating her as principal, he settled with the husband, and took his individual note in payment of the balance due for his services.

<sup>12</sup> *Arnold v. Spurr* (1881) 130 Mass. 347.

<sup>13</sup> In *Lunge v. Abbott* (Me.) supra, a verdict in favor of the plaintiff in an action to recover \$55.70 for materials and labor furnished in putting a heating furnace into the defendant's house, under a contract therefor made by her husband, to whom the plaintiff gave credit, supposing him to be the owner of the property, was held to be warranted by evidence showing that the husband had charge "outdoors" of the farm on which the house was situated; that, according to the testimony of certain carpenters who made various alterations in the house, they were employed by the husband, who seemed to be in charge of the work and gave them instructions; that the wife was there while this work was going on; that subsequently the house was further improved; that the husband hired the workmen for this work and the wife paid them with her checks, some of which the husband made out for her to sign; that before she went to the hospital one Hall was employed by the husband to make some repairs and alterations inside the house; that subsequently he was employed by the husband to do work on the outside of the buildings, and the wife was there and gave him some directions as to the

Whether the declarations of the husband are competent evidence for the purpose of establishing his agency is a question determinable with reference to the general rules of the law of agency in that regard.<sup>14</sup>

Where the evidence is such as to justify the conclusion that the husband acted as the agent of his wife in employing a contractor to erect a building, and it also appears that it was the custom of builders so employed to leave orders for materials with materialmen, to be charged to the account of the employer, the wife is liable for the cost of the materials furnished to the contractor.<sup>15</sup> The same doctrine would

doubtless be applicable, in a similar state of the evidence, to case involving the claim of a subcontractor for work and labor.

The cases so far discussed are distinguishable, so far as regards the actual theory upon which recovery was sought, from those in which the specific issue raised by the plaintiff's allegation is whether the contract of employment was made with the husband or with the wife as principal. But it is obvious that the evidential elements appropriate for the determination of the latter issue will frequently, perhaps usually, be similar to those which are deemed to be relevant with respect to the former.<sup>16</sup>

work, but his "general instructions" were given by the husband. The court said: "It is true that the wife was not at home when the furnace was put in, but she testified that there was no heat in the house when she went away, the chimney having been taken down. Apparently repairs on the house had then been commenced. Is it an unreasonable inference from the circumstances, that her husband, in her absence in the hospital, was her general agent to carry on the work of repairing the house, rebuilding the chimney, and putting in some heating appliance? When he made the arrangements for the furnace to be put in he told the plaintiff that his wife was in the hospital, that he must have heat in the house before she could come home, and that she was coming very soon."

<sup>14</sup> In *Shesler v. Patton* (1906) 114 App. Div. 846, 100 N. Y. Supp. 286, where the defendant was held not to be liable for the balance due for certain plumbing work done, under a contract made with her husband in a house of which she was a tenant at a monthly rental, the court argued thus: "Agency cannot be established by the mere declarations of the alleged agent; and proof that the alleged principal was present when the work was being done, where it appears without contradiction that she was not the owner of the property in process of repair, will not change the well-settled rule in this respect. . . . The record in this action contains no evidence that any declaration of her husband was made in her presence or brought to her knowledge; that she made any payments for the work, or that it was her money that was used for that purpose by her husband, or that she ever told the defendant that she owned the property, or that her husband was her agent; and she testified that he was never her agent in any business dealings she ever had. While the evidence is sufficient to warrant a recovery against her for the value of extras ordered personally by her, in favor of a plaintiff entitled to enforce her liability as an undisclosed principal, it lacks the necessary elements to sustain the judgment recovered against her in this action."

<sup>15</sup> *Elliott v. Bodine* (1876) 59 N. J. L. 567, 36 Atl. 1038. The court said: "An agent, in carrying out the object of his appointment, may follow the well-known and general customs of his employment. . . . The procurement of materials was a necessary part of the work and duty cast upon Bodine in his employment by Elliott to build the barn, and his ordering materials from Rolfe was not the exercise of a delegated agency, but a part of the duty which he undertook when he was employed to build the barn by Elliott."

<sup>16</sup> In *Fowler v. Seaman* (1869) 40 N. Y. 592, where the plaintiff sought to recover for extra work done upon a building by direction of the husband, the finding that he directed the work as his wife's agent and on her behalf, and not on his own account, was held to be justified by evidence which showed that the defendant was owner, in her own right, of a leasehold interest, for a term of years, of a lot; that her husband made a contract, in his own name, with the plaintiff's assignor, for the erection of a building thereon, for the sum of \$17,400; that the contract price was paid principally from means procured by the defendant from and by encumbrances placed by her upon her separate estate; that before the completion of the building, the defendant leased the premises for a term of seven years, and in the lease covenanted to erect and complete a building thereon in precise accordance with that specified in the contract.

In *Cutter v. Morris* (1889) 116 N. Y. 316, 26 N. Y. S. R. 508, 22 N. E. 451, where a nonsuit was declared to be erroneous, for the reason that the plaintiff's evidence would, if believed and interpreted according to his theory, have justified a verdict in his favor, the admitted facts were that the plaintiff rendered services of the nature described in the complaint for someone; that they were rendered in erecting an addition to a dwelling-house owned and occupied by the defendant; that she knew that this improvement was to be made upon her property through the agency of the plaintiff; and that subsequently she knew that the work was in progress under

As to the circumstances under which the wife's property becomes subject to

a mechanics' lien for work performed or materials furnished under a contract en-

his supervision. The court observed: "As the services in question were rendered for the benefit of the separate estate of the defendant, and she knew it at the time, the natural presumption is that they were rendered at her request. The conversation between the parties, which is claimed to be equivocal, should be interpreted in the light of this presumption. When, therefore, the plaintiff commenced a conversation with the defendant by saying: 'Mr. Morris tells me that you are about to erect an addition to your house,' there can be little doubt as to what she understood him to mean. Yet if he was mistaken in addressing her as the principal, she made no effort at any time to correct his impression."

In *Mackey v. Webb* (1889; Sup. Gen. T.) 2 Silv. Sup. Ct. 421, 25 N. Y. S. R. 308, 6 N. Y. Supp. 795, a verdict against the wife for the amount due to persons who had, at her husband's request, performed work and furnished materials for making improvements on her separate property, was held to be warranted by evidence that she was present when the work was performed and materials were furnished, and made no objection; that on one occasion she cautioned them about placing stone upon her garden; and that she and her husband consulted together about the work and plan of the improvements to her house. The authority mainly relied upon was *Fairbanks v. Mothersell* (1871) 60 Barb. (N. Y.) 406, where the right of a laborer employed by the defendant's husband in the capacity of a servant to perform work on her separate estate was affirmed on grounds thus stated: "The case stands simply upon an employment [of plaintiff] by the husband to work for his wife on her separate property, without any express agreement whether he should be paid by the husband or wife. The defendant knew the plaintiff was at work there, and saw the kind of work he was doing, and the law will imply a promise on her part to pay for the services if it was, in fact, her work." This decision was approved in *Perkins v. Perkins* (1872) 7 Lans. (N. Y.) 27, 62 Barb. 539.

In *Bannen v. McCahill* (1890; Sup. Gen. T.) 30 N. Y. S. R. 305, 8 N. Y. Supp. 916, the contention that a wife was liable on a sealed contract signed by her husband was rejected, where the evidence showed that all the money due under the contract was paid by him; that he had entire control of the work in question; and that the defendant did nothing in respect thereto except to file the application with the building department.

In *Friedman v. D'Amico* (1910; Sup. App. T.) 123 N. Y. Supp. 953, a verdict against a married woman for the cost of painting and paper hanging in her house was reversed on grounds thus stated in the very brief opinion: "She showed that she had a real estate agent who always at-

tended to this business for her. Plaintiffs admit that the husband gave the order, that they thought that he was the owner, and that they sent him the bill."

In *Newcomb v. Andrews* (1879) 41 Mich. 518, 2 N. W. 672, the grounds upon which an action for services rendered in altering the defendant's house was held not to be maintainable were thus stated: "There is no testimony whatever that plaintiff ever looked to defendant or supposed he was dealing with her, or that she supposed she was dealing with him. The general direction and oversight which she exercised did not differ in any respect as to the extra work from that relating to the contract. It was the same from first to last, in making the plans and seeing to their completion by the workmen. The oversight was precisely what might be expected of any wife in the house of her husband; and the fact that it was her own house does not make any difference if the work was not done on her account and by her procurement as contracting party. The plaintiff's testimony shows conclusively that the husband was the only person to whom he looked or with whom he dealt as contractor. After the whole work was done, the extras as well as contract work were charged to him, and payments were made by him. There is no proof that he was acting as his wife's agent. No bill was ever presented to her, and no payment was ever asked of her. It is the not uncommon case of a husband making improvements at his own expense for the benefit of his wife." One of the cases relied upon was *Emery v. Lord* (1873) 26 Mich. 431, where, in an action on a note given by a wife to secure a debt of her husband for materials which went to improve her separate estate, the law was thus laid down with reference to a new trial: "If the materials furnished by the plaintiff were thus used in improving her property, without her having paid or become bound to pay to the husband or anyone else for them, or if the husband, as between him and his wife, was acting only as her agent,—then, whether the note was given in extinguishment, or only as security for the indebtedness, and though the credit might originally have been given to the husband, there was a good and valuable consideration for the note, and she would be bound."

Compare also *Wagner v. Jefferson* (1876) 37 U. C. Q. B. 551, where it was held that no action could be maintained for the price of materials used in a house which the defendant was building on her own property, where the evidence showed that the husband alone contracted with the plaintiff, and that the plaintiff sold the goods in question upon the husband's credit, and without any knowledge that he was getting them for the wife, or for her private property.



tered into with her husband, see note to *Milligan v. Alexander*, A. L. R. —.

### § 19. *Wife as agent of husband.*

The cases which illustrate the liability of a husband for service performed at the request of his wife are divisible into the following classes:

(1) Cases in which the wife was cohabiting with her husband at the time when the plaintiff was employed by her, and the services rendered were alleged to be of such a character as to bring

them within the category of necessities. The general rule which defines the nature and extent of the husband's liability under these circumstances is as follows: "The simple circumstance that husband and wife are living together has been generally held sufficient, when nothing to the contrary intervenes, to raise a presumption that the wife is rightfully making such purchases of necessities as she may deem proper."<sup>1</sup> Numerous decisions which exemplify the operation of this rule with regard to various descriptions of services are collected in the footnote.<sup>2</sup>

<sup>1</sup> *Schouler*, *Husb. & W.* § 106; *Schouler*, *Dom. Rel.* § 68. Compare also *MaoQueen*, *Husb. & W.* pp. 95-108.

(a) Work and labor with respect to houses.

<sup>2</sup> In *Wennerstrom v. Kelly* (1894; N. Y. C. P.) 7 Misc. 173, 27 N. Y. Supp. 326, the liability of the husband for repairs which his wife had authorized the plaintiff to make in their house was affirmed on grounds thus stated: "The exercise of this implied authority on the part of the defendant's wife is inferable, as before stated, from the facts that she knew that some of the repairs were being made, and approved thereof; and that the remainder of the repairs were made upon and within premises at the time actually occupied by her and her husband for the purposes of their common household, and which, as such, were subject to her control and that of her husband." It may be remarked that, upon the facts, this case seems to be scarcely consistent with the decision of the appellate term in *Proctor v. Woodruff* (1909) 119 N. Y. Supp. 232. But the rationale of that decision is different. See note 15, *infra*.

In *Jetley v. Hill* (1884) 1 *Cal. & El. (Eng.)* 239, the jury were directed by Pollock, C. B., that the husband, by adhering to the wife's orders as to the furnishing of work and material for their house, and using the materials when they arrived, had allowed her to hold herself out as his agent.

For a case in which the inability of the plaintiff to enforce a claim in respect of work and labor performed in building an addition to a house was predicated on the ground that there was no evidence to show that it was "necessary" within the meaning of the Kentucky statute, see *Pell v. Cole* (1859) 2 *Met. (Ky.)* 252.

(b) Medical attendance.

For cases in which the liability of the husband in this regard was affirmed, see *Harris v. Lee* (1718) 1 *P. Wms.* 482, 24 *Eng. Reprint*, 482, *Prec. in Ch.* 502, 24 *Eng. Reprint*, 225; *Cothran v. Lee* (1854) 24 *Ala.* 380; *Black v. Clements* (1899) 2 *Penn. (Del.)* 499, 47 *Atl.* 617; *Columbus v. Strasser* (1894) 138 *Ind.* 301, 34 *N. E.* 5, 37 *N. E.* 719 (husband *prima facie* liable, but injured wife may treat expense of medical

services as her own debt, and recover the amount as a part of the damages in an action for the injury); *Towery v. McGaw* (1900) 22 *Ky. L. Rep.* 155, 56 *S. W.* 727, 982 (decided with reference to *Ky. Stat.* § 2130, which embodies the common-law doctrine); *Kettner v. Nelson* (1911) 146 *Ky.* 7, 37 *L.R.A. (N.S.)* 764, 141 *S. W.* 409 (claim of husband to be reimbursed out of proceeds of wife's separate property for money paid to physicians and nurses was rejected); *Mulligan v. Mulligan* (1914) 161 *Ky.* 628, 171 *S. W.* 420; *Spann v. Mercer* (1879) 8 *Neb.* 357, 1 *N. W.* 245 (liability of wife's separate estate denied); *Webber v. Spannbake* (1876) 2 *Redf. (N. Y.)* 258 (husband liable, though wife possesses separate estate); *Re Shipman* (1889) 22 *Abb. N. C.* 289, 5 *N. Y. Supp.* 559 (claim of husband, acting as executor of his wife, to be allowed the amount expended by him for medical attendance, was rejected); *Thrall Hospital v. Caren* (1910) 140 *App. Div.* 171, 124 *N. Y. Supp.* 1038.

In *Re Totten* (1910) 137 *App. Div.* 273, 121 *N. Y. Supp.* 942, the liability of the wife was predicated on the ground of her having by an express agreement assumed it.

On the other hand, in *Reed v. Crissey* (1895) 63 *Mo. App.* 184, where the wife insisted on going to another city for treatment, it was held that the husband could not escape liability on the ground that his wife had entered into a written agreement that she would not incur any debt against him for doctors' fees in respect of the treatment of her malady. But there the defense that competent medical services were offered to her at home was declared not to have been established.

In *Kennedy v. Benson* (1913; *Sup. App. T.*) 144 *N. Y. Supp.* 787, it was held that a physician who, during the defendant's temporary absence, had operated on his wife, could not maintain an action for the services so rendered, the evidence being that she did not request the operation, but merely acquiesced therein. Only a short *per curiam* opinion is reported, and no precedents were cited by the court.

In *Wood v. O'Kelley* (1851) 8 *Cush. (Mass.)* 406, the court held that, while a husband is ordinarily liable for medicines

(2) Cases in which the claim is founded on the same theory as to the character of the services as being necessary, but the husband and wife were living separately at the time when they were rendered. The extent of the husband's liability under this head depends primarily upon the circumstances under which the separation was commenced and continued. The right of action

against him has been considered with reference to the following situations:

**(a) That the separation had been effected by mutual consent.**

In one case the right to recover for medical services seems to have been viewed as turning simply upon whether the husband agreed to make an adequate allowance for the wife's maintenance, and duly performed the agreement.<sup>3</sup> In

and medical advice furnished to his wife during his absence, he cannot be held responsible where they were furnished by a person who did not profess to be a physician, or to have any medical skill or knowledge of diseases or their remedies.

For cases in which the implied authority of a wife to employ a doctor to attend on her children was recognized, see *Howell v. Bleah* (1907) 19 Okla. 260, 91 Pac. 893; *Davenport v. Rutledge* (1916) — Tex. Civ. App. —, 187 S. W. 988.

Where a wife requests medical treatment for an infant, it will be presumed, in the absence of proof, that she is acting as agent of her husband; but such presumption may be overcome by evidence. *Howell v. Bleah* (Okla.) supra (syllabus of court).

**(c) Legal expenses.**

It has been held that a husband is liable for legal services rendered to his wife in successfully defending her against a complaint instituted against her for being a common drunkard (*Conant v. Burnham* (1851) 133 Mass. 503, 43 Am. Rep. 532); or in defending her against a charge of murder (*Artz v. Robertson* (1892) 50 Ill. App. 27, s. c. on demurrer (1890) 38 Ill. App. 593); or in regard to her commitment as a lunatic, and subsequent discharge (*Moran v. Montz* (1913) 175 Mo. App. 360, 162 S. W. 323); or in the entering of a complaint against him for breach of the peace (*Morris v. Palmer* (1859) 39 N. H. 123).

On the other hand, we find decisions to the effect that no action could be maintained against the husband by a person who had advanced money to pay the fees of an attorney whom the wife had employed to prefer an indictment against the husband for assaulting her (*Grindell v. Godmond* (1836) 5 Ad. & El. 755, 111 Eng. Reprint, 1351, 1 Nev. & P. 168, 2 Harr. & W. 339, 6 L. J. K. B. N. S. 31); nor by an attorney who had rendered services to the wife in instituting a complaint against the husband for an assault and battery on her (*Conant v. Burnham* (1851) 133 Mass. 503, 43 Am. Rep. 532; *Smith v. Davis* (1864) 45 N. H. 566 (no finding by referee that the expenses were necessary, nor that there were reasonable grounds for the proceeding); nor by an attorney through whose efforts a reconciliation had been effected between the husband and wife (*Kuntz v. Kuntz* (1912) 80 N. J. Eq. 429, 83 Atl. 787 (where the doctrine was laid down that "necessaries are to be pro-

vided by a husband for his wife, to sustain her as his wife, and not to provide for her future condition as a single woman, or perhaps as the wife of another man"); nor by an attorney who had rendered services to the wife in a groundless action brought by her, without the husband's consent, to recover premises which were in the peaceable possession of his tenant, but were claimed by her to have been the family homestead (*Plymat v. Brush* (1891) 46 Minn. 23, 48 N. W. 443).

Reference may also be made to a case in which it was held that the expenses of the trustee of a wife's property in procuring the preparation of a deed of separation which the husband had consented to execute could not be recovered from the husband. *Ladd v. Lynn* (1837) 2 Mees. & W. 265, 150 Eng. Reprint, 755, Murph. & H. 27, 6 L. J. Exch. N. S. 73, 1 Jur. 42 ("not a thing necessary for the protection and sustenance of a wife"—Lord Abinger).

**(d) Education of children.**

In *Parrott v. Peacock Military College* (1915) — Tex. Civ. App. —, 180 S. W. 132, certain evidence (not stated) was held to show that a wife had acted as her husband's agent in contracting for the education of their son at college.

<sup>3</sup> *Beale v. Arabin* (1877; C. P. D.) 36 L. T. N. S. (Eng.) 249. There the defendant had granted his wife an allowance which was not inadequate if paid regularly; but it had not been so paid. In an action brought for medical services, it was shown that a part, at least, of the bill, was for attendance required in consequence of the defendant's cruelty. The finding of the trial judge in favor of the plaintiff was sustained, the court being of opinion that the case came within the scope of the general rule laid down in the note to *Manby v. Scott* (1661) 2 Smith, Lead. Cas. 7th ed. (Eng.) 488, that, if a husband and wife separate by mutual consent, the wife has an implied authority to bind her husband for articles suited to her degree, unless she have an adequate maintenance, and unless that allowance be duly paid to her. Two earlier cases were cited, which involved analogous circumstances, and in which the right of recovery was affirmed,—*Brown v. Ackroyd* (1856) 5 El. & Bl. 819, 119 Eng. Reprint, 686, 25 L. Q. B. N. S. 193, 2 Jur. N. S. 283, 4 Week. Rep. 229 (expenses of suit for divorce a mensa et thoro); *Rice v. Shepherd*

another case the ratio decidendi was that the husband's agreement with regard to the support of the wife did not affect a plaintiff who had no knowledge either of the separation or of the agreement.<sup>4</sup>

In a case where the separation had apparently—the language of the report being obscure with regard to this point—been effected by mutual consent, the wife was held to have authority to bind her husband by a contract for the employment of an undertaker to bury a daughter who had been living with her.<sup>5</sup>

**(b) That the separation was due to the fault of the wife.**

In most of the cases in which the question has been considered, the courts have applied a general and unqualified doctrine to the effect that the husband is not liable for medical services ren-

dered to a wife who has abandoned him without sufficient cause.<sup>6</sup>

On the other hand, it has been laid down that a husband who has left his wife for good cause, but who has made no provision for necessary medical services, may be held liable to a person who renders them, even though that person may have been directed by him to abstain from doing so.<sup>7</sup>

It has also been held that an action for the cost of a wife's board and lodging could not be maintained against her husband by a person who knew that she had abandoned the defendant without sufficient cause;<sup>7a</sup> and that, where a wife who had been living apart from her husband was indicted for adultery, and tried jointly with her alleged paramour, the attorneys whom she employed to defend her could not hold the husband liable for their fees.<sup>8</sup>

(1862) 12 C. B. N. S. 332, 142 Eng. Reprint, 1171, 6 L. T. N. S. 432 (fee of solicitor employed in suit for judicial separation).

In *Gladston v. Slayton* (1912) Rap. Jud. Quebec, 21 B. R. 440, the liability of a husband for the maintenance of a wife who had separated from him by his consent was denied on the ground that there is no implied agency (*mandat tacite*) under such circumstances. This decision evidently reflects a juristic point of view essentially different from that of common-law courts.

<sup>4</sup> *Lawrence v. Brown* (1894) 91 Iowa, 342, 59 N. W. 256. The court declined to discuss the question whether the plaintiff would have been precluded from recovering if he had known of the agreement.

<sup>5</sup> *Re Van Denburg* (1917) 178 App. Div. 237, 164 N. Y. Supp. 966, where the husband had authorized the wife to employ a designated undertaker other than the plaintiff.

<sup>6</sup> *Bevier v. Galloway* (1874) 71 Ill. 517 (plaintiff, knowing the wife was living separate, was bound to know whether she had cause for doing so); *Hartmann v. Tegart* (1873) 12 Kan. 177; *Williams v. Prince* (1849) 3 Strobb. L. (S. C.) 490; *Brown v. Patton* (1842) 3 Humph. (Tenn.) 135 (where recovery was allowed on the ground of a specific undertaking by the husband to pay for medical services); *Thorne v. Kathan* (1879) 51 Vt. 520.

Compare also *Ogle v. Dershem* (1904) 91 App. Div. 551, 86 N. Y. Supp. 1101, where it was held that the husband was not liable under these circumstances for board furnished to the wife.

In *Johnson v. Coleman* (1913) 13 Ala. App. 520, 69 So. 318, the contention that the doctrine stated in the text was not applicable in respect of services rendered to the wife at the birth of a child of which the husband was undeniably the father was rejected, although it was shown that the claimant had not heard of the separation

when he was called in. The plaintiff's counsel conceded that, having regard to the authorities, the action would not have been maintainable if the services sued for had been such that it could be said that they were rendered exclusively for the wife's benefit; but he insisted that where the services were no less necessary for the safety of the defendant's own offspring than for that of the wife, recovery should be allowed; not upon any theory of liability for necessities furnished to his wife, but upon the ground of liability for necessities furnished to his child. But it was pointed out that, under the accepted doctrine, the husband is not liable for the support of his minor children where the wife leaves him without cause, taking the children with her.

<sup>7</sup> *Button v. Weaver* (1903) 87 App. Div. 224, 84 N. Y. Supp. 388. The court relied upon the general statement in *Hatch v. Leonard* (1901) 165 N. Y. 438, 59 N. E. 270, that "the husband is liable for actual necessities furnished to his wife, unless he has made adequate provision for her, even though they are living separate." But in that case the report does not state the circumstances under which the separation had taken place. So far as appears from the opinion, the husband may have been the delinquent party.

<sup>7a</sup> *Middlebrook v. Slocum* (1908) 152 Mich. 286, 116 N. W. 422. But, *quære*, would not the plaintiff have been precluded from recovery, even if he had not known that the wife was the delinquent party?

<sup>8</sup> *Peaks v. Mayhew* (1901) 94 Me. 571, 48 Atl. 172. Two instructions were disapproved: one on the ground that it represented the question whether the separation was caused by the fault of the husband or the wife as being only a "material" element, instead of informing the jury that it is the decisive test in determining the liability of the former for necessities furnished the

**(c) That the separation was due to the fault of the husband.**

The obligation of a husband to supply his wife with necessaries continues after a separation effected under these circumstances. Ordinarily, therefore, the en-

wife while living apart from her husband; and the other on the ground that it embodied the doctrine that the wife had authority to pledge her husband's credit for the legal services of counsel who knew of the separation, if he was informed and believed that she was innocent of the charge. "In such a case," said the court, "the liability of the husband is not to be determined by the personal knowledge of counsel respecting the guilt or innocence of the wife. By her own flagrant breach of her marriage vow and duty, she has forfeited all right to pledge his credit for necessities of any kind. The fact that the counsel whom she seeks to employ has knowledge that she is living apart from her husband and is under indictment for adultery is sufficient to put him on inquiry to learn the cause of the separation, and if he afterwards renders services in her defense by her employment alone, he does so at his peril and the husband will not be liable."

**(a) Legal services.**

<sup>9</sup> In *Shepherd v. Mackoul* (1813) 3 Campb. (Eng.) 326, which involved the claim of an attorney who had been employed by a wife to exhibit articles of peace against her husband, the jury were thus directed by Lord Ellenborough: "If that proceeding was un-called for, his wife certainly could not make him liable for the expense thereby incurred. But if she was turned out of doors in the manner stated, she carried along with her a credit for whatever her preservation and safety required. She had a right to appeal to the law for protection, and she must have the means of appealing effectually. She might therefore charge her husband for the necessary expense of this proceeding as much as for necessary food or raiment."

For a similar decision by the court of Queen's bench, see *Turner v. Rookes* (1839) 2 Perry & D. 294, 10 Ad. & El. 47, 113 Eng. Reprint, 18, 8 L. J. Q. B. N. S. 211.

In *Wilson v. Ford* (1868) L. R. 3 Exch. (Eng.) 63, 37 L. J. Exch. N. S. 60, 17 L. T. N. S. 605, 16 Week. Rep. 482, where the husband died, after having deserted his wife, and left her unprovided with money or the means of subsistence, his estate was held to be liable for expenses incurred by her in bringing a suit for restitution of conjugal rights, in obtaining the opinion of counsel as to the enforceability of an antenuptial parol agreement made by him to settle her property upon her, and in consulting an attorney as to the proper mode of dealing with tradespeople to whom her husband owed money.

In *McCredy v. Taylor* (1873; Exch. Ch.) Ir. Rep. 7 C. L. 256, reversing (1871) Ir. Rep. C. L. 336, where an attorney whom a

forceability of a claim against him depends simply upon the answer to two questions, viz.: (1) whether the services rendered were necessary; and (2) whether he had made adequate provision for her support.<sup>9</sup>

wife, living apart from her husband for just cause, had employed to show cause against a *habeas corpus* proceeding instituted by the husband for the possession of their child, sued him for the services rendered, the right of recovery was denied on the ground that the averments of the declaration did not show any authority on the part of the wife to obligate the husband in respect of the payment of the plaintiff's fees.

Compare also *McQuhae v. Rey* (1893: C. P.) 3 Misc. 550, 23 N. Y. Supp. 16, where it was held that, in the absence of affirmative evidence showing the necessity of employing him, the fees of a private counsel, retained by a wife to represent her in criminal proceedings instituted by public officials, to compel her husband to support her, could not be recovered from the husband.

**(b) Medical services.**

In *Mayhew v. Thayer* (1857) 8 Gray (Mass.) 172, a person who, at the request of a wife who had abandoned her husband for good cause, employed a physician to attend on her, and paid his fees, was held to be entitled to reimbursement from the husband.

In *Dixon v. Chapman* (1900) 59 App. Div. 542, 67 N. Y. Supp. 540, the right of a physician to recover for services rendered to a child who was living with the wife was predicated on the ground that, when called in by her, he was not affected with constructive notice of the fact that the husband and wife were living apart.

In *Wolf v. Schulman* (1904; Sup. App. T.) 45 Misc. 418, 90 N. Y. Supp. 363, a judgment for the plaintiff was reversed on the broad ground that the liability of a husband for medical services rendered to a wife who is separated from him depends on whether the separation is or is not due to his fault; and that evidence bearing upon this question had been excluded.

In *Robinson v. Litz* (1910; Sup. App. T.) 123 N. Y. Supp. 362, it was held that an action for medical services could not be maintained under circumstances thus stated: "At the time of the rendition of the services the defendant and his wife were living apart and had not cohabited for several years prior to this time. The defendant's wife told the plaintiff that the defendant was paying her a certain amount per week 'according to court.' There was no evidence to show that the defendant and his wife were separated as a result of the judgment of any court, or that the defendant's fault was responsible for the separation. Nor was any evidence offered to show that the defendant did not make adequate provision for the support of his wife."

Compare also *Schneider v. Rosenbaum*

(d) That the separation was the act of the law.

The effect of a case in which recovery was denied in respect of repairing work done upon a house at the request of a wife whose husband was confined in a lunatic asylum is stated in the footnote.<sup>10</sup>

The general question of the liability of a husband for necessities furnished to his wife while living apart from him is discussed in note appended to *Denver Dry Goods Co. v. Jester*, L.R.A.1917A, pp. 958 et seq.

(3) Cases in which the scope of the authority of a wife to bind her husband with whom she was living at the time when the services in question were rendered was considered without any reference to the doctrine regarding necessities. It has been laid down by the House of Lords that "a mandate by law, making the wife the agent in law of her husband to bind him and to

pledge his credit," cannot be implied either from the fact of marriage or from the fact of cohabitation.<sup>11</sup> The same doctrine has been enunciated in a leading American case: "A wife, as such, has no original or inherent power to make any contract which is obligatory on her husband. No such right arises from the marital relation between them. If, therefore, she possesses a power in any case to bind him by her contracts made on his behalf, it must be by virtue of an authority derived from him, and founded on his assent, although such assent may be precedent or subsequent, and express or implied; and this is the light in which such contracts are universally viewed. When such authority is conferred, the relation between them and the consequences of that relation are analogous to those in the ordinary case of principal and agent. And that she has the capacity to be constituted by the husband his agent, and to act as such, equally with any other person, there is no doubt."<sup>12</sup> In the same case it

(1906; Sup. App. T.) 52 Misc. 143, 101 N. Y. Supp. 529, where the husband was held liable for services rendered by a nurse while he and his wife were living apart, and an action brought by her for separation was pending. The sufficiency of the allowance actually made by the defendant was not discussed.

But in *Carter v. Howard* (1866) 39 Vt. 106, where the plaintiff attended the defendant's wife at her request, and made his charges to her, "for the reason that he thought he should be more likely to get his pay from her than from the defendant," and it also appeared that the defendant was in jail during a portion of the time, that the wife had applied for a divorce, and that the plaintiff knew the character of the relations between them, the defendant was held not to be liable for the plaintiff's services. The question treated as being decisive, and answered in the negative, was, "whether the mere fact that the services come under the head of necessities, and are such as the husband would be liable to pay for if rendered on his credit, countervails the legal effect of the other fact, namely, that the services were not rendered on his credit, but were rendered on the credit of the wife."

<sup>10</sup> In *Richardson v. Du Bois* (1869) L. R. 5 Q. B. (Eng.) 51, 10 Best & S. 830, 39 L. J. Q. B. N. S. 69, 21 L. T. N. S. 635, 18 Week. Rep. 62, the evidence showed that, while the defendant, who held a house on a long lease, with a covenant by him to keep the premises in repair, was under restraint as a lunatic, his wife directed the plaintiff, a decorator, to make certain repairs, and that, after a part of the work had been completed, the plaintiff ascertained the condition of the defendant, but continued the

repairs under the wife's directions. The defendant's income had been reduced by his illness to £350 a year; the whole of this income, after paying for the defendant's maintenance in the asylum, had been paid over to the wife (who continued to reside in the house with her children), and in addition to this she had received an allowance from the defendant's partner and other friends, making, in the whole, £2,219 in the course of two years and four months. The jury found, in answer to questions by the judge, that the repairs were necessary to the house, and the charges reasonable and proper; and that the money which the wife had received was sufficient for all purposes, including the repairs. Held, that on these findings, a verdict had properly been directed for the defendant. The ratio decidendi was that the agency of the wife of a lunatic and her authority to pledge the husband's credit did not differ from those ordinarily implied from the relation of husband and wife; and as it was found that the wife had received money sufficient and applicable to the payment of these necessary repairs, the defendant was not liable any more than if he had been sane, and had given his wife the money, and directed her to give the orders for the repairs and pay for them.

<sup>11</sup> Lord Selborne in *Debenham v. Mellon* (1880) L. R. 6 App. Cas. 24, 50 L. J. Q. B. N. S. 155, 43 L. T. N. S. 673, 29 Week. Rep. 141, 45 J. P. 252, 2 Eng. Rul. Cas. 441.

<sup>12</sup> *Benjamin v. Benjamin* (1843) 15 Com. 347, 39 Am. Dec. 384. The actual point decided in this case was, that the plaintiff's wife had no authority to make with a person who, during his absence in another state, had attached, in a suit on a note, his land

was observed "that the law will, in some cases, presume the wife to be the agent of her husband when no such presumption would exist as to another person; and also will, in some cases, imply a larger authority to the wife than to an

ordinary agent; and this, perhaps, whether the husband be absent from home or not." Whether the wife possesses the derivative authority adverted to in these passages is a question of fact.<sup>18</sup>

and the grass growing thereon, a contract which entitled him to cut and gather the grass, and sell it on the execution in such suit, and apply the avails on the debt. But the following remarks of the court have a direct bearing on the extent of the implied authority of a wife with regard to contracts of employment: "The plaintiff's wife, on the ordinary principle of agency, would have power to do whatever is necessary or proper in the care and management of the farm intrusted to her, such as keeping in order the buildings, fences, and implements of husbandry, cultivating the land, and preserving the crops, and perhaps disposing of such crops, if necessary to enable her to do these things; and generally, to do whatever is necessary and proper in order to execute the trust reposed in her."

**(a) Husband not liable.**

<sup>18</sup>The decision in *Benjamin v. Benjamin*, cited in note 2, *supra*, was relied on in *Thompson v. Brown* (1905) 121 Ga. 814, 49 S. E. 740, as a precedent for the doctrine formulated in the syllabus of the court: "Where a wife makes a contract in her own name for the improvement of her husband's house, the husband is not liable therefor when it does not appear that the wife was his authorized agent, or that he knew that the work was being done on his property, or that he adopted the contract as his own."

"The employment of a real estate broker to rent the premises in which the family lives is not within the scope of the ordinary agency of the wife, and special authority or ratification must be shown." *Harper v. Goodall* (1881) 10 Daly (N. Y.) 269 (action for commissions not maintainable against the husband).

In *Ross v. Dunn* (1902) 130 Mich. 443, 90 N. W. 296, it was held that, in the absence of specific evidence showing that the defendant's wife had authority to bind him, a subcontractor could not recover for extra work done in painting, at her request, one of the rooms in her husband's house.

In *Gavin v. Bischoff* (1890) 80 Iowa, 605, 45 N. W. 306, evidence that plaintiff performed the labor in question under a contract with defendant's wife was held to have been properly excluded, for the reason that there was no evidence that she was authorized to make such a contract on his behalf.

**(b) Husband liable.**

In *Cooper v. Phillips* (1831) 4 Car. & P. (Eng.) 581, where the defendant and his wife resided about a mile and a half from the house in which several of their children were living under the charge of a

nurse, it appeared that the defendant, on being informed that a servant in that house had fallen ill, sent his own physician to see her. In this state of the evidence, Taunton, J., thus directed the jury: "This shows that he considered himself liable to take care of her in this illness; and it is also shown that his wife knew, and did not disapprove of the plaintiff's attendance; and I think it must be taken that the defendant's wife had the general superintendence of this house." The latter part of this sentence indicates that the defendant's wife was regarded by the learned judge as being empowered to make such a contract as the one on which the action was brought; and that the claim was sustainable on this ground as well as on that of an engagement by the husband himself.

In *Weber v. Collins* (1877) 139 Mo. 501, 41 S. W. 249, the finding of a referee that the defendant Collins was the real party interested, and that his wife was merely acting as agent for him when she signed the building contract on which the plaintiffs sued, was held to be warranted by evidence of the following purport:—that the mother of the defendant *Monro Collins* owned a tract of land on which the house in question was built without any understanding that she would convey it to her daughter-in-law, the other defendant; that the survey for the house was ordered by, and was made for, *Monro Collins*; that, though the contract price was over \$11,000, the wife, in whose name the contract was made, had no means whatever with which to pay for it; that, according to her own testimony, she expected to borrow the money, but left that important matter entirely to her husband; that she executed no notes or mortgages for borrowed money, and did not know how or from whom the loan was procured; that most of the payments on the building were made by *Monro Collins* out of the money held by him as agent for his mother; that he made repeated declarations to others that he was building a residence; that before the completion of the house he had it insured in the name of his mother, his wife, and himself; that his mother afterwards died and the title became vested in himself and his brother; that the brother made a deed of his interest to him, and not to his wife; that in about a year after the defendant moved into the house it was burned, and in the proof of loss the defendant stated under oath that the building belonged to him alone.

In *Proctor v. Woodruff* (1909; Sup. App. T.) 119 N. Y. Supp. 232, it was held the dismissal of the complaint in an action brought for labor performed and materials

(4) Cases in which the scope of the authority of a wife who was not cohabiting with her husband at the time when the services in question were rendered was considered without any reference to the doctrine regarding necessities. In cases of this class also the question whether the husband can be held liable is essentially one of fact.<sup>14</sup>

The liability of a husband for legal services rendered to his wife in a divorce suit is discussed in the notes to *Wolcott v. Patterson* (1893) 24 L.R.A.

629; *Zent v. Sullivan* (1907) 13 L.R.A. (N.S.) 244; and *Meaher v. Mitchell* (1914) L.R.A.1915C, 467.

§ 20. *Agency arising out of a domestic relation other than that of husband and wife.*

The question whether an agency of this character existed between the defendant and the immediate employer of the plaintiff is always one of fact simply.<sup>1</sup>

furnished in decorating an apartment was improper for reasons thus stated: "The plaintiff has shown that the goods were delivered and the work done in an apartment where the defendant lived, and of which he was in control, and that they were intended for use in that apartment, and therefore probably for the defendant's use. He has enjoyed the result of the contract made by his wife, and has admitted that he gave money to his wife, not to obtain these articles and decorations, but to pay the bill for them. If the alleged agent had been his housekeeper, and not his wife, I think it would be evident that he would be liable for the bill incurred under these circumstances. If the defendant actually authorized his wife to contract with the plaintiff, the marital relation with his agent can certainly be no defense. The question of the actual authority should therefore have been submitted to the jury."

In *Hamill v. Samuels* (1911) — Tex. Civ. App. —, 135 S. W. 746, the court, after remarking that there was sufficient evidence to raise an issue for the jury as to whether appellant had authorized his wife to employ a broker to sell the property, continued thus: "If she was authorized to employ, then she had the power to make the employment and terms of employment. The bare fact that she authorized and instructed the broker to sell the property for a sum less than instructed by appellant to have it sold for, the broker having no knowledge to the contrary, would not invalidate her power to employ the broker and agree on his compensation. By expressly authorizing her to employ the broker, appellant held her out as having authority to act and competent to bind him. And the broker had no knowledge of any restriction of price, and in good faith relied and acted upon the apparent authority of the agent. . . . The fact that the property to be sold was a homestead would not affect the question."

Compare also *A. A. Fielder Lumber Co. v. Smith* (1912) — Tex. Civ. App. —, 151 S. W. 605, where a finding to the effect that the wife of a contractor was in active charge of the work undertaken by him imported that she was impliedly authorized to execute transfers of money to materialmen from funds due under the contract.

<sup>14</sup> In *Buford v. Speed* (1875) 11 Bush. (Ky.) 338, proceedings were instituted un-

der the act of Congress to confiscate the property of a man who had left his wife in possession of it and joined the Confederate Army. It was held that, as his interest in the property "was assailed at a time when it was unlawful for her to communicate with him without the license of the government, and when it may not have been practicable to do so, she had authority, ex necessitate rei, by implication of law, to employ the ordinary means of making defense, by hiring and contracting to pay counsel, and he is bound by what she did, whether she had express authority or not."

"Medical services to a third person cannot be said to be necessarily incident to the duties of carrying on a farm and looking after the household affairs in the absence of the husband." *Baker v. Witten* (1892) 1 Okla. 160, 30 Pac. 491 (husband not liable for fee of physician who attended one of his servants).

(a) Child as agent of parent.

<sup>1</sup> In *Hillier v. Eldred* (1892) 91 Mich. 54, 51 N. W. 705, a judgment declaring the defendant, a married woman, to be liable for the balance due under a contract made by her son for the building of a barn on her farm was reversed, on the ground that there was no testimony which authorized the court to submit to the jury the question whether he had acted as her agent in making the contract;—that, on the contrary, the testimony of even the plaintiff himself, upon his cross-examination, showed that he made the contract either with her son or her husband, and that he looked to the latter for his compensation. The mere fact that the defendant owned the farm and appurtenances, boarded the hands, and urged the work on, was held to be no evidence that the contract was made for her, either by her son or husband.

In *Thiel Detective Service Co. v. Seavey* (1906) 145 Mich. 674, 108 N. W. 1080, where a woman whose business was in charge of a general manager was held not to be liable for services rendered by the plaintiff in making, at the request of her son, a departmental manager, an audit of the books of the concern, the decision proceeded upon the ground that the findings of the trial judge must be treated as conclusive against the plaintiff because the "undisputed evidence [not set out in the

**§ 21. Directors of a corporation; generally.**

So far as regards the directors of a private corporation, when they are acting as a body, it is unnecessary, for the purpose of the present monograph, to say more than that they are its general managing agents, and consequently that their authority to bind it by contracts of employment is, for practical purposes, plenary in respect of transactions which come within the range of their powers.<sup>1</sup> This doctrine is, of course, subject to the qualification that the corporation is not affected with liability unless the con-

tract in question was adopted by a quorum of the directors, acting as an official body, and in the formal manner prescribed by the regulating statute.<sup>2</sup>

Individual directors are not, by virtue of their office alone, invested with authority to subject the corporation to contractual obligations. In this point of view it is clear that a claimant cannot recover for services rendered at the instance of a director, unless affirmative evidence is produced which tends to show that he had received authority to enter into the contract,<sup>3</sup> or the circumstances are such as to warrant the infer-

report] does not show a holding out of [the son] as a general agent or as one having any authority to make the alleged contract on the part of his mother."

In *Habegger v. King* (1912) 149 Wis. 1, 39 L.R.A.(N.S.) 881, 135 N. W. 166, Ann. Cas. 1913C, 828, where a minor, professing to act on behalf of his father, engaged a physician to attend on a person injured by the father's automobile, while it was being operated by the minor for his own convenience, it was held that the father was not liable for the service rendered. Referring to the cases in which railroad companies have been held responsible for services of this description, the court said that they "go largely upon the corporate character of the employer, the usual practice pursued, and the great exigency which arises in railroad disasters, and the dangerous character of the business. A mere chauffeur or automobile driver, in a town where the employer is known and can be readily reached by telephone or by other speedy and certain means of communication, would not ordinarily possess such authority. Neither would an infant son, using his father's automobile under like circumstances."

See also *Baxter v. Hutchings* (1868) 49 Ill. 116, § 44, note 6, *infra*.

**(b) Parent as agent of child.**

See *Burns v. Lane* (1887) 23 Ill. App. 504.

**(c) Brother as agent of brother.**

In *Tabet v. Powell* (1903) — Tex. Civ. App. —, 78 S. W. 997, the defendant, who had been injured in a railway accident, gave his brother full charge over the matter of compensation, and told the company's claim agent that a settlement could be made with that brother. Held, that the brother was authorized to bind the defendant by a contract to engage plaintiff as attorney to prosecute the claim against the company, on the terms of being paid a percentage of the amount recovered.

For a case in which it was held that, in the absence of affirmative proof of authority to employ the plaintiff, he could not enforce a mechanics' lien for work performed by the direction of the defendant's brother,

see *Maass v. Jarvis* (1897; N. Y. City Ct.) 20 Misc. 687, 46 N. Y. Supp. 544.

**(d) Sister as agent of brother.**

See *Meade Plumbing, Heating & Lighting Co. v. Irwin* (1906) 77 Neb. 385, 109 N. W. 391, 111 N. W. 636.

**(e) Brother as agent of sister.**

See *Wheeler v. Hall* (1877) 41 Wis. 447, § 43, note 1, *infra*; and *Paine v. Tillinghast* (1885) 52 Conn. 532.

<sup>1</sup> In *Hooker v. Eagle Bank* (1884) 30 N. Y. 83, 86 Am. Dec. 351, the right of an architect to recover for work done at the request of two directors was affirmed upon the ground that they had acted with the knowledge of the directors as a body, and that the benefits of the work had been accepted without objections.

<sup>2</sup> *Nicholstone City Co. v. Smalley* (1899) 21 Tex. Civ. App. 210, 51 S. W. 527 (contract for improvements on corporate property).

<sup>3</sup> In *Homersham v. Wolverhampton Waterworks Co.* (1851) 6 Exch. 137, 155 Eng. Reprint, 486, Pollock, C. B., speaking for the whole court, said: We are of the opinion that "the mere fact of work being done is not sufficient, in the absence of any order of directors, or anything from which a parol contract can be inferred, such as would bind the company; for the company is not bound by the mere order of the engineer, or by the contract with one director."

For other cases which support the text, see *Holmes v. Board of Trade* (1883) 81 Mo. 137; *Allegheny County Workhouse v. Moore* (1880) 95 Pa. 408 (employment of broker to sell articles manufactured); *Bent v. Arrowhead* (1909) 18 Manitoba L. R. 632 (employment of broker to sell land).

In *Pittsburgh, C. & St. L. R. Co. v. Woolley* (1876) 12 Bush (Ky.) 451, the implied power of a director to engage counsel in a cause was predicated on the ground that he had assumed to act as the agent of the company in employing the original counsel; that this employment had been ratified and approved by the corporation; and that, as there was nothing in the case to indicate that his agency in this regard was limited to the employment of a single attorney, it



ence of an adoption of the contract by the corporation. See subtitle III., *infra*.

§ 22. *President of corporation.*

In a case where a person other than a servant or subagent is suing for compensation in respect of services rendered at the request of the president of a company, who was discharging the functions of a general manager, the right of recovery is obviously determinable upon the same footing as in any other case where the contracting party occupied the position of general manager. See § 24, *infra*.

The question whether a president possesses, by virtue merely of his office, an

implied authority to make a contract of this description, is obviously one which depends upon the nature of the general doctrine adopted with regard to the extent of his contractual powers.<sup>1</sup>

The position of some courts is that a corporation acts through its president, and through him executes its contracts and agreements; and, in the absence of proof to the contrary, he will be presumed to have authority to represent the corporation."<sup>2</sup> The cases in which, having regard to the language used in the opinions, it may be said with reasonable certainty that this theory was applied with reference to contracts of employment, are collected in the footnote.<sup>3</sup>

might fairly be assumed that he had authority to engage the services of such counsel as might be reasonably necessary to prosecute certain actions which were being prosecuted in a city other than the one in which the original counsel resided.

In *Moyle v. Congregational Soc.* (1897) 16 Utah, 69, 50 Pac. 806, Burton, who was director and manager of the Burton-Gardner Company, and Hollister, a member of the board of trustees of the defendant corporation, and chairman of the building committee appointed to supervise the performance of a written contract personally made with Barber & Company for the erection of a church at a specified cost, orally agreed that Barber & Company should assign the contract to the Burton-Gardner Company, and that the assignee should complete the building and be paid whatever it cost and was worth to finish it. A written assignment of the contract was accordingly executed, but no other agreement was reduced to writing, and all the work thereafter done by the Burton-Gardner Company was done in pursuance of the oral agreement between Hollister and Burton. In an action brought by Moyle, who represented the Burton-Gardner Company, his right to recover for that work was denied on two grounds, viz., (1) the fact that the oral agreement which related to the performance of the work was in conflict with the original building contract, which, under the express terms of the written assignment, was to remain in force; and (2) that evidence which merely showed that Hollister condemned materials as not being in accordance with the specifications, superintended the building operations, changed doors and windows, and did other acts of a similar character, "was not sufficient to show that he had implied authority to change and set aside a written contract of the building committee of the church, and verbally increase the obligation of the church \$11,000."

In *Brown v. Valley View Min. Co.* (1900) 127 Cal. 630, 60 Pac. 424, the ground upon which the right to recover for services rendered by a watchman at a mine, who had

been employed by two directors, was denied, was not their want of authority in the premises, but the consideration that, as they themselves could not charge the company for the services, a substitute employed by them was in no better position.

<sup>1</sup> For information regarding the conflict of judicial opinion with respect to this point, see *Thomps. Corp.* 2d ed. §§ 1453 et seq; *Clark & M. Priv. Corp.* § 701; *Cook, Corp.* 7th ed. § 716.

<sup>2</sup> *Jones & D. Co. v. Crary* (1908) 234 Ill. 26, 84 N. E. 651.

<sup>3</sup> In *Skinner Mfg. Co. v. Douville* (1907) 54 Fla. 251, 44 So. 1014, it was laid down in the syllabus written by the court that the president of a private corporation may be presumed to have authority to employ agents to negotiate the sale of property owned by it.

In *Bank of Minneapolis v. Griffin* (1897) 168 Ill. 314, 48 N. E. 154, affirming (1896) 66 Ill. App. 577, the defendant bank was held to be bound by its president's offer of a reward for furnishing such information as would lead to the arrest of a criminal.

In *Bedford Line R. Co. v. McDonald* (1897) 17 Ind. App. 492, 60 Am. St. Rep. 172, 46 N. E. 1022, where the plaintiff was a physician who alleged a general employment to attend on any person who might be injured on the defendant's railroad, the power of the defendant's president and vice president was affirmed on demurrer. Manifestly, the employing agents in this instance were assumed to be discharging the functions of the chief executive officers of the company.

In *Weinsberg v. St. Louis Cordage Co.* (1909) 135 Mo. App. 553, 116 S. W. 461, the grounds upon which the president of a manufacturing company was held to have implied authority to employ a physician to attend an employee injured in the line of his employment were thus stated: "There certainly ought not to be any question of doubt with respect to the authority of the chief executive officer of an incorporate company, of the character here in-

volved, to execute the power. When a catastrophe occurs in its factory the corporation ought not to be expected to assemble its board of directors in order to exercise the implied power referred to. There is certainly an emergency power incident to the office of president of such an institution, commensurate with the circumstances now in judgment. The proposition is entirely clear." This decision was approved in *Newberry v. Missouri Granite & Constr. Co.* (1914) 180 Mo. App. 672, 163 S. W. 570, where a claim for services rendered to an injured servant by a doctor who had been summoned by the foreman of a quarry company was allowed, the evidence being that the foreman had acted with the approval both of the president and of the manager of the company. The court said: "Whatever may be said concerning the authority of a general manager of the company to employ a physician to treat one injured in the quarry, and we believe it to be abundant, no one can doubt the authority of the president in that behalf. The question is not even a debatable one." The same precedent was relied upon in *Ghio v. Schaper Bros. Mercantile Co.* (1914) 180 Mo. App. 686, 163 S. W. 551, where one of the reasons assigned for holding that the defendant was liable for medical services rendered to an injured employee at the request of its superintendent was that, during the whole of the period of several weeks to which the claim had reference, the defendant's president knew that the plaintiff was treating the patient, and instructed him to continue the treatment.

In *Mumford v. Hawkins* (1848) 5 Denio (N. Y.) 355, the right of a master in chancery to recover his fees in a suit instituted by the president of a bank was affirmed on the ground that, "in the absence of all proof to the contrary, we think it must be assumed that the president was duly authorized to institute and carry on that proceeding for the bank." The precedent cited was *American Ins. Co. v. Oakley* (1842) 9 Paige (N. Y.) 496, 38 Am. Dec. 561. There the rights of a third person were involved; but there is nothing to show that the doctrine reflected in the following remarks of Walworth, Ch., was regarded by him as being applicable only under these circumstances: "It is a matter of every day's occurrence for the presidents or other head officers of corporations to employ and retain attorneys and counsel to prosecute or defend suits, or to assist in legal proceedings in which the corporation is interested. And I doubt whether it is usual for members of the bar to take the precaution to inquire, when they are thus retained, whether there has been a formal resolution of the board of directors authorizing his retainer in the suit."

In *Richmond, F. & P. R. Co. v. Snead* (1869) 19 Gratt. (Va.) 354, 100 Am. Dec. 670, where an action was held to be maintainable for work done on the defendant's railroad by the plaintiff's slaves, it was re-

marked that the authority of its president to make contracts for the necessary labor for the company was incident to his office, and had not been disputed.

In *Davies v. Harvey Steel Co.* (1896) 6 App. Div. 166, 39 N. Y. Supp. 791, the court, in sustaining a verdict in favor of an agent who had been employed by the defendant's president to exploit an invention, laid it down that "the president of a corporation has prima facie power to do any act which the board of directors could authorize or ratify." The doctrine thus enunciated is apparently inconsistent with the language used by the court of appeals in *Oakes v. Cattaraugus Water Co.* (1894) 143 N. Y. 430, 26 L.R.A. 544, 38 N. E. 461. See note 4, *infra*. A similar criticism applies to *Powers v. Schlicht Heat, Light & P. Co.* (1897) 23 App. Div. 380, 48 N. Y. Supp. 237, affirmed in (1901) 165 N. Y. 662, 59 N. E. 1129, where the appellate division again applied the doctrine as to the presumptive authority of the president.

In *Armstrong v. Webber & Co.* (1916) 92 Wash. 295, 158 Pac. 957, the power of the president of a corporation engaged in a real estate brokerage business to employ an agent to attend to sales of a certain description was not disputed.

In *French Gas Saving Co. v. Desbarats Advertising Agency* (1912; K. B.) — Quebec, —, 1 D. L. R. 136, where the defendant company was held to be liable for the price of certain advertisements which had, with the knowledge and acquiescence of its president, been inserted in plaintiff's newspaper by Robert, its financial agent, one of the grounds of the decision was that "the plaintiffs were entitled to assume that the president was authorized to enter into an agreement with Robert and with them, it being an agreement in regard to which the board would have had power to bind the company. They were entitled to assume that he had been duly clothed with the real authority which he was ostensibly exercising in allowing Robert, as agent, to enter in a contract for the advertisements referred to."

For cases in which the doctrine that a president has, by virtue of his office, implied authority to employ counsel to attend to the legal affairs of the company, was more or less distinctly adopted, see *Winfield, Mortg. & T. Co. v. Robinson* (1913) 89 Kan. 842, 132 Pac. 979, Ann. Cas. 1915A, 451; *Savings Bank v. Benton* (1859) 2 Met. (Ky.) 240; *Traxler v. Minneapolis Cedar & Lumber Co.* (1915) 128 Minn. 295, 150 N. W. 914; *Western Bank v. Gilstrap* (1870) 45 Mo. 419; *Turner v. Chillicothe & D. M. City R. Co.* (1875) 51 Mo. 505; *Southgate v. Atlantic & P. R. Co.* (1875) 61 Mo. 89; *Colman v. West Virginia Oil & Land Co.* (1884) 25 W. Va. 148. The distinction upon which the second of the theories stated in the text is founded was not adverted to in any of these cases; though it will be observed that, upon the facts, most, if not all, of them, might be

The theory exemplified by other cases is that a president is empowered to make contracts in respect of matters pertaining to the ordinary routine of corporate business, but has no authority to enter into such contracts where they relate to

transactions of an unusually important character.<sup>4</sup>

Other cases proceed upon the theory that a president is not invested, by virtue of his office merely, with authority to discharge executive functions.<sup>5</sup> In

regarded as illustrations of the first branch of that theory.

<sup>4</sup>In *Mathias v. White Sulphur Springs Asso.* (1897) 19 Mont. 359, 48 Pac. 624, the court refused to entertain the presumption "that one of the implied powers of the office of president of a corporation organized to acquire title to a town site and buy lands and build buildings is to act as its managing agent in entering into a contract with an architect to draw plans for an expensive new building for the company." The rule was declared to be different with respect to contracts within the ordinary scope of the business of the corporation, such as those involving the repairs of a building owned by it.

Compare also *Tobin v. Roaring Creek & C. R. Co.* (1898) 86 Fed. 1020, where it was held that the president of a railroad company had no inherent authority to make a contract under which the other party was to procure a loan of \$150,000 for the company in consideration of a commission of 10 per cent. The court proceeded upon the ground that "the transaction was an extraordinary one, and quite beyond the sphere of its ordinary business and the customary scope of the agency of the president of such a corporation."

<sup>5</sup>In *Wainwright v. P. H. & F. M. Roots Co.* (1912) 176 Ind. 682, 97 N. E. 8, the special ground upon which the court denied the power of the defendant's president to contract with the plaintiff for the management of a third part of the corporate business was that the statute authorizing the creation of corporations of the class to which the defendant belonged provided that the business of such corporation should be managed by the board of directors. But the general rule was laid down "that the office of president of a private corporation of itself confers no power on the incumbent to bind the corporation or control its property. His powers as agent must come by delegation from the corporation, through the board of directors, formally and directly granted, or implied from its habit or custom of doing business."

In *Ney v. Eastern Iowa Teleph. Co.* (1913) 162 Iowa, 525, 144 N. W. 383, where a claim for the fees of an attorney engaged to conduct a suit for an accounting against an officer of the defendant company was disallowed, the court proceeded upon the theory that authority to make such a contract could not be treated as an incident of the presidential office, unless it had been attached thereto by the articles of incorporation, or the by-laws, or had been delegated to the holder of the office by the directors. The opinion contains a lengthy discussion of the powers of presidents.

In *Seever v. Cleveland Coal Co.* (1916) — Iowa, —, 159 N. W. 194, the point that the president of the defendant company was not empowered, merely by virtue of his presidential office, to employ the plaintiff to find a purchaser for the company's coal lands, was referred to as being beyond all doubt. The ground upon which the contract of employment was held binding was that the president was also general manager.

In *Grant v. Duluth, M. & N. R. Co.* (1896) 66 Minn. 349, 69 N. W. 23, it was held that a verdict in favor of the defendant railroad company had been properly directed, on the ground that there was no evidence from which it could warrantably be inferred that its president was authorized to bind it by his promise that the plaintiff, a subcontractor, should be paid for any loss he might sustain in going on with the stipulated work and completing it, and this promise had not been subsequently ratified by it. The court said: "It would not be claimed that authority to make such a contract as this in behalf of the defendant was within the implied powers of the president, merely as an executive officer, especially in view of the explicit provisions of the articles of association vesting the entire government of the corporation and the management of its affairs in the board of directors."

That the president of a business corporation has no power, as such, to appoint a general business manager without the consent of the directors, was laid down in *Vogel v. St. Louis Museum, Opera & F. A. Gallery* (1880) 8 Mo. App. 587.

In *Risley v. Indianapolis, B. & W. R. Co.* (1874) 1 Hun (N. Y.) 202, affirmed in (1875) 62 N. Y. 240, the right of a broker to recover for services in obtaining for a railroad company, at the request of its president, a contractor who would undertake to build its road, and in procuring the conversion of certain municipal bonds, was denied on grounds thus stated: "The president, with whom the contract for the payment of the plaintiff was made, had no special or direct authority from his company to enter into any agreement of that kind. . . . The circumstance that he was president of the company was not, of itself, evidence of the existence of such authority, for it does not ordinarily appertain to the duties of persons acting in that capacity. . . . The charter of the company gave the immediate government and direction of its affairs to a board of thirteen directors, having power to elect one of their number president, a majority of whom constituted a quorum for the transaction of business. But it conferred no

one of those cases the contention that an enlargement of his authority should be predicated on the ground of an emergency was rejected.<sup>6</sup> But the language

authority on the person who should be elected president, to bind the company by his contracts. His power, in that respect, appears to have been defined exclusively by the by-laws enacted by the company. And it was restricted to the management of all negotiations with other corporations, companies, or individuals, touching their mutual interests and the claims of either party on the other, and to entering into or concluding all such agreements or contracts with any of such parties as should be approved by the board of the executive committee. This entirely withheld the power to make contracts binding on the company, unless the approval of the executive committee was first obtained for that purpose."

In *Oakes v. Cattaraugus Water Co.* (1894) 143 N. Y. 430, 26 L.R.A. 544, 38 N. E. 461, it was held that the complaint in an action for services rendered in procuring a right of way for a water company should not have been dismissed, because the evidence tended to prove that the president, who had employed the plaintiff, was the general manager of the company. The court said: "In this case the president, having full personal charge of the business which the defendant was organized to transact, represented the corporation, and prima facie he had power to do any act which the directors could authorize or ratify. . . . The corporation had resolved to do the work, which was put in charge of the president, who was the principal promoter in organizing it. He was on the ground, directing the operations, and must be assumed to have the power to do whatever was necessary in executing the corporate objects. It cannot be doubted that he had power to employ engineers and workmen to construct the works, and to bind the company by contracts for labor and materials. He could also employ men to secure for the company rights of way, rentals for hydrants, and the other things necessarily pertaining to the business; and if he could make contracts for that purpose, why could he not adopt and ratify one made by himself, though before the corporation was legally created, but in anticipation of what subsequently occurred in obtaining the consents and filing the certificate of incorporation?" From the language of the court in this case and the actual ratio decidendi, no other conclusion seems to be possible than that the non-liability of the company would have been declared as a matter of law if no affirmative evidence respecting the powers and functions of the president had been introduced. The same point of view is exemplified in the following decisions of the supreme court: *De Bost v. Albert Palmer Co.* (1885) 35 Hun (N. Y.) 386 (president not presumptively authorized to bind it by a contract to pay commission to brokers employed to sell land); *Bright v. Canadian In-*

ternational Stock Yard & A. Co. (1895) 83 Hun, 482, 32 N. Y. Supp. 71 (where it was conceded that the president had no power to employ a broker). For later decisions of that court, which reflect a different doctrine, see note 3, supra.

In *Pollock v. Shultze* (1874) 1 Hun (N. Y.) 320, where a contract made by the president of a manufacturing company for the services of a person who was to give it advice with regard to a certain newly invented article, and to obtain a patent therefor, was held to be binding on the company, only a syllabus is reported, and it does not show whether the president's authority was viewed as being presumptive, or was inferred from some specific evidence not stated.

The position of the court with regard to the presumptive powers of a president is also left obscure in *Teele v. Consolidated Amusement Co.* (1907; Sup. App. T.) 102 N. Y. Supp. 666, where an accountant was held to be entitled to recover for services rendered in examining the defendant's books because the president, with whom the plaintiff contracted, had power to bind it, and the work was done with the knowledge of, and without any objection from, the defendant's "officers,"—a somewhat vague expression which in this connection apparently means "directors."

For other cases decided with reference to the theory stated in the text, see *Hoffman v. Guy M. Rush Co.* (1915) 27 Cal. App. 167, 149 Pac. 177 (employment of broker for sale of corporate stock); *Johnson v. Sage* (1896) 4 Idaho, 758, 44 Pac. 641 (president and secretary of mining company, not impliedly authorized to appoint agent to manage, control, sell, and transfer its property); *Brooklyn Gravel Road Co. v. Slaughter* (1870) 33 Ind. 185 (president of gravel road company, not authorized to pay for any part of the grading work); *Griffith v. Chicago, B. & P. R. Co.* (1887) 74 Iowa, 85, 36 N. W. 901 (construction of railroad); *Ney v. Eastern Iowa Teleph. Co.* (1913) 162 Iowa, 525, 144 N. W. 383 (employment of counsel); *Bright v. Metairie Cemetery Asso.* (1881) 33 La. Ann. 58 (president not authorized to employ counsel without a resolution of the board of directors); *Mt. Sterling & J. Turnp. Road Co. v. Looney* (1858) 1 Met. (Ky.) 550, 71 Am. Dec. 491 (construction work); *Wait v. Nashua Armory Asso.* (1891) 66 N. H. 581, 14 L.R.A. 356, 49 Am. St. Rep. 630, 23 Atl. 77 (right of architect to recover for services in preparing plans and specifications was denied on the ground that there was no specific evidence that the president of the defendant had been authorized to employ him for such a purpose); *Thomson v. Central Pass. R. Co.* (1910) 80 N. J. L. 328, 78 Atl. 162 (president not authorized to pay a person for causing certain suits to be discontinued).

<sup>6</sup> *Pacific Bank v. Stone* (1898) 121 Cal.

used by the court shows that its views in this regard had reference merely to the special circumstances under discussion, and that it did not intend to lay down the general proposition (manifestly untenable) that the implied powers of a president cannot be extended by an emergency.

In some of the cases involving contracts for services no general statement

of doctrine concerning the presumptive authority of a president is found in the opinions, the right of recovery being determined merely with reference to the effect of the specific testimony which bore upon the fact of his investiture with managerial powers, either by a formal resolution of the directors, or through their continued acquiescence in the exercise of such powers.<sup>7</sup> Under

202, 53 Pac. 634. The argument of counsel was that the board of directors had been deposed and ousted from the bank by a decree of the superior court; that an emergency thus arose; that the vice president had the unqualified right, by virtue of his office of acting president, and having the affairs of the bank in charge, to retain an attorney to ascertain the rights of the board. But the court said: "When the directors were ousted McDonald shared their fate, for he was vice president and acting president by virtue of being also a director. There was, therefore, no emergency calling for action by McDonald which did not equally appeal to all the other directors. What view might be taken of all the facts and circumstances of the case, were this an action for the value of work and labor performed, need not be considered; for defendant, having alleged a special contract, and relying alone upon that, cannot be allowed to recover on a quantum meruit. . . . We can perceive no reason why a bank president should be clothed with ex officio powers greater than those of the president of any other corporation. As director he derives his authority from the same source as presidents of other corporations organized under the statute, and as the presiding officer his functions and powers in the management of the corporate business are no greater than those of any other director. . . . In the absence of all evidence of authority to employ an attorney, as was the case here, and, in the absence of all evidence of subsequent consent or ratification, we must hold that the contract sued upon was unauthorized, and in an action based thereon he cannot recover." The court disapproved the statement in *Morse on Banks & Banking*, § 143, that to take charge of the litigation of a bank is the function of the president by virtue of his office, and mentioned that this doctrine has been controverted in *Thompson on Corporations*, § 4620.

<sup>7</sup> In *Egbert v. Sup. Co.* (1903) 126 Fed. 568, where the evidence showed that almost the whole executive business of an insurance company was in the hands of the president, it was held to be bound by a contract made by him for the employment of an agent.

In *Rennie v. Mutual L. Ins. Co.* (1910) 99 C. C. A. 556, 176 Fed. 202, the action was brought upon an oral contract, made with the president of the defendant, whereby, in consideration that the plaintiff would ac-

cept the position of general manager for the defendant in Australia, and go to Australia in order to be general manager, it was stipulated that if, on the termination of his employment as general manager, the plaintiff had not succeeded in building up a satisfactory renewal commission account, the defendant would pay to him annually for the remainder of his life an amount sufficient to support him. The plaintiff rested his case upon § 11 of the by-laws, by which the president was empowered to have the general direction and supervision of the affairs and officers of the company, and to establish rules for the conduct of its business; upon § 40, which gave the president power to fix the salary or compensation of agents; and upon § 4, which provided that at each quarterly meeting of the trustees a report should be made by the president of the business of the company for the previous quarter, stating particularly the contracts made during the quarter. It was argued that by these provisions the practical control of the company, in the general course of its business, was given to the president. But the court rejected this contention, saying: "The whole course of business negatives the authority of the president to make such a contract, and leads to the irresistible conclusion that he had the authority, which we have just mentioned, to make only the ordinary routine contracts from day to day, but not to make other contracts, and that he clearly had no power to make an indefinite agreement for a long number of years."

In *Miller v. Mason City & F. D. R. Co.* (1906) 132 Iowa, 412, 108 N. W. 302, recovery for services rendered in drilling wells was denied, on the ground that the evidence was insufficient to show that the president of the defendant railway company had empowered the chief engineer to modify the provisions of a written contract with reference to compensation for delay in furnishing materials.

One of the points decided in *Bowditch Furniture Co. v. Jones* (1901) 74 Conn. 149, 50 Atl. 41, was that the plaintiff company's president had no authority, either as president and manager or otherwise, to make an agreement which provided that the defendant was to do dental work for the president and his family, and take in payment therefor goods and furniture from the president, it being understood by the defendant that such goods and furniture were to be taken from the stock of the plaintiff corporation.

In *T. M. Gilmore & Co. v. W. B. Samuels*

such circumstances the theoretical position of the court must be ascertained by

an examination of its decisions with regard to other descriptions of contracts,

& Co. (1909) 135 Ky. 706, 123 S. W. 271, 21 Ann. Cas. 611, it was held that a director of a manufacturing company whose official designation was "secretary and treasurer," but who had been appointed by the directors to exercise managerial functions of the same scope and quality as those intrusted to the president, was impliedly authorized to make a contract which provided that the other party, a broker, was to sell on commission for a specified period the commodity manufactured by the corporation; but that he had no power to include in such a contract a stipulation under which the broker was to receive an additional commission in the event of the purchaser of the commodity exercising the option given to him of purchasing the real property of the corporation. The reason why the extent of the powers of the director in question was a material element in this case was that the company relied upon the defense that the mental powers of the president were so weakened by the use of morphine that she did not understand what she was doing when she executed the contract. The contract was held to be a severable one, so far as the claimant's remedial rights were concerned.

In *Jones v. Williams* (1897) 139 Mo. 1, 37 L.R.A. 682, 61 Am. St. Rep. 436, 39 S. W. 486, 40 S. W. 353, where a contract made by the president of a newspaper company for the employment of the plaintiff as manager and editor was held to be binding upon it, the facts relied upon by the court were that the voluminous evidence in the record did not disclose a single instance in which the will of the president was disregarded by the board of directors; that the business of the corporation was conducted precisely as though it had been his private business; that he appointed or dictated the appointment of all the principal agents and employees, and fixed their salaries; that he directed the policy and management of the paper; that he drew out the earnings at will before dividends were declared; and that he spoke of the paper as "my paper," and treated everyone connected with it as his employees.

In *Murphy v. W. H. & F. W. Cane* (1912; Err. & App.) 82 N. J. L. 557, 82 Atl. 854, Ann. Cas. 1913D, 643, where the action was brought for the breach of a contract for plumbing work, made with the defendant company as principal contractor on a building, the authority of its president to make the contract was inferred from the fact that the stockholders elected and re-elected him as president, and refrained from establishing by-laws for prescribing his powers and authority, or for regulating the mode in which the business of the company should be conducted. Under such circumstances it was deemed to be "more reasonable to infer from the entire course of business that the company intended to confer upon him such authority as he is shown to have custom-

arily exercised." In this point of view, it was considered that the case did not require a discussion of the doctrine relied upon by the supreme court, that the president of a building company is not invested by virtue of his office with an implied power to award subcontracts in regard to construction work for which his company has the main contract. See (1910) 80 N. J. L. 163, 76 Atl. 323.

In *Bogart v. New York & L. I. R. Co.* (1907) 178 App. Div. 50, 102 N. Y. Supp. 1093, affirmed in (1908) 191 N. Y. 550, 85 N. E. 1106, where the plaintiff, who was a director and secretary of the defendant, and also its consulting engineer, sued for services rendered in the latter capacity under a contract made with the president, a verdict in his favor was sustained on the ground that it was provided by one of the by-laws of the defendant that "the president shall be the chief executive officer and head of the company in all its operations, and shall supervise all other officers and all departments of the road in every respect."

In *Rosewater v. Glen Teleph. Co.* (1903) 81 App. Div. 275, 80 N. Y. Supp. 880, the claim of an electrical expert for services in making affidavit, to be used for the purpose of opposing a motion made by another company for a preliminary injunction against placing telephone wires in a subway in a certain city, was allowed on the ground that the president of the defendant, at whose instance the affidavit was made, was its chief executive officer, that he had charge of the construction of the subways, that the defendant was directly interested in compelling the other company to use its subways, and that its interest in the action brought by that company against the city was being guarded by him in his official capacity.

In *Twelfth Street Market Co. v. Jackson* (1883) 102 Pa. 269, one of the by-laws of the defendant company conferred upon the president the general charge and direction of its business; but another by-law declared that the finance committee should make arrangements for providing the necessary funds for meeting all the corporate liabilities. Held, that the president had no power to engage a broker to procure a party to pay off the ground rent on the defendant's property.

In *Heinze v. South Green Bay Land & Dock Co.* (1901) 109 Wis. 99, 85 N. W. 145, one of the grounds upon which the claimant's right to recover compensation for certain survey work, performed under a contract made with the president of the defendant, was upheld, was thus stated: "The by-laws of the company gave him a general supervision of the entire business of the company, and authority to sign all contracts. In addition, the act in question was directly in line with the general purpose and course of business of the corpora-

—an inquiry which would carry us outside the scope of the present monograph.

It is clear that, under any theory as to the presumptive powers of a president, a contract of employment made by him is not binding upon the company where it relates to a transaction wholly outside the scope and purposes of the corporate business,<sup>8</sup> or to a matter already provided for by a resolution of the board of directors.<sup>9</sup>

Whether the contract of employment upon which the claimant relies was authorized, as being in a reasonable sense incidental to the exercise of a certain special power conferred upon the president, is a question to be determined with reference to the nature and scope of that power.<sup>10</sup>

In some of the cases which involve claims for services rendered at the instance of a president, the court has adverted to the general rule "that a business corporation cannot, by its by-laws, so limit the power of its executive officers that the corporation shall not be liable for ordinary engagements made by such officers in the transaction of the company's business with those who have

no knowledge of such limitation."<sup>11</sup> This rule manifestly operates for the protection of the claimant, irrespective of whether the ostensible power of such officers is predicated as being an implied incident of their functions, or an express delegation by the directors.

**§ 28. General manager acting for a principal other than a corporation.**

Having regard to the authorities as they stand, it cannot be said that the implied powers of a general manager appointed by an individual are deemed, so far, at least, as contracts of employment are concerned, to be essentially either broader or narrower than the powers of a general manager appointed by a private corporation (see next section). The question whether any special significance should be ascribed to the fact that, where a corporation is involved, the directors are interposed between the general manager and the stockholders themselves, has not been raised. But as there is actually some difference between the elements to be considered, according as the principal is or is not a corporation, it may be advis-

tion, and necessary in order to fully carry out the corporate purpose."

<sup>8</sup> In *McCorry v. John C. Wiarda & Co.* (1912) 149 App. Div. 863, 134 N. Y. Supp. 667, it was held that a broker employed to sell the plant of a manufacturing company was not entitled to recover commissions.

Compare also the language used in *Harris v. Vienna Ice Cream Co.* (1904; Sup. App. T.) 46 Misc. 125, 91 N. Y. Supp. 317.

<sup>9</sup> In *Templin v. Chicago B. & P. R. Co.* (1887) 73 Iowa, 548, 35 N. W. 634, it was laid down that the president of a railroad company is not invested simply "by virtue of his office" with the power to let a contract in behalf of the company for the construction of its road, when a contract for such construction has already been made by the board of directors. To the same effect, see *Central Trust Co. v. Condon* (1895) 14 C. C. A. 314, 31 U. S. App. 387, 67 Fed. 84, where the plaintiff's claim had relation to a part of railroad for the whole of which a contract had been let before he was employed.

<sup>10</sup> *Northern C. R. Co. v. Bastian* (1859) 15 Md. 494 (acting president empowered to effect the sale of certain iron has authority to engage the services of an agent to aid him in finding a purchaser and bringing about the sale); *Sistare v. Best* (1892) 88 N. Y. 527 (president empowered to sell the corporate stock has implied authority to engage a broker); *Hudson River & W. County Midland R. Co. v. Hanfield* (1899) 36 App. Div. 605, 56 N. Y. Supp. 877 (president empowered to contract for construction of rail-

road has authority to advance stock and bonds to the contractor).

In *Henderson v. Western Gas Engine Co.* (1908) 8 Cal. App. 247, 96 Pac. 787, where a broker employed by the president of the defendant company to sell its stock sued for his commission, a judgment for the defendant was reversed on the ground that the record disclosed that the defendant had, through its board of directors, passed resolutions authorizing its president to sell at par certain of its stock then in the treasury; and that "when said action was taken there was a custom and usage throughout California that officers, unless otherwise directed, when so authorized, in the usual and ordinary course of business, placed and listed such stock with brokers on a commission basis, without express instructions from the board of directors, and in cases where such stock was so listed, to pay commissions to such brokers."

<sup>11</sup> *Powers v. Schlicht Heat, Light & P. Co.* (1897) 23 App. Div. 380, 48 N. Y. Supp. 237, affirmed in (1901) 165 N. Y. 662, 59 N. E. 1129 (plaintiff, employed by president to prepare a pamphlet setting forth the patent which the company was organized to work under, was held entitled to receive compensation). The precedent cited for the general doctrine was *Rathbun v. Snow* (1890) 123 N. Y. 349, 10 L.R.A. 355, 25 N. E. 379. See also *Oakes v. Cattaraugus Water Co.* (1894) 143 N. Y. 430, 26 L.R.A. 544, 38 N. E. 461, the effect of which in another point of view is stated in note 5, *supra*.

able to recognize this difference in the arrangement of the decisions.

The manager of a hotel has authority to bind his principal by a contract for advertising the hotel.<sup>1</sup>

The foreman of a manufacturer, who is shown by the evidence to have been, during his absence, left in charge of the business, as his general agent, and consequently to have been invested with an implied authority to conduct it in the same way as when defendant was at home, possesses, by virtue of such authority, a right to employ laborers to conduct the business of the shop, and to provide board for them, in the same way that the defendant himself had been in the habit of doing when he was at home.<sup>2</sup>

A person appointed to manage in one state the business of the proprietor of a planing mill operated in another state has authority to enter into a contract for the cutting of timber owned by his principal in the former state.<sup>3</sup>

The doctrine formulated in the syllabus written by the court for the case cited below is as follows: "A nonresident agent, authorized by his principal and charged with the exclusive management of a real estate loan business in this state, including the examination of titles and foreclosure of mortgages, has

implied authority to direct a local sub-agent, through whom all the business has been transacted, to retain a lawyer whenever the interests of his principal demand professional attention."<sup>4</sup>

It has been laid down that the possession of a general authority in respect of the management and control of real property does not invest the agent with implied authority to employ counsel in a case which involves the title to land belonging to a third person, even though the legal questions presented in that case are of such a character that the decision to be rendered with regard to them will be a controlling precedent with regard to the validity of the principal's title to his own land.<sup>5</sup>

In one case it was held that the general agent of an unincorporated association operating a packet boat was not authorized to employ attorneys on the credit of his principal, to commence and prosecute suits in behalf of servants of the association who had been assaulted while engaged in its business.<sup>6</sup>

The decisions, so far as they go, proceed upon the doctrine that the employment of a doctor to attend on an injured servant is not within the ordinary scope of the powers of an agent appointed to manage the business of an individual.<sup>7</sup>

<sup>1</sup> Calhoun v. Buhre (1907; Sup. Ct.) 75 N. J. L. 439, 67 Atl. 1068. The ruling in this case was quite general; but doubtless the doctrine laid down is to be taken as being subject to the implied qualification that the contract should be reasonable, when gauged with reference to the extent and character of the business conducted in the hotel. Such would seem to be the theory underlying, or at all events assumed in, Mullin v. Sire (1901; Sup. App. T.) 34 Misc. 540, 69 N. Y. Supp. 953. There Amar, the manager, testified that he was employed by the defendant as manager of the hotel; that he had general supervision of the conduct of the hotel, general superintendence of all the employees, and general supervision of all the departments. The defendant admitted the correctness of this statement. Commenting upon this evidence, the court said: "On this statement it seems clear that the defendant held Amar out to be his general agent, so far as the conduct and supervision of his hotel business was concerned. Whether he had in fact authorized Amar to make this contract is immaterial. The question here is the extent of the apparent authority he conferred upon his agent, and which, by the latter's acts and position, the public was justified in assuming the agent possessed. The primary object of a hotel is to secure guests; and in furtherance of this object it would seem to

be well within the powers of one intrusted with the general conduct and supervision of a hotel in all its departments to insert in a daily journal a two-line advertisement. One contracting with the hotel, and for its benefit, would have the right to assume that a manager occupying the position that this one concededly did, had authority to make the contract in question."

<sup>2</sup> Burley v. Kitchell (1844) 20 N. J. L. 305.

<sup>3</sup> Simpson v. Harris (1911) 174 Ala. 430, 56 So. 968 (where the action was brought to restrain the cutting of the timber in question).

<sup>4</sup> Davis v. Matthews (1896) 8 S. D. 300, 66 N. W. 456. In the opinion it was declared to be "manifestly necessary from the methods employed, as well as from the nature and extent of the business transacted," that the defendant should delegate to the agent full authority to employ an attorney whenever it became necessary. With reference to the business that was being transacted, Mr. Day, the agent, "had the powers of a general manager, and was authorized to do or cause to be done, in the usual and accustomed manner, everything necessary to protect the interest of his principal."

<sup>5</sup> Perry v. Jones (1877) 18 Kan. 552.

<sup>6</sup> Cochran v. Newton (1848) 5 Denio (N. Y.) 482.

<sup>7</sup> In Harris v. Fitzgerald (1902) 75 Conn. 72, 52 Atl. 315, an action against a railroad



Some courts would doubtless regard this doctrine as being subject to qualification in respect of cases involving an emergency. See § 52, *infra*. But the right of recovery has not, as yet, been discussed with reference to this point of view.

§ 24. *General manager of a corporation.*

The governing principle under this head is that where a person "has the actual charge and management of the business by the appointment of or with the knowledge of the directors, the corporation will be bound by his acts and contracts which are necessary or incident in the course of the business, without other evidence of actual authority."<sup>1</sup>

contractor for medical services rendered to one of his laborers, under an alleged request from one of his sons, who was superintendent and general manager, the defendant testified that the duties of the employee were exclusively to make estimates for contracts, and to see that the work contracted for was carried on diligently and properly. Held, that the jury had been erroneously instructed that it was for them to determine whether the son, from the general scope of his employment, was authorized to employ plaintiff, and that they should have been told that, if they believed defendant, the son had no such implied authority.

In *Holmes v. McAllister* (1900) 123 Mich. 494, 48 L.R.A. 396, 82 N. W. 220, it was held that a firm operating a laundry was not bound by a contract made by its foreman for medical attendance on a servant. The court said: "We do not . . . hesitate to hold that in those avocations of life *unaccompanied by dangers*, an employer is not liable for the services of a physician summoned by his manager . . . to attend an employee in a case of sudden illness or injury, whatever his moral obligation may be." The loose phrase italicized is shown by other parts of the opinion to refer to an assumed distinction between employments which are and are not extrahazardous. It is obvious that much conflict of judicial opinion regarding similar states of fact must in practice result from the application of a test as vague as the one thus suggested. The court did not refer to the earlier case of *Hodges v. Detroit Electric Light & P. Co.* (1896) 109 Mich. 547, 67 N. W. 564 (see preceding note), which, if the point had been raised, it would presumably have undertaken to reconcile with the decision rendered in the case before it, on the ground that the business of producing electricity is an extrahazardous one, as compared with that carried on in a laundry.

In *Malone v. Robinson* (1892) — Miss. —, 12 So. 709, it was held that, in the absence of proof that the manager of a plantation had received specific authority to

The question whether the employment of a person to perform services for the corporation falls within the category thus defined is manifestly one to be determined with reference to the character of the corporate business and to the special elements, if any, which are presented by the testimony. Decisions of the following purport have been rendered:

That the general manager of a mercantile corporation was authorized to engage brokers for the purpose of negotiating the sale of real property which it acquired in the course of its business, and which was not requisite for the conduct of that business;<sup>2</sup> or to engage a person for the performance of services which consist of counsel and advice, and

make contracts for medical services to the workmen under him, the owner of the plantation could not be held liable for such services, although he had in some instances furnished medical attendance for the hands on the plantation, and saw the physician while rendering such services, and did not object. It is submitted that, under the circumstances shown, there was at least a question for the jury whether the manager had ostensible authority to engage a physician.

<sup>1</sup> *Thomp. Corp.* 2d ed. § 1576.

<sup>2</sup> *Henderson v. Raymond Syndicate* (1903) 183 Mass. 443, 67 N. E. 427. There the evidence showed that the land, for the sale of which the plaintiffs claimed commissions, came to the defendant as collateral security for a debt; that the plaintiffs, through their efforts, procured the customer who bought the land, and that they did this with the knowledge and consent of one George J. Raymond, who was acting for the defendant. The right of the claimants to maintain the action depended upon whether Raymond had authority to write on behalf of the defendant a letter in which the validity of their claim for compensation was recognized. Discussing the evidence which bore upon this question, the court said: "There was a vote of the corporation in 1893, to employ George J. Raymond as the managing director of the sales stores of the company, and a vote of the directors authorizing the sale to Lyons. There was evidence that beyond these two votes there were no votes on record authorizing Raymond to have any dealings with the real estate of the corporation, or to employ any brokers. There was also evidence from the president of the corporation that Raymond was the general manager of the defendant; and that no formal votes were made or placed upon the corporate records in regard to the business transactions of Raymond for the syndicate. The witness further testified that he never had objected, nor ever had known of any objection being made by any of the members of the corporation to anything that

of efforts to enlist new capital in the business in which the defendant is engaged.<sup>3</sup>

That it was within the legitimate scope of the powers of a general manager of a building and loan association to make a contract to pay the usual commission to a broker who should secure a purchaser for real estate held by the corporation.<sup>4</sup>

That the general manager of a colonization company had implied authority to employ persons to seek out "logged-off" lands which were for sale, and place the

company in communication with the owners, so that they might negotiate for the purchase of such lands.<sup>5</sup>

That the president of a coal company, who was also its general manager, had authority to employ an agent to find a purchaser for its coal lands in a certain district.<sup>6a</sup>

That the general manager of a railway company had authority to offer rewards for the detection of persons committing acts injurious to the road under his control.<sup>6</sup>

That the general manager of a mining

Raymond ever did for the corporation in the management of its business. We are of opinion that, on the evidence in the case, the jury were warranted in finding that the corporation was content to leave the entire business of the corporation, with all matters incidental thereto, to the management of Raymond. The employment of a broker to make the sale was merely something incidental to the sale. The ratification of the sale by the directors necessarily ratified everything incidental thereto. No vote of the directors to authorize the employment of a broker was necessary. It was also observed with regard to a requested instruction to the effect that a vote of the corporation was required before Raymond could employ the plaintiffs: "This is not a correct statement of the law. If the jury found that Raymond was authorized to sell the land, and that the employment of a broker was necessary to effect such sale, no vote of the stockholders was necessary."

<sup>3</sup> *Whitman v. Koted Silk Underwear Co.* (1902; N. Y. City Ct.) 38 Misc. 796, 78 N. Y. Supp. 880.

<sup>4</sup> *Tyler v. Anglo-American Sav. & L. Asso.* (1898) 30 App. Div. 404, 52 N. Y. Supp. 77. In that case the negotiations with the person introduced by the plaintiff to the general manager resulted in an agreement on his part to sell the property. Subsequently the defendant transferred the property to another purchaser, paying a commission for such sale to another agent. The court thus discussed the question whether the plaintiff, having furnished such customer, could be defeated in the action because the defendant had failed to carry out its agreement to sell to the purchaser who was furnished: "Upon this proposition there can hardly be two opinions. The plaintiff went to the office of the defendant, a corporation, to transact business. He was referred to Mr. Gilbert as the proper person with whom this business might be transacted, and while it will not be contended that the plaintiff would be justified, without further inquiry, in entering into a contract involving matters of large importance, and which would naturally require the co-operation of the corporation through its board of directors, the defendant is hardly in a position to say that it was not within the legitimate scope of the powers and duties

of a general manager of a building and loan association to make a contract to pay the usual commission for a purchaser of real estate held by the corporation. That is an incident of the business of these associations, and comes as naturally within the province of the implied powers of an officer of this character as the employment of any other servant of the corporation. It has no bearing upon this case that the bargain, as between the defendant and the proposed purchaser, was outside of the province of the general manager, without the concurrence of other officers. The contract was that the plaintiff was to have his commission upon supplying a satisfactory customer, and the defendant, through its general manager, having accepted the customer, is estopped from asserting a lack of authority on the part of its agent to make the contract in so far as this plaintiff is concerned."

<sup>5</sup> *Chilcott v. Washington State Colonization Co.* (1906) 45 Wash. 148, 88 Pac. 113. Discussing the contention that error was committed in permitting one of the plaintiffs to testify that the general manager, Harding, had admitted to him that he (Harding) and the other plaintiff had agreed on 25 cents per acre as compensation for the respondents, the court said: "It is conceded that Harding was at different times trustee, treasurer, and manager of the corporation. This being true, he was not an agent of restricted authority, but one exercising broad and general powers. A corporation acts only through its officers, managers, and agents, and it is a well-established rule of evidence that it is bound by the admissions of its agents or managers while engaged in the discharge of their duties."

<sup>6a</sup> *Seever v. Cleveland Coal Co.* (1916) — Iowa, —, 159 N. W. 194. An additional ground assigned for the allowance of the agent's claim for commissions was that the president had been himself directly authorized by the person who owned practically all the corporate stock to sell the lands in question, which were in Iowa; such stockholder, a resident of Chicago, being of necessity compelled to employ someone near the property to look for purchasers.

<sup>6</sup> *Arkansas Southwestern R. Co. v. Dickinson* (1906) 78 Ark. 483, 115 Am. St. Rep. 54, 95 S. W. 802. The ruling of the trial

company had, by virtue of his functions, authority to enter into a contract for work and labor to be performed upon its property.<sup>7</sup>

That, if a workmen's boarding house was necessary for the efficient operation of a mine situated in the woods, far away from any settlement, and its maintenance was in accordance with the usual practice in such cases, the manager of the mine had implied authority to pledge the credit of the mining company for the payment of the cost of such work and materials as might be required for the erection of the building.<sup>8</sup>

That the general manager of a steamship company was invested with the implied power of making contracts for the performance of wrecking services in respect of its ships.<sup>9</sup>

That the general manager of a hotel had authority to make contracts for the services of detectives.<sup>10</sup>

That the general manager of a company engaged in selling real estate for commissions has authority to employ a person to solicit prospective buyers.<sup>11</sup>

That the managing editor of a newspaper, being "charged with the full control of the business of collecting news, and impliedly vested with power to enter into contracts in respect thereto," had authority to hire a yacht for the purpose of collecting news during a war.<sup>12</sup>

That the general manager of a company engaged in theatrical enterprises was authorized, when making a contract for the employment of actors, to insert a stipulation that their employment should be terminable only on two weeks' notice.<sup>13</sup>

It has been held that the general manager of a railroad company is impliedly authorized, by virtue of his office, to engage a doctor to attend on an injured employee,<sup>14</sup> or passenger,<sup>15</sup> and to make

judge that the agency of the manager could not be established by what he said, but that his acts in his official capacity might be considered, was held to be correct, "since there was proof to justify the conclusion that these acts were assented to by the company." The authority relied on was *Central R. & Bkg. Co. v. Cheatham* (1887) 85 Ala. 292, 7 Am. St. Rep. 48, 4 So. 828, where, however, the employing agent seems to have been merely a departmental superintendent. See § 25, note 9, *infra*.

<sup>7</sup> In *Crowley v. Genesee Min. Co.* (1880) 55 Cal. 273, 4 Mor. Min. Rep. 71, it was held that the admission of the defendant on the trial that the person by whom the contract was made was its president, superintendent, and managing agent constituted sufficient evidence of his authority to make the contract.

In *Salt Lake Foundry & Mach. Co. v. Mammoth Min. Co.* (1890) 6 Utah, 351, 23 Pac. 760, the finding of the lower court in favor of the plaintiff was held to be justified by evidence which tended to show that the work in question had been performed under an agreement with a person who was a director and secretary of the defendant company, and with its general manager; that the mining operations to which this work had reference were carried on in its name; that the pay rolls of the employees and the regulations for the conduct of the work were in its name; that the proceeds of the mine were transferred to its credit; that the labor performed by the respondent was charged to it; that its president was sometimes at the mine; and that its secretary and one or two of its directors resided there. This decision was affirmed in (1894) 151 U. S. 447, 38 L. ed. 229, 14 Sup. Ct. Rep. 384.

<sup>8</sup> *Miller v. Cochran Hill Gold Min. Co.* (1896) 29 N. S. 304 (verdict for contractor

was sustained by an equally divided court).

<sup>9</sup> *Great Lakes Towing Co. v. Mill Transp. Co.* (1907) 22 L.R.A. (N.S.) 769, 83 C. C. A. 607, 155 Fed. 11, writ of certiorari denied in (1907) 207 U. S. 596, 62 L. ed. 357, 28 Sup. Ct. Rep. 262.

<sup>10</sup> This was taken for granted in *Grand Pacific Hotel Co. v. Pinkerton* (1905) 217 Ill. 61, 75 N. E. 427, affirming (1905) 118 Ill. App. 89, where the actual question considered was whether an assistant manager should be deemed, under the circumstances, to possess a similar authority.

<sup>11</sup> *Hoffman v. Guy M. Rush Co.* (1915) 27 Cal. App. 167, 149 Pac. 177 (where the powers of a president, acting as general manager, were involved).

<sup>12</sup> *Sun Printing & Pub. Asso. v. Moore* (1901) 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240 (action for breach of contract to return the yacht).

<sup>13</sup> *Ferguson v. Majestic Amusement Co.* (1916) 171 N. C. 663, 89 S. E. 45, Ann. Cas. 1917C, 389.

<sup>14</sup> *Walker v. Great Western R. Co.* (1867) L. R. 2 Exch. (Eng.) 228, 36 L. J. Exch. N. S. 123, 16 L. T. N. S. 327, 15 Week. Rep. 769 (doctrine affirmed without any argument); *St. Louis Merchants' Bridge Terminal R. Co. v. Wiggins* (1893) 47 Ill. App. 474 (where recovery was denied on the special ground that there was no evidence to show that the manager had ever received the letter written by the claimant, stating that an injured servant of the company was under his care, and that he would continue to attend the case at the appellant's expense, unless otherwise notified).

<sup>15</sup> In *Louisville, E. & St. L. R. Co. v. McVay* (1884) 98 Ind. 391, 49 Am. Rep. 770, the court argued thus: "The term 'general manager' of a corporation, according to the ordinary meaning of the term, indicates one who has the general direc-

arrangements for the board and lodging of an injured employee.<sup>16</sup> In one of the cases in which this doctrine was recognized, the right of a doctor so engaged to maintain an action for his services was apparently assumed to be predicable only where the injury treated was due to

the negligence of the company or its employees.<sup>17</sup> In the others, the existence of the authority was affirmed without any reference to this qualification.

Having regard to the effect and rationale of the cases cited under the preceding paragraph, it is obvious that

tion and control of the affairs of the corporation, as contradistinguished from one who may have the management of some particular branch of the business. There is no class of business of anything like the magnitude of the railroad business of to-day, that is so open to common observation and of which the general public know so much. The terms 'road master,' 'section boss,' 'conductor,' 'station agent,' 'superintendent,' and 'general manager,' are terms familiar to the whole people, and the public has, in the main, a correct understanding of the ordinary duties of these several classes of officers, agents, and employees, and that their duties and powers are limited to the keeping up of the road, rolling stock, etc., and operating the road in the transportation of freight and passengers. We should have to shut our eyes to the most common observation to hold that the courts will not presume that the 'general manager' of a railway has authority to bind the corporation by contracts for medical and other services to an injured employee, passenger, or other person wounded on the road by any agency of the company."

The existence of such authority was taken for granted in *St. Louis, A. & T. R. Co. v. Hoover* (1890) 53 Ark. 377, 13 S. W. 1092.

<sup>16</sup> *Atlantic & P. R. Co. v. Reisner* (1877) 18 Kan. 468. The actual point decided was that an officer of a railroad company who was not merely a station agent, but also its general agent at the place where a servant of the company had suffered injury, was authorized to employ a hotel keeper, at the expense of the company, to attend to that servant, and to furnish him with board and lodging while he was disabled. The court said: "When the witness testified that Hyde was the general agent of the road at Atchison, he thereby gave evidence that the railroad company held out to the public such person as its agent in all its business and employment. In other words, the general agent of the company is virtually the corporation itself. It has been usual in the construction and operation of railroads in this state for some person therewith connected to act as general manager or general agent of the railroad being constructed or operated; and such general manager or general agent has had, while occupying this position, the full control of all the company's affairs, and complete direction over its treasury. General manager and general agent are synonymous terms. It does not appear from the evidence that there was any legal liability on the part of the railroad company to furnish board and attend-

ance to the brakeman. Still, we do not think this proof was necessary to establish the liability of the company to Reisner. . . . The defendant in error was not compelled to institute inquiry as to the moral or legal liability of the railroad company to take care of the disabled employee before receiving him into his hotel. after the general agent of the company had agreed that the company would pay for the board and service." The basic assumption of the court in this case, that the expression "general agent" has the same connotation as the expression "general manager," seems to be of very dubious soundness. (See language of court in *Swazey v. Union Mfg. Co.* (1875) 42 Conn. 556, note 20, *infra*.) For aught that appears in the report, the plaintiff may have been merely one of several agents of the company who might have been appropriately designated as "general," for the reason that they were "authorized to transact all the principal's business of a particular kind" (1 *Parsons, Contr.* p. 40), and not the officer who would be, in the ordinary acceptance of the term, the company's "general manager." That it is possible for a company to have many "general agents," in the sense thus indicated, as well as a "general manager," seems to be indisputable. It is submitted that, in the absence of specific evidence going to show that the plaintiff's employer was, in point of fact, discharging the functions usually associated with the position of a "general manager," the court was not warranted in proceeding upon the theory that his "general agency" was of the same nature as that which is vested in a "general manager." But the decision, though of doubtful correctness with reference to the particular facts, may be treated as a clear precedent for the doctrine stated in the text.

<sup>17</sup> *Evans v. Marion Min. Co.* (1903) 100 Mo. App. 670, 75 S. W. 178. The court said: "In this case, we must assume that Abbott was injured through the negligence of defendant. It was, therefore, liable to him for the damage occasioned by the injury, including the expense of a physician. It was directly interested in seeing that such injuries were not made worse by lack of medical attention, and that the suffering and other ill consequences should be lessened in every proper way. Its president and general manager, who is necessarily in charge of its general interests and welfare, was certainly not acting outside his duties when he was doing that which was lessening the damages for which he found it had become liable." Compare the decisions cited in note 20, *infra*.

they do not bear out the statement, that "no court . . . has gone so far as to hold that even the general manager of a railroad may, on behalf of the company, engage generally in providing medical aid to sick and injured employees and passengers," and that it is only in cases of emergency that the corporate officers have the authority to provide such aid.<sup>18</sup> That statement is, moreover, essentially irreconcilable with the reasoning of the courts in several cases in which the authority of general, and even of division, superintendents, to bind

their principals, has been affirmed with relation to contracts of this description.<sup>19</sup>

In all the reported cases in which the liability incurred under contracts for medical services by companies other than those operating railroads has been considered, the injured person was an employee of the defendant. Whether the general managers of such companies are, by virtue merely of their office, empowered to make contracts of this description, is a question which has evoked a remarkable conflict of opinion.<sup>20</sup>

<sup>18</sup> *Cushman v. Cloverland Coal & Min. Co.* (1908) 170 Ind. 402, 16 L.R.A. (N.S.) 1078, 127 Am. St. Rep. 391, 84 N. E. 759. For further information as to this case, see note 19 to this section, and § 52(c), *infra*.

<sup>19</sup> See § 26, notes 2 and 4, and § 27, notes 8 and 10.

#### (a) Recovery allowed.

<sup>20</sup> In *Montgomery Brewing Co. v. Caffee* (1890) 93 Ala. 132, 9 So. 573, the right of a doctor to recover for medical services rendered to the negro driver of the defendant company was affirmed, where the evidence showed that an "agent" (functions not specified) having, in answer to the plaintiff's inquiry, stated that he had no authority to bind the company by a contract for the treatment of the driver, but that he would write for instructions, had received the telegraphic reply: "Have the negro treated." The court said that "the telegram was without qualification, and imported authority to the agent to have the negro treated properly, and, if necessary, to procure professional treatment." It may reasonably be assumed for the purpose of classification, that the dispatch in this case was sent from the manager of the defendant, and that the court took it for granted that he had authority to issue the instructions sent to the subordinate "agent."

In *Fraser v. San Francisco Bridge Co.* (1894) 103 Cal. 79, 36 Pac. 1037, where the plaintiff was engaged by the president of the company, who was also its general manager, the decision allowing the claim was based on the existence of an assumed moral obligation to which the defendant was subject. In so far, as it rests upon that ground, it is conceived that the decision cannot be regarded as a sound precedent. It should be observed, however, that the court also relied upon the consideration that the defendant, by paying one of the attendant physicians a certain sum for his services, and offering to pay the plaintiff another amount, had "recognized, approved, and confirmed the authority of its president to write the letter and make the contract therein expressed." Upon the actual facts, therefore, the decision was correct, irrespective of the grounds upon which it was based.

In *Hodges v. Detroit Electric Light & P. Co.* (1896) 109 Mich. 547, 67 N. W. 564, it was held to be for the jury to determine whether one who, for five years, had had charge of the affairs of a corporation as superintendent and general manager, and who was also a member of its board of directors, had authority to bind it by a promise to pay for the attendance of a nurse upon an injured employee. The court adopted the reasoning of *Cooley, J.*, in *Marquette & O. R. Co. v. Taft* (1873) 28 Mich. 289, § 26, note 2, *infra*. But the case is not easy to reconcile either with the language used or the conclusion arrived at in *Holmes v. McAllister* (1900) 123 Mich. 494, 48 L.R.A. 396, 82 N. W. 220. See subd. (b) of this footnote.

In *Hasler v. Ozark Land & Lumber Co.* (1903) 101 Mo. App. 136, 74 S. W. 465, a lumber company was held liable for the fees of a surgeon who, as the evidence showed, had declined to render any services until an official who was both its president and its general manager had agreed to recompense him. The court took it for granted that the official in question had power to make the given contract, the actual point decided being that the case was not one for the application of the rule invoked by the defendant, viz., that unless the relation existing between the person who engages a physician and the person who is to be treated is such as raises a legal obligation to procure and pay for medical attendance upon the latter, the law will not imply a promise to pay the value of the services rendered.

In *Freeman v. Junge Baking Co.* (1907) 126 Mo. App. 124, 103 S. W. 565, a verdict finding that one who was the general manager of a bakery, and operated its plant, and who, on occasions previous to the one in question, had employed physicians, was authorized to bind the corporation for services rendered by a physician to an employee, injured while in its employ, was sustained.

In *Greensfelder v. Witte Hardware Co.* (1915) 189 Mo. App. 576, 175 S. W. 275, Witte, the secretary of a manufacturing company, who, at the time when the employee in question was injured, was acting as its general manager, was summoned by

By some courts the position has been taken, more or less explicitly, that such a contract is or is not binding upon the company, according as the injury treated

one Dr. Reber on behalf of the plaintiff, with the view of obtaining, after the first emergency treatment had been administered, his instructions with regard to the disposition to be made of the employee. Witte said: "Go ahead. Do the best you can with him; if you have to take him to a hospital, go ahead." It was urged that this conversation could not in any event bind defendant to pay more than the reasonable value of the first or emergency treatment, and that, since plaintiff did not thereafter confer with the defendant during the course of the treatment at the hospital, he could at most recover only for his services as in respect of that treatment. But this contention did not prevail. The court said: "When the conversation was had the physicians had done all that they could for the injured man without removing him to a hospital for treatment. It was with reference to this particular matter that Witte was summoned in order to ascertain who would be responsible for the expense to be thereby incurred. And plaintiff's evidence is that Witte told the physicians to take the patient to a hospital, if necessary, and to do the best they could for him. And in the absence of any limitation then or thereafter placed upon the authority thus apparently conferred upon plaintiff, the defendant, in our opinion, may be held liable for the services covered by plaintiff's account sued upon."

In *Chickasha Cotton Oil Co. v. Lamb* (1911) 28 Okla. 275, 114 Pac. 333, the court assumed that the general manager of an oil mill company had authority to employ a doctor to treat a servant who had been injured in a fight with a trespasser, but the verdict for the claimant was set aside on account of certain errors committed by the trial judge in respect of the admission and rejection of testimony.

See also *Rich v. Edison Electric Co.* (1912) 18 Cal. App. 354, 123 Pac. 230 (where the actual ruling was that the manager's acquiescence in what had been done by the plaintiff physician rendered the defendant liable).

#### (b) Recovery denied.

In *Swazey v. Union Mfg. Co.* (1875) 42 Conn. 556, the plaintiff did not attempt to prove by specific evidence that the injury was the result of the defendant's negligence, or that the general manager had been authorized to pledge the defendant's credit for the payment of the plaintiff's bill, but relied simply upon the legal inference to be drawn from the fact that he was the defendant's business manager. The conclusions of the court were thus stated: "Upon this record there remained a question of fact as to the extent of Mr. Tuck's authority to bind the corporation by his agreement that it should pay the plaintiff for medical services to Middleton, which should have been sub-

mitted to the jury; for the name given in the motion to the office held by Tuck, to wit, general agent or general business manager, does not furnish a fixed legal standard by which his powers can be measured; it does not put any definite limitations upon them; he did not hold an office known to the law, with duties prescribed with such certainty as that the court can assume judicial knowledge of them; nor does the reasonableness of his belief that the defendant was liable for negligence furnish the true test by which his powers are to be determined. He was a servant of the defendant, appointed by its directors. The extent of his power to bind the corporation depends in part upon its by-laws, if any such there be, touching his office; in part upon the language of the vote of the directors appointing him, if any such appears of record; in part upon their knowledge and approval of, or the acquiescence of the corporation in, acts performed by him; and in part upon usages which may be shown to exist, controlling the matter. Nor is there any rule of law by which the question as to his power to bind the corporation by his agreement in this case is made to turn upon the magnitude or the insignificance of the sum involved; no principle can be made to rest upon such an unstable foundation." No definite opinion was expressed as to the liability of a company in cases where the injury was, in point of fact, due to its negligence.

Where a corporation operates a mining plant, and does not authorize its superintendent to employ a physician at the expense of the corporation to attend an employee injured by the machinery of the plant, the law does not imply such authority; at least where there is testimony that such authority was not given or contemplated by those exercising the rights of the corporation. *Atlantic Ref. Co. v. Leffingwell* (1911) 61 Fla. 101, 34 L.R.A. (N.S.) 351, 54 So. 266, 1 N. C. C. A. 1.

In Indiana the position has been taken that the employment of a doctor to attend an injured servant is beyond the power of a manager of a corporation other than a railroad company, even in a case where the injury is so serious that there is an urgent necessity for its immediate treatment. *Cushman v. Cloverland Coal & Min. Co.* (1908) 170 Ind. 402, 16 L.R.A. (N.S.) 1078, 127 Am. St. Rep. 391, 84 N. E. 759; *Chaplin v. Freeland* (1893) 7 Ind. App. 676, 34 N. E. 1007; *New Pittsburgh Coal & Coke Co. v. Shaley* (1900) 25 Ind. App. 282, 58 N. E. 87; *Sourwine v. McRoy Clay Works* (1908) 42 Ind. App. 358, 85 N. E. 782.

In *Godshaw v. J. N. Struck & Bro.* (1900) 109 Ky. 285, 51 L.R.A. 668, 53 S. W. 781, the court said: "We are not, therefore, prepared to hold as a matter of law that the employment of physicians or surgeons

was or was not occasioned by negligence for which it is legally responsible;<sup>21</sup> and the opinion has even been expressed that no liability attaches to the company where such negligence is proved.<sup>22</sup> An obvious corollary to the former of these theories is that the authority of a man-

ager to make such a contract cannot be implied from evidence which merely shows that he had reasonable ground to believe that the company was liable for the injury, and that he employed the claimant to save it from pecuniary loss.<sup>23</sup>

It may be pointed out that both the

for injured employees comes within the scope of the duties of a general manager of an ordinary manufacturing business. It seems to us that the rule that appellant seeks to have applied to this case is confined exclusively to railroad companies, and generally in cases which involve some act of negligence on the part of the company which occasioned the injury." The doctrine thus laid down has been modified pro tanto by the later decision, cited in note 21, *infra*, which affirmed the right of recovery in respect of cases where the injury treated was caused by the fault of the company or its agents.

In *Spelman v. Gold Coin Min. & Mill Co.* (1901) 26 Mont. 76, 55 L.R.A. 640, 91 Am. St. Rep. 402, 66 Pac. 597, the court said: "He [i. e., the manager] cannot, however, bind his principal by a contract to confer a gratuity or bestow a charity, however strong the promptings of humanity may be. He acts for and is virtually the company itself in those matters only which have to do with its ordinary business, and are within the scope of the duties delegated to him for performance. Unless the limits of his authority are shown to have been enlarged, the duties of the general manager are confined to the transaction of the business of the corporation as distinguished from its mere ethical duties, and consequent imperfect obligations or supposed charities. The fact that a certain person is general manager of a mining company does not, in and of itself, imply authority in him to bind the company in matters other than those of business affairs. It may not be said, as matters of law, or declared as a fact judicially known, that general managers of mining corporations are usually clothed with such authority as that assumed by Loomis. So to hold would be to affirm that every general manager may contract with physicians and surgeons in behalf of the mining company for which he is agent, irrespective of the rights of the company, and without regard to whether it was at fault. If he has such authority by virtue of his office, then he may bind the company to pay for the services and expenses of surgeons, physicians, nurses, and others, rendered to and paid out for men who, through their own gross negligence, have suffered injuries in his company's mines, and his promise in the name of the company to pay any price that might be agreed upon by him and those employed would (in the absence of fraud) bind the corporation."

In *Harris v. Vienna Ice Cream Co.* (1904; Supp. App. T.) 46 Misc. 125, 91 N. Y. Supp. 317, recovery was denied on the grounds

that the contract in suit could not be said to fall within the purpose of the creation of the defendant company, and that the evidence did not disclose any benefit to it or any authority, actual or apparent, in its president or secretary, to obligate it in the given instance.

In *Journal & Tribune Co. v. Lones* (1914) 130 Tenn. 209, 169 S. W. 760, the court thus stated its position: "The rule is that even the general manager of a commercial corporation has no authority or power implied from his official position to commit his company to the payment of ordinary attendance (as contradistinguished from emergency attendance, with which we are not dealing) by a physician or surgeon on an employee of the corporation, injured while in the line of duty. That this "rule" is not universally accepted is apparent from the cases cited in subd. (a), *supra*.

<sup>21</sup> In *Lithgow Mfg. Co. v. Samuel* (1903) 24 Ky. L. Rep. 1590, 71 S. W. 906, it was laid down that the general rule, under which a master is exempted from any legal obligation to pay for medical attendance on a servant (see *Labatt, Mast. & S. § 1999*), is subject to an exception in a case where the servant's condition is due to the negligence of the master. If this broad doctrine is adopted, there would seem to be no adequate reason for drawing the line sharply between a general manager and superior employees of lower grades.

In *Evans v. Marion Min. Co.* (1903) 100 Mo. App. 670, 75 S. W. 178, the ratio decidendi was, that in cases where the employee treated appears to have had a good cause of action against the company, its liability under a contract made by its principal executive officer may properly be predicated upon the ground that it is his duty to consult the general interests and welfare of the company, and that this duty, under one of its aspects, is fulfilled by lessening the damages for which it had become liable.

For language supporting the statement in the text, see also the extracts quoted in the preceding note from the opinions in *Swasey v. Union Mfg. Co.* and *Spelman v. Gold Coin Min. & Mill. Co.*, and the cases cited in note 20, *supra*.

<sup>22</sup> In *Atlantic Ref. Co. v. Leffingwell*, *supra*, note 20, it was observed that the liability of the corporation for negligence that proximately injures an employee may extend to medical services to an injured employee, but this does not create a contract liability for such services.

<sup>23</sup> See passage quoted in note 20, *supra*, from the Connecticut case.

doctrine which, in cases of the type discussed in the preceding paragraph, differentiates between the liability of railroad companies and other classes of principals, and the doctrine which treats the right of recovery as being predicable or not predicable, according as the injury treated by the claimant was or was not caused by negligence imputable to the principal, are logically irreconcilable with the broad theory noticed in § 1, *supra*, under which the contractual powers of agents of every description are regarded as being incidental to and based upon their duty to protect the interests of their principals by taking such measures as are calculated to mitigate the damages for which, upon further investigation, those principals may be found liable.

In two cases claims in respect of medical services rendered to injured servants

of the defendant have been disallowed on the ground that, at the time when the injuries were sustained, the servants were not engaged in the performance of their duties.<sup>24</sup>

The cases cited below may seemingly be regarded as authorities for the broad doctrine that a general manager possesses, irrespective of the nature of the corporation, implied power to employ counsel to attend to its legal affairs.<sup>25</sup>

The powers of a president whom the directors have appointed to act as general manager are manifestly of the same scope as those of any other appointee.<sup>26</sup> The same remark applies with regard to a vice president; but in the case cited below the authority of such an official to make the contract in question was denied in view of the special circumstances involved.<sup>27</sup>

<sup>24</sup> In *Dale v. Donaldson Lumber Co.* (1886) 48 Ark. 188, 3 Am. St. Rep. 224, 2 S. W. 703, an action brought by a physician who had been hired by a man who acted as secretary, treasurer, and business manager of a lumber company was held not to be maintainable because the servant treated by the plaintiff had been injured in a private brawl.

In *Chase v. Swift & Co.* (1900) 60 Neb. 696, 83 Am. St. Rep. 552, 84 N. W. 86, the plaintiff had attended certain wounded men who had come to the city where the defendant's packing house was situated, to take the places of employees who had gone out on a strike. The theory upon which the action was prosecuted was that the defendant's manager had agreed to take care of any of the new men who should be injured by the strikers in consequence of having engaged in the service of the company. The court said that the evidence did not show when, where, or why the plaintiff's patients were injured. It was certain that they were not hurt while in the actual service of the defendant, and as there was no proof that they were assaulted by the strikers, or that there was any causal relation between their injuries and the service in which they were engaged, it seemed quite clear that it was not within the apparent range of the managers' agency to employ a physician to attend them.

<sup>25</sup> *Ney v. Eastern Iowa Teleph. Co.* (1913) 162 Iowa, 525, 144 N. W. 383 (power taken for granted in a case involving authority of president); *St. Louis, Ft. S. & W. R. Co. v. Grove* (1888) 39 Kan. 731, 18 Pac. 958; *Western Bank v. Gilstrap* (1870) 45 Mo. 419 (employment by cashier of bank whose president was out of town); *Maupin v. Virginia Lead Min. Co.* (1883) 78 Mo. 24; *Holmes v. Board of Trade* (1883) 81 Mo. 137 (*arguendo*); *Lewis v. Pulitzer Pub. Co.* (1898) 77 Mo. App. 434; *Root v. Olcott*

(1886) 42 Hun (N. Y.) 536 (employment by cashier of bank); *Clarke v. Union F. Ins. Co.* (1883) 10 Ont. Pr. Rep. 339.

<sup>26</sup> *Rich v. Edison Electric Co.* (1912) 18 Cal. App. 354, 123 Pac. 230 (doctor employed by such an official to attend on an injured servant was held entitled to recover for his services); *Lee v. Pittsburgh Coal & Min. Co.* (1877; Buffalo Super. Ct.) 56 How. Pr. (N. Y.) 375 (president and manager of coal company held to be authorized to agree to pay commissions to coal merchants for negotiating its sale of large quantities of coal); *Calvert v. Idaho Stage Co.* (1894) 25 Or. 412, 36 Pac. 24 (president and manager of stage company authorized to employ agent to take charge of its routes in other state).

The power of a president to employ counsel has been predicated on the ground of his having been actually invested with the functions of general manager for all purposes (*Dublin & S. W. R. Co. v. Akerman* (1907) 2 Ga. App. 746, 59 S. E. 10; *Dallas Ice Factory & Cold Storage Co. v. Crawford* (1898) 18 Tex. Civ. App. 176, 44 S. W. 875); or of manager in respect of the conduct of litigation (*Potter v. New York Infant Asylum* (1887) 44 Hun (N. Y.) 367, affirmed in (1890) 118 N. Y. 684, 23 N. E. 1147).

<sup>27</sup> In *Balet v. New York & N. J. Bridge Co.* (1899) 40 App. Div. 245, 58 N. Y. Supp. 19, in which an action for work and labor expended in drawing plans for a bridge over the Hudson at New York was brought upon an oral agreement made by the vice president and the secretary, who were the managing officers of the defendant bridge company, the claim was disallowed, where the evidence showed that the plaintiff, when he made his original application to be allowed to submit the plans, had notice of certain conditions which "exclude the idea that he could assume that the persons with whom



In a case where the liability of a sanitarium company for the services of an architect hired by its general manager was affirmed, the court laid stress upon the facts that he had been owner of the establishment before the defendant was organized and took it over; that, after the transfer, he owned or controlled nearly all of its stock, actively conducted its business, and dominated its affairs about as completely as he did the business of his sanitarium before it was incorporated. "Practically," therefore, "he was dealing with his own property through a corporate agency as absolutely as he might deal with it as an individual."<sup>28</sup> What decision would have been rendered if these special evidential ele-

ments had not been present is not apparent from the opinion. But it is at least clear that the ruling cannot warrantably be regarded as a precedent for a general doctrine as to the implied power of a general manager to bind his employer to pay for such services as those in question.

A special defense relied upon in some of the cases was, that the authority of the general manager in respect of the employment of agents did not extend to the making of contracts of a certain duration. The general rule is that such an agent cannot engage employees for a long future period without express authority.<sup>29</sup> This rule is, of course, subject to the qualification created by the fun-

he talked had authority to make a valid and binding contract in respect to a plan for such bridge, without ratification by the directors or approval by the public authorities;" that, after he had completed plans which were declared by Swan, the vice president, and Greene, the secretary, to be the thing they wanted, they told him they would submit the drawings to the board of directors; that in the week following Swan told him that the board of directors had accepted his plan; that an article prepared by him at the request of Swan subsequently appeared in the New York Herald, containing a description of the proposed bridge, together with certain "cuts" prepared from drawings furnished by him at the request of Swan; that in this article it was stated that the plans prepared by him would be used in the construction of the bridge; that Swan and Greene invited him to be present as engineer of the company at the ceremony of breaking ground for the New Jersey end of the bridge; and that, being present, he was introduced to various persons as the engineer whose plan had been accepted. Ultimately the plaintiff's plans were not used. The court laid the chief stress upon the consideration that "the work itself was practically of national importance, and it is quite evident that, under such circumstances, no plan would or could be accepted until it had passed the scrutiny of the board of directors of the defendant, and received the approval of state and national authorities." The conclusion reached was that "from all that appears that the persons who talked with the plaintiff respecting these plans, and the plaintiff himself, did not contemplate, either the one to accept or the other to furnish by binding agreement any plans, but that the former was willing and invited plaintiff to submit a plan which might or might not be adopted, dependent entirely upon future contingencies; and we also think that under such circumstances the vice president and secretary would have no power to accept any plan or create a legal obligation against the defendant in connection therewith."

<sup>28</sup> *Fernekes v. Nugent Sanitarium* (1914) 158 Wis. 671, 149 N. W. 393.

<sup>29</sup> *In Reupke v. D. H. Stuhr & Son Grain Co.* (1905) 126 Iowa, 632, 102 N. W. 509, the contention of the defendant that its general manager had no power to contract with the plaintiff for one year was rejected on the ground that, in the territory where the defendant operated, it was the custom to employ grain solicitors for a term of one year or longer.

In *Wainwright v. P. H. & F. M. Roots Co.* (1912) 176 Ind. 682, 97 N. E. 8, it was held that an issue of fact with regard to the scope of the authority of the general manager of a manufacturing corporation in respect of making the contract in question is raised where its purport is that a part of the corporate business shall be placed under the entire control of the person designated, that he shall receive for his services a percentage of the profits, and that the arrangement shall continue for a period of five years. The court said: "Here we have a contract of rather an unusual and extraordinary character. The general manager gets his authority by delegation from the board of directors. Under our statute, the directors are elected annually by the stockholders. The stockholders then may make an entirely different board of directors in one year, and such new board may displace the general manager and select another. The terms and character of the contract under consideration not only give rise to the implication that it may be beyond the usual and ordinary course of the business of appellee . . . but it also does this for a period of five years, which may be both beyond the terms of the general manager and board of directors. Added to this showing, the answer directly alleges that Johnston, as general manager, had no authority to execute the contract for the corporation, and that it was never ratified nor approved by the board of directors or stockholders. The answer, by force of this last allegation, was sufficient to withstand a demurrer."

damental doctrine of the law of agency that, "where the principal confers upon his agent authority to transact business in reference to which there is a well-known usage or custom, it is the presumption of the law, in the absence of anything to indicate a contrary intent, that such authority was conferred in contemplation of the usage; and third persons who deal with the agent in good faith and in the exercise of reasonable prudence will be protected."<sup>30</sup>

On the ground that the nature of the functions of a superintendent of a separate and distinct department of an insurance company's business constituted him a general agent with "power to do acts of a class," it has been held that the employment of such an official is not within the scope of the powers of the manager of the company.<sup>31</sup> There seems to be room for doubt as to whether the criterion of a general agency was properly applied here. But the decision may well be sustained upon the ground that the appointment of the departmental superintendents of a large concern is not an act which pertains to the usual and ordinary course of the business.

**§ 25. Assistant manager of a private corporation.**

In one case it was held that the facts which the testimony tended to prove were such as justified the inference that the assistant manager of a hotel company had authority to contract for the services of detectives.<sup>3</sup>

It has been held by an intermediate court of appeal that an official appointed

to assist the general manager of an electric company, and invested with "authority to look after the interests of the company where special attention could not be given by the general manager at the time," acts within the scope of his implied powers when he engages a physician in case of emergency to look after an injured servant, even though technically no liability attaches to the company on account of the injury.<sup>3</sup>

**§ 25a. Manager of a department of a business.**

Evidence which showed that the plaintiff in an action to recover for services rendered in procuring a purchaser for one of the elevators owned by the defendant company had been employed by the manager of its office in a certain city, and by its traveling manager, an agent who looked after its properties in different parts of the state, was in one case held to be "probably" not sufficient to show that these agents were empowered to sell the property of their principal, or to engage other persons to find purchasers therefor.<sup>1</sup> The actual decision proceeded on the ground of a subsequent ratification by the defendant.

**§ 26. General superintendent.**

The implied authority of an agent designated as a "general superintendent," but exercising functions coextensive with those ordinarily associated with the position of a general manager, must, it is clear, be determinable upon the same footing as if he were actually a general manager and so denominated.

the hotel company were so changed as to make the president the manager, but that he was still retained in the hotel as a sort of assistant manager under the president. When the contract with the plaintiffs was made, he was in the hotel, giving orders and drawing checks, and in every way appeared to persons having business with the hotel company to be authorized to act for it. It also appeared from the testimony introduced by the defendant itself, that the president of the hotel company engaged Glennie to assist him in his management, and to exercise superintendence. Held, that these and other circumstances (not mentioned) showed that, apart from the testimony of witnesses who heard Glennie say that he was manager, there was sufficient evidence to warrant the conclusion that he had authority to contract with the plaintiffs in reference to the matter in question.

<sup>2</sup> Rich v. Edison Electric Co. (1912) 18 Cal. App. 354, 123 Pac. 280.

<sup>1</sup> Fritz v. Chicago Grain & Elevator Co. (1907) 136 Iowa, 699, 114 N. W. 193.

<sup>30</sup> Reupke v. D. H. Stuhr & Son Grain Co. (Iowa) supra.

<sup>31</sup> Skene v. Union Casualty & S. Co. (1901) 91 Mo. App. 120. Another point decided in the same case was that a supplemental contract, made with the manager, by which it was provided that the employee should have, in addition to his salary, a contingent interest in the profits of expired business, was not binding on the company, because the existence of knowledge on his part that the power to contract in this particular matter was vested in the executive committee of the directors, and not in the manager, was a necessary inference from the fact that he had previously received from the manager a letter, notifying him that he had been employed by the committee, and that the question of a contingent interest had not been submitted to it.

<sup>1</sup> Grand Pacific Hotel Co. v. Pinkerton (1905) 217 Ill. 61, 75 N. E. 427, affirming (1905) 118 Ill. App. 89. There it was in evidence that one Glennie had been manager of the defendant's hotel until the by-laws of

Whether the functions intrusted to the agent who made the contract which it is sought to enforce were of this character and scope is a question to be determined from the particular facts in evidence.<sup>1</sup>

Presumably this theory is, in the final analysis, the rationale of the cases in which it has been held that ordinary powers of the general superintendent of a railroad company extend to the making of contracts for the performance of medical and similar services with respect to injured persons. In nearly all the

cases in which this position has been taken, the injured person was a servant of the defendant, and the court did not advert either to the question whether the company's liability is also predicable in respect of services rendered to persons other than servants, or to the question whether proof that the injury treated was caused by negligence imputable to the company is a necessary prerequisite to the implication entertained with respect to the superintendent's powers.<sup>2</sup> The right to recover for services ren-

<sup>1</sup> In *Ghio v. Schaper Bros. Mercantile Co.* (1914) 180 Mo. App. 686, 163 S. W. 551, the court observed: "It is true the office of general manager appears in the mental vision as something broader and as comprehending more power than that of superintendent, generally speaking. But the mere denomination of the particular office or title is not to control in every instance, for the question of the power annexed thereto is to be determined in the circumstances of the case, with a view of the facts pertaining to the power usually exercised by the corporate officer and with the apparent consent of the company. Sometimes a general manager may be clothed with the usual powers, and sometimes, too, a superintendent may be clothed with and exercise powers quite as extensive. The matter is to be determined, in a measure, by reference to the apparent power of the officer and that which it appears he has been accustomed to exercise; for third persons, such as this plaintiff, dealing with the company, have a right to rely on the appearances it holds out."

In *McCarthy v. Missouri R. Co.* (1884) 15 Mo. App. 385, the court refused to disturb a verdict in favor of the plaintiff, a physician, where the evidence of the defendant showed that its superintendent, at whose request the services in question were rendered to one of its employees, had, in cases of emergency, authority to employ a physician other than the one regularly retained; that he had exercised this authority on more than one occasion; and that his conduct in this regard had been ratified by the defendant. The court said: "After verdict in the plaintiff's favor, we must take as true the plaintiff's testimony to the effect that Mr. Allen [superintendent], after the plaintiff had dressed the wound of the employee of the defendant corporation, had told the plaintiff to go on and treat the case; and if, in doing this, he acted contrary to instructions, it is not material, in the absence of a state of facts showing that the plaintiff knew what his instructions were and what the extent of his authority was. It appears that he was acting within the scope of such a general authority as would be implied from his previous acts ratified by the company; and, clearly, where the superintendent of a corporation requests a physician to go on and treat an employee of the company, who has been injured, the natural

implication would be that he makes the request for the company, and not with the intention of charging himself personally."

<sup>2</sup> In *Toledo, W. & W. R. Co. v. Rodriguez* (1868) 47 Ill. 188, 95 Am. Dec. 484, where a contract made by a general superintendent for the treatment of an injured servant was held to be binding on the defendant, the court said: "As his title implies, he has a general superintendence of the business affairs of the road, and we deem it but a reasonable inference to conclude that this was within the scope of these powers."

When it is known that the general superintendent manages all the business of the road within his department, and binds the company by contracts on its behalf, in regard to its general business, it may safely be inferred that such a contract as this was within the scope of his authority." This case was followed in *Toledo, W. & W. R. Co. v. Prince* (1869) 50 Ill. 26, in which the facts were substantially similar. The power of the general superintendent to engage the claimant was taken for granted, the actual ratio decidendi being, that he had ratified a contract previously made by a station agent.

In *Pacific R. Co. v. Thomas* (1877) 19 Kan. 256, the court laid it down that the general superintendent of a railroad company would presumptively have authority to employ a surgeon to attend on an employee of the company who had been injured while in the employ of the company; but that this presumption might be rebutted by evidence showing that he had no such authority. The claim in this case was for services rendered until the servant's recovery.

In *Atchison & N. R. Co. v. Reeher* (1880) 24 Kan. 228, the court proceeded upon the assumption that a surgeon engaged by a gang foreman, with the sanction of the defendant's general superintendent, to treat an injured laborer, was entitled to maintain an action for the value of his services. The only question actually discussed was whether a telegram received from the general superintendent conferred upon the foreman authority to employ the claimant. See, however, the later Kansas case, cited in note 4, *infra*.

In *Marquette & O. R. Co. v. Taft* (1873) 28 Mich. 289, the court was equally divided upon the question whether, in the absence of evidence of an express delegation of the

dered to an injured passenger has also been affirmed without any reference to those questions.<sup>3</sup> But it has been laid down by the supreme court of Kansas, and by a court of inferior jurisdiction in Ohio, that the contractual power of a superintendent is not predicable as regards cases in which the injured person was a passenger. The consideration upon which this doctrine is based is that the

obligations owed by a railroad company to its employees are essentially different in quality from those which it owes to passengers.<sup>4</sup> It was intimated, however, by the Kansas court, that even where the injured person was a passenger, an action for the services rendered in treating him might be maintainable if the injury resulted from negligence for which the company was responsible.

appropriate authority, or of some usage of the defendant company, or of circumstances tending to show the nature or scope of his powers and duties, it was permissible to infer that an agent described as a "superintendent" had power to bind the company by a contract for medical attendance on an injured servant for a considerable period. Cooley, J., one of the judges who held that no evidence to prove a special authorization was requisite, reasoned thus: "The nature of the powers of a railway superintendent is indicated by the title to his office. He has the general superintendence of the business of the corporation, and is the immediate representative of the corporation in all business transactions with the public. This is the general fact, though there are undoubtedly cases where these general powers are, in part, at least, conferred upon the president, or some other officer. There is no evidence that this case was exceptional, and we must consequently assume that this superintendent had the usual powers of general supervision. In all that pertains to the general management and operation of the road he speaks and acts for the company, and he must decide for it, and may make contracts on its behalf in the emergencies which unexpectedly arise, connected with, or growing out of, the running of their trains, the transportation of persons or property, and the management and control of servants." The views thus expressed were approved in *Hodges v. Detroit Electric Light & P. Co.* (1896) 109 Mich. 547, 67 N. W. 564.

In *Texas & St. L. R. Co. v. Myers* (1883) 1 Tex. App. Civ. Cas. (White & W.) 168, it was declared to be "well settled that a promise to pay for medical attendance and nursing rendered to a servant of a railroad company, injured in the discharge of his duty upon the road, is presumed to be within the general powers of the superintendent of the road, and will bind the company."

In *Bigham v. Chicago, M. & St. P. R. Co.* (1890) 79 Iowa, 534, 44 N. W. 805, where the authority of an assistant superintendent to hire a nurse for an injured servant was held to have been established by the particular evidence presented, the court did not express any opinion about the extent of the powers which such an agent possesses by virtue merely of his office.

<sup>3</sup> In *Cincinnati, I. St. L. & C. R. Co. v. Davis* (1890) 126 Ind. 99, 9 L.R.A. 503, 25 N. E. 878, evidence offered by the defend-

ant to prove that it had in its employment a chief physician and surgeon, whose duty it was to employ surgeons to give professional attention to passengers injured by its trains, was held to have been properly excluded for reasons thus stated: "It was immaterial whether the appellant had, or had not, a chief surgeon in its service, charged with the duty of employing subordinate surgeons, for there is no pretense that the appellee had notice of that fact. He was not bound to look beyond the general superintendent as the source of authority warranting his employment. . . . It would be unreasonable to require a surgeon to give professional assistance to a person injured by the company's trains and then deny him compensation, upon the ground that the superintendent had no authority to employ him, because that authority was lodged in a chief surgeon. Nor are we willing to sanction a rule imposing upon the surgeon whose services are requested by the superintendent, the duty of making specific inquiry as to the scope of the superintendent's authority. Such a rule would operate harshly in many cases, for, if the surgeon must stop to make inquiries before leaving his home or office, the injured man might perish. It is a familiar rule that instructions to a general agent do not bind one who deals with the agent in ignorance of such instructions, and acts upon the apparent authority with which the principal has clothed his representative, and there is no conceivable reason why the rule should not apply in all its force to such a case as this." It was declared to be "quite well settled that a general superintendent has authority to employ surgeons to give attention to persons injured by the trains of the company he represents."

<sup>4</sup> In *Union P. R. Co. v. Beatty* (1886) 35 Kan. 265, 57 Am. Rep. 160, 10 Pac. 845, where the employing agent was, in point of fact, merely a division superintendent, these remarks were made: "There is no more obligation resting upon the company to provide medical care and treatment for passengers unavoidably injured, than for passengers who become sick during the journey over the road. In either case the full measure of the duty of the company is to carry the passenger in the condition in which he may be found to his destination. Beyond this the company has no interest in the passenger, and therefore has no such concern for his health and soundness that it has in its employees who may be injured

In all the cases so far reported which have involved the liability of a principal other than a railroad company for medical services rendered in pursuance of a contract made with a general superintendent, the injured person was an employee of the defendant. In one of these the action was held to be maintainable.<sup>5</sup> In other cases claims have been disallowed on the ground that an agent designated as a "superintendent" is not invested, by virtue merely of his office, with authority to make contracts for medical services.<sup>6</sup> In this point of view

it has been declared that a doctor engaged by a superintendent cannot hold the principal responsible unless it appears that the superintendent was discharging functions and exercising powers similar to those of a general manager,<sup>7</sup> or that the previous conduct of the principal had been such as to justify the plaintiff in acting on the assumption that the superintendent was invested with authority to retain him.<sup>8</sup>

It should be observed that the various distinctions taken, in the cases cited under the preceding paragraphs, between

while in its service. To furnish medical care and treatment for passengers in such cases would be a mere gratuity, and the funds of the corporation cannot be thus dispensed by the division superintendent without authority from the board of directors. Perhaps it is true that in certain emergencies the superintendents of railroads are authorized to provide medical and surgical care for injured passengers, and to bind the railroad companies for the payment of such services, and it is probably well that such provision should be made; but in those cases it will not be difficult to show the authorization, or a recognized custom or usage of the company to furnish medical attendance to passengers injured by inevitable accident. In the absence of testimony of express authority from the company, or of a custom or usage from which authority might be implied, the company cannot be bound by such contracts made by the superintendent or his subordinates."

In *Columbia & C. Street R. Co. v. Wiseman* (1885) 1 Ohio C. D. 134, where an action for services rendered to a passenger was held not to be maintainable, certain cases cited on behalf of the defendant were denied to be relevant precedents, because they related to injured servants. A distinction was taken "between the passenger and the employee, on the ground that the employee is necessary in the management of the affairs of the company, and that the company, for its own protection, and for the protection of the employees, owes a duty to them which it does not owe to the passenger."

<sup>5</sup> In *Mt. Wilson Gold & S. Min. Co. v. Burbridge* (1898) 11 Colo. App. 497, 53 Pac. 820, where the general superintendent of a mining company had full charge of the business and property of the company, and had made arrangements with a hospital for nursing and caring for a miner, the decision proceeded upon the broad ground that, "as to everything belonging to or growing out of its business, or the management of its property, he represented it, and, presumptively, at least, was authorized to act for it." The removal to the hospital and the nursing of the miner while he was there were held not to be "so disconnected from the defendant's business as to be out-

side the presumptive authority of the general superintendent."

<sup>6</sup> For a case in which this doctrine was categorically laid down, see *Ghio v. Schaper Bros. Mercantile Co.* (1914) 180 Mo. App. 686, 163 S. W. 551.

<sup>7</sup> In *Ghio v. Schaper Bros. Mercantile Co.* supra, where the action was brought on an alleged contract under which the plaintiff was to treat an injured servant in a hospital, and afterwards at home, until she recovered, the evidence which was held to be sufficient to render the question of the defendant's liability one for the jury to determine was thus stated by the court: The superintendent, who engaged the plaintiff, exercised broad and comprehensive authority with respect to the management of defendant's business, and was known as general superintendent, for the reason that he possessed a general superintending control. Plaintiff testified that while he occupied an office in the same building and was about defendant's store, he frequently saw the superintendent employ and discharge employees. Whatever happened that needed immediate attention was reported to the superintendent, and he exercised discretion on behalf of defendant with respect thereto. It was conceded that he possessed authority to call a physician for the purpose of administering temporary or first aid treatment to injured persons about the store. When plaintiff rented his office in defendant's building, a few weeks before this injury, the superintendent negotiated and executed the lease on the part of the company and signed its name to the instrument. The court said: "It is abundantly well settled that one occupying the position of superintendent may commit the corporation he so represents, as by a contract, for medical and surgical services rendered for the benefit of a third person, injured in the employ of the company, if it appears he possesses and is accustomed to exercise broad and comprehensive authority with respect to the power to employ persons for the company and on its account, and otherwise exercises discretion with respect to the conduct of its affairs in a general way."

<sup>8</sup> In *Ward v. J. Samuels & Bro.* (1915) — R. I. —, 93 Atl. 649, Ann. Cas. 1918A, 783, where the plaintiff had been engaged

services rendered to railroad employees and to passengers, between injuries which import, and injuries which do not import, fault in the defendant, and between the liability of railroad companies and other classes of principals, are logically irreconcilable with the broad theory (see § 1, *supra*) under which the contractual power of agents of every description is regarded as being based upon and incidental to their duty to protect the interests of their principals by taking such steps as will tend to keep down the damages for which the principal may by possibility be found liable. It should be pointed out, moreover, that the first-mentioned of those distinctions is also open to the objection that the special obligation to which it assumes a railroad company to be subject as regards its employees cannot be predicated without running counter to the elementary rule that a master is not bound to furnish medical assistance to his servants. See *Labatt, Mast. & S. § 1999*. Conceding that no duty in respect of medical assistance is owed by a railroad company to its passengers by reason merely of their position as passengers,

it would seem reasonably clear that the effect of that rule is to place servants and passengers on precisely the same footing, so far as regards the implied incidents of their respective relationships to the railway company. If so, it must follow that any distinction between their remedial rights which is founded simply and solely on the predication of a difference between these incidents is untenable.

It has been laid down that the "superintendent" of a railroad company is impliedly authorized to make contracts with respect to the carriage of the mails from one station to another in the same city,<sup>9</sup> that a contract made by the "general superintendent" of a railroad for fencing a part of its line is binding upon the railroad company,<sup>10</sup> that the superintendent of a street railway has power to bind it by a promise to compensate the services of a person who, at the request of an agent employed by the superintendent, agrees to go to the place where he witnessed an accident, and, having verified the facts, draw up a statement of what he knows concerning it;<sup>11</sup> and that the su-

by one S., the assistant superintendent of defendants' department store, who was then acting temporarily as general superintendent, to attend on an injured servant, it was shown that the superintendent and assistant superintendent had received instructions that, in case of physical injury to an employee or customer, they were immediately to summon a doctor and employ him to attend on the injured person. The testimony was conflicting with regard to the question whether, as claimed by the defendant, their authority in this regard was limited to the employment of a physician to render first aid, or extended to a retainer for the purpose of rendering further services. There was evidence from which the jury were warranted in finding that for more than two years before the accident in question the plaintiff had attended a large number of defendants' servants upon the call of S., without any knowledge of the limitation upon his authority which was claimed; that the plaintiff had given to those servants the medical care which their cases required, whether of first or subsequent treatment; that the charges for these services had always been made by the plaintiff against the defendant alone; that the defendant, through its responsible agents, was aware of these facts; and that in every case the plaintiff's charges against the defendant had been paid either by the defendant itself or through its agency in such a manner as to give no notice to the plaintiff that the defendant questioned its liability to him. Held, that this evidence was sufficient to support a verdict in favor

of the plaintiff. The court said: "Notwithstanding the absence of actual authority in the agent, and the unwillingness of the law to imply such authority from the nature of the agent's general powers, nevertheless the corporation by its previous conduct may have so held the agent out as one having full authority to employ physicians that it will not be permitted later to disavow the agent's acts in that regard."

In *Meisenbach v. Southern Co. (1891)* 45 Mo. App. 232, the defendant's liability for the fees of a surgeon called in by its superintendent was denied on the ground that no special evidence was given that he had been previously authorized to summon a medical man in cases of emergency.

<sup>9</sup> *Louisville & N. R. Co. v. Vaughan's Transfer Co. (1909)* — Ky. —, 123 S. W. 253 (doctrine taken for granted in the argument of the court).

<sup>10</sup> *New Albany & R. Co. v. Haskell (1858)*

<sup>11</sup> *Ind. 301*, where the court said that the employer of the plaintiff was "the general agent of the company, and, as such, it may be fairly presumed that he was clothed with authority to bind his principal in contracts relative to the safe and effective operations of the road."

<sup>11</sup> In *Lovejoy v. Middlesex R. Co. (1888)* 128 Mass. 480, the defendant requested the judge to rule that the agent had no authority to employ the plaintiff; and that, if the plaintiff knew that there was no necessity for him to go to the place of the accident, in order to make his statement, he could not recover. The judge declined

perintendent of a manufacturing company, who is permitted to manage and conduct its affairs, has ostensible authority to bind it by a contract for the performance of services in procuring foreign patents, where the person employed has no notice that his authority is subject to certain limitations.<sup>12</sup>

The theory that the extent of the powers of an official designated as a "superintendent" is essentially a question of fact is indicated by a judgment sustaining a verdict against a company engaged in the business of repairing automobiles, on the ground that it was bound by a written contract, under which its superintendent "in active charge of the building" occupied by it, and authorized to employ and discharge such men as were needed about the business, rented a part of the shop to a man who undertook on his side to perform a certain kind of work for a year at a specified rate.<sup>13</sup> That theory is also exemplified by a ruling that the question whether an agent described as the "secretary, treasurer, and superintendent of mines" had authority to let a contract for the mining and delivery of coal on the tippie for a year had been properly submitted to the jury.<sup>14</sup> In both the cases cited the functions discharged by the agents in question seem to have been virtually the same as

those of a general manager. The form in which the question as to the extent of their powers was submitted to the appellate tribunals rendered it unnecessary to decide whether a presumptive authority in respect of the contracts under discussion was incidental to their offices.

#### § 27. Superintendent of a department of a business.

So far as regards cases in which the term "superintendent" is used as the designation of an agent employed, in subordination to a general manager, for the purpose of controlling some particular department of a business, it is manifest that the extent of the authority delegated to him in respect of contracts of employment must in every instance be determined as a question of fact, and without reference to any initial presumption.

In this point of view it has been held that a contract for the carriage of the mails from one station to another in the same city came within the scope of the authority of the defendant's "general superintendent of transportation," who, as the evidence tended to show, exercised control of the matter of mail transfer and directed and supervised the mail transfer clerks;<sup>1</sup> that the superintendent of a railroad, "intrusted with

to give the ruling. Held, that the defendant's exceptions to the rulings given, and to the refusal to rule as requested, were frivolous, and must be overruled, with double costs.

<sup>12</sup> *Rosenbaum v. Gilliam* (1903) 101 Mo. App. 126, 74 S. W. 567 (by-laws imposing limitations held not to be admissible as evidence against claimant).

<sup>13</sup> *Slocum v. Seattle Taxicab Co.* (1912) 67 Wash. 220, 39 L.R.A. (N.S.) 435, 121 Pac. 67. After having for several months continued to pay the amounts falling due for the work performed in pursuance of this contract, the defendant ejected the plaintiff from the building. The grounds upon which the judgment of the lower court in favor of the plaintiff was affirmed were thus stated: "We are satisfied that it was not incumbent upon the plaintiff or any other employee to hunt up the president of the company, or to obtain the charter or the by-laws of the company, in order to determine the authority of one who occupies the position of superintendent of a business, so as to make a valid contract of employment. It is conceded that the superintendent in charge had authority to employ men, and that he did so. The fact that he prepared and signed the written contract in this case as superintendent was sufficient to bind the company, because the contract

was made in the course of his apparent authority as well as his expressed authority to hire and discharge men. This is especially true in this case, where the plaintiff acted in good faith and did not know, and had no reason to suspect, that the superintendent had no authority to reduce the contract to writing, or that he was limited in the employment of men to a day by day employment."

<sup>14</sup> *Raven Red Ash Coal Co. v. Herron* (1912) 114 Va. 103, 75 S. E. 752. Commenting on an instruction which was held to be correct, the court said that "it could not be said, as a matter of law, that the officer in question, as manager and superintendent of defendant's mines, did not have the authority to make for his company the contract sued on."

<sup>1</sup> *Blowers v. Southern R. Co.* (1906) 74 S. C. 221, 54 S. E. 368, the actual point decided was that, as he was empowered to direct a station agent to enter into such a contract, the company was no less bound by a contract made by that agent in compliance with the superintendent's instructions than if he had made it himself. The doctrine, "Delegatus non potest delegare," "does not apply when there is express or implied authority to employ subagents in the work of the principal."

the general management of the supervision of the running and operation of the road," is invested with implied authority to offer a reward for the detection, apprehension, and bringing to justice, of persons obstructing the road;<sup>2</sup> that a division superintendent of a railroad was authorized to make contracts with respect to the unloading of coal from cars;<sup>3</sup> and that the liability of a lumber company in respect of extra work which had, in pursuance of the orders of its "woods superintendent," been performed in handling logs, had been properly left to the jury.<sup>4</sup>

On the other hand, it has been held that a man employed by a merchant as a "superintendent of trucking" had no authority to offer a reward for the recovery of his employer's property;<sup>5</sup> and that a "field superintendent of logging operations, with authority to have timber cut from time to time as needed," had no authority to make a verbal contract with the plaintiff "to cut and top

all the merchantable juniper timber" of the defendant in a specified tract, containing about 5,000 acres, at a certain rate per tree.<sup>6</sup>

By one of the inferior courts of New York it was laid down that a superintendent who testified that "everything connected with the running of the road" was under his control; that he had no direction over the treasury, and no share in the direction of the company's affairs, and that he paid money to drivers, conductors, and other persons employed by him for the company—had no power to engage a surgeon to attend upon a child who had been struck by moving car.<sup>7</sup>

The position taken in Kansas is that a division superintendent of a railroad company is impliedly authorized to engage a doctor to attend on an injured employee,<sup>7a</sup> but that the company is not liable for medical services rendered at his request to an injured passenger.<sup>8</sup> The first branch of this doctrine has also

<sup>2</sup> *Central R. R. & Bkg. Co. v. Cheatham* (1887) 85 Ala. 292, 7 Am. St. Rep. 48, 4 So. 828. This decision was cited in *Arkansas Southwestern R. Co. v. Dickinson* (1906) 78 Ark. 483, 115 Am. St. Rep. 54, 95 S. W. 802, as an authority bearing upon the scope of the powers of a general manager. See sec. 24, note 6, *supra*. But, in spite of the unfortunate ambiguity of the language used by the court, it seems on the whole reasonably certain that the employing agent in this instance was a departmental superintendent merely.

<sup>3</sup> *Cincinnati, N. O. & T. P. R. Co. v. Rednower* (1910) 140 Ky. 370, 131 S. W. 179 (conceded).

<sup>4</sup> *MARTINDALE v. LOBDELL-EMERY MFG. Co. ante*, 1.

Reference may also be made to a case in which it was held that the superintendent of pulpwood operation at a certain place was impliedly authorized to make a stipulation to pay a third person for supplies furnished to contractors to enable them to perform their work. *Channell Bros. v. West Virginia Pulp & Paper Co.* (1916) 77 W. Va. 494, 87 S. E. 876.

<sup>5</sup> *Rubenstein v. Frost* (1909; Sup. App. T.) 116 N. Y. Supp. 681.

<sup>6</sup> *CHESSEON v. RICHMOND CEDAR WORKS, ante*, 6. The court said: "The alleged contract is so unusual, extraordinary, and unique that it is not to be assumed that said Shucker had authority to make it. It was no function of his position. If it were, Shucker, a superintendent of logging, holding at will, with authority to have the timber cut as needed, could bind his employers by a verbal contract not approved by the company or its general manager, which might last for twenty years, and involve the expenditure of many thousands of dol-

lars, without any bond or guaranty given by the plaintiff for the faithful performance of his work, and such contract would bind the company should it sell its timber to another party."

<sup>7</sup> *Stephenson v. New York & H. R. Co.* (1853) 2 Duer (N. Y.) 341. The court said: "The only inference deducible from his description of his powers is, that they relate solely to making provision that trains are run as prescribed by the company, that means and men are supplied for the purpose, and other things are provided, which are essential or proper to effectuate this general result. His description of his powers, or of the business which he transacts, does not justify the inference that he is authorized, by his office, to arrange and liquidate claims made against the company for the negligence of its servants in running its trains, or to contract with third persons, as its agent, to repair or remedy the consequences of such negligence."

<sup>7a</sup> In *Pacific R. Co. v. Thomas* (1877) 19 Kan. 256, the court laid it down that presumptively a division superintendent possesses, in respect to matters happening within his jurisdiction, the same authority as the general superintendent, and allowed the plaintiff's claim on the ground that the act of the defendant's master mechanic in employing him had been ratified by its division superintendent. See also *Union P. R. Co. v. Winterbotham* (1893) 52 Kan. 433, 34 Pac. 1052.

<sup>8</sup> *Union P. R. Co. v. Beatty* (1886) 35 Kan. 265, 57 Am. Rep. 160, 10 Pac. 845, error to instruct the jury that the division superintendent would be presumed to have authority to employ the doctor and to bind the company, until the contrary was made to appear. The cases, *Pacific R. Co. v.*



been affirmed in Mississippi;<sup>9</sup> but in Missouri it has been laid down that no recovery can be had against the company for drugs furnished, on the order of an officer of this description, to a traveler who has been hurt by one of its locomotives, unless it is proved affirmatively that he was authorized to give the order.<sup>10</sup> The soundness of the distinction taken between medical services rendered to employees and passengers seems to be disputable. See the remarks concerning this point in the preceding section.

According to a Massachusetts case, the power of the superintendent of a department of a manufacturing company to bind it by a contract to pay for the medical or surgical treatment of one of its employees cannot be predicated in the absence of affirmative evidence. It was held that the fact of his being au-

thorized to hire and discharge employees does not, of itself, constitute such evidence.<sup>11</sup>

As to the impossibility of reconciling the distinctions taken in the two preceding paragraphs with the broad theory adverted to in § 1, supra, see §§ 24 and 26, supra.

The theory upon which one Canadian case proceeded was that the superintendent of the power house of a company engaged in the production of electricity was invested with implied authority to employ a doctor to attend on an injured workman.<sup>12</sup>

### § 28. *Manager of tug boat*

In a case where the manager of a tug-boat found himself unable to comply with the request of the defendant to send it with a scow for the purpose of transporting certain hay, and, having

Thomas, supra, note 7a, and *Atlantic & P. R. Co. v. Reisner* (1877) 18 Kan. 458 (see § 26, note 2, supra), which were relied upon by the plaintiff, were held to be inapplicable as precedents, because the injured persons treated were servants.

<sup>9</sup> In *Southern R. Co. v. Humphries* (1901) 79 Miss. 761, 31 So. 440, an action for services rendered in caring for a railroad employee who was desperately wounded and had lain for several hours without medical aid, it appeared that the trainmaster, who was shown, without contradiction, to be acting as local superintendent, told the plaintiff to take charge of the case for a certain fee. Held, that the trainmaster, as superintendent, had authority to employ a physician, and that the railroad was liable for the services rendered. The court said: "Whether Francis, as trainmaster, had authority to contract with Dr. Humphries as he did, we are not here called to decide; but, inasmuch as, at the time, he was in the exercise of the functions of a division, or local, superintendent over that part of the road, we think it may be presumed that he had the power to so contract. Moreover, Dunn testified that Francis had such authority, and his testimony is not controverted or denied. This evidence, of itself, was sufficient to support the verdict." The fact that the company had surgeons regularly in its employ did not, it was held, affect the result, as it was shown that they were not within call.

<sup>10</sup> *Brown v. Missouri, K. & T. R. Co.* (1877) 67 Mo. 122 (verdict in favor of the plaintiff was set aside on the ground that no evidence had been offered as to the duties of the officer in question, and that the court could not take judicial notice of them).

<sup>11</sup> *King v. Forbes Lithograph Mfg. Co.* (1903) 183 Mass. 301, 67 N. E. 330. The court observed that, in those jurisdictions where railroad companies have been held

liable for medical attendance procured for an employee by one of their agents, the liability has been limited to cases in which there was an extreme emergency calling for immediate medical or surgical attendance, citing *Terre Haute & I. R. Co. v. McMur-ray*, 98 Ind. 358, 49 Am. Rep. 752; *Holmes v. McAllister* (1900) 123 Mich. 493, 48 L.R.A. 396, 82 N. W. 220. This statement, however, is not accurate, for some of the rulings reviewed in §§ 24 and 26, supra, show that, in cases where the liability of the defendants in respect of contracts made by their managing officials has been affirmed, the element of an emergency has not always been relied on as the specific *ratio decidendi*.

<sup>12</sup> *Oldwright v. Hamilton Cataract Power Co.* (1904) 3 Ont. Week. Rep. 16, a decision of Boyd, C., affirmed (without opinion) by a divisional court (see p. 397). The evidence which was held to justify the enforcement of the claim was that the message upon which the plaintiff acted "came from the head office of defendants at Hamilton, and it was ratified and confirmed and continued by the superintendent of the power house near St. Catharines, where the accident happened." It is not apparent why any reliance was placed upon the fact of "ratification" by the superintendent, if he was, as may be supposed, subordinate to the official or officials at headquarters, from which the message emanated. The notion that an agent of inferior rank may "ratify" a contract made by his superior seems to be somewhat of a novelty in jurisprudence. But the language used by the learned judge may, at all events, be reasonably construed as showing that he regarded the superintendent as being invested with a degree of authority which would have enabled him to bind the company, if, in engaging the plaintiff, he had acted independently of the head office.

good grounds for believing that the need for the immediate removal of the hay was urgent, engaged the proprietor of another tugboat to transport it in a scow to be hired by him, the *ratio decidendi* was that, in making this agreement, the manager had exceeded his powers as agent of the defendant. It was accordingly held that the owner of the scow hired by the proprietor of the second tugboat could not recover from the defendant either the amount which he alleged to be due in respect of its use, or damages in respect of an injury which it sustained while the hay was in course of transportation.<sup>1</sup> The present writer ventures to express the opinion that, while the defendant's liability was properly denied in this case, the remedial rights of the plaintiff were determined with reference to an erroneous theory concerning the relationship between defendant and the manager of the tugboat. It is submitted that he was not an agent in the sense in which that expression is commonly used, but an independent contractor for the performance of a specific piece of work. In this point of view it follows that the third person who furnished the tug by means of which that work was performed was simply a sub-

contractor, and that, in the absence of proof of a breach of some non-delegable duty on the part of the defendant, such manager was the only party whom the proprietor of the scow could sue either in contract or in tort.

### § 29. Foreman.

In a case where a nonsuit was held to have been properly granted in an action against a telegraph company for the amount alleged to be due under a contract made by one of its foremen with regard to the hire of men and teams from the plaintiff, the *ratio decidendi* was that "one who is held out merely as a foreman of a gang of hands engaged in moving or repairing a few miles of the wire and posts of a telegraph company, known to have hundreds of miles of similar property," could not be considered as "a general agent in charge of construction and repair for the company."<sup>1</sup>

The cases cited below proceed upon the ground that neither a railroad company nor a company of any other description is, under ordinary circumstances, bound by a contract made by a mere foreman for medical attendance on an injured servant.<sup>2</sup> The extent to which

<sup>1</sup> *Bleeker v. Satsop R. Co.* (1891) 3 Wash. 77, 27 Pac. 1073. The court, after advertising to the doctrine which forbids the delegation of an agent's trust, proceeded thus: "We must conclude that there are no circumstances surrounding this case taking it out of the general rule; and Pritchard had no authority to bind the Satsop Railroad Company by the contract he is claimed by the plaintiff to have made with Shaw, who employed and hired plaintiff's scow to remove the hay of defendants. Especially is this true in view of the well-settled rule that the authority of the special agent must be strictly pursued." . . . All the authority that was conferred in this case was that contained in the telephone message referred to. It was simply to transfer a certain lot of hay. It was not even an unqualified order to transfer it, but it was an order to transfer it in a certain way, by a specified medium of conveyance, viz., the tug Rip Van Winkle. If we adopt the theory that the defendant was to be responsible for the conveyance, then the doctrine of choice must obtain. Being a bailee for the vehicle of conveyance, it would be a hard rule that would deprive defendant of the right of selection. Assuming that risk, defendant may be presumed to have selected the tug Rip from a knowledge of its fitness for the work in hand. All tugboats are not equally safe or serviceable. In this case we may fairly presume that, if the instructions had been fol-

lowed, the damage both to the hay and scow would have been avoided."

<sup>1</sup> *Langston v. Postal Teleg.-Cable Co.* (1909) 6 Ga. App. 833, 65 S. E. 1094. The contract was shown to have been in violation of explicit instructions which forbade the foremen to hire teams, except by the day, and "subject to be discharged at the end of the day;" and, in view of this fact, the plaintiff relied upon the rule that secret limitations upon the authority of a general agent are not binding upon a person dealing with him, unless such limitations are known to that person.

<sup>2</sup> In *Aimone v. Chicago, M. & St. P. R. Co.* (1913) 182 Ill. App. 592, where the claimant was engaged after the foreman had endeavored without success to procure the services of the company's regularly appointed doctor, the court, taking the position that a foreman in charge of a few laborers in a railway yard had no apparent authority, by virtue merely of his position, to bind the railway company to pay the expenses of an operation performed upon an injured laborer in the hospital to which the foreman directed him to be removed, laid it down that, as the surgeons presumably had time, before operating on the laborer, to communicate with officers of the company who had apparent authority to act in the premises, and had not asked for instructions from such officers, they could not hold the company liable for the services rendered by them.

an enlargement of his power in this respect may be implied on the ground of an emergency calling for immediate action is discussed in § 52, *infra*.

It has been held that the "woods foreman" of a lumber company has no implied authority to bind it by an agreement to pay the wage of the employees of a man who has taken a subcontract for the cutting of timber.<sup>3</sup>

### § 30. Treasurer.

The treasurer of a parish who has, by virtue of his office, charge of the notes and other securities belonging to the parish, and is under the duty of collecting them, has the incidental power to commence a suit on them, when necessary, and for this purpose to employ counsel.<sup>1</sup>

Where a corporation is a necessary party to a suit brought by the treasurer and other individual stockholders, but has no pecuniary interest in the result

of the litigation, the treasurer has, in his official capacity, no power to employ counsel and pay them out of the corporate funds.<sup>2</sup>

The doctrine adopted in one case was that the treasurer of a railroad company was invested with apparent authority to bind it by a contract for the employment of a physician to attend upon any persons who might be injured on its line.<sup>3</sup> But the correctness of this ruling seems to be more than doubtful, in view of the general effect of the decisions regarding the extent of the powers of agents of a lower rank than general managers or superintendents.

### § 31. Secretary.

In a case already referred to under another head, the court took the position that the secretary of a railroad company had power to enter into a contract for the employment of a physician to attend on any persons who might be injured on

In *Chaplin v. Freeland* (1893) 7 Ind. App. 676, 34 N. E. 1007, where it was denied that the foreman had, under the circumstances proved authority to engage a doctor to attend on an injured employee, the discussion centered mainly on the effect of an emergency in enlarging the powers of such an agent. See § 52, *infra*.

In *Godshaw v. J. N. Struck & Bro.* (1900) 109 Ky. 285, 51 L.R.A. 668, 58 S. W. 781, where the defendants were held not to be liable on a contract made by a foreman whom they had engaged to superintend the construction of a building, the court argued thus: "There is a marked distinction between the power and authority of a general and special agent to bind his principal. A general agent is usually authorized to do all acts connected with the business or employment in which he is engaged, while a special agent is only authorized to do specific acts in pursuance of particular instructions, or with restrictions necessarily implied from the act to be done; but, in either case, if the agent exceeds the authority conferred, his acts will not bind the principal. Third parties dealing with an agent are put upon their guard by the very fact, and do so at their own risk. They cannot rely upon the agent's assumption of authority, but are regarded as dealing with the power before them, and they must, at their peril, observe that the act done by the agent is legally identical with the act authorized by the power."

In New Brunswick it has been held that the superintendent and bookkeeper of a mill owned by a nonresident who was represented by a general agent had no authority to hire a surgeon to attend an injured workman. *Guy v. Brady* (1885) 24 N. B. 563. The report does not state whether the general agent was residing at the

mill,—a circumstance which would obviously have a very distinct relevancy.

In *Suderman-Dolson Co. v. Rodgers* (1907) 47 Tex. Civ. App. 67, 104 S. W. 193, it was assumed that the foreman of a construction company, who hired the men required for certain railroad work, paid them their wages, and exercised a general supervision and control over the operations, was not authorized to enter into an agreement providing that the plaintiff was to have, as the consideration for the use of his premises by the company, all the medical practice incident to the treatment of the company's employees during the progress of the work. But the right of recovery was discussed with reference to the question whether the agreement had been ratified.

See also *Salter v. Nebraska Teleph. Co.* (1907) 79 Neb. 373, 13 L.R.A.(N.S.) 545, 112 N. W. 600, where it was assumed that the normal powers of the foreman of a gang of workmen did not extend to the employment of a doctor to treat one of them.

In *Holmes v. McAllister* (1900) 123 Mich. 494, 48 L.R.A. 396, 82 N. W. 220, the non-liability of a laundry company in respect of a contract made for medical services by its "foreman" was affirmed. But as the employing agent in this case was also denominated a "manager" by the court, and the functions discharged by him would seem to have been those which are usually associated with that office, the effect of the decision has been stated in § 24, *supra*, note 20.

<sup>2</sup> *Brookhaven Lumber & Mfg. Co. v. Posey* (1917) 115 Miss. 854, 76 So. 731.

<sup>1</sup> *Wallace v. Townsend* (1872) 109 Mass. 263.

<sup>3</sup> *Chabot & R. Co. v. Chabot* (1912) 109 Me. 403, 84 Atl. 892.

<sup>3</sup> *Bedford Belt R. Co. v. McDonald* (1897)

the road.<sup>1</sup> But for the reason stated at the end of the preceding section, the writer ventures to question the correctness of this decision.

That a secretary of a hardware company was not authorized, by virtue of his office alone, to bind his principals by a contract for medical services to be rendered to an injured servant, was explicitly held in a case where recovery was allowed on such a contract for the special reason that, at the time when it was made, the secretary was temporarily "in complete charge of the defendants' business, and performing the duties ordinarily devolving upon the president or other chief officer of a corporation."<sup>2</sup>

### § 32. *Claim agent of railway company.*

That an official employed by a railroad company to adjust claims for damages in respect of personal injuries resulting from the operation of the road was empowered to engage a doctor to attend on certain injured passengers was, in one case, held to be a warrantable inference from the actual evidence presented.<sup>1</sup> The court did not express any opinion as to the general question whether the authority to make a contract of this description is an implied incident of the office itself. An affirmative answer to this question is indicated whenever, as is, perhaps, usually the case, the powers

intrusted to a claim agent are ostensibly those of a general agent, so far as regards the affairs of his own particular department.<sup>2</sup> It is apparent, moreover, that the functions normally associated with the office are of such a nature as to render peculiarly applicable in the present connection the broad theory propounded in a leading English case (see § 1, *supra*), that the implied authority of an agent to bind his principal by a contract for medical attendance on an injured person is based upon the duty of the agent to protect the principal's interests by taking such measures as are calculated to mitigate the damages for which the principal may, upon further investigation, be found to be liable. In one case, however, the court seems to have proceeded upon the assumption that even a general claim agent has no implied authority to hire a surgeon to attend on an injured servant, unless an emergency exists.<sup>3</sup>

### § 33. *Station master.*

The doctrine that it does not come within the scope of the ordinary powers of an employee of this description to engage a surgeon to attend on injured passengers was laid down in an English case which has been frequently cited by the American courts.<sup>1</sup> In England it is still, so far as that doctrine is concerned,

17 Ind. App. 492, 60 Am. St. Rep. 172, 46 N. E. 1022 (on demurrer).

<sup>1</sup> Bedford Belt R. Co. v. McDonald (1897) 17 Ind. App. 492, 60 Am. St. Rep. 172, 46 N. E. 1022.

<sup>2</sup> Greensfelder v. Witte Hardware Co. (1915) 189 Mo. App. 576, 175 S. W. 275.

<sup>3</sup> In Reynolds v. Chicago, B. & Q. R. Co. (1905) 114 Mo. App. 670, 90 S. W. 100, it was held that the acts of the claim agent in visiting injured passengers, employing doctors, and consulting with them in reference to their condition and treatment, were, when taken in connection with the acts of the railroad company in paying for the services of such doctors, proper evidence to go to the jury, and sufficient to support the finding that, when he employed and agreed to pay plaintiff for his attendance on the passenger in question, he was acting within the scope of his authority. The court said that the claim agent "appears to have been put forward as a general agent in looking after such persons, and was placed in a position where others were justified in the belief that his powers were general in that respect, and whatever restrictions may have been imposed on said agent as between him and defendant could have no effect on the rights of third persons who had no knowledge of the restrictions or limitations upon his apparent authority. . . . But

we are of the opinion that, as agent of defendant to settle claims against it for personal injuries, he was within the scope of his authority in agreeing to pay plaintiff for his services as physician for Coffey; and as it was necessarily a part of the latter's claim for damages, it was immaterial whether this agreement to pay was made with plaintiff or with Coffey; and it was also immaterial whether he employed plaintiff to render the services in the first place."

<sup>2</sup> In Hays v. Wabash R. Co. (1906) 119 Mo. App. 439, 95 S. W. 299, the court assumed throughout its opinion that the general claim agent of the defendant company was empowered to determine whether injured passengers should be treated at its expense. But possibly some specific evidence which is not reported may have been given with respect to his authority. Another case to which the same remarks apply is Bigham v. Chicago, M. & St. P. R. Co. (1890) 79 Iowa, 534, 44 N. W. 805.

<sup>3</sup> Scullin v. Routh (1917) 126 Ark. 571, 191 S. W. 218, where the enforceability of the claim was discussed with reference solely to the effect of an emergency in enlarging the powers of a subordinate agent. See § 52, note 12, *infra*.

<sup>1</sup> Cox v. Midland Counties R. Co. (1849) 3 Exch. 268, 154 Eng. Reprint, 844. There the surgeon who was first applied to by the

deemed to be good law.<sup>3</sup> As the fact that the injured person "required immediate surgical attendance" was expressly mentioned as one of the elements relied upon by the plaintiff, it may also be regarded as being by implication a

precedent for the theory that the powers of the agent were not enlarged by the existence of an emergency. But in this particular it has been virtually overruled by a later decision of the Exchequer Chamber.<sup>3</sup>

railway guard found the case a serious one, and wishing to have the assistance of the plaintiff, an eminent hospital surgeon at Birmingham, communicated his desire to the station master at Birmingham, who had, according to the evidence, acted as chief officer there in the passenger and indeed in every department. The station master having given directions that every attention should be paid to the injured man, the plaintiff was requested by Davis to perform the operation of amputation, which he did successfully. It was argued on behalf of the plaintiff "that, considering the nature of the railway traffic, each of these servants [the guard and the station master] had, as incidental to his employment, an authority in case anything occurred which would be prejudicial to the interests of the company, to do what was reasonably fit to be done, under the circumstances, to remedy or diminish the damage done." But this contention did not prevail. Parke, B., who delivered the judgment of the court, said: "We are all of opinion that the power to enter into this contract was not incident either to the employment of the guard or the superintendent. The simple employment of servants by a corporation carrying on a business cannot give them, as incident to that employment, a larger authority than if the same appointment were made by a partnership of as many individuals as the shareholders of the company, nor does it appear to us to make any difference that it is carried on by fewer members, or even by a single individual. . . . Could it be maintained that a coachman from whose carriage a passenger had fallen and broken his arm, or by which another person had been run over, or a horsekeeper who happened to be near, or the bookkeeper, could bind his master by a contract with a surgeon to cure the injured person, and oblige his master to pay the bill? We are of opinion that he could not. Though it might be a benefit to the master to have the damage diminished by a speedy cure, if he was really liable for that damage, it would be a prejudice to him to be bound to pay if he was not; and is the servant to decide whether his master is liable or not—a man whom he has not appointed with any view to the exercise of such a discretion? We think the servant has clearly no such power. The employer of an agent for a particular purpose gives only the authority necessary for that agency under ordinary circumstances. . . . The employment of an agent gives also the powers usually exercised by similar agents; but there was no evidence of any usage in this case."

Compare also *Union P. R. Co. v. Beatty*

(1886) 35 Kan. 265, 57 Am. Rep. 160, 10 Pac. 845, where the original contract of employment, afterwards ratified by a division superintendent, was made by a station agent (see § 27, *supra*); and *Galveston, H. & S. A. R. Co. v. Allen* (1906) 42 Tex. Civ. App. 576, 94 S. W. 417 (where it was laid down that it is "not within the scope of the apparent authority" of a railroad station agent to make a contract of this description).

<sup>3</sup> See the second of the cases cited in note 3, *infra*.

<sup>3</sup> *Langan v. Great Western R. Co.* (1874) 30 L. T. N. S. (Eng.) 173. See § 38, *infra*. Some of the comments made by Bramwell, B., on the earlier case, may be quoted: "I wish to say, as to the case of *Cox v. Midland Counties R. Co.*, that I am not sure that our judgment in the present case is not inconsistent with it. In that case the accident occurred at the Whittington station, and a message was sent to the station master at Birmingham, a quite different station master, about employing a surgeon. There was not there the same necessity for immediate action that there was here. The judgment is a somewhat singular one, with a great deal of law in it, but I do not think it is as able as many other of the judgments of the able judge by whom it was delivered." The learned judge then adverted to the following statement of Parke, B., in which he summarized one of the arguments advanced on behalf of the plaintiff: "It was contended that . . . any servant who was near, or, at all events, the head servant of the nearest station, would be authorized, if a passenger received personal damage, requiring immediate surgical attendance, to contract with a surgeon and to bind the company by that contract to pay what was reasonably due to him, such authority being an incident to his employment, considering its peculiar nature, and it being for the benefit of the company that the damage and consequent loss to them, from any occurrence for which they were responsible, should be as much mitigated as possible." The criticism of Bramwell, B., on this passage, was: "He does not say what decision he would give in the case put. I think it somewhat queer that the learned judge should only have alluded to the argument, and not say what he thought of it. . . . There are two peculiarities about this judgment: a very cogent argument is stated without any answer being given to it; and there is an uncertainty expressed as to whether the contract was made by the railway guard or the superintendent."

It is somewhat remarkable that the *Langan Case* was not cited either by the

It has also been held both in England and the United States, that a station master has, under ordinary circumstances, no implied authority to engage a doctor to treat an injured servant,<sup>4</sup> or to employ a hotelkeeper, at the expense of the company, to take care of an injured servant, and furnish him with board and lodging while he is disabled.<sup>5</sup>

judges or by counsel in *Houghton v. Pilkington* [1912] 3 K. B. (Eng.) 308, 82 L. J. K. B. N. S. 75, 107 L. T. N. S. 235, 28 Times L. R. 492, 56 Sol. Jo. 633, Ann Cas. 1913C, 790, where, in an action brought to recover damages for the negligence of the driver of defendant's cart with respect to a stranger whom he had requested to get into it, for the purpose of assisting another servant of the defendant who had been taken sick, the Cox Case, *supra*, note 1, was relied upon as a controlling precedent for the doctrine laid down, viz., that the emergency did not invest the driver with authority to invite the plaintiff into the cart.

<sup>4</sup>In *Walker v. Great Western R. Co.* (1867) L. R. 2 Exch. (Eng.) 228, 36 L. J. Exch. N. S. 123, 16 L. T. N. S. 327, 15 Week. Rep. 769, where the power of a general manager in this regard was affirmed, the Cox Case, *supra*, note 1, was distinguished solely on the ground of the station master's want of authority to make a contract binding his employers to pay for medical attendance,—a matter entirely beyond the scope of his employment. No stress whatever was laid upon the fact that in the one case the injured person was, and in the other was not, a servant of the defendant. The comments made upon Cox's Case in *Langan v. Great Western R. Co.* *supra*, note 2, have impaired its authority, so far as it may be regarded as embodying the theory that, under no circumstances whatever, can a subordinate officer like a station master bind his employers by contracts for surgical attendance. But there is nothing in those comments to show that the court was prepared to concede to such an officer the power to make contracts of this kind in any cases except those which involved a necessity for prompt action.

In *Cooper v. New York C. & H. R. R. Co.* (1875) 6 Hun (N. Y.) 276, the evidence showed that one S., an engineer of a gravel train, telegraphed to M., the station agent at P., to "have Dr. Cooper [plaintiff] at depot, on arrival of No. 1—a man injured," and that M. handed the telegram to a hackman, with directions to give it to plaintiff. The plaintiff sought to prove that he had, before this time, attended persons injured on the defendant's road, and had been paid by the check of the company for such services, but did not offer to prove that in such cases he had been employed either by S. or M. He also was asked to state whether he had been called upon by M. to perform professional services for a party injured on defendant's road, but there was no offer to

Nor can it be inferred, in the absence of specific evidence, that his powers extend to the hiring of a detective to discover the persons by whom thefts have been committed near the station at which his duties are performed;<sup>6</sup> or to the making of contracts with regard to the conveyance of the mails between the station and the postoffice,<sup>7</sup> or from one

show that in such case M. had undertaken to employ the plaintiff in behalf of the defendant, or that the defendant had paid the bill, or in any way ratified or authorized the employment. Objections to both these questions were sustained by the trial court, and at no later time during the trial was any evidence offered to show that M. had any communication with the plaintiff, except to the extent of forwarding the despatch. Held, that the plaintiff had been properly nonsuited for want of proof tending to show that the defendant was liable. The court said: "There was no offer to show that the defendant had ever ratified any contract undertaken to be made by Martin in respect to the employment of a physician. The nature of the office he held does not call for any intendment that to make such a contract was within the scope of his powers; nor did it in any way appear that he had ever undertaken to employ the plaintiff in behalf of the company." The Cox Case, *supra*, note 1, was cited with approval.

Other cases in which the authority of a station master to make contracts of this class was denied are the following: *Atlantic & P. R. Co. v. Reisner* (1877) 18 Kan. 458; *Tucker v. St. Louis, K. C. & N. R. Co.* (1873) 54 Mo. 177; *St. Louis, A. & T. R. Co. v. Hoover* (1890) 53 Ark. 377, 13 S. W. 1092; *Hall v. New York, N. H. & H. R. Co.* (1906) 27 R. I. 525, 65 Atl. 278.

<sup>5</sup>*Atlantic & P. R. Co. v. Reisner* (Kan.) *supra*, citing the Cox Case, *supra*, note 1.

<sup>6</sup>*Schlabach v. Richmond & D. R. Co.* (1891) 35 S. C. 517, 15 S. E. 241.

<sup>7</sup>In *Silver v. Missouri, K. & T. R. Co.* (1907) 125 Mo. App. 402, 102 S. W. 621, where it was held that the defendant could not be held liable for the services of this description, rendered by a person whom the postmaster had hired in pursuance of a request made by the station agent, when he and the telegraph operators under him were about to go on strike. The court said: "If we concede that the station agent had not yet quit defendant's service when he requested the postmaster to engage someone to care for the mail, yet there was no authority shown from the defendant to such agent to make such employment. Proof that he was station agent is not proof of such authority, for we cannot know, in the absence of evidence, that a station agent has authority to hire other agents to carry the mail between the railway station and the postoffice. There is nothing in the office or employment of a station agent which

train to another.<sup>6</sup> But an enlargement of his powers with respect to contracts of the type last mentioned may sometimes be predicated on the ground of an emergency.<sup>9</sup>

It would seem that the court might well have relied upon this ground in another case in which it was held that, where the station building has been destroyed by fire, the station agent has authority to make an arrangement for the transfer of freight to another railroad which enters the same city. But the decision in favor of the person who performed the services of this descrip-

tion turned simply on the question whether the apparent scope of the agent's authority extended to the making of the contract sued upon.<sup>10</sup>

#### § 34. Freight agent of railway company.

Authority on the part of a freight agent of a railroad company to engage a veterinary surgeon to treat an injured animal cannot be implied, where the injury was sustained while it was in the custody of a connecting carrier, and consequently no responsibility for the damage is imputable to the company.<sup>1</sup>

would imply such authority, or which would justify anyone in believing that he possessed it."

<sup>8</sup> In *Blowers v. Southern R. Co.* (1906) 74 S. C. 221, 54 S. E. 368, it was held that, as there was evidence tending to show agency of the station agent with respect to supervising the transfer of mail, it was for the jury to say whether it was within the scope of his agency to hire, for the purpose of transferring the mail from one train to another, a mail messenger in the employ of the Federal government whose duty was to convey the mail to and fro between the trains and the postoffice. The following passage in the trial judge's charge, and others of a similar purport, were approved: "A mere station agent has no authority to bind a railroad company by entering into contracts, either express or implied, in behalf of the company, unless it is shown by proof that such agent was authorized to make such contract."

<sup>9</sup> In *Louisville & N. R. Co. v. Vaughn's Transfer Co.* (1909) — Ky. —, 123 S. W. 253, the plaintiff, Vaughn's Transfer Company, had entered into a written contract with the railroad company, by which it agreed to transport all of the mails to and from the passenger station of the defendant railroad company and the postoffice. At the time that this contract was entered into and until October, 1904, the United States government had a contract with one Coleman to carry what was called the "through mail;" that is, mail that was not taken to the postoffice, but which was taken to and from the defendant's depot and that of the Illinois C. R. Co. In October, 1904, Coleman notified Hoe, the station agent of the defendant, and also Coon, the station agent of the Illinois Central Railroad, that he would not any longer carry the mails between the two depots. In this emergency the two station agents, not knowing what else to do, made a temporary arrangement with Vaughn to carry the mails that Coleman had theretofore been carrying. Vaughn continued to carry the mail from October, 1904, until January 1, 1908, when he brought suit against the defendant to recover 50 cents a day for each day that he had carried this mail. Held, that he was

entitled to recover, on the ground that, although "it was not within the express or implied scope of Hoe's authority as station agent to enter into ordinary permanent contracts for the carrying of this mail," it was clear that his "general powers as station agent invested him with authority to make emergency contracts for the railroad company, and that when Coleman abandoned the contract, and the question of making temporary arrangements to meet the exigencies of the situation came up, Hoe had the implied authority to employ Vaughn to take the place of Coleman."

<sup>10</sup> *Cincinnati, N. O. & T. P. R. Co. v. Ashurst* (1910) —Ky. —, 124 S. W. 303. The court said: "The company was charged with notice, when its depot burned, that some arrangement for transferring the freight different from that followed while the depot stood must be provided. It knew that freight was being daily transferred. Its superintendent was often on the ground and saw the business going on. As between Ashurst and the company, it was the duty of Reddick to report to his master what he had done. No bill was sent in by Ashurst until December 1st, when he gave his bill to Reddick, who forwarded it to the superintendent. This not having been paid, Ashurst, the next month, gave his bill to Reddick, and sent himself a copy of it to the superintendent; and, not being paid, in a short time he wrote the superintendent a letter. The matter was then taken up by the superintendent, but no other means of hauling the freight was provided until February 22d. Under the proof, there was sufficient evidence to go to the jury as to the contract being within the apparent scope of the authority of the station agent, and their finding is not against the weight of the evidence."

<sup>1</sup> *Hill v. Southern R. Co.* (1912) 6 Ala. App. 488, 60 So. 450. The court laid stress upon the fact that the agent's authority to settle claims for damages was limited to \$50, and it seems to have regarded this fact as a material element; for, after advertent to the nonliability of the company for the injury in question, it stated its conclusion in the following language: "Under such circumstances, it was not rea-

**§ 35. Roadmaster of railway company.**

In one case it was declared to be "very clear, upon authority and reason, that there is nothing in the ordinary meaning of the term 'road-master' from which the courts may know or presume that such employee has authority to bind the company for attendance and nursing of a person injured upon the line of the railroad, whether such person, when injured, be an employee, passenger, or a person sustaining no relation to the corporation." It was added that such presumption could not be entertained even if the courts "could judicially know that the roadmaster is a person having charge of the repairs of the road."<sup>1</sup>

**§ 36. Trainmaster of railway company.**

In one case the defendant company was held to be bound by a contract which a trainmaster, who was apparently clothed with authority in that regard, had made for the nursing of an injured servant.<sup>1</sup> But the evidence upon which this apparent authority was predicated is not specified in the report. It seems clear that a trainmaster would not have such authority by virtue merely of his official position.

reasonable for the plaintiff to indulge the belief that the defendant's agent would be authorized to incur a liability against the defendant of \$400 for the care and treatment of the injured stock." On general principles, however, it seems reasonably clear that notice of such a limitation on the agent's powers could not be imputed to the plaintiff. In this point of view, the existence of the limitations and the amount of his claim would have no bearing upon his right of recovery, the essential question involved being simply whether a subordinate agent, intrusted with certain special functions, could impose upon his employers an obligation to pay for services, the purpose of which was to mitigate the effects of an injury for which they were not liable.

<sup>1</sup> Louisville, E. & St. L. R. Co. v. McVay (1884) 98 Ind. 391, 49 Am. Rep. 770.

The authority of a roadmaster to employ a physician to attend on an injured servant was also denied in *Peninsular R. Co. v. Gary* (1886) 22 Fla. 356, 1 Am. St. Rep. 194.

In *Houston & T. C. R. Co. v. Watkins* (1878) 1 Tex. App. Civ. Cas. (White & W.) 147, evidence to the effect that the roadmaster who employed the physician to attend an injured servant was an official whose duties were limited to the supervision of the roadbed, track, etc., and that the superintendents and general officers of the road were alone authorized to employ

In another case the right of a doctor to recover for medical services rendered to an injured servant at the request of the defendant's assistant trainmaster was affirmed on the ground that the evidence tended to show that he had on previous occasions procured medical attendance for injured persons, and that it was his duty to see that such persons received proper treatment.<sup>2</sup>

The effect of a case in which the liability of the company in respect of medical services rendered at the request of a trainmaster who was then acting as division superintendent was involved is stated in § 27, note 9, supra.

**§ 36a. Yardmaster of railway company.**

An employee of this description has, under ordinary circumstances, no authority to engage a doctor to attend on an injured servant of the company.<sup>1</sup>

**§ 37. Conductor of railway train.**

The general rule is that a conductor is not authorized "in ordinary cases to contract for surgical attendance upon a passenger or employee injured in operating the trains of the railway company, so as to bind the company."<sup>1</sup> The extent to which the existence of an emer-

physicians in such cases, was held to show that, in employing the physician, the roadmaster acted beyond the scope of his authority.

The same doctrine was taken for granted in *Mobile & M. R. Co. v. Jay* (1878) 61 Ala. 247, where a claimant who had, at the request of the defendant's "supervisor," whose duties were concerned with the maintenance of its track, roadbed, and bridges, or a portion of the line, rendered services to an employee injured by the running of the cars, unsuccessfully relied on the special ground that a custom to pay the fees of doctors who were engaged by supervisors was established by evidence which merely showed that the defendant had, on one previous occasion, paid for services rendered by another at the request of another supervisor.

<sup>1</sup> *Chicago, P. & M. R. Co. v. Kane* (1896) 65 Ill. App. 276.

<sup>2</sup> *Stewart v. New York C. & H. R. R. Co.* (1916) 62 Pa. Super. Ct. 234.

<sup>1</sup> *Sevier v. Birmingham, S. & T. River R. Co.* (1890) 92 Ala. 258, 9 So. 405; *Marquette & O. R. Co. v. Taft* (1873) 28 Mich. 289.

<sup>1</sup> *St. Louis, A. & T. R. Co. v. Hoover* (1890) 53 Ark. 377, 13 S. W. 1092, where the injured person was a passenger. See also the following cases, in which the injured persons were servants: *Sevier v. Birmingham, S. & T. River R. Co.* (1890) 92 Ala. 258, 9 So. 405; *Peninsular R. Co. v.*



agency operates so as to enlarge his powers in this regard is discussed in § 52, *infra*. In cases where the appropriate course to be followed with respect to procuring medical attendance for injured passengers or servants is defined by the rules of the company, their provisions will, of course, determine, in the first instance, at least, whether the contract in question was binding on his principal.<sup>2</sup>

There is specific authority for the doctrine that a conductor has no power,

under ordinary circumstances, to bind the railway company by a contract with a hotel keeper for the board and lodging of an injured trainman.<sup>3</sup> A similar rule doubtless holds where the person for whose benefit the contract was made was a passenger.<sup>4</sup>

### § 38. *Superior officer of railway police.*

In an English case it was assumed that the ordinary powers of a subinspector of railway police did not extend to the making of a contract with an

Gary (1886) 22 Fla. 356, 1 Am. St. Rep. 194; St. Louis & K. C. R. Co. v. Olive (1891) 40 Ill. App. 82; Terre Haute & I. R. Co. v. Brown (1886) 107 Ind. 336, 8 N. E. 218; Tucker v. St. Louis, K. C. & N. R. Co. (1873) 54 Mo. 177; Adams v. Southern R. Co. (1899) 125 N. C. 565, 34 S. E. 642.

In *Gaudreau v. Canada Atlantic R. Co.* (1903) Rap. Jud. Quebec, 24 C. S. 337, where a conductor engaged a doctor to attend to a person who had been struck at a crossing by a train, the actual ratio decidendi was an adoption of the contract by the company. But the court cited with approval the doctrine laid down in *Langan v. Great Western R. Co.* (1874) 30 L. T. N. S. (Eng.) 173, regarding the effect of an emergency in enlarging the powers of subordinate employees.

<sup>2</sup> In *Hays v. Wabash R. Co.* (1906) 119 Mo. App. 439, 95 S. W. 299, the plaintiff, at the times his services were rendered, was the local surgeon of the defendant at Hannibal, and also local surgeon for an association composed of and supported by the employees of the railroad company. A copy of the defendant's book or rules, prescribing the duties of its employees in cases of injury to them and to passengers, had been furnished to plaintiff. One of these rules was as follows: "In cases of wrecks or accidents where a number of persons, either passengers or employees, are injured and require immediate attention, summon at once the nearest competent surgeon; summon at the same time whichever local surgeon can be gotten to the scene of the accident most quickly, and notify by wire at once the nearest hospital and the chief officers of the road, giving full particulars as to the names and whereabouts of the injured persons, the name of the surgeon in attendance, and stating what further action is required for the relief of the injured." Held that, in meeting the train at the Hannibal station, in response to a telegram from the conductor of a train on which an injured passenger was being conveyed, taking charge of him and removing him to the hospital of the association, and there treating him for such reasonable time as was required for the notification of the defendant's claim agent and the return of his answer, the plaintiff acted strictly within the terms of this rule, and was clearly entitled to recover the reason-

able value of his services rendered during such time. But his right to recover anything more than this was denied, on the grounds that he had failed to perform his duty to make an immediate report to the general claim agent, who alone was authorized to determine whether or not an injured passenger should be treated by the company's surgeon, and that the evidence did not show that the services subsequently rendered had been requested by any employee representing the claim agent.

In *Perkins v. Trenton Street R. Co.* (1911) 81 N. J. L. 36, 78 Atl. 666, it was held that a trolley company was liable to a physician for the value of his services, the evidence being that a printed rule of the trolley company required the conductor of the car, in case of accident, to take the injured person to a physician; that the motorman met with an accident by which his leg was crushed, and that the conductor telephoned plaintiff, who amputated the limb.

<sup>3</sup> *Hunt v. Illinois C. R. Co.* (1904) 163 Ind. 106, 71 N. E. 195, 16 Am. Neg. Rep. 313. There an injured brakeman was conveyed, at his own request, from the locality where the accident occurred, to the city in which he had been boarding at the claimant's hotel, and in which he had many friends. Without any request on his part, he was taken to that hotel by the conductor. The only evidence showing an employment of the claimant by the conductor was contained in the following request: "Can we get a room to put S. in? He had his foot mashed, and will have to have it off. The doctors are here to do the work." Held, that the action was not maintainable.

<sup>4</sup> In *Central of Georgia R. Co. v. Price* (1898) 106 Ga. 176, 43 L.R.A. 402, 71 Am. St. Rep. 246, 32 S. E. 77, we find it laid down in the syllabus of the court that, "where, through the negligence of the conductor of a railway company, a passenger on its cars has been carried beyond the point of her destination, such conductor, in the absence of express authority so to do, cannot constitute the proprietor of a hotel, who is entirely unconnected with the company, its agent for the purpose of providing safe and comfortable lodgings for the passenger until she can return on the company's train to her destination." The deduction actually drawn was, that the com-

innkeeper for the supply of board, lodging, and other necessities to passengers who had been injured in an accident.<sup>1</sup> The actual rationale of the judgment, which was in favor of the innkeeper, was the effect of an emergency in enlarging those powers. See § 52 (d), *infra*.

### § 39. *Inspector on street railway.*

In a case where an injured passenger on a street railway car was surgically treated by the plaintiff at the request of an employee designated as an "inspector," whose general duties were to supervise the conduct of other employees engaged in operating the defendant's cars, the right to recover for the services so rendered was affirmed on the ground that the defendant had instructed the inspector, in case of accident, "to see that those injured were taken somewhere where medical aid could be given," and that the injured passenger had been brought to the plaintiff in pursuance of this instruction. The evidence, it was held, might reasonably be regarded as showing that this instruction "did not contemplate or mean merely that he should remove injured persons to such a place that medical aid could be there bestowed if a physician or surgeon should come there by chance or in response to the request or call of any person, but rather that the meaning of

his instructions was to place such persons under proper medical or surgical treatment—to see that they should receive such treatment."<sup>1</sup>

### § 40. *Physician or surgeon.*

In one case the decision by which the claim of a surgeon who had, at the instance of the chief surgeon of a railway company, treated an injured servant, was disallowed, proceeded upon the grounds, that the authority of the latter was limited to the appointment of the permanently retained local surgeons of the company; that the only exception to which this system was subject was that he was empowered to employ a surgeon for temporary purposes only, if the case was urgent, and the regular local surgeon could not be immediately reached; and consequently that, under circumstances not falling within the scope of this exception, he could not bind the company by contracting with the plaintiff to attend merely to one particular patient.<sup>1</sup> But possibly this ruling would not command universal assent.<sup>2</sup> The company's liability might, as it would seem, have been properly predicated on the theory that the chief surgeon was the defendant's general agent with regard to all matters incidental to the treatment of injured servants, and was consequently invested with ostensible

pany was not liable for any injuries or damage such passenger might have sustained while at the hotel, in consequence of any negligence on the part of its proprietor. But it seems clear that the non-liability of the company would also have been a necessary inference if the object of the action had been the recovery of the value of the passenger's board and lodging.

<sup>1</sup> *Langan v. Great Western R. Co.* (1874; Exch. Ch.) 30 L. T. N. S. (Eng.) 173.

<sup>2</sup> *Hanscom v. Minneapolis Street R. Co.* (1893) 53 Minn. 119, 20 L.R.A. 695, 54 N. W. 944. The claim was allowed in respect of all the services rendered up to the time of recovery.

<sup>1</sup> *Burke v. Chicago & W. M. R. Co.* (1897) 114 Mich. 685, 72 N. W. 997. In that case the servant was treated by Dr. Scott, a local assistant surgeon; but having been taken worse on a certain occasion, he sent for Dr. Scott who could not be found. Plaintiff was then summoned, and continued to treat the patient for about three months and a half. Four weeks after the treatment was begun, Dr. Johnson, the defendant's chief surgeon, wrote as follows to the plaintiff: "I am informed that you are now attending Herman Radke, an employee of the C. & W. M. R. R. Co., who was injured a few weeks ago. Will you be

kind enough to inform me as to his present condition? Has he completely recovered? I would like a history of the case since you took charge of it. Please send your bill for services, itemized, to me, if you are through with the case." The circuit judge left it to the jury to say whether Dr. Johnson had authority to employ plaintiff to render services after the date of this letter, and whether he did employ the plaintiff to render such services. In one of the instructions it was ruled that, in determining that question, the letter should be considered. The court held that it certainly contained no express authorization for plaintiff to attend Radke at the expense of defendant.

<sup>2</sup> The only authorities cited in support of the doctrine of the court that the chief surgeon had exceeded his powers in engaging the plaintiff were *Terre Haute & I. R. Co. v. Brown* (1886) 107 Ind. 336, 8 N. E. 218, and *McCarthy v. Missouri R. Co.* (1884) 15 Mo. App. 385. The former case involved the powers of a conductor; the latter those of a "superintendent" who attended to the running of trains. It is submitted, therefore, that neither of them can be regarded as a relevant precedent with respect to the implied authority of an agent occupying the peculiar position of chief surgeon.

authority to engage other surgeons whenever, in the exercise of his discretion, he deemed it necessary. This position is virtually that which was taken in a case decided by an intermediate court of appeal with regard to the authority of the chief surgeon of an electric company.<sup>3</sup>

It seems to be settled law that a mere local physician, regularly retained by a railroad company, is not invested, by virtue merely of his office, with author-

ity to engage another physician to attend on an injured passenger or servant,<sup>4</sup> and that a similar lack of power in this respect is predicable as regards a physician who is called in to treat a particular patient.<sup>5</sup> Accordingly, in the absence of some specific evidence tending to show an enlargement of the ordinary powers of the employing physician, the one employed cannot hold the company liable for his remuneration.<sup>6</sup>

<sup>3</sup> In *Rich v. Edison Electric Co.* (1912) 18 Cal. App. 354, 123 Pac. 230, where, after the first operations upon an injured servant had been concluded, one Dr. Stinchfield, acting "as or for the chief surgeon of defendant," arrived upon the scene, made a cursory examination of the injured man's condition, recommended that certain things be done, and directed the hospital authorities to give the patient every possible care, the right of the hospital to recover for the services thereafter rendered, a judgment in favor of the plaintiff was affirmed on the ground that this direction was given by an agent of the defendant who had ostensible authority to give it.

For a case in which the authority of the examining physician of a railroad company's relief department to engage a surgeon was held, with reference to the right of the servant treated by the latter to recover damages for his malpractice, to involve a question for the jury, see *Haggerty v. St. Louis, K. & N. W. R. Co.* (1903) 100 Mo. App. 424, 74 S. W. 456.

<sup>4</sup> This doctrine was laid down in *Southern R. Co. v. Grant* (1911) 136 Ga. 307, 71 S. E. 422, Ann. Cas. 1912C, 472, on the authority of 2 Enc. L. & P. 1044. It should be observed, however, that only a portion of the decisions there cited relate to the powers of doctors.

In *Chicago & E. R. Co. v. Behrens* (1893) 9 Ind. App. 575, 37 N. E. 26, it was held that no recovery could be had for certain services rendered to an injured servant who required immediate attention, and who had been brought to plaintiff's house by one of the defendant's regular physicians, in whose charge the servant had been placed by a conductor. The ground upon which the decision was put was that the special verdict on which the claim was based did not find that the servant was injured while in the performance of his duty, nor that the physician had any authority to bind appellant by any agreement, nor that he said or did anything indicating an intention on his part to bind appellant for the payment of any part of the services performed or articles furnished by appellee.

In *Galveston, H. & S. A. R. Co. v. Allen* (1906) 42 Tex. Civ. App. 576, 94 S. W. 417, the decision proceeded upon the ground that, as it was not within the apparent scope of the authority of the local surgeon of a railway company to employ the plain-

tiff to operate upon an injured passenger, and the specific evidence showed not only that he had no such authority, but also that his want of authority was known to the claimant, the refusal of the trial judge to instruct the jury to return a verdict for the company was error.

<sup>5</sup> In *Evansville & I. R. Co. v. Spellbring* (1890) 1 Ind. App. 167, 27 N. E. 239, the ground upon which recovery was denied was that, under the evidence adduced, it was merely a matter of conjecture whether the employing surgeon occupied with respect to the company such a position as would empower him to bind the company by a contract of this description.

<sup>6</sup> See cases cited in the two preceding notes.

In *Bond v. Hurd* (1904) 31 Mont. 314, 78 Pac. 579, 3 Ann. Cas. 566, one Walters, who had been sent to another county, to receive some of defendant's horses which had been collected by one Williams, was injured by being thrown from one of them. Plaintiff was called in to attend Walters, and engaged Dr. Miller to assist him. The action was brought to recover for medical services rendered by Dr. Miller to Walters, plaintiff being the assignee of the claim in respect of those services. It was shown that, after the accident, Williams telegraphed to defendant, stating that Walters was hurt, and asking him whether he would pay the "doctor's bill." Defendant replied by telegram that he would do so. Plaintiff saw this reply, accepted the offer therein contained, and acted upon it. Held, that no agency could be implied from these telegrams which would authorize Williams to delegate to plaintiff the right to engage the assistance of other physicians, and bind defendant to pay their fees.

In *Omaha General Hospital v. Strehlow* (1914) 96 Neb. 308, 147 N. W. 846, the position taken by the court is thus stated in its syllabus: "Where a master, at the time his employee receives a severe bodily injury, calls his own regular physician and surgeon over the telephone and instructs him 'to come and take care of the injured man,' and at the time of giving such direction well knows that the injuries of his employee are of such a character as to render it necessary to immediately remove him to a hospital, and the doctor at once responds and takes the man to a hospital, and for the purpose of inducing the hospital authorities to receive him, states to

The position has been taken that the general authority of a physician regularly in the employ of a railway company extends only to the provision of medicines and things of a similar nature for persons injured on the company's lines, and that he has no implied power to bind it by a contract for the board and nursing of such persons.<sup>7</sup>

them that the principal for whom he is acting will be responsible for the payment of the hospital bill of the injured man, the master is bound by such acts and declarations on the part of his agent." As to the other point involved in this case, see § 52d, *infra*.

In *Smith v. Chicago & N. W. R. Co.* (1897) 104 Iowa, 147, 73 N. W. 581, one Fairchild, a local surgeon of the defendant in one district, was directed by telegram to go to a place in another district and see an injured servant. After his arrival at that place he employed the plaintiff to treat the patient. A published rule of the company, not known to the plaintiff, but an important factor in the case, as showing the actual authority of local surgeons to employ others, was that "the company would not pay for the services of any other surgeon, after the arrival of their own local surgeon, except by special arrangement in writing with the chief surgeon or general claim agent." By one of his instructions the trial judge in effect took from the jury the question of the ratification of Dr. Fairchild's act, and by another directed them that there was no evidence tending to show that, at the time in question, "district surgeons either had or exercised any authority in employing surgeons outside the limits of their respective districts." The court observed that, in this condition of the record, the point to be determined was this: Had Dr. Fairchild such apparent authority as that the company is bound by his acts, assuming that he did employ Dr. Smith? By another of the instructions the jury were told that none of the declarations or statements of Dr. Fairchild to the plaintiff or to the injured servant could be taken or considered as any evidence of his authority to employ the plaintiff, and that such declarations and statements were only for the purpose of showing that Dr. Fairchild did or did not employ the plaintiff. The contention of the company that the two branches of the instruction were inconsistent was held to be well founded. The court said: "The instruction, in express terms, authorized the jury to consider for that purpose the facts that Dr. Fairchild said to plaintiff that the defendant would pay him for his services; that he was only to assist Dr. Fairchild, who was to remain in charge of the case; that he was to report the condition of the patient to Dr. Fairchild, and, to make those reports, he was to have free use of the telegraph service of the defendant. It seems to us that

#### § 41. *Route agent of express company.*

In a case where the claimant sought to recover for services, rendered at the request of an agent of this description, in procuring the arrest of a man who was accused of stealing goods in the custody of the defendant, it was declared to be plain "both upon principle and authority, that the fact that the person with

these facts are of the class that cannot be considered to show authority, under the rule given by the court. That the instruction only permits the conclusion that there was apparent authority by these facts being considered with other facts does not change the rule. The effect is to aid facts proper for consideration, by those that are not. . . . Having in view the language of the telegram by which Dr. Fairchild was authorized to go to Clinton, and other undisputed facts, it may be stated as established conclusively that his authority was to render his personal service, and no more. His duty was of a professional nature, not involving such business transactions as are common to agents, where implied powers attach because within their apparent scope. The service he was authorized to render justified no inference of an authority to employ another, and it is quite impossible to understand what he could have done at that time to properly indicate an apparent authority, if his own statement would be incompetent for that purpose. It would seem, as held in the Kansas case [*Kane v. Barstow* (1889) 42 Kan. 465, 16 Am. St. Rep. 490, 22 Pac. 588] that, to give his acts the force of apparent authority, there must have been previous transactions of a character to have justified the plaintiff in believing that such authority did exist." The conclusion arrived at was that the evidence remaining after the rejection of that which was incompetent did not warrant the inference that Dr. Fairchild was authorized to employ the plaintiff.

<sup>7</sup> *Mayberry v. Chicago, R. I. & P. R. Co.* (1882) 75 Mo. 492 (injured person was a servant). This decision was followed in *St. Louis, A. & T. R. Co. v. Hoover* (1890) 53 Ark. 377, 13 S. W. 1092 (contract for the board of passenger); and in *Bushnell v. Chicago & N. W. R. Co.* (1886) 69 Iowa, 620, 20 N. W. 753 (contract for board of servant, of his nurse, and certain of his relatives), where a judgment for the plaintiff was reversed on the ground that the jury had been improperly instructed to render a verdict for the plaintiff if they found that one C., a surgeon in the employ of the defendant, directed the deceased to be kept and cared for by the plaintiff, and that C. was authorized to treat the defendant's employees under such circumstances. The court said: "We have some doubt as to the meaning of this instruction. If the court meant that express authority must be shown, then the verdict is clearly against the evidence. If the court meant that the

whom the plaintiff made this alleged contract was a route agent of the company raised no presumption of law, and was not ground for an inference of fact, that the making of such a contract was within the scope of the agent's powers. Nor can such presumption arise or inference be drawn from the mere fact that the agent declared to the plaintiff that he was authorized to make it, and conducted himself in their dealings in this single matter as if he had such authority.<sup>1</sup>

#### § 42. Local agent of person operating stagecoaches.

In a case where the local agent of the defendants, who were owners of a line of stages, engaged a doctor to attend on a passenger injured through the upsetting of a coach, and also on the driver, a man who had, without authority from or knowledge of the defendants, been engaged by the regular coachman to take

authority of Dr. Cox could be implied from his employment and the duties he was expected to perform, the jury should have been so told; and certain it is that the jury, under the instruction, could have found that express authority was conferred, or that it could be implied. Certain it is, also, that the jury were authorized to allow, and in fact they must have allowed, the plaintiff compensation for certain meals furnished the relatives of the deceased, who were not in any respect in the employ of the defendant. Before the plaintiff can recover such compensation, it must appear that Dr. Cox was expressly authorized to make such contract.<sup>2</sup>

<sup>1</sup> Fee v. Adams Exp. Co. (1909) 38 Pa. Super. Ct. 83. One of the grounds upon which the verdict in favor of the plaintiff was set aside was that, even if the offer of the defendant to show by its general agent, who had charge of the route agents of the company, and knew the extent of their authority, that they had no authority to make a contract of this sort, had been properly rejected on account of its generality, the same objection did not apply to the offer of the defendant to prove by the testimony of the route agent himself that such a contract was beyond the scope of his powers. Reliance was also placed upon the failure of the plaintiff to adduce any evidence to show the functions of a route agent, the nature of his duties, or the extent of his powers. "This was not a matter of which a court can take judicial notice, nor one within the common knowledge of men, and therefore presumably known by the jurors." In answer to the contention based upon the admitted fact that the route agent was assigned to investigate the theft, the court said: "We are unable to agree with the appellee's

his place, it was held that the doctor was entitled to recover in respect of the services which he had rendered to the passenger, but not in respect of those which he had rendered to the driver.<sup>1</sup>

#### § 43. Agent of theatrical company.

The power of an agent of this kind to employ a contractor to furnish the individual performers for the orchestra of his theater necessarily includes the lesser power of suggesting to the contractor that he desires to have a particular performer in the orchestra, and of refusing to make a contract with such contractor if he declines to employ the individual suggested.<sup>1</sup>

#### § 44. Clerk.

The inability of an undertaker to recover from a railroad company liable, the funeral expenses of a deceased employee, was in one case predicated on evidence that the person who made the

counsel in their contention that, whether this power was specially conferred or was held by virtue of his position as route agent, there was implied in it the power to contract with an officer, who had been designated previously as the commonwealth's agent in a requisition for a person charged with the theft, to pay such officer a specific sum for apprehending the accused in a distant state. The making of such a contract was beyond the scope, not only of his actual but of his apparent authority.<sup>2</sup>

<sup>1</sup> Shriver v. Stevens (1849) 12 Pa. 258. The statement of the trial judge to the jury that, on a careful examination of the charge, the answers to the points and the authorities contain no error, except in one particular: the court, speaking of the authority given to Gilbert as the agent of the company, says: "He," the agent, "certainly had power to employ a physician to render aid to Mr. Moses, and if he had this power, it was within the scope of his authority to employ a physician for Walker,"—was held to be erroneous for reasons thus set forth: "It does not follow as a legal inference, that because he had power to employ medical services for the passenger, to whom they were liable for the negligence of their servants, that therefore they had given him authority to employ a physician for the other, who may have been the cause of the disaster. In the former case they were at least under a moral obligation; for the other they were not bound, either legally or morally. He had thrust himself into their service, without their leave, and was bound to pay for these services himself. It is a point in this case, but not such a one as justifies the binding force given to it in the charge."<sup>2</sup>

<sup>2</sup> Interstate Amusement Co. v. Pauli (1913) 107 Ark. 628, 156 S. W. 439.

arrangements for the funeral was a clerk in the general passenger agent's office; that, so far as appeared from the testimony, he was neither by implication from his position, nor by express delegation, invested with authority to bind the company by a promise that the expenses would be defrayed by it; and that, so far from having held himself out as representing the company, or promised that it would meet the expenses, he had spoken of the means of payment that were expected to be available from the estate of the deceased. The conclusion of the court was that there was nothing to overcome the ordinary presumption that funeral expenses are incurred on the credit of the estate of the deceased.<sup>1</sup>

The implied powers of an employee who apparently was a clerk of the local agent of a mercantile company were discussed in the case cited below. The precise character of his functions is not shown by the opinion.<sup>2</sup>

In one case it was held to be error to leave it to the jury to determine whether

a man who was performing the duties of bookkeeper and timekeeper of a contractor was authorized to engage the plaintiff to treat an injured servant.<sup>3</sup>

In another case the power of an employee of this description to enter into a similar contract was held to be a warrantable inference from testimony that he signed checks in behalf of his employers, looked after their correspondence, and signed letters for them.<sup>4</sup> But it seems probable that this ruling would not be approved by all courts.<sup>5</sup>

#### § 45. Agent of executive committee.

Where an executive committee which has undertaken the management of the details of a public celebration delegates to an agent the function of making arrangements for the performance of certain work, the extent of the powers conferred by such delegation will, of course, depend upon the phraseology of its appointing resolution and the other incidental circumstances, if any, which bear upon its intention with regard to the transaction.<sup>1</sup>

<sup>1</sup> Rice v. New York C. & H. R. R. Co. (1907) 195 Mass. 507, 81 N. E. 285.

<sup>2</sup> Beyers v. Hodge (1892; Sup. Gen. T.) 1 Misc. 76, 19 N. Y. Supp. 830. There one Soule, claiming to represent the defendants, the agents of the Barber Asphalt Co. in Buffalo, employed the plaintiff to circulate a petition for the purpose of procuring signatures of property owners, on which to institute proceedings by the common council of that city for the paving of a street. The plaintiff brought suit on the express agreement of Soule to pay her a certain sum for her services. The court, while conceding that enough direct evidence, taken in connection with the acts of defendants in paying to the plaintiff money, and their making use of the petition circulated by the plaintiff in securing the contract with the city, had been introduced to warrant the inference that Soule was authorized by them to employ the plaintiff to perform the services which she did perform, held that no recovery could be had, because no evidence had been given from which it could be inferred that the defendants ever agreed to pay, or ratified an agreement by Soule to pay, the sum alleged to be due to her. It was, however, admitted that she might have maintained an action on a quantum meruit.

<sup>3</sup> Harris v. Fitzgerald (1902) 75 Conn. 72, 52 Atl. 315.

<sup>4</sup> Perkins v. Kilpatrick (1917) —Mo. App.—, 193 S. W. 876. The court agreed with defendants "that the mere fact that they collected a fund out of wages of employees would not necessarily make them liable to plaintiff or any other particular persons for services. But it was a proper circumstance to be considered by the jury."

<sup>5</sup> The present writer ventures to express the opinion that the evidential elements specified were not sufficient to show that a merely subordinate agent, like the one in question, was invested with authority to make a contract pertaining to a matter which was entirely outside the range of the transactions to which he was ordinarily attending. The ruling is, moreover, in conflict with the earlier decision of the same court to the effect that the general manager of a mining company has no power to make such a contract as the one under review. See § 24, note, subd. (b), supra. Clearly such functions as those intrusted to the timekeeper are frequently discharged by officials in control of an entire business, and are always within their competence, whether actually discharged or not. If the discharge, actual or potential, of such functions, is not regarded as investing a general manager with authority to engage a doctor, it cannot, without a palpable inconsistency, be held that authority in this respect may be predicated from that circumstance where a subordinate agent is concerned. The liability of the defendant might apparently have been affirmed in both of these cases on the general ground that the circumstances created an emergency which operated so as to enlarge the normal powers of the employing agents. See, generally, § 52, infra. But in neither of them was this aspect of the evidence adverted to by the court.

<sup>1</sup> In Galvano Type Engraving Co. v. Jackson (1905) 77 Conn. 564, 60 Atl. 127, the defendants, who acted as the executive committee of the department of publicity of an Old Home Week celebration held in a certain city, and were charged with the

**§ 46. Building committee.**

A church which authorizes its building committee to have plans prepared for an edifice which shall cost not more than a specified amount cannot be held liable for the remuneration of an architect who is employed by the committee to prepare plans for a more expensive edifice.<sup>1</sup>

**§ 47. Agent in charge of construction work; generally.****a. Civil engineer in service of railway company.**

As the characteristic and ordinary

functions of an employee of this description are the designing and supervising of construction work, his implied authority does not, generally speaking, extend to the making of a contract respecting such work. Consequently his principal cannot be held liable for the remuneration of a person whom he employs to perform such work, unless it is shown by affirmative evidence that the employment was within the scope of his powers.<sup>1</sup> This doctrine is applicable to a chief engineer as well as to one of lower rank.<sup>2</sup>

duty of preparing and publishing an official program or souvenir to be used in the celebration, passed a motion that A and B should arrange for a photographer to prepare such photographs as needed for the completion of the official souvenir, and arrange for the half-tone cuts at 10 cents each. It further appeared that, when the committee passed this motion, they knew that it was the customary method in the business of preparing cuts or plates, to have a minimum charge for small plates, and the portion of said resolution relating to half-tone cuts at 10 cents related and was intended to relate to such plates as would not be included in a minimum charge. The plaintiff completed the work as directed by A and B, and the materials were used by the defendants in the manufacture and publishing of the souvenir. In an action brought to recover the amount due for the work so performed and the materials so furnished by the plaintiff, it was argued by the defendants that, in determining the question of authority, the court was confined to the simple act of the committee in passing the motion, and especially could not consider its knowledge of the customary method in the business to which the motion related and in view of which it was framed. But the court said: "There is no merit in this claim. Treating the motion as an independent writing whose language must determine the rights of the parties, the court properly considered their situation and the circumstances of the transaction in arriving at the intent expressed or implied in the language used, and for the purpose of applying the vote to the subject-matter contemplated and intended by the parties. But the motion was not such an independent writing. The matter in dispute was not a power derived wholly from a written instrument, but an agency created by the conduct and acts of the parties, including as one circumstance the passage of the motion quoted, and the existence of this agency was a fact depending on all the evidence in the case."

<sup>1</sup> *Swearingen v. Bulger* (1915) 117 Ark. 557, 176 S. W. 328.

For a case in which a lien was declared in favor of a petitioner who had done work

on a schoolhouse, in pursuance of a contract with a building committee, see *Morse v. School Dist.* (1858) 3 Allen (Mass.) 307.

<sup>2</sup> In *Gardner v. Boston & M. R. Co.* (1879) 70 Me. 181, where the plaintiff's claim for work performed upon a railroad was based on the fact that he had been employed by an engineer in the service of the defendants, recovery was denied on grounds thus stated: "There is no evidence to show that Bacon was specially authorized to hire men. It would be an unusual proceeding if he were so authorized. As an engineer, without special authority, he would have no power to bind the defendants. He would be no more than an employee of the corporation. The engineer ordinarily cannot employ others to do the work which contractors have agreed to do, and make the corporation liable for its payment." The report does not show whether the engineer referred to was the chief engineer or one of his assistants. But apparently he was a mere subordinate.

For cases in which it was held that a railroad company is not liable in respect of work which, after the abandonment of the contract by the contractor, a subcontractor performs in reliance upon the assurance of a resident engineer that he will be paid by the company, see *Alexander v. Alabama Western R. Co.* (1912) 179 Ala. 480, 60 So. 295; *Alabama Western R. Co. v. Bush* (1913) 182 Ala. 113, 62 So. 89.

In *Rowland Lumber Co. v. Ross* (1902) 100 Va. 275, 40 S. E. 922, it was held that the engineer of a lumber company had no authority to bind it by a contract with regard to dredging work, but the report does not afford any precise information concerning the nature of the employer's functions.

<sup>3</sup> In *Wilson v. Kings County Elev. R. Co.* (1889) 114 N. Y. 487, 21 N. E. 1015, the plaintiff, with the view of taking a contract for the construction of a railroad projected by the defendant, devoted his time and attention to the matter, and advanced and expended some money in that behalf, preparatory to the making of the contract and to the performance of the work of construction. Having finally failed to obtain the contract, he brought

*b. Architect.*

Except in so far as he has been invested with special authority in that regard, an architect has no power to bind his principal by a contract respecting the erection of a building, or the performance of work upon it.<sup>3</sup> His duties are limited to the supervision and direction of work to be done by the contractor or those acting under him,<sup>4</sup> and "to see that the materials and workmanship are in accordance with the specifications."<sup>5</sup>

In an English case where an architect engaged by the defendants to draw a specification of a building employed plaintiff to make out the quantities, and the defendants ultimately refused to allow the building to be erected, a verdict finding that the architect was authorized to bind the defendants by the contract with the plaintiff was sustained, mainly on the grounds, that the evidence showed that there was a usage in the trade for architects or builders to have their quantities made out by surveyors; and that

an action to recover the money so advanced and expended and compensation for his services so rendered by him in contemplation of having the contract and the opportunity to perform it. The right of recovery hinged upon whether authority to conduct the negotiations with him was predicable as regards the officials with whom he has carried on negotiations with regard to the prospective work; viz., the defendants' chief engineer and general counsel. The evidence (too voluminous to state here) was held to warrant an affirmative answer to this question, and the finding of the referee in favor of the plaintiff was accordingly upheld.

See also *Sharpe v. San Paulo R. Co.* (1873) L. R. 8 Ch. (Eng.) 597, 29 L. T. N. S. 9, reviewed in § 48, note 4, *infra*.

<sup>3</sup> This general rule was laid down, arguing, in *Hampton v. Glamorgan County Council* [1917] A. C. (Eng.) 13, 86 L. J. K. B. N. S. 106, 15 L. G. R. 1, 115 L. T. N. S. 726, [1916] W. N. 374, 33 Times L. R. 58, 81 J. P. 41, and explicitly affirmed in *Campbell v. Day* (1878) 90 Ill. 363.

In *Rass v. Sebastian* (1896) 160 Ill. 602, 43 N. E. 708, affirming (1895) 57 Ill. App. 417, it was held that an allegation that the petitioner had entered into a written contract with the defendant for the construction of the building in question was not supported by the proof, because the evidence showed that the contract introduced had been signed by the defendant's architect after the suit was brought, and his authority for doing so was not established.

In *Leverone v. Arancio* (1901) 179 Mass. 439, 61 N. E. 45, it was held that the provision of the contract that the contractor, under the direction and to the satisfaction of the architect, acting, for the purposes of this contract, as agent of the said owner, shall provide all the materials and perform all the work mentioned in the specifications and shown in the drawings, "did not go further than to make the architect the agent of the owner in the matter of deciding whether the work done fulfilled the requirements of the specifications and drawings." There being no other provision from which an enlargement of his authority beyond that which was thus shown could be inferred, it was held that the trial judge had erroneously instructed the jury, as a matter of law, that it would be competent for the

architect to waive, on behalf of his principal, the terms on which the owner had stipulated in writing that the payments for the work were to be made when the work described had been done to the architect's satisfaction.

In *Dunovant v. Taylor* (1897) — Tex. Civ. App. —, 40 S. W. 326, the grounds upon which it was held that the architect's principal was not liable for the price of sand supplied by Taylor, a subcontractor engaged to do certain painting, were thus stated: "Appellant had no knowledge of the contract with appellee. Dickey had no authority to contract with anyone but Macon [contractor in chief]. Appellee was not employed by Macon to do the work. Before Dickey made the contract with Taylor, appellant had already, at the instance of Dickey, made the contract with Macon to deliver the sand. We are of the opinion that Dickey had no authority whatever to make the contract with appellee, and that appellant, having paid Macon for the sand, is not liable to appellee. If appellant had, with knowledge of the facts, permitted appellee to do the work, and had then paid another for it, he might be held liable; but he has paid the man with whom he contracted, not knowing that appellee had any connection with the same, and he cannot be made to pay the money a second time. Appellee did not claim to be a subcontractor under Macon, or endeavor to fix a lien on the property."

In *Bouton v. McDonough County* (1877) 84 Ill. 384, it was held that the action of architects appointed to superintend the construction of a courthouse, in making an arrangement under which the subcontractor was to continue the work after the contractor in chief had become bankrupt and abandoned it, and to receive his compensation directly from the county, was not binding upon the county, because the architects "had no authority to vary the terms of the agreement in any respect." For similar decisions with reference to similar facts, see *Watts v. Metcalf* (1902) 23 Ky. L. Rep. 2189, 66 S. W. 824; *Schanen-Blair Co. Marble & G. Works v. Sisters of Charity* (1914) 77 Wash. 256, 137 Pac. 468.

<sup>4</sup> *Campbell v. Day* (1878) 90 Ill. 363.

<sup>5</sup> *Starkweather v. Goodman* (1880) 48 Conn. 101, 40 Am. Rep. 102.



the defendants themselves had an intimation that such was the practice.<sup>6</sup>

In Scotland the authority of an architect employed on the ordinary footing to engage a surveyor to measure the work was in one case affirmed without any qualification. Lord Gifford laid down the broad doctrine that "the architect is the general agent of his employer for all purposes necessary for carrying out the work."<sup>7</sup> But more recently it has been declared that an architect is not invested with an implied power to make a contract for services of this description until the plans have been approved, and he has been authorized to go on with the building operations.<sup>8</sup>

*c. Person superintending work for contractor.*

In one case it was held that a person sent by a nonresident contractor to superintend the construction of a railroad tunnel in a city had implied authority to employ a broker to find a purchaser for the earth to be excavated in the course of the work.<sup>9</sup>

In another case it was held that a person acting as the representative of

contractors for the construction of a section of a railroad track, and superintending the work for them, was invested with apparent authority to bind them by a promise to pay the board bills of the laborers employed by the subcontractors. The consideration relied upon was, that he was empowered to compel the subcontractors to keep sufficient men on the work to fulfil their contracts with the defendants, and that, for the purposes of the case, it must be assumed that, in order to do this effectually, it was necessary to obligate them to pay these board bills.<sup>10</sup>

*§ 48. Same description of agent. Authority with respect to extra work and alterations.*

*a. Civil engineer in service of railway company.*

The accepted doctrine is that a civil engineer appointed to superintend construction work on a railroad by an independent contractor is not, by virtue of his office alone, invested with authority to make a subsidiary agreement which provides for the performance of work not covered by the main contract,<sup>1</sup> or

contractors were to have the privilege of selling the earth for their own benefit. They immediately closed the contract with Settegast. Mills thereupon complained by letter to Thompson, but the latter disclaimed the authority of Skene to make such a contract, and instructed Skene to send the contract with Fitzgerald & Ray to St. Louis for his signature. The court said: "To our minds the facts plainly show that under Skene's general authority to employ hands to have the work performed he had the authority either to dispose of the earth or employ another to dispose of it for him. The earth in question was unlike a piece of ordinary property owned and held by defendant, and which he had employed a broker to sell. It is apparent that the earth, as a source of profit, was of little or no moment, and, except for the trouble of its disposition, was a mere incident to the main task of building the tunnel. If it be true that Thompson had authorized Skene to go to Houston and have the tunnel built, and this is clearly made to appear, then it seems to us Skene's employment of Mills was as clearly within that broad power as the contract with Fitzgerald & Ray."

<sup>10</sup> Cannon v. Henry (1890) 78 Wis. 167, 23 Am. St. Rep. 399, 47 N. W. 186.

<sup>1</sup> One of the grounds assigned for the decision in Homersham v. Wolverhampton Waterworks Co. (1851) 6 Exch. 137, 155 Eng. Reprint, 486, 6 Eng. Ry. & C. Cas. 790 (see § 21, note 3, supra), was that a waterworks company was not bound by the order

<sup>6</sup> Moon v. Witney Union (1837) 3 Bing. N. C. 814, 132 Eng. Reprint, 624, 5 Scott, 1, 3 Hodges, 206, 6 L. J. C. P. N. S. 305. There the defendant's attorney had given out that the successful competitor should defray the expenses of making out the quantities. The plaintiff's case was that, if there should be a successful competitor for the building, he was to pay for making out the quantities; but if there should be no such competitor, the defendants. The defendants contended that if there should be no successful competitor, no one was to pay the plaintiff, and that his employment was a speculation which he chose to enter into on those terms.

<sup>7</sup> Black v. Cornelius (1879) 6 Sc. Sess. Cas. 4th Series, 581, 16 Scot. L. R. 475.

<sup>8</sup> Knox v. Garden Suburb Co. [1912-13] Sc. Sess. Cas. 872.

<sup>9</sup> Thompson v. Mills (1907) 45 Tex. Civ. App. 642, 101 S. W. 560. In that case Skene, the superintendent appointed to represent at Houston the defendant Thompson, who lived in St. Louis, agreed to pay Mills whatever amount he could obtain for the earth in excess of a sum specified. After Mills had sold the earth to one Settegast, who wanted it to fill in some city blocks, Skene was notified of the contract, and expressed his approval of the proposed arrangement for the disposition of the earth. A few days afterwards Skene, acting as Thompson's agent, signed with Fitzgerald & Ray, subcontractors for the excavation of the tunnel, an agreement which provided that, as part of the consideration, the sub-

operates so as to modify that contract in some other respect.<sup>2</sup> Accordingly, where the enforceability of a claim depends upon the question whether such an agreement is binding upon the railroad company, the plaintiff cannot succeed unless he produces affirmative

evidence that it was within the scope of the engineer's powers.<sup>3</sup> This doctrine is applicable as regards the chief engineer of a railroad company.<sup>4</sup>

On the other hand, a resident engineer has authority to arrange the manner in which the details of extra work which

of its engineer for the performance of the extra work on which the plaintiff's claim was founded. This case was one of those relied upon in the Woodruff Case (see § 49, note 2, *infra*); but it is manifestly an imperfect precedent, because it did not involve the effect of a specific restrictive stipulation of the kind that was there discussed.

<sup>2</sup> In *Burke v. Kansas City* (1889) 34 Mo. App. 570, where it was held that a city engineer could not change the provisions of a sewer contract regarding the depth at which the pipe should be placed, a stipulation, "according to such directions as the city engineer may from time to time give in superintending the construction of the works," was construed as being applicable to "such directions that he may give looking to a completion of the work according to the plans and specifications, and not to mean that the engineer may give directions for an improvement in manner different from that provided in the plans and specifications." It was made "the duty of the engineer, under the contract, to see that the contract is complied with, not violated."

See also *Dillon v. Syracuse* (1890) 5 Silv. Sup. Ct. 575, 9 N. Y. Supp. 98, where a claim for materials furnished was rejected on the ground that a city engineer was not empowered to vary the contract for the repair of a bridge.

<sup>3</sup> In *La Fayette R. Co. v. Tucker* (1890) 124 Ala. 514, 27 So. 447, the plaintiffs' evidence tended to show that, in addition to the work which they undertook for the original contractors, they raised certain portions of the roadbed of the defendant's line and lowered others, at the instance of its engineer, Cowan, and under his promise that it would pay them for it. Discussing the evidence, the court said: "Both Cowan and the defendant's president testify that Cowan had no authority to make contracts for defendant. It is not disputed, however, that Cowan was the defendant's civil engineer, having active and personal superintendence of the road's construction. He testified that 'he had the authority to change the grade of the railroad and have the work done according to the changes.' Such changes, if made, must have involved work extra of the original specifications. He assumed to represent the defendant when, according to his own testimony, he told one of the plaintiffs, referring to the grading in question, 'to go on and do the work, and whether it was to the grade or not, that the company would pay for it.' Whether by this he meant that the company would pay plaintiffs or the original contractors may not be clear, but, being addressed to the plaintiffs, it might reasonably be inferred that the promise inured to

them. This evidence forms a sufficient predicate for the testimony introduced by plaintiffs of Cowan's acts and statements. That it had not been elicited previously is immaterial. Testimony which is incompetent only for lack of connecting facts may be rendered competent by proof of those facts, made subsequently, during the trial. . . . The statement of Cowan, testified to by W. B. Tucker, was properly admitted in evidence. It appears to have been made in the presence of one of the plaintiffs while the work claimed for was in progress, and was therefore part of the *res gestæ*, and not merely a narration."

<sup>4</sup> In *Sharpe v. San Paulo R. Co.* (1873) L. R. 8 Ch. (Eng.) 597, Lord Romilly, M. R., whose decision was affirmed by the court of appeal, dismissed a bill praying for accounts and inquiries as to the indebtedness of the defendant company in respect of certain extra work performed by a contractor who had undertaken, by a contract under seal, to build a railway for a specified sum, and declared it to be quite clear that the engineer had no power to vary the contract; he had power to give directions to do certain things upon the line within the limits of the contract, and if the contractors thought that these things were not within the contract, they were not bound to do them. The bill alleged that the contractors had executed certain other works on the faith of the promises and agreements of Mr. Brunlees (chief engineer) that the contractors should be paid for those works by the company. Lord Romilly remarked that these were merely the inferences and opinions of the contractors, on which the court could not act, and that the company certainly never led the contractors to take any such view. He further said: "As to the extra works, the mere allegation that the contractors did these things upon certain vague statements of the engineer Brunlees, and the allegation of their own feelings and opinions, and the reasons why they did these things, would not ground an equity by which they would be entitled to come for relief to this court. . . . Unless the plaintiffs could show that the company had, by some means or other, in writing—not necessarily under seal—clearly and decisively bound themselves, the plaintiffs could not vary the contract and make a new and substituted contract by reason of any conversations said to have been held with the engineer, which it was obvious, upon the bill itself, he had repudiated and would not assent to." The extent of the engineer's authority was not discussed by the higher court.

has been ordered by his principal shall be carried out, and to make the necessary contracts for its performance.<sup>5</sup>

**b. Architect or other agent supervising the construction of a building.**

It is well settled that, except in so far as special circumstances may operate so as to enlarge his ordinary authority,<sup>6</sup> an

architect or other agent exercising similar functions "has no power to change, alter or modify that contract,"<sup>7</sup> or to enter into a subsidiary agreement for the performance of work in excess of that covered by the contract.<sup>8</sup>

It has been held, however, that this doctrine does not apply where the evidence shows that "the architect was also

<sup>5</sup> In *Henderson Bridge Co. v. McGrath* (1889) 134 U. S. 260, 33 L. ed. 934, 10 Sup. Ct. Rep. 730, the original plan, which provided for several stretches of trestling where the railroad leading to the bridge to be constructed under the main contract crossed river bottoms, was changed by the company, so as to omit the trestles and substitute a continuous embankment with culverts. This alteration necessitated a different system of surface drainage, and it was determined that the borrow pits should form a drainage ditch on one side of the embankment for about two thirds of its length. One Hurlbert, who had supervision of the work in the field, was directed to have the modifications carried out. The plaintiffs' claim was founded in part on the theory that the ditch required under the new plans was extra work, not included in their contract, and that Hurlbert promised that they would be paid for it at the same price that they had bid for excavation, and that it would be estimated from the top of the ground downwards. The contention that this promise bound the defendant was sustained. With regard to another contested item, which had reference to the value of certain extra pile work, the court said that, as the action was on a quantum meruit, the question whether Hurlbert had authority to make a contract as to the payment of the piles was immaterial.

<sup>6</sup> Such a situation may conceivably arise with reference to the provision commonly inserted, that if any dispute shall arise respecting the true construction of or meaning of the drawings or specifications, the same shall be decided by the architect, and his decision shall be final and conclusive. See *Fitzgerald v. Moran* (1894) 141 N. Y. 419, 36 N. E. 508. There, however, the actual ground upon which it was held that a plasterer could not enforce a mechanics' lien was that he had departed from the specifications as to the composition of the plaster, and that a letter in which the architect had complained of his noncompliance with the contract, and directed him to follow the instructions of the superintendent of the manufacturer of the cement used in the mixture, could not be construed as an authority to follow those instructions in respect of a matter fixed by the specifications.

<sup>7</sup> *Mallard, S. & Co. v. Moody* (1898) 105 Ga. 400, 31 S. E. 45 (said, with reference to a certificate, that the contract had been fully complied with); *Adlard v. Muldoon* (1867) 45 Ill. 193 (instruction disapproved

which proceeded on the assumption that an architect was entitled to agree that certain departures from the specifications would be set off against extra work); *McIntosh v. Hastings* (1892) 156 Mass. 344, 31 N. E. 288 (where the actual point decided was, that the principal was not bound to pay the extra cost of furnishing mortar in a way not contemplated by the contract).

In *Boyd v. Newark* (1869) 19 N. J. Eq. 376, where the actual point determined was that the street inspector and committee of the defendant city "had no power to dispense with the contract, or anything that it required in terms," the following remarks were made by Zabriskie, Ch., arguendo: "An architect to whom, by the contract, everything was to be referred, could not hold that a brick house was a compliance with a contract to build one of marble; or that steps of blue flag were brown stone steps; or that a wall 12 inches thick complied with a contract to make one of 16 inches. He could determine whether the marble front, the brown stone steps, or the 16-inch wall were put up in a workmanlike manner, but could dispense with no substantial matter expressly required by the contract. Such approval would not entitle the contractor to recover at law."

See also *Cooper v. Langdon* (1841) 9 Mees. & W. 60, 152 Eng. Reprint, 27, 1 Dowl. N. S. 392, 11 L. J. Exch. N. S. 222, where, in an action of assumpsit on an agreement to build a house according to certain drawings and to the satisfaction of the plaintiff, a plea averring in substance that the defendant had deviated from the drawing by the direction of plaintiff's architect was held bad, no authority on the part of the architect to bind the plaintiff by any deviation from the drawings being alleged.

<sup>8</sup> *Starkweather v. Goodman* (1880) 48 Conn. 101, 40 Am. Rep. 152 (changes in plans increased cost of house); *Campbell v. Day* (1878) 90 Ill. 363 (subcontractor replaced defective piers); *Watts v. Metcalf* (1902) 23 Ky. L. Rep. 2189, 66 S. W. 824 (architect not authorized to bind owner by agreement to pay subcontractor if he went on and finished certain work, after the contractor had thrown it up); *Benton County v. Patrick* (1876) 54 Miss. 240 (commissioner appointed in behalf of a county to supervise the building of a courthouse could not bind the county by contract for extra work); *Day v. Pickens County* (1898) 53 S. C. 46, 30 S. E. 681; *Schauen-Blair Co. Marble & G. Works v. Sisters of Charity* (1914) 77 Wash. 256, 137 Pac. 468 (sub-

the agent of the owner, and represented him in the erection of the building."<sup>9</sup>

In a case where, besides the contract between the employer and the builder, there is a contract, of which the latter is not informed, between the employer and the architect, to the effect that the outlay shall not exceed a given sum, and the builder is by the contract subject to the orders of the architect as to what works he shall execute, the questions whether certain extra works executed by him are worth the alleged amount, and whether certain works are or are not included in the contract, are questions between the architect and the

builder, and not between the employer and the builder, as in the ordinary case, where no such contract exists. Under such circumstances, therefore, the builder cannot "be bound by an undertaking that he would abide by the decision of the architect on all such questions, inasmuch as that undertaking had been entered into by the builder at a time when he was ignorant of the contract between the architect and the employer, and when he supposed that the decision of the architect would be impartial, unbiased, and not one in which he had himself a strong pecuniary interest."<sup>10</sup>

contractor who, under the instructions of the architect, went on with his work after the default of the contractor, was held not to be entitled to enforce a mechanics' lien; *Smith v. Board of Education* (1915) 76 W. Va. 239, 85 S. E. 513 (architect not authorized to change plans as regards material of wainscoting).

In *Merrill v. Worthington* (1908) 155 Ala. 281, 46 So. 477, the question whether recovery could be had for extra grading on a street was held to be for the jury, where the evidence tended to show that the employee in pursuance of whose directions it was performed had been stated by the defendant, when speaking to the claimant, to be his "superintendent," whom he had placed in charge of the work, and whose orders would be "the same as if they came from himself." It was also laid down that, after the introduction of such evidence, testimony as to what the superintendent had said to the claimant was competent.

Reference may also be made to *Rex v. Peto* (1826) 1 Younge & J. 37, 148 Eng. Reprint, 577, where, in an action brought by the Crown upon the bond given by a contractor for the performance of a building contract, which reserved to the obligee the power of directing by its surveyor "additions or omissions," it was held that the obligor must, on a plea of performance, quoad those parts in which no orders were given by the surveyor to vary and deviate from the original plan, show an authority in the surveyor to give such directions, or aver that the deviation or variation was an omission or addition. *Alexander, C. B.*, said: "Is it possible that this clause was intended to give to the surveyor, a person who ought to be in general but an overlooker of the owner, to see that the work is accurately performed, a power to vary the whole scheme of the building? or if it were so intended, that it could have been expressed in such language? In sound construction, it should be limited to that to which the condition had confined it, namely, to such extra works as may be done, or something which is to be omitted; but it cannot refer to the substitution of one thing for another, more

especially anything so important as the making the foundation on which the whole validity and security of the building depends."

<sup>9</sup> *Thomas v. Stewart* (1892) 132 N. Y. 580, 30 N. E. 577. There the agreed case was that one R. was employed by the defendant as his architect and servant, to superintend the work of erecting his house, and that the defendant told one of the contractors that everything was left with the architect. The fact that the change was made "without the knowledge or consent of the owner," as found by the court, was held, when the context was considered, to import, "without his personal knowledge or consent." This decision was treated by the appellate division as a controlling precedent in a case where the changes were made by the direction, or with the consent, of an architect who, as the defendant admitted, was employed by him "to supervise the construction of the building in all of its details." *Schnaier v. Nathan* (1900) 49 App. Div. 298, 63 N. Y. Supp. 38.

In *Loeb Foundry Co. v. Stout* (1895) 61 Ill. App. 166, the right of the plaintiff to recover for work and labor in replacing a part of a roof was predicated on the ground that his employer had "principal charge of the work of erecting the building."

See also *Gibson County v. Motherwell Iron & Steel Co.* (1889) 123 Ind. 366, 24 N. E. 115, where, however, the actual ratio decidendi, though not specified in the opinion as distinctly as it might have been, was apparently the fact of the final acceptance of the building in question by the principals, rather than the extent of the architect's authority as their representative.

Compare also *Powell v. King Lumber Co.* (1915) 168 N. C. 632, 84 S. E. 1032, where it was held that an agent appointed by a nonresident contractor to oversee the work of erecting a building was not a mere foreman, but the local "superintendent" of his principal, and, as such, authorized to bind the contractor to pay for materials furnished to a subcontractor.

<sup>10</sup> *Lord Romilly in Kimberley v. Dick* (1869) L. R. 13 Eq. (Eng.) 20.

**§ 40. Same description of agent. Authority considered with reference to express stipulations as to extra work.**

**a. Civil engineer in service of railway company.**

The following statement of doctrine with regard to contracts for railroad work is found in a standard treatise. "Where the contract contains express provisions that no allowance shall be made against the company for extra work, unless directed in writing, under the hand of the engineer, or some other person designated, or unless some other requisite formality be complied with, the party who performs extra work, upon the assurance of any agent of the company that it will be allowed by the company, without the requisite formality, must look to the agent for compensation, and cannot recover of the company, either at law or in equity."<sup>1</sup> This statement of the law has been approved in a leading New York case.<sup>2</sup>

In all the cases in which the doctrine thus enunciated has been applied, the claimant was a subcontractor, and, as

was pointed out in one of them, the inability of such an employee to recover for extra work ordered by a subordinate engineer may also be predicated on the general ground that there is "nothing in the general duties of an engineer that would authorize him to employ others to do the work on the road, which by express contract belonged to the contractor to do. If he could do this, he might have rescinded the entire contract with . . . [the principal contractor], and let the work to others."<sup>3</sup>

**b. Architect or other agent supervising the construction of a building.**

The general statement in subsec. (a), supra, with regard to the effect produced by restrictive provisions in cases where the principal is represented by a civil engineer, is also expressive, mutatis mutandis, of the manner in which such provisions operate in cases where the claim has reference to extra work done upon a building by the order of an architect or other agent appointed to supervise its erection.<sup>4</sup>

<sup>1</sup> Redf. Railways, 5th ed. pp. 431, 433.

<sup>2</sup> Woodruff v. Rochester & P. R. Co. (1888) 108 N. Y. 39, 14 N. E. 832. There the plaintiffs, who were subcontractors, after having substantially completed a certain cutting, excavated a large amount of earth which had caved into it at four different times. In an action brought to recover the expense of this work the plaintiffs claimed that they did it under contract with the defendant and for its benefit. The evidence produced by them tended to show that they did the work upon the request of the engineer in charge of the work, and under an agreement made with them by which such work was taken outside of their contract with the principal contractors. The court said: "It is not pretended that they were clothed with any special authority so to do; and it cannot be inferred or presumed that while they were in the employment of Brown, Howard, & Company they had any authority to bind the defendant by any contract which they should make. It is true that we do not know the precise relations which existed between Brown, Howard, & Company and the defendant except that, in a general way, they were a construction company engaged under some contract with the defendant in the construction of its road. It cannot be supposed that a construction company was organized, not as contractors to build the defendant's road, but as agents to take charge of and manage its construction for the defendant, with power to bind it by their contracts and engagements. Such a relation between the construction company and the defendant would be quite extraordinary, and, we think, unusual. . . ."

But we will go still further. If it be assumed that Brown, Howard & Company, in some general and undefined way, could be treated as the general agents of the defendant for the construction of the road so that it would be bound by their contracts with Thompson & Company, we should still reach the same conclusion. In that event the defendant would be responsible to Thompson & Company for all the work embraced within their contract according to the terms thereof, and in no other way." It was pointed out that, assuming the work in question to have been "extra work," it was provided in the plaintiffs' contract that no claim should be allowed for such work "unless the same should be done in pursuance of a written order from the engineer in charge, and the claim made at the first settlement after the work was executed." The court then proceeded as follows: "If these engineers were the agents of the defendant, they were its agents with special powers simply to do the engineering work and to superintend and direct as to the execution of the contract. But they had no power to alter or vary the terms of the contract, or to create obligations binding upon the defendant, not embraced in the contract." The court cited with approval the following decisions, in which the right of recovery for extra work ordered by engineers was denied: Thayer v. Vermont C. R. Co. (1852) 24 Vt. 440; Vanderwerker v. Vermont C. R. Co. (1855) 27 Vt. 125; Herick v. Belknap (1854) 27 Vt. 673.

<sup>3</sup> Thayer v. Vermont C. R. Co. (Vt.) supra.

<sup>4</sup> Baltimore Cemetery Co. v. Coburn (1854) 7 Md. 202, it was stipulated in a written

In one case the supreme court of Michigan seems to have committed itself to the adoption of a general doctrine to the effect that, where an architect is expressly declared in the contract to be the "agent" of the owner for the pur-

poses of the work, he has implied authority to dispense with a provision of the type now under discussion, whenever the performance of the contract will be seriously delayed unless the extra work is carried out.<sup>5</sup> On the other hand, the

contract for the building of a gateway to a cemetery "that should any alteration be contemplated from the present design it may be done, provided the parties beforehand agree upon the price and indorse it upon the contract, and unless such agreement be also entered, it is to be taken to be an agreement to make the alteration without any change in the price of the original contract." An action to recover for work performed in constructing two windows not specified in the original plan was held not to be maintainable for two reasons: (1) because this work involved an "alteration" and the agreement and price therefor had not been indorsed upon the contract, and (2) because the architect appointed to superintend the work according to the plan, with such alterations as the parties might agree upon, had no power to bind the owners by promising in their name to pay for this alteration.

In *Stuart v. Cambridge* (1878) 125 Mass. 102, where the written contract provided that any additions to or deviations from the plans and specifications should be directed in writing by the committee or architect, and that "no alterations or additions were to be paid for unless so directed in writing," the plaintiffs offered to show that they drove the piles and did the work in respect of which the suit was brought, under the direction of the defendant's architect, who was the agent of the defendant, and that, when they contended that the work was not included in their contract, he told them "to go ahead and do the work as he directed, and they would be paid for it." Held, that this evidence was rightly excluded. The court said: "No evidence was offered of any waiver of this provision by the defendant, or of any authority in the architect to waive it. This clause was intended to protect the defendant against claims for extra work under alleged oral directions or contracts. If the evidence offered can be construed to show an oral promise by the architect, founded upon a sufficient consideration, to pay for the work, it was made without authority, and is not binding upon the defendant." For a recent case in which this decision was followed with reference to a clause providing that, "if extra work is required, a price for the same must be agreed upon, and approved in writing by the architect, before such work is done," see *Burns v. Thorndike* (1917) 228 Mass. 552, 117 N. E. 799. There it was also held that a subsequent oral approval by the architect was not sufficient to bind the owner.

In *Ahern v. Boyce* (1885) 19 Mo. App. 552, where the action was brought to recover the value of labor performed and

material furnished in repairing a bridge, the grounds upon which the admission of evidence as to the performance of extra work by the plaintiff, and its value, was held erroneous, were thus stated: "Before a party can recover for work done, he must show that it has been done upon request of the party sought to be charged. Here, the request, by the terms of the agreement, had to be evidenced in a certain manner; namely, by writing, signed by the contractor and the superintendent. It is true that such contract provisions may be waived, but there is not a particle of evidence in this case, either that the plaintiff waived it, or that the superintendent had any power to waive it."

In *Leafgreen v. Yablonsky* (1913) 178 Ill. App. 19, it was held that a lien for excavation work not included in a written contract for the erection of a building, but performed by the order of an agent who was superintending its construction in behalf of the owner, could not be enforced by a contractor, where the contract expressly provided that "no extra work or material should be paid for, without a written agreement made and approved by the owner."

See also *Gray v. La Société Française de Bienfaisance Mutuelle* (1901) 131 Cal. 566, 63 Pac. 848 (contractor not entitled to recover cost of raising foundation of building); *L'Hommedieu v. Winthrop* (1901) 59 App. Div. 192, 69 N. Y. Supp. 381 (recovery denied on the ground that the architect had no power except by "provision in writing" to vary the specification of the contract as to the constituents of the stucco to be used).

In *Coker v. Young* (1800) 2 Fost. & F. 98 (*Nisi Prius* case), Hill, J., agreed with the view of counsel that, so far as regards alterations which a surveyor is empowered to order, an oral allowance suffices, if a certificate is not expressly required by the contract.

<sup>5</sup>In *Teakle v. Moore* (1902) 131 Mich. 427, 91 N. W. 636, one of the conditions attached to the general specifications furnished to the contractor before they made their bids read as follows: "The owner and architects shall have full power to make any alterations during the progress of the work which they may deem necessary or advisable, and such alterations shall not affect or make void the contract. No claim for extra work shall be considered unless the price for the same shall have been agreed upon in writing between the owner and architects prior to the commencement of the same." No such condition was attached to the "carpenter specifications" which governed the contract entered into by the plaintiffs. The various contractors were to erect

New York court of appeals, relying upon the fundamental consideration that "the restrictions upon the authority of the architect are for the protection of the owner," has taken the position that his "agency so far as it relates to making alterations, or directing that extra work should be done, is limited to such orders as he shall give in writing."<sup>6</sup> The present writer ventures to express the opinion that the latter of these views is the sounder one. Even if it should be assumed that the architect becomes, by virtue of a stipulation of this character, the general agent of the owner with re-

gard to the control of the work,—a theory for which there is authority, so far as regards contracts which do not embrace any restrictive clauses,<sup>7</sup> the theory that his powers are circumscribed pro tanto by any special provisions which may be inserted in the contract would seem to be more in harmony with accepted principles of construction.

**§ 50. Independent contractor as agent of principal employer.**

The doctrine is well settled that, except in so far as his remedial rights may have been enlarged by a special stipula-

such scaffolding as their work made necessary. The claim of the plaintiffs was, that the work which should have been done prior to their work was delayed; that, for the purpose of hastening this work, they were requested by the architects to build a large scaffold, which could be used by the other contractors, but which was not necessary to enable plaintiffs to perform their contract; and, in reply to their inquiry as to who would pay for it, they were assured that the defendant would do so. The defendant argued that, as each contractor had agreed to furnish his own scaffolding, the architects were not authorized to make such a promise. But this contention was rejected. The court said "Scott & Company were the supervising architects. They were described in all the contracts as 'acting as agents of said owner.' The plaintiffs' contract provided that their work should be completed by October 1st. It is evident from the situation when the roof fell that the work necessary to be done before the carpenter work could be completed was delayed. The architects were acting for the owner in all the contracts. It is perfectly apparent that if, instead of each contractor putting up and taking down such scaffolding as he might need, a scaffold should be built that would answer the needs of all the contractors, it would save expense and expedite the work. We think the architects, for the purpose of accomplishing this, might arrange that the carpenters should put up this scaffold, that Mr. Moore should pay them, and, by agreement with the other contractors, the cost should be prorated among them, and deducted from the amount to be paid upon their several contracts. Had the roof not fallen, just this would have been done, and no question raised."

<sup>6</sup> In *Langley v. Rouss* (1906) 185 N. Y. 201, 77 N. E. 1168, 7 Ann. Cas. 210, reversing (1905) 106 App. Div. 225, 94 N. Y. Supp. 108, the contract contained the following provisions: No alteration should be made in the work as specified, except upon the written order of the architect. But no extra work will be allowed in any case unless itemized estimate is submitted by contractor, and architect's order in writing is given for the same. A verdict for the plaintiff was set aside on the ground that the charge

of the trial judge relating to the architect's authority to waive such provisions of the contract was erroneous. The court said: "Where contracts, including plans and specifications, involve a great amount of detail, and the merits of claims for alterations and extra work are difficult to determine and adjust after the work is completed, a provision requiring the contractor to submit itemized estimates of the expense of proposed alterations or extra work, and that the order of the architect therefor should be in writing, is reasonable and tends to a more definite understanding and avoids controversies. The contractor is not required to make changes or perform extra work unless he first receives written authority therefor; and the contract is, therefore, neither unreasonable nor severe, and it should be enforced. An agent cannot enlarge his own powers by waiving the limitations thereon. . . . A building contract which makes an architect an agent of the owner, and limits his authority in regard to alterations and extra work, as in this case, is entirely different from a contract providing that the contractor shall not be paid for alterations or extra work unless the same are ordered in writing by the owner. A party to a building or other contract can waive a provision therein inserted for his benefit (*Solomon v. Vallette* (1897) 152 N. Y. 147, 46 N. E. 324; *Dunn v. Steubing* (1890) 120 N. Y. 232, 24 N. E. 315; *Eagle Iron Works v. Farley* (1903) 83 App. Div. 82, 82 N. Y. Supp. 503), but it is an elementary rule that an agent for a party is bound by the terms of his agency." The precedent relied on was the *Woodruff Case* (see note 1, supra), *Thomas v. Stewart* (1892) 132 N. Y. 580, 30 N. E. 577 (see § 40, note 9, supra), and *Schnaier v. Nathan* (1900) 49 App. Div. 298, 63 N. Y. Supp. 38, in which the authority of an architect employed by the owner as his agent and representative in the erection of a building was held to extend to giving verbal consent to deviations from the written contract, were distinguished on the ground that the contracts in question contained no limitation on the architect's authority.

<sup>7</sup> See *Thomas v. Stewart* (1892) 132 N. Y. 580, 30 N. E. 577, § 48, note 9, supra.

tion or by statute, a person by whom services have been performed in pursuance of an agreement with an independent contractor cannot hold the principal employer liable for his compensation.<sup>1</sup> The nonliability thus predicated is simply one of the incidents of the peculiar juristic position of an independent contractor, who, although he comes within the scope of the term "agent" in its widest connotation,<sup>2</sup> is not deemed to be an agent in such a sense as to affect the contractee with liability in respect of contracts made or torts committed by him in the course of the work undertaken by him. In other words, the relationship in which he stands to the contractee is of such a nature that *prima facie* the persons whom he employs to perform services

are not brought, by reason of that employment, into privity with the contractee.

The effect of the doctrine above stated is, on the one hand, that a claim for compensation in respect of services rendered by a subcontractor cannot be enforced against the principal employer unless the plaintiff produces affirmative proof that the contractor was acting as the defendant's agent with regard to the hiring of the subcontractor;<sup>3</sup> and, on the other hand, that, in an action brought to recover such compensation, it is error to exclude any evidence which tends to establish that fact.<sup>4</sup>

The purport of some cases which have been decided with reference to the doctrine is stated in the footnote.<sup>5</sup>

<sup>1</sup> The earliest authority for this doctrine seems to be *Bramah v. Abingdon*, an unreported case to which, during the argument of counsel in *Paterson v. Gandasequi* (1812) 15 East, 62, 104 Eng. Reprint, 768, Lord Ellenborough referred, as one which had decided that the defendant was not liable for goods ordered by a surveyor with whom he had contracted.

In *Fairbanks v. Mothersell* (1871) 60 Barb. (N. Y.) 406, it was observed: "As the law now is, in regard to the separate property of married women, they may make special contracts with their husbands and let jobs to them of particular work, such as building and the like, the same as though they were strangers; and in such a case, where the transaction is, in all respects, in good faith, and the husband employs the men on his work in his own name, and for his own benefit, as contractor or jobber, and in no respect on the wife's credit, the laborers so employed would have to look to the husband for pay, and could not make the wife liable, the same as in any other case where a jobber employs laborers for himself, to work on his job."

In *Corbett v. Schumacker* (1876) 83 Ill. 403, where the actual decision was that the leader of a band, who had contracted to furnish the defendant with fifteen musicians to play at a fair, was entitled to maintain an action for the amount due for their services, the court made the following remarks: "If a contractor engages with a railroad company, or any other, to furnish one hundred or more hands to work on the company's railroad, and he does furnish them, would he not have his action against the company, and would it not be absurd to hold that each man so working under the contract had a right of action against the company? Wherein is the difference? The only difference is, appellee was a contractor to furnish music."

Compare also *Wright v. Terry* (1887) 23 Fla. 160, 2 So. 6, where it was held that a contract for the driving of logs at a certain

rate per thousand feet board measure did not constitute the contractor an agent to employ men for the latter.

<sup>2</sup> "One who is employed to do any act for the benefit of another is an agent." Story, *Agency*, § 1.

An agent is "one who acts for or in the place of another." *Wynegar v. State* (1901) 157 Ind. 577, 62 N. E. 38; *Rowe v. Rand* (1887) 111 Ind. 206, 12 N. E. 377.

For similar definitions, see *Anderson's Law Dict.*, quoted in *Crowley, C. & Co. v. Sumner* (1901) 97 Ill. App. 304; *Katzenstein v. Raleigh & G. R. Co.* (1881) 84 N. C. 688; *Peters v. St. Louis & S. F. R. Co.* 150 Mo. App. 721, 131 S. W. 917.

"In one sense they [stevedores] may be said to be agents of the owner." *Willes. J., in Murray v. Currie* (1870) L. R. 6 C. P. (Eng.) 24, 40 L. J. C. P. N. S. 26, 23 L. T. N. S. 557, 19 Week. Rep. 104.

"An agent is a substitute for another. Here White & Son, contractors, were the substitutes of Davids, who caused the house to be built." *Davids v. Harris* (1848) 9 Pa. 501.

<sup>3</sup> See cases cited in note 5, *infra*.

<sup>4</sup> In *Finkelstein v. Waldo* (1897; Sup. App. T.) 21 Misc. 460, 47 N. Y. Supp. 590, reversing (1897) 20 Misc. 701, 46 N. Y. Supp. 686, where recovery for work performed in painting the defendant's houses was sought on the ground that it was done on the order of one Converse, and that he was the defendant's agent respecting the work, the defendant denied the agency of Converse, and in defense undertook to prove that she had contracted with Converse for the work, and paid him for it; all of which evidence was excluded under exception. The written contract with Converse, and his receipts for the payments made thereon, were also offered by the defendant, and excluded. Held that the exclusion of this evidence was error.

(a) Contractor not acting as agent of the principal employer.

<sup>5</sup> In *Hampton v. Glamorgan County Council* [1917] A. C. (Eng.) 13, affirming (1910;



C. A.) 113 L. T. N. S. 112, a contract by which one Shail agreed to build a school in accordance with the specifications and directions of the defendant's architect for the lump sum of £13,600, included the following specification: "Provide the sum of £450 for a low-pressure heating apparatus." A hot-water engineer submitted a scheme to the architect for the heating of the school for £391, and by the direction of the architect this scheme was accepted by the builder. During the progress of the work Shail paid to the engineer £200 on account, but he was unable to pay the balance. Shail having become bankrupt, the engineer sued the defendant for the balance, alleging by his statement of claim that the work was done and the goods supplied under a contract which was pleaded alternatively as having been made by the architects, or by Shail acting on behalf of the defendants. It was held that, having regard to the language of the contract, the plaintiff must be taken to have contracted with Shail as principal, and not as agent of the defendants, and that the action consequently could not be maintained. Lord Loreburn said: "Had Shail that authority, as is argued, as to this £450 item? My Lords, there is no evidence of it, unless the terms of the contract which deal with provisions confer that authority. They do not do so in terms. Do those words do so by implication? It is said that they merely required Shail to advance the sum of £450 to the Glamorgan county council if that was needed. If that be the true construction, I do not see why Shail was to be paid for doing that work at all, because he was merely a lender of money in connection with that work, and yet the contract says that he is to do the work, and he undertakes to do it. He contracted also that he was to be paid for it as part of the whole £13,600, provided that he was required to do it, and that he did do it, or got it done. That also is not consistent with his duty being only the duty of advancing money. It is consistent only with the view, which I think is the true view, that he was the contractor as to this heating apparatus, and employed a subcontractor. Accordingly, I think he was not an agent of the county council to employ the plaintiff, but he was the principal himself, and the plaintiff was the other principal to this subcontract." Lord Haldane said: "Prima facie the only relation between the appellant and Shail was that of two parties dealing as principals; there is nothing in that contract which establishes a relation of privity between Hampton (the appellant) and the respondents, and there is nothing in the course of dealing which displaces the inference that that is not only the true construction of the contract, but the position in which the parties left themselves." Both Lord Loreburn and Lord Shaw expressed their disapproval of the law as laid down, with reference to a similar contract in *Crittall Mfg. Co. v. London County Council* (1911; K. B. D.) 75 J. P. (Eng.) 203, where

Channell, J., thus stated his theory as to the relationship of specialists to the employer of the contractor: "In the case of these provisional items, however, it does seem that the contract made to procure them is, in point of fact, a contract in which the building owner is the real principal; because if it is a good contract he gets the benefit of it; if it is a bad contract, he suffers the loss. He is the person who is interested. The builder is not in the least interested. He gets no more if it is a good contract, and no less if it is a bad one. He simply has his accounts settled." Lord Loreburn declared that there is no "difference of principle as between a prime cost item and any other item in respect of which one person is to find and supply goods for the benefit of another, which makes it any more or any less likely that there is a contract between the person who supplies the goods and the person who ultimately enjoys the benefit of the goods."

Two other decisions which seem to have proceeded upon the general theory that, under a contract of this character, a privity between the subcontractor and the owner of the building is created by the order of the architect, were not referred to in the House of Lords; but they have presumably been discredited by its judgment, in so far as they depend upon that theory—*Hobbs v. Turner* (1902; C. A.) 18 Times L. R. (Eng.) 235, affirming (1901) 17 Times L. R. 83; *H. Young & Co. v. White* (1911) 76 J. P. (Eng.) 14, 28 Times L. R. 87. Whether they are susceptible of being distinguished with reference to the particular stipulations of the contracts involved is possibly a question still open for discussion.

In *United States v. Driscoll* (1877) 96 U. S. 421, 24 L. ed. 847, one Ordway contracted with the United States to furnish granite from certain quarries at specified prices, and deliver it in Washington at such times as might be required. It was provided by the contract that he should "furnish all the labor, tools, and materials necessary to cut, dress, and box, at the quarry or quarries, all the granite in such manner as should be directed;" that the United States should pay him the full cost of such labor, etc., and also the insurance on the granite, increased by 15 per cent on such cost; that he should furnish such number of men as might be deemed necessary for the proper prosecution of the work by the United States; and that, in default of delivery at the times required by the United States, he should pay \$100 for each day thereafter. Held, that a laborer who had worked under the contractor for ten hours a day was not entitled to recover from the United States compensation in respect of the two hours by which such a day's work exceeded that fixed by statute. The court said: "It is clear that there was no privity between the appellee and the United States. Ordway employed him and was to pay him, and did pay him. The United States had no interest

in the rate or amount paid, save that the sum so paid, with 15 per cent in addition, was to be paid to Ordway. The fact that Ordway procured the appellee's receipts, presented his own vouchers to the government, and received his pay before paying his hands, is immaterial as regards the rights of the parties. It was a convenience to the contractor, and safe for the government. The hands trusted the former, and, if he had failed to pay them, the loss would have been theirs." The opinion was also expressed that the stipulation as to the penalty was "incongruous with the idea of Ordway's being an agent, and not a contractor."

In *McKenna v. Stayman Mfg. Co.* (1908; Sup. App. T.) 112 N. Y. Supp. 1099, where the plaintiff sought to hold the defendant responsible for services rendered to the Underwriters' Engineering & Construction Company, on the theory that the latter company was the agent and the defendant an undisclosed principal, recovery was denied on the ground that a perusal of a written contract (not set out in the opinion) on which the claim was based did not disclose that it was the intention of the parties that the defendant should prescribe not only what the engineering company should do, but also the manner of doing it, nor did it appear that the engineering company agreed to give its time exclusively to the defendant. "It was therefore not a servant (*Singer Mfg. Co. v. Rahn* (1889) 132 U. S. 518, 33 L. ed. 440, 10 Sup. Ct. Rep. 175), and much less an agent, as every servant is an agent, though the converse in law be not true. The contract as a whole exhibits independence rather than dependence on the part of the engineering company (*Uppington v. New York* (1901) 165 N. Y. 233, 53 L.R.A. 550, 59 N. E. 91, 9 Am. Neg. Rep. 115), and therefore an absence of obligation as undisclosed principal on the part of the defendant."

In *McCarthy v. Hughes* (1913) 36 R. I. 66, 88 Atl. 984, Ann. Cas. 1915D, 26, where the action was brought to recover for services rendered by a constable to a collection agency, the defendant contended that the plaintiff, as a constable in serving said writs, was informed by the writs as to who was the principal; that the defendant was the agent of the creditor or principal disclosed in each writ; and that the defendant had exonerated himself from any liability by reason of having disclosed the name of the principal, through its appearance upon the writ; especially since he made no express agreement to pay the fees claimed. But this theory as to the effect of the defendant's contract with his employer was rejected. The court said: "It is undisputed that he advertised himself as a collector of bills, and that he carried on the business of collecting bills. What was his contract with the creditors who gave him their bills for collection? What was his authority as to the employment of attorneys to sue or of officers to serve the writs? There is no evidence as to such contract, or as to the

authority from those who gave him their bills to collect. His contract with those who employed him to collect bills and his authority can only be inferred from the nature of the employment. . . . In our opinion a collection agency, in taking steps for the collection of accounts, in the absence of a special contract limiting its liability—and no such contract is here claimed—is an independent contractor, and is liable to those whom it employs in the business of making collections. We see no reason for a distinction in this respect whether the employee is an attorney or a constable."

In *Campbell v. Day* (1878) 90 Ill. 363, where subcontractors on a building sought to recover for work done in replacing defective work under the direction of the supervising architect, it was argued without success that the principal employer should be held responsible, for the reason that he had seen the plaintiffs at work and hurried them on. The court said: "When . . . appellees saw them [plaintiffs] at any particular work, they were authorized to assume they were at work under Darcy, as his subcontractors or servants; and whether the work was of one kind or another could make no difference to them. They had put the whole matter in Darcy's hands, surrendered to him the entire possession, and in the absence of notice that he had abandoned the work, they could have no reason to suspect that anybody there engaged was not under him. . . . The evidence clearly shows that appellees all the time supposed the change in the piers was being done by Darcy or under his direction, and that they never gave any authority to have it done by others, nor did the architect suppose that he was making a contract with Burkhardt & Sherwin. In what he did and said he assumed they were acting under Darcy, and this, also, seems to have been Darcy's understanding. It was incumbent on Burkhardt & Sherwin, if they intended to charge appellees, to have notified them before they commenced."

**(b) Contractor acting as agent of the principal employer.**

In *Carolina Hardware Co. v. Raleigh Bkg. & T. Co.* (1915) 169 N. C. 744, 86 S. E. 706, the right of the plaintiff to recover against the principal employer for materials furnished to the contractor was affirmed on grounds thus stated: "The evidence reported by the referee, in our opinion, is sufficient to justify his Honor in finding from that evidence that when the trust company saw that its building would not be completed and that its contractor had broken down, its officers authorized the contractor to purchase the necessary material to complete the building and agreed to pay for it. It is not necessary that this contract should have been made directly with these plaintiffs. If the facts be true, as reported by the referee and found by his Honor, then Carr was constituted agent of the trust company and duly authorized to

**§ 51. Effect of decisions summarized with reference to the descriptions of work in question.**

In order to increase the utility of the foregoing review of the authorities, which shows their purport under a classification based upon the nature of the functions discharged by the employing agent, it has been deemed advisable to append in a footnote a summary, by

means of which the practitioner will be enabled to trace all the cases relating to each particular description of services for which claimants have sought to recover compensation. For the purposes of such a summary a brief memorandum, indicating the points decided and the sections in which the facts involved and the rationale of the decisions are stated, will be sufficient.<sup>1</sup>

purchase the material necessary to complete the building. The benefits to accrue to the trust company were sufficient consideration to support such new agreement. When that agreement was made, the trust company undertook to complete the building itself. Carr then became its agent, and not an independent contractor."

See also *Seattle Lumber Co. v. Sweeney* (1906) 43 Wash. 1, 85 Pac. 677, where the existence of an actual, as well as a statutory, agency, was held to be inferable from evidence the effect of which is stated in § 56, note 5, *infra*.

In a Newfoundland case it was held that the "supplier and receiver" of a fishery voyage was not the principal of the person who made the voyage and hired the servants, and consequently the latter was liable for their wages. *Greeley v. Monroe* (1891) Newfoundland Rep. 484.

**Services in procuring sale of real property.**

<sup>1</sup> *Authorized* employment by president of corporation, § 22, note 3; by general manager of mercantile corporation, § 24, note 2; by general manager of building and loan association, § 24, note 4; by general manager of corporation engaged in selling real estate, § 24, note 11; by departmental manager, § 25a, note 1.

*Unauthorized* employment by president of company, § 22, note 5.

**Services in procuring sale of personal property.**

*Authorized* employment by president of corporation, § 22, note 3; by president appointed as general manager of corporation, § 24, note 26; by person superintending work for nonresident contractor, § 47, note 9.

*Unauthorized* employment by president of corporation, § 22, notes 5 and 6; by general manager, § 24, note 29.

**Services in relation to the purchase of real property.**

*Authorized* employment by general manager of colonization company, § 24, note 5.

**Services of agent in procuring loan.**

*Unauthorized* employment by president of corporation, § 22, note 6.

**Services in procuring contractor for construction work.**

*Unauthorized* employment, § 10, note 1.

**Services in procuring investors.**

*Authorized* employment by general manager of corporation, § 24, note 3.

**Legal services.**

*Authorized* employment by general agent in respect of real estate transactions, §§ 1-2, note 1; by person appointed as attorney in eminent domain proceedings for the expropriation of the principal, § 3, note 2; by general agent of insurance company, § 8, notes 1 and 2; by another attorney, § 9, notes 1-3; by general counsel of corporation, § 9, notes 4 and 5; by agent appointed to procure contracts for street work, § 11, note 1; by wife of defendant, § 19, note 2 (necessaries); by husband appointed as general agent in respect of the management of his wife's separate estate, § 18, note 4; by brother of defendant, § 20, note 1; by president of corporation, § 22, note 3; by treasurer of parish, § 30, note 1.

*Unauthorized* employment by agent for sale of real property, § 3, note 3; by local agent of foreign brewing corporation, § 5, note 4; by agent appointed to sell machinery on commission, § 5, note 5; by agent to collect rent, § 7, note 1; by husband of defendant, § 19, note 1; by president of company, § 22, note 5; by acting president of bank, § 22, note 6; by agent having exclusive charge of business of loaning money on real estate, § 23, note 4; by general manager of real property owned by individual, § 23, note 5; by treasurer of corporation, § 30, note 2.

**Medical and similar services rendered to injured employees of individuals.**

*Authorized* employment by clerk (under circumstances as proved), § 44, note 4.

*Unauthorized* employment by general manager, § 23, note 7; by foreman, § 29, note 2; by local agent of stagecoach proprietor, § 42, note 1; by clerk, § 44, note 3.

**Medical and similar services rendered to injured employees of railroad companies.**

*Authorized* employment by president and vice president, § 22, note 3; by general manager, § 24, notes 14, 16, and 17; by general superintendent, § 26, notes 2 and 3; by division superintendent, § 27, notes 7 and 9; by conductor (under circumstances as proved), § 37, note 2.

*Unauthorized* employment by foreman, § 29, note 2; by treasurer, § 30, note 3; by secretary, § 31, note 1; by trainmaster,

§ 36, note 1; by yardmaster, § 36a, note 1; by conductor, § 37, notes 1 and 3; by chief surgeon, § 40, note 1; by local physician regularly or specially employed, § 40, notes 4 to 7.

**Medical services rendered to employees of corporations other than those operating railroads.**

*Authorized* employment by president, § 22, note 3; by general manager, § 24, notes 20, 21, and 26; by assistant manager, § 25, note 2; by superintendent of power house, § 27, note 12; by chief surgeon, § 40, note 3.

*Unauthorized* employment by general manager, § 24, notes 20, 21, 22; by general superintendent, § 26, notes 5 to 7; by departmental superintendent, § 27, note 11; by foreman, § 29, note 2; by secretary, § 31, note 2.

**Medical services rendered to passengers injured on railroad trains.**

*Authorized* employment by general manager, § 24, note 15; by general superintendent (where injury was caused by negligence), § 26, *quere*; by claim agent, § 32, note 1.

*Unauthorized* employment by attorney, § 9, note 6; by general superintendent, § 26, note 4; by division superintendent, § 27, note 8; by foreman, § 29, note 2; by station master, § 33, note 1; by conductor, § 37, note 1; by inspector of police, § 38, note 1; by inspector on street railway (under circumstances as proved), § 39, note 1.

**Medical services rendered to passengers injured on stagecoaches.**

*Authorized* employment by local agent, § 42, note 1.

**Medical services rendered to travelers injured by railroad trains.**

*Unauthorized* employment by superintendent of the operation of trains, § 27, note 7; by division superintendent, § 27, note 10.

**Medical services rendered in an emergency.**

The effect of an emergency in enlarging the ordinary powers of agents is discussed in § 52, *infra*.

**Medical services rendered to married women.**

Liability of husband, § 19, note 2 (necessaries).

**Medical services rendered to animals.**

*Unauthorized* employment by freight agent of railroad company, § 34, note 1.

**Services rendered in procuring patents.**

*Authorized* employment by general superintendent, § 26, note 12.

**Services of architect.**

*Authorized* employment by two directors of a corporation, with knowledge of the whole board, § 21, note 1; by general manager of sanitarium association, § 24, note 28.

*Unauthorized* employment by husband of defendant, § 18, note 1; by president of corporation, § 22, note 5; by building committee, § 46, note 1.

**Services of civil engineer.**

*Authorized* employment by president of corporation, § 22, note 6.

**Services of surveyor.**

*Unauthorized* employment by president of corporation, § 22, note 6.

**Services of scientific expert.**

*Authorized* employment by president, § 22, note 6.

**Services of accountant.**

*Authorized* employment by president, § 22, note 5.

**Services with regard to inventions.**

*Authorized* employment by president of manufacturing company, § 22, notes 3 and 5.

**Services in educating children.**

*Authorized* employment by wife, § 19, note 2 (necessaries).

**Work and labor generally.**

*Authorized and unauthorized* employment by independent contractor, § 50.

**Work and labor on buildings.**

*Authorized* employment by husband of defendant, § 18, notes 5–12, by wife of defendant, § 19, note 2 (necessaries); by employee licensed to occupy house, § 13, note 1; by general manager of mine, § 24, note 8.

*Unauthorized* employment by husband of defendant, § 18, note 1; by son of defendant, § 20, note 1; by care taker, § 12, note 1.

**Work and labor on railroads.**

*Authorized* employment by president of railroad company, § 22, note 3.

*Unauthorized* employment by president of railroad company, § 22, notes 5 and 9; by civil engineer in charge of construction, §§ 47(a), 48(a), 49(a).

**Work and labor on telegraph line.**

*Unauthorized* employment by foreman, § 29, note 1.

**Work and labor in mines.**

*Authorized* employment by general manager of mining company, § 24, note 7.

**Work and labor on ships.**

*Authorized and unauthorized* employment by master of ship, § 15.

**Work and labor on machinery.**

*Authorized* employment by agent appointed to purchase a machine, § 6, note 1.

*Unauthorized* employment by an individual director of a corporation, § 21, note 2; by agent to look after the property, and consummate a prospective sale, § 3, note 1; by agent appointed to lease the property, § 4, note 1.

**Logging operations.**

*Authorized* employment by "woods superintendent" of lumber company, MARTIN.

## II. Effect of an emergency in enlarging the ordinary powers of agents.

### § 51a. Generally.

The well-settled doctrine that the ordinary powers of an agent with respect to the making of contracts may sometimes be enlarged by the supervision of an emergency necessitating immediate action has frequently been applied in cases of the type reviewed in the present monograph. So far as regards some of the illustrative rulings, it will be sufficient to refer the reader to the earlier section in which their effect is stated.<sup>1</sup> But the decisions relating to claims of one particular description, viz., those based on medical and similar services rendered to injured persons, are sufficiently numerous and important to call for special treatment.

## § 52. Enlargement of authority considered with reference to the enforceability of claims founded on medical and similar services.

### a. Contracts made by agents of individual employer.

In a case where an action to recover for medical services rendered to an employee in a laundry operated by a partnership was held not to be maintainable, the court did not hesitate to hold that "in those avocations of life *unaccompanied by dangers*, an employer is not liable for the services of a physician summoned by his manager or foreman or other servant to attend an employee in a case of sudden illness or injury, whatever his moral obligation may be."<sup>1</sup> There is nothing in the opinion to show what classes of occupations were re-

DALE V. LOBDELL-EMERY MFG. Co. ante, 1 (§ 27, note 4); by general manager of non-resident principal, § 23, note 3.

Unauthorized employment by field superintendent of lumber company, § 27, note 6.

### Threshing of wheat.

Authorized employment of co-owner of wheat, § 16, note 1.

### Services in regard to wrecked ships.

Authorized employment by general manager of steamship company, § 24, note 9.

### Services in unloading goods from railway cars.

Authorized employment by division superintendent of company, § 27, note 3.

### Services in conveying mails.

Unauthorized employment by station agent, § 33, notes 7 and 8.

### Services in transporting goods.

Unauthorized employment by manager of tugboat, § 28, note 1.

### Services in preparation of pictures.

Authorized employment by agents of executive committee managing details of public celebration, § 45.

### Services in furnishing board and lodging.

Authorized employment by person superintending work for contractor, § 47, note 10 by general agent of absent manufacturer, § 23, note 2.

### Services in regard to advertising.

Authorized employment by local agent of a foreign mercantile company, § 5, note 1; by financial agent appointed to promote sale of corporate stock, § 5, note 3; by

president of corporation, § 22, note 3; by manager of hotel, § 23, note 1.

Unauthorized employment by agent for sale of merchandise, § 5, note 2.

### Services in procuring detection of criminals.

Authorized employment by general manager of railway company, § 24, note 6; by general manager of hotel, § 24, note 10; by assistant manager of hotel, § 25, note 1; by superintendent of a railway company having general charge of the operation of the road, § 27, note 2.

Unauthorized employment by superintendent of trucking in mercantile establishment, § 27, note 5; by station agent of railway company, § 33, note 6; by route agent of express company, § 41.

### Services of undertakers.

Unauthorized employment by clerk of railroad company, § 44, note 1.

<sup>1</sup> Louisville & N. R. Co. v. Vaughan's Transfer Co. (1909) Ky. 123 S. W. 253 (§ 33, note 9); Hill v. Coates (1907: Sup. Ct. App. T.) 34 Misc. 535, 69 N. Y. Supp. 964 (§ 12, note 1); Pacific Bank v. Stone (1898) 121 (§ 22, note 6).

<sup>1</sup> Holmes v. McAllister (1900) 123 Mich. 493, 48 L.R.A. 396, 82 N. W. 220. The court said: "An employee in a bank, store, or shop, or upon a farm, may become suddenly very ill, or in some way seriously injured, so that some foreman or other employee might properly deem immediate medical attendance necessary, and, in the absence of the employer, summon a physician. Is the employer liable? We are cited to no authority which so holds. It is doubtful whether such an employer would be liable if he himself sent for the physician to attend one of his employees. It is unnecessary upon this point to express an opinion."

garded as coming within the vague words which are italicized. But it is not easy to concede that this description is applicable to any kind of industry, whatever it may be, which, like the one in which the injured person was in this instance employed, is carried on by steam-operated machinery.

In another case, where recovery was denied for services performed by a doctor who had been called in by the foreman of a manufacturer to treat an injured employee, and then employed by the general manager of the concern, the court made the following remarks: "Whether or not such an extreme case might arise as would justify or require the court to impose on individual employers a duty analogous to that imposed on railroad companies, it is unnecessary for us to determine. There are here no facts showing any emergency, save the necessity for the immediate services of a surgeon. No necessity for action by the employer is shown. It does not appear but that the injured person was possessed of abundant means to provide for himself, nor does it appear that he lacked friends and relatives both able and willing to provide for him."<sup>3</sup> The responsibility to which railroad companies had been held to be subject was declared to be referable to the consideration that they occupy "a peculiar position with reference to such matters, exercising quasi public functions, clothed with extraordinary privileges, carrying their employees necessarily to places remote from their homes, subjecting them to unusual hazards and dangers." The

views thus expressed were approved in two subsequent cases, involving the liability of companies.<sup>3</sup>

The reason assigned in one case for the disallowance of a claim in respect of medical services rendered at the request of a surgeon who had been previously engaged by the defendant to treat an injured employee was, that the action could not be maintained either on the ground of "substituted agency" or on the ground of emergency.<sup>4</sup>

*b. Contracts made by managing agents of railway companies.*

An examination of §§ 24 to 27, *supra*, will show that nearly all the cases in which claims of this description were involved have been considered and determined with reference merely to the question whether the contracts under discussion were within the scope of the ordinary powers of the employing agents. Cases decided in this point of view do not cast any light upon the theory entertained by the courts with regard to the qualifying effect of the element of an emergency.

In a New York case, in which it was held that the employment of a surgeon to treat a child who had been struck by a moving car was not within the ordinary powers of a superintendent who controlled all matters connected with the operation of trains (see § 27, *supra*), the contention "that the emergency of the case and the benefit resulting to the defendant from the employment," justified the act of that officer was raised and rejected.<sup>5</sup>

<sup>3</sup> Chaplin v. Freeland (1893) 7 Ind. App. 676, 34 N. E. 1008. In the preceding year the same court had declined to determine whether or not the rule as to the effect of an emergency applied to private employers. Toledo, St. L. & K. C. R. Co. v. Mylott (1892) 6 Ind. App. 438, 33 N. E. 135.

<sup>4</sup> New Pittsburgh Coal & Coke Co. (1900) 25 Ind. App. 282, 58 N. E. 87; Cushman v. Cloverland Coal & Min. Co. (1908) 170 Ind. 402, 16 L.R.A. (N.S.) 1078, 127 Am. St. Rep. 391, 84 N. E. 759. See note 7 to this section, *infra*.

<sup>5</sup> Bond v. Hurd (1904) 31 Mont. 314, 78 Pac. 579, 3 Ann. Cas. 566. The court said: "Presumptively, plaintiff, when he was employed, assumed that he was a competent physician, and capable of taking care of the case for which he was employed without assistance. If he concluded that assistance was required, before procuring the same it was his duty, if he desired to hold defendant liable for the payment of the bills of an assistant, to communicate with him and obtain his con-

sent to the employment. He knew where defendant resided, and knew of the telegraphic correspondence between him and Williams, and could have communicated with him. If the plaintiff had the right to employ Miller and make the defendant liable for his services, he would have had a like right to employ as many other physicians as he might have deemed necessary, and compelled defendant to have paid them all."

<sup>6</sup> Stephenson v. New York & H. R. Co. (1853) 2 Duer (N. Y.) 341. The court of common pleas reasoned thus: "No emergency arose which, but for this employment, would have interrupted or prevented the running of defendant's cars. If the injury was not caused by the negligence of its servants, contracting to pay for expenses to which they could not be subjected by law would be no benefit to the company. If caused by such negligence, this employment would not exonerate them from any liability which would otherwise have attached. The principle sought to be invoked

On the other hand, the liability of a railroad company for medical services rendered to an employee at the request of its general superintendent has been affirmed in Alabama on the ground that such an official, "having supervision of the general management and operation of the road, including the employment, discharge, and control of employees, may, in an emergency, make any contracts connected with or necessary to running the trains."<sup>5a</sup>

*c. Managing agents of corporations other than railway companies.*

The doctrine that the ordinary powers of agents belonging to this category may be enlarged by an emergency has been unreservedly accepted by one of the courts which hold (see § 24, *supra*) that the employment of a doctor to attend on an injured person is not within the scope of those powers.<sup>6</sup> By another of those courts it has been accorded a recognition of an extremely qualified nature in a case where the services in question were rendered to a workman in a mine. The court declined to lay it down absolutely that "a case cannot arise with a mining or manufacturing company, or even with an individual, wherein the facts may be so unusual and extreme as to impose upon the employer a duty analogous to that imposed on railroad com-

panies."<sup>7</sup> But the express ruling that "the averment that the injured party's wounds were so severe as to create an emergency for the immediate attention of a physician and surgeon in order to save life is but pleading the baldest conclusion" indicates that this general concession as to the effect of an emergency was not intended to embrace the very class of cases which have usually been viewed as appropriate for the application of the doctrine here under discussion. The serious nature of the injuries, and the consequent risk of death or permanent incapacity to which the injured persons would have been exposed if medical treatment had been postponed, are precisely the circumstances which, in most of the cases bearing upon the subject, have been assumed to constitute sufficient grounds for affirming the responsibility of the defendants.<sup>8</sup> It is, moreover, extremely difficult to allow any decisive weight to the particular reason which was adduced in support of the theory of the court, viz., that the conditions incidental to work on railroads and in mines are so essentially diverse that a different standard of responsibility may and ought to be applied, according as the person treated by the claimant was engaged in one of these descriptions of industry or the other.<sup>9</sup> For the purposes of its argu-

has no application to the facts of this case." The latter part of this statement is in harmony with the general views expressed a few years previously by the English court of exchequer in *Cox v. Midland Counties R. Co.* (1849) 3 Exch. 268, 154 Eng. Reprint, 844, 18 L. J. Exch. N. S. 65, 13 Jur. 65 (see § 33, note 1, *supra*, which, so far as appears from the report, was not brought to the attention of the New York court. But that case, in so far as it relates to the effect of an emergency in enlarging the normal powers of an agent, has been overruled by the later decision of the exchequer chamber in *Langan v. Great Western R. Co.* (1874) 30 L. T. N. S. (Eng.) 173. See note 10 to this section, *infra*.

<sup>5a</sup> *Sevier v. Birmingham, S. & T. River R. Co.* (1890) 92 Ala. 258, 9 So. 405.

<sup>6</sup> See *Journal & T. Co. v. Lones* (1914) 130 Tenn. 209, 169 S. W. 760, where the actual point determined was that the manager of a newspaper company was not authorized to impose upon it a liability for medical services rendered to an injured employee after the emergency created by the accident had expired.

<sup>7</sup> *Cushman v. Cloverland Coal & Min. Co.* (1908) 16 L.R.A.(N.S.) 1078, 170 Ind. 402, 127 Am. St. Rep. 391, 84 N. E. 759. The

actual ratio decidendi was that a complaint was demurrable which averred that the plaintiff had been engaged by the superintendent of a mine to attend on a servant, and that this contract had been ratified by the president and general manager, but which did not allege any facts showing the existence of a special emergency which imposed upon the mining company the duty of employing a doctor. This decision was followed in *Sourwine v. McRoy Clay Works* (1908) 42 Ind. App. 358, 85 N. E. 782.

<sup>8</sup> That the supreme court of Indiana itself was in this case unmindful of its earlier views concerning the nature of an emergency is apparent from the statement in *Terre Haute & I. R. Co. v. Brown* (1886) 107 Ind. 336, 8 N. E. 218, that such "an overwhelming emergency might arise as would create a necessity for immediate action to save life, or prevent great bodily suffering."

In all the cases cited in subsec. (d), *infra*, not excluding those of the Indiana courts, this conception of the nature of an "emergency" was assumed to be the appropriate one.

<sup>9</sup> The remarks made in this connection were as follows: "This exception relating to railroads has no bearing on the question before us. The appellee is a coal mining

ment in this point of view it is assumed by the court that, in respect of his ability to procure medical attendance promptly, either on his own initiative, or by the help of relatives or friends, a railroad employee is always more unfavorably situated than a miner. That such an assumption cannot warrantably be entertained as a basis for a general rule is at once apparent when we advert to the notorious fact that a large part of the labor in the mines of this country is performed by men who have no family ties, and are constantly moving from place to place.

*d. Subordinate agents of railway companies.*

By most of the courts which have expressed an opinion upon the point it has been held that subordinate agents of a railway company, who, under ordinary

circumstances, are not empowered to bind it by contracts for medical attendance on its servants or passengers, have an implied authority to make such contracts in its behalf, in cases where there is an urgent necessity for the immediate employment of a physician or surgeon to attend to servants or passengers who have been injured by conditions or occurrences incident to the operation of the road. The earliest illustration of this doctrine is furnished by a case in which the English court of exchequer chamber upheld a verdict against a railway for the cost of board, lodging, and other necessities which the plaintiff, an innkeeper, had, at the request of a sub-inspector of the railway police, whose duty it was to attend at the scene of an accident, supplied to certain injured persons who had been carried into the inn after an accident.<sup>10</sup> As is shown by

company, a strictly private corporation. Its business is stationary. Its employees perform their duties in one general working place, near their homes, family, friends, and acquaintances, and have all the facilities for hastily summoning medical and other aid, in time of pressing emergency, as may be possessed by the corporation. There is no greater or different reason for holding a private mining corporation responsible for supplying medical aid for its employees than appertains to all kinds of manufacturing bodies; and we perceive no reason why either class of corporations, under ordinary circumstances, should be required to furnish their workmen with medical service any more than they should be required to furnish them with dinner. . . . It is not averred that the injured employee was unable to help himself, or that he had no money or credit or family or friends present to give him assistance, nor is it shown by the complaint that there existed any other reason why he was not able and competent to speedily summon a physician as the company." In this passage the court reiterates, in slightly changed language, the arguments previously advanced by the court of appeals in *Chaplin v. Freeland* (1893) 7 Ind. App. 676, 34 N. E. 1007 (see subsec. (a), supra), and adopted in *New Pittsburgh Coal & Coke Co. v. Shaley* (1900) 25 Ind. App. 282, 58 N. E. 87, in which a counterclaim founded on a contract made by the manager of a coal company for the treatment of an injured employee was disallowed.

<sup>10</sup> *Langan v. Great Western R. Co.* (1874) 30 L. T. N. S. (Eng.) 173. There the passengers in question were carried into plaintiff's inn, partly by the help of the station master of the station where the collision took place. The subinspector ordered some brandy to be given to one of the injured persons, and, in reply to a question of plaintiff's as to who would pay for the

maintenance of the injured persons, replied, "Don't trouble yourself about that; we'll see that all is right." Bramwell, B., said: "Surely it is reasonable to say that the person who is chief in office where the accident takes place should have authority to do those things which must be done at once, and which are presumably for the benefit of the company. Take the case of a number of bystanding laborers who are asked to clear the line; that is not a matter of absolute necessity, but it is presumably for the benefit of the company. Take the case of a person in a state of collapse, to whom a glass of brandy may be of vital importance, could there not be authority to pledge the company's credit for that? And here the question of quantum is not raised. If, at the outset, Locke [the sub-inspector of police] had said that he was going to pledge the company's credit for six or seven weeks' maintenance of the sufferers, it may be that he would thereby have exceeded his authority. If it were his duty to report what he had done, the company might repudiate any further liability, and tell the plaintiff that if she continued to keep the persons injured beyond a certain time, she must do so at her own expense. I do not determine, therefore, whether the question of quantum, if it were raised, would be determined for or against the railway company. I go on the ground that under the circumstances of the case there was a necessity for immediate action, and there was no one to direct what should be done but Locke." Denman, J., said: "I think he [the inspector] had authority to do what was reasonable in the case of injured persons, and, ex necessitate rei, to take them to a place of security, and there have them properly attended to till the arrival of a doctor. I do not say that it necessarily follows that he would have authority to give orders for the supply of every pos-



the extracts from the judgments which are quoted in the footnote, the rationale of this very important decision was that the emergency created by the circumstances operated so as to invest the sub-inspector with an enlarged authority which, for a certain time, at least, after the accident, extended to the pledging of the company's credit for the cost of such necessities as might be required for the maintenance of the passengers. Having regard to the broad ground upon which the right of recovery was affirmed, and the language used by the judges, this case seems to have virtually overruled the earlier one in which it was

held that neither a station master nor a guard was empowered to employ a surgeon.<sup>11</sup>

It is somewhat remarkable that this leading case, embodying, as it does, the deliberate conclusions of a court of error, should have almost entirely escaped the notice of the American judges who have had occasion to consider the effect of an emergency in enlarging the powers of subordinate agents (see § 1, supra). But a doctrine of a substantially similar purport and scope has been independently evolved in several of the states.<sup>12</sup> In some of the cases in which this doctrine was recognized, the right

sible thing that might be comfortable to persons under these circumstances. It depends very much, I think, on the condition of the persons taken in." Grove, J., argued thus: "Locke was for this district the superior officer; and what was his duty? 'To attend on the spot' when an accident occurred. That cannot mean that he is to attend there for the purpose of looking on, but that he is to do what he considers best under the circumstances for the interests of the company, and to repair, as far as possible, the evil consequences of the accident. . . . It is necessary that the persons injured should be removed; and is it not part of his duty, in the interests of the company, to take the injured persons to some place where they can be reasonably attended to? And is it not a necessary consequence of this duty to take them away that they should have what is immediately necessary for their sustenance, what is necessary to keep up life and to restore animation or strength to the limbs, so far as it can reasonably be done?" Cleasby, B., viewed the circumstances from a different standpoint, remarking that the fact of the company's having allowed the plaintiff to continue the performance of the services after the inspector had made his report was evidence of his having been originally invested with authority to make the contract.

<sup>11</sup> *Cox v. Midland Counties R. Co.* (1849) 3 Exch. 268, 154 Eng. Reprint, 844, 18 L. J. Exch. N. S. 65, 13 Jur. 65. See § 33, note 1, supra.

#### (a) Contract made by conductor.

<sup>12</sup> In Alabama it has been stated, arguing, that a contract made by a conductor would be binding, provided that "exceptional circumstances justified it, and prevented communication with higher officials." *Sevier v. Birmingham, S. & T. River R. Co.* (1890) 92 Ala. 258, 9 So. 405.

In *St. Louis, A. & T. R. Co. v. Hoover* (1890) 53 Ark. 377, 13 S. W. 1092 (passenger injured), it was laid down that, where a person is injured at a point distant from the company's chief offices, "and there is urgent necessity for the employment of a surgeon to render professional services

to an injured employee, the conductor, if he is the highest agent of the company on the ground, has authority to bind the corporation by the employment of a surgeon to render the services required by the emergency." This decision was followed in *Arkansas Southern R. Co. v. Loughbridge* (1898) 65 Ark. 300, 45 S. W. 907 (employee injured), and *Bonnette v. St. Louis, I. M. & S. R. Co.* (1908) 87 Ark. 197, 16 L.R.A.(N.S.) 1080, 128 Am. St. Rep. 30, 112 S. W. 220 (trespasser run over by train). In the latter case the dismissal of the complaint was held erroneous, for the reason that the existence of an emergency was alleged. The court took the position that 'before sufficient time had intervened to ascertain whether the accident was caused by the negligence of the company, he [the conductor] certainly had at least the implied authority to protect his company by doing what might be necessary to lessen the damages in the event it should be afterwards ascertained that the company was liable. This authority would be sufficient to bind the company for his contract with the surgeon, but not for the surgeon's contract with others.'

In *Chicago & A. R. Co. v. Davis* (1900) 94 Ill. App. 54, the court said: "The rule is well settled in this state that where an accident happens to an employee of a railroad company, and local surgeons of the company are not in the vicinity, and the condition of the injured man requires prompt medical attention, that the representative of the company in authority at the time and place of the injury has the right to employ medical assistance." Of the two cases cited by the court, however, only one, *Indianapolis & St. L. R. Co. v. Morris* (1873) 67 Ill. 295, is a precedent in point. The other, *Toledo, W. & W. R. Co. v. Rodrigues* (1868) 47 Ill. 188, 95 Am. Dec. 484, involved merely the ordinary powers of a general superintendent.

In *Chicago Consol. Traction Co. v. Mathews* (1904) 117 Ill. App. 174, where a man injured by a live trolley wire was attended by a surgeon called in by the conductor of a street car, the court said: "We are inclined to the view that when one is thus hurt, and the condition of the injured

of recovery was affirmed with respect to services performed for the benefit of trespassers.<sup>18</sup> That this position is logically indicated, whatever is deemed to

party requires prompt medical attendance, and no surgeon of the company is obtainable, the representative of the company in authority at the time and place of the accident has a right to employ a physician, and thus, for the time being, at least, to bind the company to pay for his reasonable services." In view of the earlier decisions the hesitating language thus used by the court is somewhat singular.

In the following Indiana decisions it has been held that a conductor possesses this temporary authority whenever he is the highest agent of the company who is present at the spot where an accident occurs: *Terre Haute & I. R. Co. v. McMurray* (1884) 98 Ind. 358, 49 Am. Rep. 752; *Louisville, N. A. & C. R. Co. v. Smith* (1889) 12 Ind. 353, 6 L.R.A. 320, 22 N. E. 775; *Hunt v. Illinois C. R. Co.* (1904) 163 Ind. 106, 71 N. E. 195, 16 Am. Neg. Rep. 313; *Toledo, St. L. & K. C. R. Co. v. Mylott* (1892) 6 Ind. App. 438, 33 N. E. 135; *Evansville & R. R. Co. v. Freeland* (1892) 4 Ind. App. 207, 30 N. E. 803.

In *Gaudreau v. Canada Atlantic R. Co.* (1903) Rap. Jud. Quebec 24, C. S. 337, the court cited the *Langan Case*, note 10, *supra*, as a controlling authority; but the right of recovery was predicated mainly on the ground of ratification. See § 57, note 4, *infra*. See also the cases cited in note 14, *infra*, in which recovery was denied merely on the ground that the injured persons were trespassers.

The general principle that the existence of an emergency amplifies the ordinary powers of a railway company's agents with regard to the making of contracts for medical attendance was recognized, *arguendo*, in *Holmes v. McAllister* (1900) 123 Mich. 493, 48 L.R.A. 396, 82 N. W. 220.

It may be mentioned in passing that the theory adverted to in the *Bonnette Case* (Ark.) *supra*, which virtually involves an imputation to the railway company of an absolute duty to give proper attention to an injured person, was applied in *Northern C. R. Co. v. State* (1868) 29 Md. 421, 96 Am. Dec. 545, where the action was one of tort for the recovery of damages in respect of the death of a man who had been struck by a train, and who was, under circumstances evincing a truly revolting callousness on the part of the trainmen, simply carried into a shed, and left there in a helpless and insensible condition. The court said: "If, in removing and locking up the unfortunate man, though apparently dead, negligence was committed, whereby the death was caused, there is no principle of reason or justice upon which the defendant can be exonerated from responsibility. To contend that the agents were not acting in the course of their employment in so removing and disposing of the party is to contend that the duty of the defendant extended no farther than to have cast off by

the wayside the helpless and apparently dead man, without taking care to ascertain whether he was dead, or, if alive, whether his life could be saved by reasonable assistance, timely rendered. For such a rule of restricted responsibility no authority has been produced and we apprehend none can be found." It seems clear that a court which accepts the doctrine propounded in this case with regard to the duty of a railroad company to care for a person who has been injured by a train cannot consistently refuse to hold the company liable for such medical or surgical attendance as the employees operating the train may, in the exercise of a reasonable discretion, determine to be necessary for the purpose of mitigating, at least, the first effects of the injury. For another decision which bears upon the same phase of the question, see *Yazoo & M. Valley R. Co. v. Byrd* (1906) 89 Miss. 308, 42 So. 286, where a passenger was injured.

#### (b) Contract made by foreman.

In *Aimone v. Chicago, M. & St. P. R. Co.* (1913) 182 Ill. App. 592, where the injury treated by the claimant was sustained by a laborer working in a gang supervised by a foreman, the court said that, if it were a fact that the foreman was the highest officer of the company on the ground, "he had authority to employ the claimant to perform such temporary service, by way of first aid, as the occasion required;" and that, in this point of view, recovery might be had for the services rendered in treating the injured man in the defendant's yard, and for such services as the evidence might show were necessarily performed before the claimant had time to communicate with authorized agents of the defendant.

#### (c) Contract made by station master.

In *Vandalia R. Co. v. Bryan* (1915) 60 Ind. App. 223, 110 N. E. 218, the authority of a station master to engage surgeons to perform operations necessary to save the life of a trespasser who had been run over by a train was affirmed.

<sup>18</sup> In *Bonnette v. St. Louis, I. M. & S. R. Co.* (1908) 87 Ark. 197, 16 L.R.A. (N.S.) 1081, 128 Am. St. Rep. 30, 112 S. W. 220, the court remarked that "if the duty, and the consequent liability for failure to discharge that duty, grow out of the obligations which the impulses of our common humanity would suggest and impose under such circumstances, then we do not see that the status or relationship of the party injured to the party producing the injury could affect the question of the appellee's right to recovery."

In *Vandalia R. Co. v. Bryan* (Ind.) *supra*, the fact that the person treated was a trespasser was declared to have "no bearing" upon the extent of the authority of a conductor to engage the plaintiff. The court

be the true rationale of the doctrine (see § 53, *infra*), would seem to be reasonably clear. But in other cases the circumstance that the injured person was a trespasser has been held to constitute a bar to the maintenance of the action.<sup>14</sup>

The doctrine illustrated by the cases which are reviewed under the preceding paragraph has been held, so far as servants are concerned, to be applicable only as regards cases in which the injuries treated were sustained while they were engaged in the line of their duty, and within the scope of their employment.<sup>14a</sup>

In cases decided in New York and Texas the theory as to the implied en-

largement of the normal authority of subordinate agents of railroad companies has been rejected. But in neither of these cases was there any thorough examination of the questions involved.<sup>15</sup>

*e. Subordinate agents of corporations other than railway companies.*

Some cases proceed upon the doctrine that a foreman appointed by a company other than one operating a railroad, to supervise and control a gang of workmen, is impliedly authorized to engage a doctor to treat one of them who has sustained an injury which requires immediate attention.<sup>16</sup> This doctrine would

said that it was not for the station master, who had hired the claimant, "to investigate whether appellant was liable to the injured person before undertaking to aid him."

<sup>14</sup> *Adams v. Southern R. Co.* (1899) 125 N. C. 565, 34 S. E. 642 (company not liable to doctor summoned by conductor to attend on men who were injured through derailment of train on which they were stealing a ride). *Wills v. International & G. N. R. Co.* (1905) 41 Tex. Civ. App. 58, 92 S. W. 273 (company not liable to doctor who, at request of conductor, treated a man who was run over by train).

(d) Contract made by claim agent.

In *Scullin v. Routh* (1917) 126 Ark. 571, 191 S. W. 218, the power of an agent of this description to engage a surgeon wherever it is impossible to procure one of those regularly retained by the company was affirmed with special reference to the rules promulgated ad hoc by the company of which the defendant was receiver. But the court also regarded the case as being within the scope of the doctrine applied in the earlier cases cited in subd. (a) of this note.

(e) Contract made by assistant engineer.

The implied authority of an employee of this description was recognized in the case cited in the note 14a, *infra*, but limited to the extent there stated.

<sup>14a</sup> In *Carson v. Chicago, M. & St. P. R. Co.* (1917) — Iowa, —, 164 N. W. 747, where the claim of a surgeon summoned by an assistant engineer in charge of grading work to operate upon a wounded laborer was disallowed on the ground that the wound was inflicted while he was laid off on a rainy day, and was at a considerable distance from the company's premises. The evidence showed that the bills of surgeons previously called in under similar circumstances had been paid, but on all these occasions the servant had been injured while he was actually at work.

<sup>15</sup> *Voorhees v. New York C. & H. R. R. Co.* (1909) 129 App. Div. 780, 114 N. Y. Supp. 242, affirmed (without opinion) in (1910) 198 N. Y. 558, 92 N. E. 1105, where

the plaintiff had been summoned by the superintendent of a hospital to treat an injured employee of the defendant, the court declined to follow the decisions in other states which proceeded upon the ground "that any employee present when the emergency arises may summon a physician on the responsibility of the employer."

A doctrine of similar purport, but referred to different considerations, was applied in *Houston & T. C. Co. v. Watkins* (1878) 1 Tex. App. Civ. Cas. (White & W.) 147, where a judgment in favor of a claimant who had been called in by the defendant's roadmaster was reversed for reasons thus stated: "It is a fact, to which this court will not close its eyes, that in emergencies every person connected with the road can open communication with the superintendent and officers in less time than it has taken us to write this sentence. Having officers charged with the duty of seeing to it that the necessary attention is rendered to the injured in case of accident, this court will not infer that any and every employee has authority to bind the company by employing physicians and surgeons whenever they please or think it proper to do so." So far as it relates to the implied power of the employing agent, this decision has been virtually overruled by the later case (see note 14, *supra*) in which it was taken for granted by the same court that the action would have been maintainable if the injured person had not been a trespasser.

<sup>16</sup> In *Salter v. Nebraska Teleph. Co.* (1907) 79 Neb. 373, 13 L.R.A.(N.S.) 545, 112 N. W. 600, the following statement of principles was formulated in the headnote written by the court: "When a serious injury requiring immediate medical or surgical services is incurred by the employee of a company engaged in a business dangerous to its employees, and the injury is received at a place distant from the home of the injured party, any general officer of the company then present may engage such medical or surgical treatment and care as the case requires, and bind the company for the reasonable value thereof, without

clearly not be accepted in an unqualified form by any court which takes the position that it is only in cases involving the liability of railroad companies that the normal powers even of managing agents are deemed to be susceptible of enlargement by an emergency, in the sense in which that expression is commonly used.<sup>17</sup>

any proof on the part of the party furnishing such treatment and care that such general officer of the company had special authority to make such contract, or that such action on his part came within the general scope of his power and duties. In case of serious injury to an employee under the circumstances above set out, if no general officer of the company is present, the highest officer, or person highest in authority then present, may bind the company for such services as the emergency may demand."

In *Texas Bldg. Co. v. Albert* (1910) 57 Tex. Civ. App. 638, 123 S. W. 716, it was laid down that a foreman who had been intrusted with the supervision and control of a crew of workmen sent out from the defendant's main office to erect a building in a distant town had implied authority, in a case where prompt action was demanded, to engage a doctor to attend on an injured workman. As to the ratio decidendi, see § 53, *infra*.

In *Rich v. Edison Electric Co.* (1912) 18 Cal. App. 354, 123 Pac. 230, the court, arguing, treated the rule as being well established, "that even subordinate employees of a corporation, who, under ordinary circumstances, are not empowered to bind the corporation by contract, nevertheless possess power, where an urgent necessity exists for immediate employment by reason of injuries incident to the operations of the corporation, to employ medical help to alleviate the condition of persons so injured." But, having regard to the decisions as a whole, including those which relate to the powers of managing agents, it is clear that no more can be asserted than that this rule is supported by some precedents.

<sup>17</sup> See *Indiana* cases referred to under subsecs. (a) and (c), *supra*. At first sight it might appear that the doctrine enounced in those cases indicates a departure from that laid down in an earlier case in which it was declared that "railroads are under precisely the same obligation in respect to procuring medical and surgical aid for their employees as other employers under like circumstances; and the authority of a railroad employee is not different in that respect from the authority of one employed by any other corporation or person when placed in a like situation." *Terre Haute & I. R. Co. v. Brown* (1886) 107 Ind. 336,

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§ 52a. *Same subject. Limits of the enlarged authority as predicated.*

By all the courts which have accepted the doctrine concerning the effect of an emergency in enlarging the powers of an agent the position has been taken that this enlargement is predicable only with respect to the period during which the emergency subsists.<sup>1</sup> In this point of view it follows that the principal cannot be held liable for services rendered after the emergency has expired,<sup>2</sup> except

8 N. E. 218. But in this passage the court was merely formulating a general rule applicable to ordinary cases, and not to those in which there is an emergency.

<sup>1</sup> For decisions of this purport, see *Bedford Belt R. Co. v. McDonald* (1895) 12 Ind. App. 620, 40 N. E. 821 (statement reiterated in same case (1897) 17 Ind. App. 492, 60 Am. St. Rep. 172, 46 N. E. 1022); *Godshaw v. J. N. Struck & Bro.* (1900) 109 Ky. 285, 51 L.R.A. 668, 58 S. W. 781 (rule affirmed in a case where power of employee was denied even as regards the time immediately after the accident); *Holmes v. McAllister* (1900) 123 Mich. 494, 48 L.R.A. 396, 82 N. W. 220 (similar decision).

In *Ohio & M. R. Co. v. Early* (1894) 141 Ind. 73, 28 L.R.A. 546, 40 N. E. 257, the court remarked that the obligation of furnishing medical assistance is one which "arises out of strict necessity and urgent exigency, where immediate attention thereto is demanded in order to save life or prevent great injury. [It] . . . arises with the emergency and with it expires." For similar language, see *Toledo, St. L. & K. C. R. Co. v. Mylott* (1893) 6 Ind. App. 448, 33 N. E. 135.

<sup>2</sup> In *Ohio & M. R. Co. v. Early*, note 1, *supra*, it was held that the conscious and deliberate choice which an injured employee, while in possession of his mental faculties, had made respecting the time when, place where, and person by whom he would be treated, relieved the master of any liability for failure to provide other treatment, and that no liability on the part of a railroad company for failure to provide for an injured brakeman was shown, where the evidence was, that the best medical treatment which could be obtained at the little town where he was injured was procured; that he was removed as soon as possible, with his intelligent and conscious consent, without any objection of the physicians who had attended him thus far, to another town, where a place was provided for him and competent surgeons were awaiting him; that he insisted on being taken still further, to the town where he lived; and that he died soon after reaching the place, from loss of blood sustained while he was on the way.

A surgeon who, at the direction of the conductor, amputates the leg of an employee injured in an accident to a construction train by which a large number

upon the grounds of express authorization, ratification, or estoppel.<sup>3</sup>

For the purposes of this doctrine it

would seem that, irrespective of the actual condition of the injured person, the emergency is deemed to subsist only

are injured, there being only one surgeon of the company present, who is unable to attend to all the wounded, is entitled to compensation therefor, but not for services rendered after the emergency ceases. *Evansville & R. R. Co. v. Freeland* (1892) 4 Ind. App. 207, 30 N. E. 803 (damages measured on the basis thus indicated).

In *Terre Haute & I. R. Co. v. Brown* (1886) 107 Ind. 337, 8 N. E. 218, it was held that the temporary powers possessed by a conductor in an emergency do not entitle him to confer upon a surgeon engaged by him authority to employ assistance at the company's expense; and that, if the surgeon first engaged finds it "necessary or convenient to call in other assistants," they must look to him for their compensation.

In *Louisville, N. A. & C. R. Co. v. Smith* (1889) 121 Ind. 353, 6 L.R.A. 320, 22 N. E. 775, the court thus discussed the remedial rights of a doctor who had been called in to assist one engaged by a conductor: "The conductor . . . had authority to do what the emergency demanded, in order to preserve his injured fellow employees from serious harm; but he had no authority to do more. When the company had procured the services of a competent surgeon, it did all that it was morally or legally bound to do, and the conductor could not impose upon it any greater obligation. We hold that the conductor did have authority to at once employ the surgical aid demanded by the urgency of the occasion; but we hold, also, that his authority did not extend beyond this limit."

It is immaterial whether Dr. Judah [the surgeon first employed] was called by a brakeman or by the conductor in person; for, if he was called by the direction, express or implied, of the conductor, or if the conductor confirmed what had been done, he could not subsequently employ another surgeon. It is possible that Dr. Smith [the second surgeon called in] may be entitled to compensation for one visit, that made in obedience to the telegram, for it may be that he had a right to act upon it at once; but when he found the injured man attended by a competent surgeon he had no right to continue to give the case attention and charge the company. He was bound to know that, when the agent, who possessed limited special authority, had procured the services of a competent surgeon, his authority was exhausted; and if, with this knowledge, he continued to give the injured man attention, he did it at the expense of some other person than the agent's principal."

In *Vandalia R. Co. v. Bryan* (1915) 60 Ind. App. 223, 110 N. E. 218, the two decisions last cited were erroneously cited in support of a ruling to the effect that, "if the condition of the patient and the emergency

of the case made additional surgical and medical aid absolutely necessary, . . . the doctor engaged . . . to perform the necessary services would be justified in calling the necessary additional aid," and consequently is entitled to recover for their services as well as for his own. The former case is manifestly a specific authority against the doctrine thus laid down. The latter involved merely the extent of a conductor's powers. The effect of the actual ruling in the *Bryan Case* itself, where the action was brought to recover for the whole of the services rendered during a period of about six weeks by the plaintiff and the other surgeons whom he had called in to assist him, is indicated by the following extract from the opinion: "It seems to us, however, that all of the better reasoned cases have limited the recovery of physicians employed, as was appellee in this case, to what should be termed as emergency or first aid services, and no more. And in all such cases an emergency exists where the exigencies are of so pressing a nature that immediate action must be taken to relieve the injured party from his present suffering, or preserve his life; and when such services have been rendered, the emergency authorizing the original employment ceases to exist, and there is no further liability for medical services unless such further liability arises by reason of some additional contractual relation between the parties. It is the inability of the injured party to obtain medical aid for himself that gives rise to the emergency. . . . We have held that, under the facts of this case, appellant is liable to appellee for emergency first aid services rendered, and what shall constitute first and emergency services is a question of fact for the jury; and as there was no evidence introduced from which the value of such services, independent of the value of all services rendered by appellee and the other physicians, can be ascertained, we are required to reverse the judgment."

Compare also the remarks of Bramwell, B., in *Langan v. Great Western R. Co.*, § 52, note 10, *supra*, concerning the limits of the employing agent's authority to pledge the defendant's credit.

<sup>3</sup> The first of these qualifications was the only one specified in *St. Louis, A. & T. R. Co. v. Hoover* (1890) 53 Ark. 377, 13 S. W. 1092; but the other two should manifestly be included in any statement which purports to be complete.

The same criticism is applicable to the remark in *Holmes v. McAllister* (1900) 123 Mich. 494, 48 L.R.A. 396, 82 N. W. 220, that "if the physician desires to hold the employer responsible for subsequent services he must make a special contract with him."

for such time as may be needed for communicating the facts to the principal, or his representative, and ascertaining whether he will consent to defray the expenses of treatment in the future. If he refuses his consent, his liability, in so far as it has been created by the emergency, is ordinarily devested when the doctor in attendance on the injured person is informed of the refusal, or, if the person has no money to defray the cost of future treatment, when the case has been reported to the public authorities whose duty it is to take care of the poor.<sup>4</sup>

In a case where a brakeman whose injury was sustained in a town in which the railroad company had a competent surgeon of its own, and ample facilities for treating his injury were available, had been, at his own request, removed to another town, in which he desired to be for the reason that he had many friends there, it was held that the conductor's enlarged authority, as predicated from emergency arising from the accident, did not extend to the making

of a contract for the board and lodging of the brakeman at a hotel in the latter town.<sup>5</sup> The court remarked that, even if the company was responsible for the injury in question, "its responsibility for any service not comprehended within an emergency is, as to such employee, to be recovered as a part of his damages."

In the case cited below, the limits of the agent's enlarged authority were considered with reference to the language of the specific rules promulgated by the defendant.<sup>6</sup>

**§ 53. Same subject. Rationale of the enlarged authority as predicated.**

By some courts a basis for the doctrine as to the effect of an emergency has been found in the dictates of "humanity and justice," which are assumed to impose upon the principal an absolute juristic duty to see that the injured person shall immediately receive such attention as will relieve his suffering, and mitigate the ulterior consequences of his injury.<sup>1</sup> In most of the cases in

<sup>4</sup> In *Salter v. Nebraska Teleph. Co.* (1907) 79 Neb. 375, 13 L.R.A.(N.S.) 545, 112 N. W. 600, the court stated its views in the headnote written by it: "While not attempting to formulate any general rule to determine what constitutes emergency treatment for which a company will be liable under employment made by an officer or agent of known limited authority, it ought generally to extend for a time sufficient for the party employed to communicate with the company, and, if it decline to be further responsible, for notice to the proper poor authorities, if the injured party is entitled to public care." In that case the trial judge had directed a verdict for the plaintiffs for the full amount of their claim for services rendered to the injured servant during the whole time he was in the hospital, and refused to admit evidence offered to show that the defendant had informed them that it would not be responsible for any services except the first treatment. The verdict was set aside.

The above case was distinguished in *Omaha General Hospital v. Strehlow* (1914) 96 Neb. 308, 147 N. W. 846, where an injured employee had been taken to a hospital by a surgeon, with the express sanction of the employer. It was held that, under the circumstances, it was an implied condition of the contract that the employer "could only terminate his liability to the hospital by removing the patient, or when he could be dismissed by the hospital without serious danger to his life or health, or by showing that the injured man had means out of which the hospital could and should have collected its pay."

See also *Vandalia R. Co. v. Bryan* (1915)

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60 Ind. App. 223, 110 N. E. 218, where the court approved an instruction to the effect that the defendant would not be liable to the claimant for any services undertaken after he had been notified that the defendant would not be liable for any further services.

<sup>5</sup> *Hunt v. Illinois C. R. Co.* (1904) 163 Ind. 106, 71 N. E. 195, 16 Am. Neg. Rep. 313. Compare the analogous facts involved in the *Early Case*, note 2, *supra*.

<sup>6</sup> *Scullin v. Routh* (1917) 126 Ark. 571, 191 S. W. 218. The rules of the railroad company of which the defendant was receiver authorized the employment of the nearest surgeon to administer first aid and care to the patient, until the company's surgeon could take charge of him. A surgeon engaged by the company's claim agent to attend on an injured servant was awarded his fees not only for services rendered immediately after the accident, but also in respect of twenty-eight subsequent visits to the patient. The ratio decidendi was that the burden of proving that a surgeon of the company could have taken charge of the case at the time when these visits were paid rested upon the defendant, and that no affirmative evidence on this point had been adduced by him.

<sup>1</sup> The leading case with regard to this theory is *Terre Haute & I. R. Co. v. McMurray* (1884) 98 Ind. 358, 49 Am. Rep. 752, where the court argued as follows: "Assuming, as we may justly do, that there are occasions when the exigency is so great, and the necessity so pressing, that the conductor stands temporarily as the representative of the company, with authority adequate to the urgent and immediate de-

which this theory has been adverted to, the services in question had been rendered to an employee of the defendant. But there appears to be no satisfactory ground upon which it can be maintained that a duty so broad as that predicated is not applicable in respect of other classes of persons also, such as passengers on the railroad trains, or invitees.

The obvious objection to explaining

the doctrine of this footing is that the common law does not, as a general rule, regard the considerations thus relied upon as giving rise to any obligation of a higher degree of validity than that which is designated by the vague term, "moral," and that the courts by which such considerations have been invoked in cases of the type now under discussion have not produced any definite reasons

mands of the occasion, we inquire, What is such an emergency as will clothe him with this authority and put him in the position designated? Suppose that a locomotive is overturned upon its engineer, and he is in immediate danger of great bodily harm,—would it not be competent for the conductor to hire a derrick, or a lifting apparatus, if one were near at hand, to lift the locomotive from the body of the engineer? Surely someone owes a duty to a man, imperiled as an engineer would be in the case supposed, to release him from peril, and is there anyone upon whom this duty can be so justly put as upon his employer? The man must, in the case supposed, have assistance; and do not the plainest principles of justice require that the primary duty of yielding assistance should devolve upon the employer rather than on strangers? An employer does not stand to his servants as a stranger, he owes them a duty. The cases all agree that some duty is owing from the master to the servant, but no case that we have been able to find defines the limits of this duty. Granting the existence of this general duty,—and no one will deny that such a duty does exist,—the inquiry is as to its character and extent. Suppose the axle of a car to break because of a defect, and a brakeman's leg to be mangled by the derailment consequent upon the breaking of the axle, and that he is in imminent danger of bleeding to death unless surgical aid is summoned at once; and suppose the accident to occur at a point where there is no station, and when no officer superior to the conductor is present,—would not the conductor have authority to call a surgeon? Is there not a duty to the mangled man that someone must discharge? And if there be such a duty, who owes it, the employer or a stranger? Humanity and justice unite in affirming that someone owes him this duty, since to assert the contrary is to affirm that upon no one rests the duty of calling aid that may save life. If we concede the existence of this general duty, then the further search is for the one who in justice owes the duty; and surely where the question comes between the employer and a stranger, the just rule must be that it rests upon the former."

In *Ohio & M. R. Co. v. Early* (1894) 141 Ind. 73, 28 L.R.A. 546, 40 N. E. 257, the court observed that, "where . . . [an] employee has, by unforeseen accident to him, while engaged in the line of his duty as

such employee, been rendered helpless, the dictates of humanity, duty, and fair dealing would seem to demand that it [the railway company] should furnish medical assistance." To the same general effect, see *Louisville, N. A. & C. R. Co. v. Smith* (1889) 121 Ind. 353, 6 L.R.A. 320, 22 N. E. 775; and *Tippecanoe Loan & T. Co. v. Cleveland, C. C. & St. L. R. Co.* (1914) 57 Ind. App. 644, 104 N. E. 866, 106 N. E. 739 (where the actual point under discussion was whether the defendant company was liable for the death of the person in question).

In *Sevier v. Birmingham S. & T. River R. Co.* (1890) 92 Ala. 258, 9 So. 405, the court observed: "Humanity . . . imposes upon the company engaged in such hazardous business [i. e., as the operation of a railroad] a moral obligation when a person in its employment, without fault on his part, is injured while rendering service, to provide such assistance as may be necessary to prevent loss of life, or irreparable injury. This much is demanded by humanity, fair dealing, and the conservation of the interests of the company." There seems to be some inconsistency in the position of the court, as thus explained. In the first sentence of this passage "humanity" is specified as the sole basis of the moral obligation predicated; in the second the existence of that obligation is referred to another consideration also, viz., the "interests" of the company. Did the court intend merely to assert the proposition that "humanity," like "honesty," is the "best policy?" Or is its language to be construed as reflecting the conception which was relied upon by Bramwell, B., in the *Langan Case*? So far as the report shows, that case had not been brought to the notice of the court.

In *Bonnette v. St. Louis, I. M. & S. R. Co.* (1908) 87 Ark. 197, 16 L.R.A.(N.S.) 1081, 128 Am. St. Rep. 30, 112 S. W. 220, it was remarked that "the rationale of the doctrine, whether in the case of a stranger and trespasser, or of an employee or passenger, is found in the duty imposed by the dictates of common humanity." But the court did not express any definite opinion as to the correctness of this theory.

In *Chicago Consol. Traction Co. v. Mathews* (1904) 117 Ill. App. 174, the court laid down that "humanity, common honesty, and fair dealing, if not strict justice, require the company to pay."

for treating as exceptional the class of cases now under discussion.

The preferable theory seems to be that which refers the doctrine to the more practical and juridically unimpeachable conception that, in order to fulfil his duty to protect the interests of his principal, the agent is not merely entitled, but bound, to take such measures as are calculated to keep down the damages for which it may possibly be found, upon further investigation, that the principal is liable.<sup>2</sup> In this point of view the position may reasonably be taken that any subordinate agent who is present when an injury is sustained should be regarded as competent to pledge the credit of the principal for the expense of such temporary arrangements as may be necessary for the safety, health, and welfare of the injured person during such time as may elapse before the principal himself or his managing agent is apprised of the circumstances. If this explanation of the doctrine is accepted as correct, the notion that the doctrine is applicable only in cases in which the principal is a railroad company must obviously be discarded. The existence of the implied authority of the subordinate agent will, whatever may be the nature of the principal's business, depend simply upon two questions of fact; viz., (1) whether there was or was not an urgent necessity for the performance of the services upon which the claim is founded; and (2) whether it was or was not feasible to obtain immediate instructions from the principal or his managing agent.

In one case the liability of the principal was affirmed on the ground that the implied authority of the agent extended to doing "not only such things as might be incident to the work in hand, but all things that might be necessary for the advancement of the master's interests;" and that it was "to the master's interest that the servant should have medical attention, to the end that he might be the better enabled to perform the master's service."<sup>3</sup> The obvious objection to relying upon this consideration is that it is relevant as regards only a portion (and that much the smaller one) of the accidents which create a necessity for immediate treatment. It is clear that, in the very nature of the case, the injuries sustained must ordinarily be of such a

serious nature that the possibility of the servant's resuming the performance of his duties cannot warrantably be regarded as a factor in the situation.

### III. *Effect of Mechanics' Lien Laws.*

#### § 53a. *Generally.*

The question whether a lien created by laws of this description can be enforced in respect of work performed under a contract made by an agent of the owner of the property which it is sought to charge is determinable with relation to different considerations, according to the nature of the phraseology employed for the purpose of defining the scope of the enactment on which the plaintiff's claim is based.

A portion of the cases belonging to the category discussed in the present monograph have been reviewed in the note appended to *Belnap v. Condon*, 23 L.R.A.(N.S.) 601, relating to the power of a lessee or vendee to subject the owner's interests to a lien.

The circumstances under which the separate property of a married woman may be subjected to a lien on the ground that the contract in pursuance of which work was performed or materials furnished by the claimant was made with her husband, acting as her agent, are discussed in the note appended to *Milligan v. Alexander*, A. L. R. —.

#### § 54. *Enactments not providing specifically for contracts made by agents of the owner.*

In one group of statutes the words of the defining clauses do not upon their face show any intention on the part of the legislatures to provide a remedy for claimants whose services were rendered at the request of persons other than the owners. In cases turning upon the effect of such statutes the courts have uniformly assumed that they are to be construed with due regard to the general principle expressed in the maxim, *Qui facit per alium, facit per se*, and consequently that contracts made with the authorized agents of the owners are as much within their purview as contracts made with the owners themselves. This is the rationale of decisions rendered with reference to statutes containing provisions of the following types:

<sup>2</sup> See passage quoted in § 1, *supra*, from the judgment of Bramwell, B., in *Langan v. Great Western R. Co.* (1874; Exch. Ch.) L.R.A.1918F.

30 L. T. N. S. (Eng.) 175.

<sup>3</sup> *Texas Bldg. Co. v. Albert* (1910) 57 Tex. Civ. App. 638, 123 S. W. 716.



(1) Provisions which create upon the property in respect of which the work is performed an absolute lien in favor of certain classes of persons.<sup>1</sup>

(2) Provisions which create a lien "for the payment of all debts contracted for work or materials."<sup>2</sup>

(3) Provisions which create a lien in

<sup>1</sup>In *Porch v. Agnew Co.* (1905) 70 N. J. Eq. 328, 61 Atl. 721, affirmed in (1906) 71 N. J. Eq. 305, 65 Atl. 485, the contention that certain kitchen equipment in a hotel was not ordered by competent authority from the defendant was held to be refuted by evidence which showed that the detail of the work was arranged and ordered by a person who was the defendant's secretary and also one of its executive officers in charge of the building, that its president was in almost daily attendance there while these fixtures were being installed, and that they were accepted and used by the company when it started in business in the following July.

In *Owen v. Northrup* (1872) 30 Wis. 482, the undisputed evidence showed that Wilson, the person for whom the work in question was done, had contracted to purchase a factory, owned by the defendant, but situated in a town about 20 miles away from the one where he resided; that Wilson, wishing to have a house somewhat closer to the factory than the one he was occupying, applied to the defendant for assistance, which was promised and given; that the defendant furnished Wilson with the plan of a house, together with an estimate of the probable cost; that, although he had frequently been in the town where the building was being erected while the work was in progress, he had never inspected it or issued any orders regarding it; and that Wilson bought the materials, made the contract, supervised the construction, and transacted all the business with respect to the building. It was held that, as bearing upon the disputed fact of Wilson's agency, the contract relations between him and the defendant, respecting the foundry, their agreement, if any, as to the house and lot, the bargain for or proposed purchase by him of the lot, the price to be paid and all the business transactions which then existed between him and the defendant, and which were connected with and led to the building of the house, were admissible in evidence, and ought to have been submitted to the jury.

In *Leismann v. Lovely* (1878) 45 Wis. 420, it was held that the question whether one Pitz was authorized by the defendant to make a contract with the plaintiff for the removal of stumps from her land should have been submitted to the jury, the evidence being that he was her son-in-law, living upon the farm upon which the work was done; that she lived with and was supported by him, but that he carried on the farm without any orders or directions from her; that he managed it in his own way, had all he could make therefrom, and rendered no account of the profits. The court said: "The evidence is as consistent with the theory that he managed the farm in the

character of a tenant, paying the rent by way of supporting the defendant, as that he was her agent in its management. Now, if he was carrying on the farm as a tenant, and made the contract in question for his own convenience and benefit, or if he made the contract as a principal, and not as the authorized agent of the defendant, then she would not be bound by his contract, nor could her property be subjected to a lien for the work done upon it. . . . Besides, Pitz might have been agent for the defendant for some purposes, and still not authorized to make the contract for removing the stumps."

In *Wheeler v. Hall* (1877) 41 Wis. 447, the right to a lien was held to be shown by a complaint which alleged that the petitioner's work was done for the defendant James Hall, and with the knowledge, approbation, and consent of the defendant Lucy Hall, who was then the owner of the legal title to the premises in question; that the same were in the actual occupation of James Hall; that both he and Lucy Hall (his sister) participated in the management and control of the business of running and operating the mills upon which the work was performed; and that such work was performed upon articles of machinery which were fixtures to the premises. In *Lauer v. Bandow* (1878) 43 Wis. 556, 28 Am. Rep. 571, it was stated that the judgment in this case "went upon the ground that it sufficiently appeared in the complaint that he [the brother] acted as the agent of the sister, as well as in his own behalf, in procuring the work to be done." This is not as clearly stated in the opinion as it should have been.

<sup>2</sup>In *Goodfellow v. Manning* (1892) 148 Pa. 96, 23 Atl. 1052, it appeared that, after one Willis, who had entered into a written agreement with defendant to erect the building in question, had thrown up the work, Albright, the architect, made a verbal contract with the defendant to assume Willis's responsibility under the contract, and to finish the building according to its terms, and thereafter contracted with the plaintiff to do certain work for the defendant towards completing the house in question, by inviting proposals for such work, which were made in writing, and began: "We will complete house for Mr. E. N. Manning, at Elm, Pa., at following terms," and which were duly signed by plaintiff, and returned with the indorsement, "Accepted Aug. 21, 1890, Harrison Albright, architect." The testimony was conflicting as to whether, at the time said proposals were made and accepted, the plaintiff had any knowledge that Albright occupied any other relation to defendant than that of agent or architect, and as to whether defendant afterwards ratified the contract. It

favor of persons who work "by contract with the owner."<sup>3</sup>

(4) Provisions which create a lien in respect of work performed "at the request of" the owner of the property in question. The reasons assigned in the case cited below, for enforcing in favor of a contractor's servant the lien given by an enactment of this purport, are, it seems, equally applicable as regards the claim of subcontractors.<sup>4</sup>

**§ 55. Enactments expressly applicable to claims founded on contracts made with an agent of the owner.**

In another group of statutes the language used is such as to cover explicitly

also appeared that plaintiff knew there had been a contract between defendant and Willis for the erection of the house in question, but not its terms. Held, that the court below had properly submitted to the jury the question whether Albright had authority to make the contract as Manning's agent, and whether Manning ratified it after it was made, and also whether it was made subject to the terms of the original contract with Willis, or was entirely independent of it. It may be well to point out that the contract here under review was made before the passage of the Statute of 1891, which declares contractors to be "agents" of the owner.

Compare also *Weber v. Weatherby* (1871) 34 Md. 656, where the vendee of the house in question was held to have acted as the vendor's agent with regard to the ordering of a furnace, the reasonable inference being that if it was put into the house with the defendant's knowledge, and without his objection, it was done with his sanction and approval. This decision was followed in *Blake v. Pritcher* (1877) 46 Md. 453.

<sup>3</sup>In *Williams v. Uncompahgre Canal Co.* (1888) 13 Colo. 469, 22 Pac. 806, a lien was allowed for work performed at the instance of the president and treasurer of the defendant company. The contention actually rejected was that, on the evidence, the plaintiff's immediate employers were principal contractors, and that he himself was consequently a subcontractor.

<sup>4</sup>In *Pilz v. Killingsworth* (1891) 20 Or. 432, 26 Pac. 305, the exactment under discussion was not the general Mechanics' Lien Law of Oregon but the special provision in § 3676 of Illill's Code, by which it is declared that "any person who shall, at the request of the owner of any lot in any incorporate city or town, grade, fill in, or otherwise improve the same, or the street in front of or adjoining the same, shall have a lien upon such lot for his work done and materials furnished in grading, etc." The court thus stated its position: The contract authorized the contractor "to do all acts necessary and proper to enable him to fulfil his contract. It must have been

the case of services rendered at the request of persons acting as the agents of the owners. The right of claimants to enforce liens on the ground that they were employed by persons who had authority to enter into the contract of employment on behalf of the owners involves the determination of a question of fact. That question has been considered with reference to provisions of the following description:

(1) Provisions which create a lien in respect of work performed under a contract made by an "agent" of the owner.<sup>1</sup>

(2) Provisions which create a lien in respect of work performed under a con-

understood that this work was not wholly to be done by the contractor with his own hands. He was fully empowered to employ such assistance as might be necessary to enable him to complete his contract. The consent of the owner to the employment of laborers by the contractor is a necessary and inevitable implication from the contract under which the work was done. We think a fair and reasonable construction of the section under consideration is, that when a person is employed by the owner of a lot in an incorporated city or town, to grade, fill in, or otherwise improve the same, and he employs laborers to assist him in performing the work, that the services of such laborers must be considered as having been rendered at the request of the owner." Compare the language used in *Parker v. Bell* (1856) 7 Gray (Mass.) 429, cited in § 55, note 2, *infra*. As to the second ground upon which the lien was held to be enforceable, see § 56, note 5, *infra*.

**(a) Lien enforceable.**

<sup>1</sup>In *Central Trust Co. v. Condon* (1895) 14 C. C. A. 314, 31 U. S. App. 387, 67 Fed. 84 (decided with reference to the Tennessee statute), the right of an assistant engineer to enforce a lien on a railroad was affirmed on the ground that, in hiring him, the principal contractor had acted as the agent of the railroad company. Referring to the assistant engineers as a class, the court said: "The amount which they did receive was paid, it is true, by Eager [contractor]; but we have found that it was the duty of the company, under the contract, to pay the engineering expenses. In paying and employing these men, therefore, Eager was not arranging and paying for work to be done by him under the contract, but he was pro tanto acting as agent for the company in arranging and paying for work which was imposed by the contract on the company."

In *Libbey v. Harney* (1913) 41 App. D. C. 205, the right to enforce a lien for materials supplied was affirmed on the ground that the agency of the architect who ordered them was shown by the record to

have been "of that general character which would indicate to plaintiffs, in his dealings with them, that he was, at least, apparently acting within the scope of his authority."

In the following cases an architect was held or assumed to be an "agent" of the owner: *Thomas v. Stewart* (1892) 132 N. Y. 580, 30 N. E. 577; *Fitzgerald v. Moran* (1894) 141 N. Y. 419, 38 N. E. 508; *Schnaier v. Nathan* (1900) 49 App. Div. 298, 63 N. Y. Supp. 38.

See also *White Lake Lumber Co. v. Russell* (1887) 22 Neb. 126, 3 Am. St. Rep. 262, 34 N. W. 104, where a lien for materials was enforced on the ground that the contract to furnish them had been made with one who, as the evidence (not stated) showed, was acting as the agent of his daughter, the defendant.

(b) Lien not enforceable.

In *Central Trust Co. v. Condon* (Fed.) supra (decided with reference to the Tennessee statute), the right of a subcontractor to enforce a lien for work done on part of a railroad under a contract with the president of the railroad company was denied on the ground that such a contract was unauthorized, in view of the fact that a contract for the construction of the whole road had previously been let by the board of directors.

In *Stout v. McLachlin* (1887) 38 Kan. 120, 15 Pac. 902, the disallowance of a claim for a lien upon a mill was held to be justified by evidence to the effect that certain new machinery supplied by the claimants had, without the authority or knowledge of the millowners, been shipped to them in pursuance of an order sent by a person who had contracted for a lump sum to furnish all the material necessary for making certain changes in the mill. The special contention that, as claimants had established the fact of the custom of charging up to the millowner the goods when ordered by millwrights who were repairing mills throughout the country, and giving the agent a commission on the sale of the goods, this custom of trade superseded, as far as they were concerned, the contract made by the defendants with the millwright without their knowledge, was rejected, for the reason that the defendants were not shown to have had any knowledge of the custom alleged, and that the parties had, by entering into a definite contract, left nothing to be interpreted by the laws of trade.

In *Watts v. Metcalf* (1902) 23 Ky. L. Rep. 2189, 66 S. W. 824, it was held that an architect was not the owner's "agent" in respect of a promise to pay a subcontractor, for work performed after the contractor had abandoned the contract.

In *Meade Plumbing, Heating & Lighting Co. v. Irwin* (1906) 77 Neb. 385, 109 N. W. 391, 111 N. W. 636, it was held that a woman who had been merely empowered by her brother, a resident of another state, to collect the rents accruing from certain

property, and pay them over to a designated person, had no authority to bind him by a contract for improvements on the property, and to subject his interest therein to a lien.

*Maass v. Jarvis* (1897; N. Y. City Ct.) 20 Misc. 687, 46 N. Y. Supp. 544, where the contract declared that the architect should have no power, except by "permission in writing," to vary the terms of a provision in the contract regarding the constituents of the stucco to be used, it was held that no lien could be enforced for extra work done in pursuance of an order which he had given without such permission.

On the ground that the contract drawn by defendant's architect related only to the plans and his compensation and matters relating thereto, in case defendant proceeded with the construction of the building in question, it was held in *Litherland v. Cohn Real Estate Co.* (1909) 54 Or. 71, 100 Pac. 1, 102 Pac. 303, that one who claimed as a principal contractor, and not as a subcontractor relying on the statutory "agency" of the contractor (see note 5, infra), was not entitled to enforce a lien on the theory that the architect was the owner's agent as regards making a contract for the erection of the building.

In *Nicholstone City Co. v. Smalley* (1899) 21 Tex. Civ. App. 210, 51 S. W. 527, the question whether a corporation organized for the erection of buildings and the accumulation and loan of funds for the purchase of real estate in cities, towns, and villages, was bound by the action of one Nichols, who, acting in pursuance of the authority conferred by a written instrument signed by a portion of the stockholders, had entered into a contract with plaintiff for the improvement of the corporate property, was resolved in favor of the defendant on the following grounds: That the instrument was never so acted upon as by its own terms to bind the company; that, although Nichols was chairman of the executive committee, and as such, in a sense, an agent of the company, this did not authorize him to make improvements; that without such authority no lien on the land or its fixtures could arise from his contract; that neither the individual directors nor a majority, however great, of stockholders, acting separately, could thus bind the corporation.

For a case in which a lien was disallowed on the ground that an agent appointed to "look after" the defendant's property, and "close a deal for its sale," had exceeded his power, see *Daly v. Arkadelphia Mill. Co.* (1916) 126 Ark. 405, 189 S. W. 1053, the effect of which is stated in § 3, supra.

On the ground that the promoters of a company were not its "agents," it was held in *David v. Maysville Creamery Asso.* (1895) 63 Mo. App. 477, that they could not charge property to be acquired by it with a mechanics' lien.

Compare also, *Doolittle v. Goodrich* (1882) 13 Neb. 296, 13 N. W. 400, where a judgment in favor of a materialman was

tract made with a person "having authority from or rightfully acting for" closed principals are exempt from the operation of an enactment containing

these words was rejected in the case cited below.<sup>2</sup>

(3) Provisions which create a lien in respect of work performed under a con-

reversed on the ground that the testimony did not show that the contractor was the agent of the defendant.

the owner.<sup>2</sup> The contention that undis-

<sup>2</sup>The following reasons assigned in *Parker v. Bell* (1856) 7 Gray (Mass.) 429, for holding an enactment of this tenor to be applicable to laborers hired as servants by a contractor, would seem to be equally pertinent in respect to subcontractors: The contract "authorized" the contractors "to do all acts necessary and proper to enable them to fulfil their contract, and to complete the tenement to be erected. It was, of course, understood between the parties that this work was not to be wholly and in every part done by the contractors with their own hands. They were fully empowered to employ, in the execution of the contract, the necessary workmen, and to cause their labor to be faithfully applied in fulfilment of its provisions. The consent of the respondents to such employment of laborers, and such application of their labor, is a necessary and inevitable implication from the contract under which the house was to be erected." There the immediate employers of the petitioners were a firm with whom one Pratt had, with the knowledge and consent of Bell, his cotenant, made an agreement in writing for the erection of a dwelling house on their lot of land.

This case was followed in *Morse v. School Dist.* (1858) 3 Allen (Mass.) 307, where the petitioners were employed to perform work on a schoolhouse by a party with whom the duly chosen building committee of the school district had, in the exercise of its delegated powers, made a contract by which he undertook, for a stipulated compensation, to finish a certain addition to the building. The court said: "The building committee of the district were left wholly unrestricted as to the manner in which they should proceed in executing and completing the work, which they were instructed to cause to be performed without delay. They had therefore a right to employ Davis to do it; and it is wholly immaterial whether, in their contract with him, they came under a personal obligation for the compensation to be paid to him, or imposed a direct liability therefor upon the party for whom the work was to be done, and who was to continue to be the owner of the building when the proposed enlargement of it should be completed. The work having been ordered and directed by the district in the improvement of its own property, and being done under a lawful contract made for that purpose, was necessarily done with its consent and under its authority. As soon, therefore, as Davis had entered into an agreement with the

committee for that purpose he was authorized by the district, as the owner of the land on which the building stood, to proceed in the construction of the proposed addition to the schoolhouse, and for that purpose to employ such persons to render the service thereon as might be requisite and necessary to complete it."

In *Carolina Hardware Co. v. Raleigh Bkg. & T. Co.* (1915) 169 N. C. 744, 86 S. E. 706, one of the findings of the trial judge was that, in order to procure the completion of the building on which the plaintiff claimed a lien for materials furnished and work done, the defendant agreed with the principal contractor that he would pay for all materials thereafter purchased. The right of the plaintiff to enforce the lien was affirmed on grounds thus stated: "The material furnished by these plaintiffs became the direct obligations of the trust company, and not those of the original contractor. It is immaterial whether the plaintiffs knew of the new agreement made in August, 1912 although it is found that they had knowledge of it. The liability of the agent is not exclusive. Although the plaintiffs extended credit to Carr in ignorance of the fact that he was acting for the trust company, the plaintiffs had the right to hold the undisclosed principal liable when discovered."

<sup>3</sup>*Paine v. Tillinghast* (1885) 52 Conn. 532. The court said: "The language is broad and comprehensive. . . . Much of the business of repairing buildings in cities and large towns is under the supervision of agents, and in many instances probably the mechanic or dealer in supplies knows only the agent. They know that the statute on its face gives them a lien on the building, and they rely on it quite as much as or more than they do on the personal responsibility of the agent. To construe the statute as not applying to an undisclosed principal would make it operate as a snare, and would deprive parties of the benefit which the statute evidently intended they should have. To apply and enforce the statute in a case like this works no injustice. Every owner of real estate knows the law. When he employs an agent to construct or repair a building he knows the liability he incurs under the Lien Law, and may easily protect himself and it is not unreasonable to require him to do so, while it would be a hardship to require mechanics, when the owner is unknown, to know the terms of the agency, and to ascertain the nature and extent of the private instructions to the agent. We conclude, therefore, that the peculiar principles of the law of agency which relate to undisclosed principals must yield to the provisions of the statute."

tract made with a person "acting by the authority" of the owner.<sup>4</sup>

(4) Provisions which create a lien in respect of work performed under a contract with "one whom the owner had authorized or permitted" to make it.<sup>5</sup>

As the lien created by enactments of the type discussed in this section "is a special one, in favor of a special class, it is but reasonable that those who claim it should be required to know when they contract, that the person with whom they contract has power to create it so as to bind the property. The title being on record, the mechanic is chargeable with notice that the agent is not the owner, and having that notice,

while dealing with a person not having the title, or being clothed with the evidences of title, he should ascertain the source and extent of the authority before contracting; and, failing to do so, he should bear the consequences of his negligence."<sup>6</sup> But the operation of this principle is obviously modified pro tanto wherever the circumstances are such as to call for the application of the general doctrine of the law of agency, that a limitation which does not affect the nature and character of the authority conferred by the principal, but simply circumscribes its exercise in some particular respect, does not affect the remedial rights of third persons who have no notice of the limitation.<sup>7</sup> With refer-

<sup>4</sup>In *Schindler v. Green* (1905) 7 Cal. Unrep. 229 82 Pac. 341, the evidence held to be sufficient to entitle the plaintiff to a lien for work done in the house of the defendants was as follows: That the parties by whom the contract was signed were the daughters of the defendants and lived with them; that the person who drew the contract and who supervised and superintended the work was a brother of the defendants; that the other defendant could sign his name only with a mark; and that both defendants had actual knowledge of the agreement between plaintiff and their daughters; and they had actual notice that the work was being performed, and that the plaintiff was performing it.

Compare also *Grenfell Lumber Co. v. Peck* (1916) 29 Cal. App. 347, 155 Pac. 1012 (involving the claim of a materialman), where the evidence was held to be sufficient to support the finding that the defendant's son, if not actually authorized by the defendant to act for him in the matter of the building of a barn on his farm, and in the directing the plaintiff to deliver to the tenant of the farm the lumber necessary therefor, had by the defendant's acts and conduct been so held out as his agent in the business as to warrant the plaintiff in so regarding him.

<sup>5</sup>In *Hough v. Collins* (1898) 176 Ill. 188, 52 N. E. 847, the conclusion that Collins was entitled to a lien, as having performed labor on a building under a contract made with a "person authorized by the owner" and not with a mere contractor, was held to be properly drawn from evidence which showed that his immediate employers, Dorn & Company, superintended the construction and management of the building in question; that the first contract made between them and the defendant, Hough, showed that he simply desired their "aid and assistance," for which they were to get no compensation; that Dorn told various parties during the progress of Collins's work that he was simply acting as Hough's agent; that Hough also said Dorn was his agent in the construction of that building;

that Hough had not paid Dorn & Company money on their pretended contract; that, according to the architect's testimony all of the other contracts for plastering, plumbing, etc., were made directly with the owners, through Dorn & Company, their agents, and his own relations with Hough were through his agents, Dorn & Company.

In *Burns v. Lane* (1887) 23 Ill. App. 504, a judgment subjecting the defendant's property to a lien for work performed under a building contract made with her father was held to be warranted by evidence to the following effect: "That a day or two previous to the signing of the contract she, with her father and mother, had a conversation with the claimant, in which she took a prominent part; that after the contract was made, and before the work began, she gave instructions as to how she wanted the house built; that she went with her father and the claimant to look at the ground on which it was afterwards built; that she was frequently present during the progress of the work, making objections, giving directions, and complaining at delay; especially that she furnished the money with which to pay a part of the contract price and promised to pay the balance; and that before it was completed she moved into the house with her parents and was still occupying it.

In *Leafgreen v. Yablonsky* (1913) 178 Ill. App. 19, it was held that a lien for extra work done by the order of the superintendent of construction could not be enforced because the contract expressly provided that no such work "would be paid for without a written agreement made and approved by the owner."

<sup>6</sup>*Baxter v. Hutchings* (1868) 49 Ill. 116 (lien claimed for materials furnished to defendant's son).

<sup>7</sup>*Paine v. Tillinghast* (1885) 52 Conn. 532, where it was unsuccessfully contended by the defendant, a married woman, that, as the power she had conferred upon her brother to attend to the making of certain repairs needed on her property, and to act according to his judgment, was restricted

ence to the Kansas statute, one of those which includes a provision of the type specified under par. (1), supra, it has been laid down that, if the evidence shows that claimant looked to the agent for his remuneration, he cannot enforce a lien upon the principal's property.<sup>8</sup>

The following remarks, made with reference to the Massachusetts statute, are doubtless pertinent in respect of all the enactments mentioned in this section: "It is merely to the extent of the labor actually performed by the petitioners that the lien upon the estate was created. This will include not only the work done with their own hands, but also that which was contributed by their apprentices; but it excludes from the amount so to be secured all the charges for the labor which was performed by their journeymen or laborers in their employment. The reason is obvious. . . . The apprentice earns no wages for himself, and therefore he can have no lien, for, having no claim for personal compensation, he has no occasion for security; but the labor which he performs belongs to his master, in whose favor the lien arises the same as if he had himself executed the work. It is otherwise with the journeyman. He earns wages; he is entitled to payment for labor performed, and therefore he may have in his own behalf a lien upon the land upon which he has wrought."<sup>9</sup>

A lien otherwise valid and enforceable is not extinguished by an unsatisfied judgment against an agent who has made himself personally liable on the contract.<sup>10</sup>

In any case in which the remedial rights of the claimant depend upon whether the contract was made by his employer in the capacity of an agent or

of a principal, the question of fact thus presented is determinable from such relevant evidence as may be offered on one side or the other.<sup>11</sup>

#### § 56. Enactments specifically applicable to the claims of subcontractors.

In a third group of statutes the terminology adopted evinces explicitly an intention on the part of the legislature to provide a remedy in rem for the protection of subcontractors. The cases which bear upon the subject of the present monograph have been decided with reference to the following classes of provisions:

(1) Provisions which create a lien in respect of work performed under an agreement with an "agent" of the owner, or with a "contractor or subcontractor." The operation of these provisions so far as they involve the construction of the word "agent" has been discussed under par. (2) of the preceding section. The effect of extending the scope of the lien so as to cover work done for a "contractor" or "subcontractor" is obviously to create a special kind of constructive agency, and thus to supersede pro tanto the general rule which is controlling apart from statute, viz., that the employees of a contractor cannot hold the principal employer liable for their remuneration. The consequence which follows in this point of view is that, "in contemplation of law the owner of the building, by employing a person to do the work, does thereby cloth him with authority, not to bind him individually and to an unlimited extent, as an ordinary agent might do, but so far as the procuring of materials and labor may be necessary to complete his contract."<sup>1</sup>

by instructions that he should not expend more than \$500, the plaintiff, a materialman, could not enforce a lien for more than that amount.

<sup>8</sup> Such a doctrine seems to be a warrantable deduction from that applied in *Doane v. Bever* (1901) 63 Kan. 458, 65 Pac. 693, where it was laid down that "if the plaintiffs chose to make Schwartz their debtor and to sell their goods upon his credit, the mere fact that they were to be used in betterments upon the premises of the defendant Bever would not entitle them to a lien thereon."

<sup>9</sup> *Parker v. Bell* (1856) 7 Gray (Mass.) 429.

<sup>10</sup> *Dickson v. Corbett* (1876) 11 Nev. 277.

<sup>11</sup> In *Union Trust Co. v. Branch Mint Operating Co.* (1912) 28 S. D. 549, 134 N. W. 65, involving the right to enforce a miner's lien on a mine which was being operated

by the Branch Mint Operating Company, under a contract with the owners, the Branch Mining & Milling Company, it was held that, under a finding to the effect that all of said labor was performed and materials furnished under contracts made with the former company, and by its officers, in its name and behalf, and ostensibly for a person claiming to act as the agent of the latter company, it followed that the contractors, knowing of the contract under which the lessee company was working the mine, contracted with it as principal and in its behalf.

<sup>1</sup> *Morrison v. Hancock* (1867) 40 Mo. 561 (where the claimant was a materialman).

The precise scope of the theory stated in the text is further indicated by the language used in *Deardorff v. Everhart* (1881) 74 Mo. 37, where an instruction given at the request of a materialman was declared

But this doctrine is subject to the qualification that a person employed by the contractor cannot establish a lien, if it is shown that the full contract price was paid to the contractor before the owner had any knowledge of the plaintiff's claim.<sup>2</sup>

(2) Provisions which create upon the

erroneous, as being inconsistent with the proposition that "the relation of principal and agent is not established by the statute between the owner of the real estate and the contractor. If the latter was the agent of the former, not only the property improved would be subject to the lien of the materialman, but the owner would be personally liable for the debt."

In *Mineah v. Stotts* (1906) 130 Iowa, 530, 107 N. W. 425, where the plaintiffs "claimed as principal contractors" a lien in respect of labor and material furnished for the improvement of the defendant's house, the defendant's contention was that she contracted with one Cross for the entire job at a certain price, and was therefore not liable for any sum in excess thereof. The conclusion arrived at was that this contention was not supported by the evidence, and that Cross undertook only to furnish certain labor and material for the reasonable value thereof and to superintend the improvement. "By employing him as she did, Mrs. Stotts made Cross her agent for the purchase of the necessary material and the employment of the necessary labor, aside from the carpenter work, which he undertook himself, to carry out her plan for the improvements. And his contract with the materialmen and laborers was her contract in law." See also *A. E. Shorthill Co. v. Aetna Indemnity Co.* (1910) — Iowa, —, 124 N. W. 613, where the court, in discussing the right of a materialman to a lien, observed: "In the theory of mechanics' lien statutes he was endowed by the owner, in entering into the building contract, with authority to bind said owner to the extent of the material furnished him, as such contractor, necessary to complete the contract." The actual point decided was that, after the owner had, in the exercise of a reserved right, terminated the employment of the contractor and completed the building, the relation of agency under the statutes ceased, and that the subsequent supply of materials and labor imposed no obligation upon him.

<sup>2</sup> *Henry v. Hinds* (1885) 18 Mo. App. 497 (claim in respect of extra work). The court said: "By the express provision of the statute, his [the contractor's] right to the lien depends and rests upon the existence of a contract between him and the property owner. That his subcontractor, who never saw nor communicated with the owner, can occupy in this respect a better position than the principal contractor, must strike the judicial mind as violative of every principle of recognized law and

property in relation to which the work is done an absolute lien in favor of 'subcontractors.'" Under a provision of this tenor the "right of lien is confined to work, labor, and material required by the principal contract. To that extent, by force of the statute, the owner makes the principal contractor his agent to bind his property, but no further."<sup>3</sup> If, in point

every dictate of justice. Such a right cannot stand on the doctrine of principal and agency. *Deardorff v. Everhartt* (Mo.) supra. He who deals with a special agent must take notice of the extent of his authority and the limitations upon his office. . . . The only rational basis for the legislation giving the subcontractor a lien against the property owner is the principle of substitution by which, it would seem, the party substituted, by operation of law, could occupy no better situation than he for whom he is substituted."

<sup>3</sup> *Siebrecht v. Hogan* (1898) 99 Wis. 437, 75 N. W. 71. There a judgment in favor of a subcontractor who claimed a lien for extra work was reversed on the ground that the instructions given to the jury embodied "the theory that the right of the subcontractor to a lien included charges for all work, labor, and material furnished to the principal contractor, without regard to the principal contract, and all damages to such subcontractor by reason of negligence of the principal contractor or breach of contract on his part." The court, after making the statement quoted in the text, continued thus: "The subcontractor's right, at every point, is referable to the principal contract as originally made or subsequently modified. That forms the basis for all operations; hence, as to everything outside of it, for which the principal contractor would not be entitled to a lien against the owner, the subcontractor cannot acquire a lien to the prejudice of such owner, whatever his rights may be against the principal contractor personally. That is the clear intent of the statute. The whole theory of it is that the owner consents to what is required to carry out the principal contract, and makes his property liable therefor in accordance with the statute, which is made a part of the contract, the same as if actually embodied in it. But if the subcontractor, by mistakes, increases the cost of the building to him, or by reason of negligence or breaches of contract with a subcontractor in the second degree increases such cost, that cannot be said to have been contemplated by the owner and consented to by him." The rule thus laid down was approved in *Seeman v. Biemann* (1900) 108 Wis. 365, 84 N. W. 490, but held to be inapplicable under the evidence in the record. For cases in which the rule was applied for the benefit of materialmen, see *Taylor v. Dall Lead & Zinc Co.* (1907) 131 Wis. 348, 111 N. W. 490; *W. H. Pipkorn Co. v.*

of fact, he was such an agent, the lien attaches to the property, "not by reason of the contract, for the lien is not the creature thereof, but it is by virtue of the statute."<sup>4</sup>

(3) Enactments which provide that a contractor or subcontractor shall be held to be the "agent" of the owner as for the purpose of the enforcement of the lien. The effect of provisions of this

type is to produce a species of statutory agency which is wholly independent of the actual intentions of the principal, and in this respect is analogous to the description of constructive agency which arises under the provision referred to in pars. (1) and (2), *supra*.<sup>5</sup> Most, if not all, of these enactments, are, by their express terms, applicable to persons who supply materials to contractors.<sup>6</sup> But

Tratnik (1915) 161 Wis. 91, A. L. R. —, 152 N. W. 141.

As to the effect of statutes of this tenor, see generally Jones, Liens, §§ 1283 et seq.; Phillips, Mechanics' Liens, §§ 57 et seq.; Rockel, Mechanics' Liens, §§ 54 et seq.

<sup>4</sup> Beach v. Huntsman (1908) 42 Ind. App. 205, 85 N. E. 523.

Compare also, Pomeroy v. White Lake Lumber Co. (1891) 33 Neb. 243, 49 N. W. 1131, where it is laid down in the syllabus written by the court, that the right of a materialman to a lien upon a building does not result from the contractor being an agent of the owner, but from having furnished such contractor materials which were used in the erection of the building.

<sup>5</sup> In Smith v. Wilcox (1903) 44 Or. 323, 74 Pac. 708, 75 Pac. 710, the court said: "To facilitate the acquirement of the lien, however, the statute has made the original contractor an agent of the owner while in charge of the construction. Necessarily, he is given the primary control thereof. He may authorize some other person to superintend or take the management of the work, or the parties may agree that an architect or a special builder shall be in charge, but unless there is some such provision to shift the supervision, he is necessarily intrusted with it. Being in entire charge, therefore, of the construction, he may subject the building to a lien by the employment of any person to perform labor or furnish materials therefor. A subcontractor, as we have seen, is within the range of such employment, so that he is manifestly within both the letter and spirit of the statute. The principle upon which mechanics' liens are upheld, where they are given to persons other than those contracting directly with the owner, is that the contractor becomes, for the purpose of the statute, an agent of the owner, and thus do all such persons indirectly contract with the owner." The authority cited for this proposition was Osborn v. Logus (1894) 28 Or. 302, 42 Pac. 997, in which the special point was decided that "whether the person for whom the labor is done or to whom the materials are furnished was an agent under the statute, or had authority to bind the owner, and entitle the laborer or materialman to a lien, is a matter of pleading and proof at the trial," and that the fact of agency consequently need not be stated in the notice of lien.

In Litherland v. Cohn Real Estate Co. (1909) 54 Or. 75, 102 Pac. 303 (for earlier

appeal, involving merely a point of practice, see (1909) 54 Or. 71, 100 Pac. 1), the remarks of the court in Smith v. Wilcox (Or.) *supra*, were approved. But the actual ratio decidendi was that the statutory provision was not applicable to the claim of a principal contractor.

In Pitz v. Killingsworth (1898) 20 Or. 432, 26 Pac. 305, the second ground assigned for the decision was, that the provision of the general Mechanics' Lien Law as to the statutory agency of the contractor was by implication to be read into the special enactment as to liens for work done in the grading of streets.

In Hobbs v. Spiegelberg (1884) 3 N. M. 357, 5 Pac. 529, it was laid down that, by force of the statute, the owner of a building is "in privity with every laborer who works upon it."

In Seattle Lumber Co. v. Sweeney (1906) 43 Wash. 1, 85 Pac. 677, where the subcontractor had taken over the work of constructing the building in question, after the principal contractor had absconded, a person who had supplied materials both before and after the new arrangement went into operation was held to be entitled to a lien, on the ground that, as the subcontractor had been authorized to construct the building, and the owner had made no provision for materials, the subcontractor was by implication invested with the power to procure them, and was consequently the actual, as well as the statutory, agent of the owner for this purpose.

The general provision in § 5710 of the Idaho Rev. Codes was applied in Hill v. Twin Falls Salmon River Land & Water Co. (1912) 22 Idaho 274, 125 Pac. 204 (lien declared in favor of man who had hauled materials to be used in a dam).

Under § 5112 of those Codes, the contractor who constructs a sidewalk is made the agent of the owner of the abutting lots for the purpose of the provisions of the chapter in said Codes providing for mechanics' and materialmen's liens. Shaw v. Johnston (1910) 17 Idaho, 676, 107 Pac. 399.

The Oregon cases were approved in Cribb v. Caskey (1910) 4 Alaska, 254.

<sup>6</sup> For cases in which enactments of this tenor were construed, see Valley Lumber & Mfg. Co. v. Nickerson (1907) 13 Idaho, 682, 93 Pac. 24; Hill v. Twin Falls Salmon River Land & Water Co. (1912) 22 Idaho, 274, 125 Pac. 204; Peerless Pacific Co. v. Rogers (1916) 81 Or. 51, 158 Pac. 271.



their protection does not extend to persons who perform work and labor in preparing the materials for the material-man.<sup>7</sup>

There is explicit authority for the doctrine that, when used in connection with a clause relating to the supply of materials, a provision which creates a statutory agency confers upon the contractor merely the limited powers of a special agent, who is competent "to bind the property benefited for the payment of the reasonable value of such material only as is ordinarily sufficient properly to construct the building in accordance with the plans and specifications thereof, or in pursuance of the agreement entered into between the owner and contractor."<sup>8</sup> Mutatis mutandis, this doctrine is presumably applicable to cases where a lien in respect of labor is claimed.

In *Pacific Rolling-Mill Co. v. Hamilton* (1894) 61 Fed. 476 (decided with reference to the Washington statute), the court held that a person who had refused to deal with the defendant company, and had furnished it with materials solely on the personal liability of the acting manager, was not a "contractor" in such a sense as to be its "agent" in respect of a claimant from whom he had purchased materials.

<sup>7</sup> In *Baker v. Yakima Valley Canal Co.* (1913) 77 Wash. 70, 137 Pac. 342, there was held to be no basis in the facts for declaring a statutory agency in favor of laborers who had screened sand and gravel for a man who had agreed to supply them to a contractor. The court quoted the statement that "a subcontractor is one who takes from the principal contractor a specific part of the work, and the term does not include laborers or materialmen." *Young Men's Christian Asso. v. Gibson* (1910) 58 Wash. 307, 108 Pac. 766.

<sup>8</sup> *Fitch v. Howitt* (1898) 32 Or. 396, 52 Pac. 192.

<sup>1</sup> The failure to satisfy this prerequisite was one of the grounds upon which it was held in *Linn v. Alameda Min. & Mill Co.* (1909) 17 Idaho, 45, 104 Pac. 668, that no action could be maintained in respect of work performed in prospecting a mine, under a contract made with the agent of a company which had previously secured an option upon the stock of a large shareholder in the defendant company, and exercised it before the plaintiff's claim was presented. The court said: "The fact that the Alameda Company [vendor] may have, after the work was completed, paid Mayo-Sachs & Company [purchaser] for some or all of the money they had expended or work they had caused to be performed through the Success tunnel would not of

IV. *Right of recovery considered with reference to the question whether the contract of employment was adopted by the principal.*

#### § 57. Generally.

A portion of the cases in which the right of a claimant to hold the principal liable on the ground of a ratification of an unauthorized contract has been discussed with reference to claims for remuneration on account of work performed illustrate some of the general conditions precedent to a recovery upon this footing; viz., that the party with whom the claimant dealt should have been professedly acting as the agent of the defendant, or that the claimant should, under the circumstances, have been justified in believing him to be such an agent;<sup>1</sup> and that the defendant should have had knowledge of all the material circumstances incidental to the making and performance of the contract upon which the action is brought;<sup>2</sup> and that,

itself obligate them to pay anyone else, nor would it mislead anyone who had already performed labor on the faith of Mayo's credit, nor would it create any element of estoppel against the Alameda Company, or impose any liability against them for other debts of Mayo-Sachs & Company that had been previously incurred."

In *Thompson v. Brown* (1904) 121 Ga. 814, 49 S. E. 740, the fact of a husband's having paid for work done under a contract made with his wife was held not to import ratification by him as principal, the evidence being that she had contracted in her own behalf.

In *Woodman v. Wicker* (1904; Sup. App. T.) 88 N. Y. Supp. 411, where it was held that the lower court was warranted in denying the right of a chemist to recover for certain services, it was observed that "the use made by the defendant of the plaintiff's last report cannot be considered as a ratification of the acts of Cullen as defendant's agent, for the reason that there is nothing in the testimony from which it can legitimately be inferred that Cullen ever had authority from the defendant to act as his agent."

As to the general doctrine, see *Story, Agency*, § 251-2.

#### (a) Ratification inferable.

<sup>2</sup> In *Re Berkebile* (1905) 144 Fed. 572, a wife's knowledge and ratification of a building contract made by her husband with the plaintiff, and, without her cognizance, assigned to her, was held to be inferable from the fact that, while the work was in progress, she made certain assignments of money due or to become due upon the contract.

In *Central R. & Bkg. Co. v. Cheatham* (1887) 85 Ala. 292, 7 Am. St. Rep. 48, 4 So.

828, evidence that circulars offering a reward were posted at various places on the line of the railroad, by direction of an employee who was under the control of the superintendent, and remained posted for several months and until after the performance of the service, was held to be proper to go to the jury as tending to show that the officers of the defendant company were cognizant of the superintendent's act in offering the reward.

In *Pittsburgh, C. & St. L. R. Co. v. Woolley* (1876) 12 Bush. (Ky.) 451, requisite notice was inferred where the employment of an assistant counsel was reported to the director who had authorized such employment, and also to another agent of the defendant, who had some connection with the litigation in question.

In *Crane v. Ross* (1912) 168 Mich. 623, 135 N. W. 83, the direction of a verdict in favor of a married woman, sued by a broker for his commission on a sale of her land, was held erroneous, on the ground that there was evidence tending to show that she had knowledge of the agreement between her husband and the plaintiff, relating to the sale or exchange of her property, that she acquiesced therein, and that her husband had assumed to act for her respecting her property, with her knowledge and consent.

In *Shepherd v. Mackoul* (1813) 3 Campb. (Eng.) 328, where the defendant's wife was indicted for keeping a disorderly house, and employed the plaintiff to defend her, the jury were thus directed by Lord Ellenborough: "As the defendant knew and approved of the business his wife carried on, and was aware of the prosecution, without expressing any dissent to the plaintiff's defending her, I think a promise may be fairly inferred on the part of the defendant to pay the plaintiff for his labour in conducting the defense."

See also *Crockett v. Chattahoochee Brick Co.* (1894) 95 Ga. 540, 21 S. E. 42, where it is laid down in the syllabus of the court that if an architect assumes to act as agent of the owner, and purchases material upon the credit of the owner, with his full knowledge and assent, the latter thereby ratifies the assumed agency of the architect, and is bound for the price of the material thus purchased.

#### (b) Ratification not inferable.

*Sevier v. Birmingham, S. & T. River R. Co.* (1890) 92 Ala. 258, 9 So. 405 (managing agent of railroad company not notified of employment of physician by a subordinate until after the physician's services had been rendered); *Findlay v. Hildenbrand* (1909) 17 Idaho, 413, 29 L.R.A. (N.S.) 400, 105 Pac. 790 (none of defendant's acts showed that he had been informed of the nature of the contract); *McLaren v. Hall* (1868) 26 Iowa, 297 (instruction erroneous which ignored the necessity of proving knowledge by a wife of a contract made with her husband); *Thiel Detective Service Co. v. Seavey* (1906) 145 Mich. 674, 108 N. W. 1080 (general

manager of company knew that the work of auditing its books was being done, but had no knowledge that it was being done under a contract made in behalf of the company); *Grant v. Duluth, M. & N. R. Co.* (1896) 66 Minn. 349, 69 N. W. 23 (no evidence of knowledge on the part of directors of the company that the president had assumed to make the contract in question); *Holmes v. Board of Trade* (1883) 81 Mo. 137 (essentiality of knowledge affirmed by court in commenting on statement of law by trial judge in action for legal services rendered at the instance of one of the defendants' directors); *Scott v. New York Filling Co.* (1910) 79 N. J. L. 231, 75 Atl. 772 (no knowledge shown on the part of the company, or of its board of directors, that the secretary had attempted to make any alteration in the contract); *Woodruff v. Rochester & P. R. Co.* (1888) 108 N. Y. 39, 14 N. E. 832 (no sufficient proof that defendant had any knowledge of the alleged agreement made with plaintiff by its engineers as to certain earthwork, or that it knew that the earth in question had been removed from the cut on its account and outside of the contracts which had been made for the construction of the road); *Twelfth Street Market Co. v. Jackson* (1883) 102 Pa. 269 (fact that the directors of the defendant company entered into a contract with the owner of the ground rent of the land on which its building stood was held not to amount to a ratification of its president's employment of a broker to procure a person to pay off the rent, because there was no evidence that such employment was known to the directors); in *Suderman-Dolson Co. v. Rodgers* (1907) 47 Tex. Civ. App. 67, 104 S. W. 193 (an agreement by which the foreman of a construction company stipulated that, as part of the consideration for the use of a doctor's premises, he should be employed as he regular physician for the company's workmen at a salary guaranteed to amount to a specified sum was not known to the company until the lease had expired and the premises had been abandoned).

That circumstances may arise, however, in which a want of complete knowledge on the principal's part will not be a bar to recovery, is indicated by *Galvano Type Engraving Co. v. Jackson* (1905) 77 Conn. 564, 60 Atl. 127, where one aspect of the evidence given in an action against a committee which had been formed to manage a public celebration, and had delegated to two of its members the task of making arrangements for the preparation of souvenirs, was thus commented upon: "The fact that Babcock and Sperry did not report to the defendants the terms of their agreement with the plaintiff until said official program or souvenir was printed and sold, and that the defendants did not, although knowing said work was being done, have other information as to the terms of the agreement, nor ask for such report or information,—assuming that such report and information ought

if the party by whom the contract is alleged to have been ratified was himself an agent, the contract should have been one which he had authority to make.<sup>3</sup>

Other cases exemplify the application of the doctrine that the failure of a prin-

cipal to state his position explicitly with regard to the extent of the agent's authority to bind him in the premises may, under certain circumstances, justify the inference of a ratification.<sup>4</sup>

It has been laid down that "the evi-

to have been given in pursuance of the rules regulating the conduct of the executive committee,—cannot prevent the plaintiff from recovering the judgment rendered in this action. Such failure by the defendants to follow and enforce their own rules cannot relieve the defendants from their liability to the plaintiff."

<sup>3</sup> In *Carroll v. Manganese Steel Safe Co.* (1903) 111 Md. 252, 73 Atl. 665, two of the points determined were, first, that, even if the language of a letter written by the defendant's secretary was assumed to be such as would have imported on its face a ratification of the transaction under discussion, there was no specific evidence in the case that the writer had, as secretary, any authority to ratify it, and, secondly, that no presumption can be entertained that the secretary of a corporation has power either to appoint agents or to ratify appointments previously made without authority.

In *Bright v. Metairie Cemetery Asso.* (1887) 33 La. Ann. 58, no legal ratification of a contract made by the defendant's president for legal services was held to have been established where the only evidence offered consisted of sundry bills of costs and other charges, made in the name of the association, approved by plaintiff, as its counsel, and paid by the president, and there was nothing to show that the president was thereto authorized by the board of directors, or that they ever approved or ratified his conduct in that particular.

<sup>4</sup> In *Toledo, W. & W. R. Co. v. Prince* (1869) 50 Ill. 26, the court argued thus: "Although a railway company is under no legal obligation to provide medical attendance for persons injured in its service, yet this would be so unreasonable a thing to do, where the wounded employee is dependent upon his daily labor for support, that a jury will generally find, even upon somewhat slight evidence, that the act of the station agent in employing the surgical skill necessary to save human life was ratified by his superiors. In this case, however, the station agent reported the case to the general superintendent a few days after the accident, and he testified that he heard no complaint in regard to his action until he afterwards presented the bills for payment. If the superintendent desired to save the company from being held responsible, he should, on receiving the report of the case, have dissented from the action of the station agent, and directed him to apprise the surgeon of such dissent, instead of allowing the latter to continue his services under the belief that he was in the employment of the company."

In *Cairo & St. L. R. Co. v. Mahoney*

(1876) 82 Ill. 73, 25 Am. Rep. 299, a ratification by the general superintendent of the employment of a surgeon by a station agent was held to have been properly inferred from evidence tending to show that the day after the employee had been injured, the superintendent inquired of the station agent how the man was getting along; that, while he had had information in regard to the character of the injury and the treatment by the surgeon, no objection whatever was interposed or complaint made by him in reference to the act of the station agent; and that afterwards, a few weeks subsequently, in a conversation with the surgeon, the superintendent informed him that the pay would be all right.

In *Chicago Consol. Traction Co. v. Matthews* (1904) 117 Ill. App. 174, where the plaintiff, a surgeon, attended an injured person at the request of the conductor of a street car, and on the following day communicated with the defendant's superintendent, and asked as to a continuation of his services, a confirmation of the contract of employment was held to be a permissible inference from the fact of the superintendent's having failed to make a direct reply to the plaintiff's question.

In *Terre Haute & I. R. Co. v. Stockwell* (1888) 118 Ind. 98, 20 N. E. 650, where the evidence showed that a conductor of a railway train, acting as the agent of the company, employed the appellee to render the medical services in question, that when the services were rendered the appellant had full knowledge of all the facts, and that the appellee was never discharged by the appellant, the court thus stated its conclusions: "We are of the opinion that if the services were rendered under the employment as stated, and with a full knowledge of all the facts at or about the time of the accident or employment, and that the appellant permitted the appellee to go on and render services after it had acquired such knowledge, it thereby became liable for the services rendered."

In *Stewart v. New York C. & H. R. R. Co.* (1916) 62 Pa. Super. Ct. 234, one of the grounds upon which it was held that a doctor was entitled to recover for services rendered to an injured railroad employee at the request of an assistant trainmaster was that the evidence showed that the doctor had made reports about the case to the trainmaster's office; that a district claim agent directed the doctor to give the patient attention and to send the bill to the company; that a bill was afterwards furnished to the company; and that a letter was received from the claim agent, in which he objected that the bill was excessive, but did

dence necessary to establish a ratification by the wife of a contract made by her husband as her agent, must be of a stronger and more satisfactory character than that required to establish a ratification by the husband of the act of the wife as his agent, or than as between independent parties."<sup>4-5</sup> That this doctrine would not be accepted by every court is indicated by the difference of opinion concerning the analogous ques-

tion as to the quality of the evidence required for the purpose of proving that a husband was acting as his wife's agent.

In a case where the claimant never understood that he was being employed by the alleged agent on behalf of the defendant, there is, of course, no room for the operation of the doctrine of ratification.<sup>6</sup>

not deny the company's liability for the services rendered.

In *Hall v. New York, N. H. & H. R. Co.* (1906) 27 R. I. 525, 65 Atl. 278, the plaintiff, a physician, was summoned by a station agent to attend an injured servant. He procured a trained nurse for his patient, and the following day prepared a report of the case, which he sent to the principal offices of defendant. Twice after the accident the claim agent of defendant, together with the company's physician, visited the patient, but the plaintiff remained in charge of the case. The plaintiff sent several bills to the defendant for his professional services. The defendant remained silent throughout the proceedings. Held that the question whether the defendant had ratified the employment of the plaintiff was for the jury. Evidence that the defendant had paid for services rendered in other cases in which the plaintiff had been called in by its station agents and other officials at times subsequent to the commencement of the services for which the action was brought was held to be inadmissible on the issue of ratification.

In *Ward v. J. Samuels & Bro.* (1915) 37 R. I. 438, 93 Atl. 649, the evidence showed that the superintendent of the defendants knew that the plaintiff had taken the case in question with the expectation of treating the patient as long as medical attention should be required in the case; that he was continuing such treatment; and that, under the circumstances, the plaintiff would probably regard the treatment as rendered on account of the defendant and to be charged to it. The court said: "These facts being known by its responsible agent, having the duty to act upon them himself, or to report them to the defendant, it became the legal duty of the defendant to early apprise the plaintiff of the true condition of affairs, to explain the extent of the authority of Mr. Solomon and the limit that it intended to place upon its own liability. If, in these circumstances, Mr. Solomon and the defendant remained silent, the defendant will not be permitted now to deny its liability."

In *Gaudreau v. Canada Atlantic R. Co.* (1903) Rap. Jud. Quebec, 24 C. S. 357, the liability of a railway company for medical services rendered at the request of a conductor to a man who had been struck by a train at a crossing was affirmed on the ground that, although the accident and the employment of the claimant had been

promptly reported to the general manager of the company, six weeks elapsed before a disavowal of the conductor's assumed authority was sent to the claimant, who had, in the meantime, performed several operations. Corroborative evidence of ratification was also found in the fact that, several weeks after this disavowal was sent the defendant's traveling passenger and freight agent was specially appointed to attend to all the wants of the wounded man, and, having put himself into communication with the claimant, proceeded to work in common with him with the avowed object of saving the patient's life and securing his early recovery.

A simple denial of liability is not evidence of a ratification. *Rice v. New York C. & H. R. R. Co.* (1907) 195 Mass. 507, 81 N. E. 285.

For other illustrative cases, see *Sevier v. Birmingham S. & T. River R. Co.* (1890) 92 Ala. 258, 9 So. 405 (managing agent of railroad company, when notified of the employment of a physician by a subordinate to attend on an injured person, should, if he desires to relieve the company of responsibility, notify the physician to that effect); *Indianapolis & St. L. R. Co. v. Morris* (1873) 67 Ill. 295 (managing officers of railroad company, when notified that conductor had taken an injured brakeman to plaintiff's house to be cared for, did not notify plaintiff that the company would not be responsible for the expenses); *Toledo, W. & W. R. Co. v. Prince* (1869) 50 Ill. 26 (general superintendent of railroad company, when he was notified that a station agent had employed plaintiff to treat an injured servant, did not dissent from the act); *Ferguson v. Majestic Amusement Co.* (1916) 171 N. C. 665, 89 S. E. 45, Ann. Cas. 1917C. 389 (owner of theater, who had engaged plaintiffs under contract terminable only on two weeks' notice, allowed them to continue playing for a week and a half before he notified them that they must submit to an alteration in the contract or leave at the end of the week); *Jones v. Jones* (1913) 72 Wash. 517, 130 Pac. 1125 (married woman knew that associate counsel was actively engaged on a case on her behalf).

<sup>4-5</sup> *McLaren v. Hall* (1868) 26 Iowa, 305.

<sup>6</sup> *Fish & H. Co. v. New England Homestake Co.* (1911) 27 S. D. 221, 130 N. W. 841 (defendant used surveyor's notes and plats).

In other instances the question of ratification has been determined from a consideration of the effect of certain

specific testimony having reference solely to the particular facts of the case under review.<sup>7</sup>

(a) Recovery allowed.

<sup>7</sup> In *The Sappho* (1899) 36 C. C. A. 395, 94 Fed. 545, a written contract for the repair of a steamer contained a clause providing that no new work of any kind done on the steamer, and no work of any kind, should be considered as extra work unless a separate estimate in writing should be made for the same before its commencement, and submitted by the contractor to the respondent company, and the signature of the chairman of the board of directors obtained thereto. After commencing the performance of the contract, the contractor found that the condition of the steamer was much worse than had been anticipated, and that it was impracticable to go on with the work according to the contract. After a conference between the libellant, the master of the steamer, the president of the respondent company, and the government inspector, the extra work made necessary by this condition was done. The conclusion of the trial judge, that there was not sufficient evidence in the record to sustain the contention that the company had ever formally abrogated the written contract, or, in view of the said clause as to extra work, had ever authorized the libellant to do the work as charged for by him, or acquiesced in or ratified what he did, so as to become liable therefore, was disapproved. The court said: "While this work was being done, President Witte was frequently at the steamer, and saw for himself what was being done; the evidence being that he would drive down about once a week. His own superintendent, specially designated by him for the purpose of looking after the work, was there all the time. The secretary of the company and its superintendent, Mr. Armine Witte, were frequently there, as were also Messrs. Lapan and Thompson, two directors of the company. In all, six officers of the company, several of whom had full knowledge of all that was being done, and all of them abundant opportunity to see what was done, and they one and all stood by and allowed the work charged for to be done and services performed, and the respondent company acquiesced therein by weekly supplying, according to the contract, sums necessary to pay off the employees for the labor performed. Under these circumstances, the work, in our opinion, should be paid for. . . . When the president of the company, upon being told that the contract could not be performed so as to make the steamer seaworthy, without replacing the rotten material discovered in her hull, directed Pregnall to go on with the contract, and had his superintendent overlook and direct the replacing of the rotten knees and timbers, Pregnall, from his own words and conduct, had a right to understand that the president consented to

his doing the necessary extra work, no matter what the president may have had in his mind, undisclosed to Pregnall, with regard to the effect of the contract."

In *Brong v. Spence* (1898) 56 Neb. 638, 77 N. W. 54, the evidence showed that Mrs. Brong owned an 80-acre farm, which she had leased to Spence; that she instructed her husband to cause the well upon it to be repaired; and that, after consulting with Spence, he was induced to make with one Swain a written contract for a new tubular well, by which it was provided that Swain should receive 75 cents per lineal foot for sinking the well, be furnished with a sufficient supply of water to enable him to prosecute the work, and have his men boarded and lodged while the work should be in progress. The defendants insisted that Mrs. Brong, having read the contract, acquiesced in its terms only upon being assured by her husband that Spence had agreed, in consideration of the new well being put down, to furnish board and lodging for the men, feed for the team, and furnish all necessary help. But this issue was determined by the jury in favor of the plaintiff. Discussing the question whether Mrs. Brong was bound by the agreement between her husband and Spence, the court said: "She undoubtedly ratified the contract with Swain with a full knowledge of its provisions. This, of course, included a ratification of the engagement in regard to furnishing water and boarding and lodging the men. To perform the obligations imposed by the Swain contract, Spence was employed, with her knowledge and consent. She was, it is true, misinformed as to the arrangement between Spence and her husband, but that was not the plaintiff's fault, and we do not see why it should prevent him from recovering for services rendered and accommodations furnished for Mrs. Brong's benefit and in fulfillment of the contract with Swain."

In *Cunningham v. Massena Springs & Ft. C. R. Co.* (1892) 63 Hun, 439, 44 N. Y. S. R. 723, 18 N. Y. Supp. 600, the action was brought to recover a balance claimed to be due for constructing a portion of defendant's railroad, under a verbal contract made with one Foster, president and general manager of defendant, and afterwards in part reduced to writing. The evidence held to show a right of recovery was that, after the contract was made, ground was broken by the plaintiff in the presence of twelve or fifteen of the defendant's directors; that Foster then and there pointed him out as the contractor who was to build the road; that he went on with the work in pursuance of the contract made with Foster; that the defendant not only furnished materials necessary to be used in said work, but made payments thereon to a large amount; and that he was also recognized

as a contractor by a resolution passed at a meeting of defendant's directors. The general rule was laid down that, "where a party does work or furnishes materials to a corporation under a contract with one assuming to act as its agent, to the knowledge of its officers, without dissent on the part of the corporation, it will be held to have ratified the contract, and to be liable thereunder."

In *Hill v. Coats* (1901; Sup. App. T.) 34 Misc. 535, 69 N. Y. Supp. 964, the defendant wrote a letter acknowledging the receipt of the plaintiff's bill for certain plumbing work, and stated that he had obtained the opinion of another plumber as to the value of the work, who considered \$40 an outside price for it. The letter concluded: "I am, therefore, willing to pay this sum provided you will give me a receipt in full for the work, but do not intend to go beyond this figure. Under the circumstances, I cannot but expect that you will modify your estimates to suit the case." Commenting upon the letter the court pointed out that it "did not resist payment of the plaintiff's claim on any theory of unauthorized employment, but merely because of excessive charge, and proceeded as follows: "The defendant could not take a position inconsistent with a disclaimer of ratification, and then deny liability after the plaintiff's refusal to accede to his terms. He was under no obligation to write or to pay, and his silence could not have been construed into an acceptance of the work. . . . A reasonable construction of the entire letter justifies this paraphrase: 'I accept the work. I do not intend to question the claim you allege against me, except as to its amount; that is exorbitant, and I refuse to pay more than \$40.'"

In *Rosewater v. Glen Teleph. Co.* (1903) 81 App. Div. 275, 80 N. Y. Supp. 880, where the plaintiff was an expert who had furnished an affidavit to be used by the defendant in legal proceedings, the right of recovery was thus discussed under one of its aspects: "The president of the defendant in this case in its name obtained numerous affidavits for use by the defendant in that action. The defendant paid the bills so incurred by its president in every case except the bill of the plaintiff. The defendant's attorney gave directions in regard to the affidavits so prepared and to be prepared by the defendant for use in that action. . . . The defendant should also be deemed by its acts to have ratified and approved his efforts in its behalf in sustaining the construction, safety, and practicability of the subways so owned by it."

In *Alexander v. Bank of Rutland* (1852) 24 Vt. 222, the court, adverting to the fact that other persons hired by the employing agent in the same work were paid by the defendant, said: "Its effect might possibly have been lessened, if not destroyed, if it had appeared that the payment was made on the account of Burdick. But, standing

as it does, it is a direct ratification of Burdick's agency in making such employments, and of their obligation to pay those thus employed."

In *Johnson v. Welch* (1896) 42 W. Va. 18, 24 S. E. 585, a contract made with the building committee of a church for the erection of a church building was held to have been ratified as a result of their having proceeded with the work, and received compensation therefor from the pastor, representing the church.

See also *Union Surety & G. Co. v. Tenney* (1902) 200 Ill. 349, 65 N. E. 688, affirming (1902) 102 Ill. App. 95 (company approved and directed negotiations carried on by its vice president); *Reupke v. D. H. Stuhr & Son Grain Co.* (1905) 126 Iowa, 632, 102 N. W. 509 (ratification shown by evidence); *Fritz v. Chicago Grain & Elevator Co.* (1907) 136 Iowa, 699, 114 N. W. 193 (owners of elevator met parties with whom agents had been negotiating with a view to its sale, concluded a bargain for its sale, and made a bill of sale for it); *Harnett v. Garvey* (1873) 4 Jones & S. (N. Y.) 326 (evidence being conflicting, jury was erroneously instructed that it did not prove ratification); *Cincinnati, N. O. & T. P. R. Co. v. Ashurst* (1910) — Ky. —, 124 S. W. 303.

#### (b) Recovery denied.

One of the syllabi written by the court for *Findlay v. Hildenbrand* (1909) 17 Idaho, 403, 29 L.R.A.(N.S.) 400, 105 Pac. 790 (work on mining claim), is as follows: "Where a person assumes to act as agent in making a contract, and the person with whom such contract is made proceeds to a performance of the same under protest from the principal, and during such performance is advised and notified by the principal that such person is not in his employ, and that no one had authority to employ him, and that he does not desire or need his services, the mere fact that, after the cessation of such labor, the principal pays to such person an amount which he deems such service is worth, will not alone amount to a ratification of the contract made by the person assuming to act as such agent, and will not support an action based upon such contract, upon the ground that the contract was ratified."

In *Carroll v. Manganese Steel Safe Co.* (1909) 111 Md. 252, 73 Atl. 665, one of the grounds upon which recovery was denied was that, even if a certain letter amounted to such an acceptance of the plaintiff's services as to have entitled him to compensation under his agreement or otherwise, if he had secured the contract for the sale of the article in question, it could not, standing by itself, be construed as having a similar operation upon services rendered by him a year thereafter in relation to another and different transaction.

In *Syring v. Zelenaki* (1909; Sup. Ct.) 77 N. J. L. 406, 71 Atl. 1119, it was held that a ratification by the defendant of a contract

**§ 58. Principal's acceptance of the benefits of the services rendered.**

Where the acceptance of the benefits of a contract of employment made by an agent in excess of his authority is relied upon as a ground for imputing liability to the principal, it is clear that, under the elementary rules of the law of agency, the claimant is debarred from

recovery unless he can show that the person by whom he was employed was, in respect of the employment, acting professedly as the agent of the defendant,<sup>1</sup> and that the defendant, when he accepted the benefits of the contract, had knowledge of all the material circumstances.<sup>2</sup>

with the plaintiff for the performance of certain work could not be inferred from evidence that on one occasion, while the work was in progress, he said to the plaintiff: "My wife is boss. Anything as far as the wife goes that's all right. You will get your money."

In *Bleecker v. Satsop R. Co.* (1891) 3 Wash. 77, 27 Pac. 1073, where the defendant had indorsed on the bill rendered for the services of a tugboat and for damages sustained by it, the following words: "Payment refused until matter of freight and loss of cargo of steamer Quickstep is adjusted," it was held that this entry could not be construed as a ratification of the contract, or as an acknowledgment of liability for damages.

In *Brooklyn Daily Eagle v. Dellmar* (1900; Supp. App. T.) 30 Misc. 747, 62 N. Y. Supp. 1041, where a selling agent of a manufacturer agreed with a purchaser that the goods would be advertised in the plaintiff company's newspaper, and subsequently made arrangements for the insertion of the advertisement, it was held that no recovery could be had upon evidence which merely showed that some unidentified party in the defendant's office had revised the proof of the first advertisement, and that, when a bill therefor was presented to the defendant's president, he at once declared that his company had nothing to do with it, and that, if it had been inserted by the agent, he was the proper person to pay for it. The court said: "It appears that the defendant, through its president, at the very first opportunity repudiated the transaction. It was not bound thereafter to run after the plaintiff, and reiterate the disclaimer. If, after this repudiation of the first bill, the plaintiff chose to go on and repeat the advertisement, it did so at its peril."

The syllabus written by the court for *McMichen v. Brown* (1911) 10 Ga. App. 506, 73 S. E. 691, is as follows: A parol ratification by an owner of land of an unauthorized written contract made by an agent, to pay a stipulated price for improvements to be made on the land, will not be effective to bind the principal when the improvements were made before the ratification took place, and the tenant has not acted on such ratification to his injury.

"The fact that the defendant condoned any misconduct on the part of his wife by receiving her back, and resuming cohabitation with her, is not a ratification by him of her employment of counsel while she was living apart from him without his fault,

and does not render him liable to pay for the services then rendered." *Peaks v. Mayhew* (1901) 94 Me. 578, 48 Atl. 172.

<sup>1</sup>In *Savings Bank v. Benton* (1859) 2 Met. (Ky.) 240, where the claimant had been engaged as counsel by Sandford, a co-defendant of the bank, the court thus stated its conclusions: "If it [the bank] had counsel of its own employed, and the plaintiff had not been employed by it, but had been employed only by Sandford, and the bank, through its president, knew of that employment, then, although the plaintiff's services may have been beneficial to the bank, and received and accepted by it, yet it would not thereby incur any liability to pay for them. To impose such a liability upon it, under the circumstances of the case, it must have been apprised that it was looked to by the plaintiff for compensation for his services, and afterwards received them without informing him that it would not pay for them."

In *Lauer v. Bandow* (1878) 43 Wis. 556, 28 Am. Rep. 571, the statement in *Wheeler v. Hall* (1877) 41 Wis. 447, that, "if one accepts, or knowingly avails himself of, services done for him without his authority or request, he should be held to pay for them," was thus criticized: "This proposition, of the liability of one for work done upon the express contract of another, appears to be an unfortunate misconception of the text of Mr. Chitty, cited to support it, and dangerous doctrine in itself. . . . It seems to me very unfortunate that the opinion appears to hold that, if the work were done upon the express contract of the brother, as principal, not as the sister's agent, his contract would bind her personally, and charge her realty for his personal debt, because she was benefited by it."

Compare also the cases cited in § 57, note 1, *supra*.

<sup>2</sup>In *Bright v. Canadian International Stock Yard & A. Co.* (1895) 83 Hun, 482, 32 N. Y. Supp. 71, where a broker who had been employed by the president of the defendant company to sell its stock sued for his commissions, the court, after remarking that, if the claims were enforceable, "it must be upon the theory that the defendant has received the fruit of the plaintiff's labor, and is, consequently, liable in respect to a contract of which it had no knowledge," proceeded thus: "Unless the plaintiff can show that he was employed to do the things he did, certainly the defendant, in ignorance of any liability arising from his intervention, cannot be held bound to an agreement

In one case we find an unqualified statement which, on its face, imports that, among the material circumstances contemplated by the latter of these prerequisites, the court did not include the fact of the agent's having undertaken to make, in his representative capacity, the contract with reference to which the services in question were performed;<sup>2</sup> but

in respect to which it was absolutely ignorant. The plaintiff has failed to show any employment upon the part of the defendant which was essential to his cause of action. And when it is stated that the defendant has not returned that which it received under its contract with the parties with whom it negotiated and contracted, it is clear that the rule has no application to the facts in the case at bar. How could it return? In what way could it restore the situation? That depended upon the will of other parties, and the defendant could be held to its contract by the other parties."

See also *Harris v. San Diego Flume Co.* (1891) 87 Cal. 526, 25 Pac. 758 (defendant knew nothing of the arrangement made by its superintendent for the employment of the plaintiff as a broker to procure the services of a contractor for the construction of its flume); *Pacific Bank v. Stone* (1898) 121 Cal. 202, 53 Pac. 634 (no evidence showing that the directors had any knowledge whatever of the specific contract sued upon, or of its terms, or that its vice president had entered into it); *Harper v. Goodall* (1881) 10 Daly (N. Y.) 269 (husband's ratification of wife's contract not inferable).

Compare also the cases cited in § 57, note 2, *supra*.

<sup>2</sup> "The general rule is that an agreement by an officer or agent of a corporation who assumes to act in its behalf can be enforced against the corporation where it has received the benefit of the agreement." *Davies v. Harvey Steel Co.* (1896) 6 App. Div. 166, 39 N. Y. Supp. 791.

<sup>4</sup> In another part of the opinion it was explicitly mentioned that "the fact that the hiring of the plaintiff was known to the defendant was abundantly proved;" and this was also the state of the evidence in *Cunningham v. Massena Springs & Ft. C. R. Co.* 63 Hun, 439, 18 N. Y. Supp. 600, one of the cases relied upon as a precedent.

<sup>5</sup> In *Grant v. Duluth, M. & N. R. Co.* (1896) 66 Minn. 349, 69 N. W. 23, where a subcontractor sought to enforce a claim for labor performed in reliance upon a promise of the defendant's president to see that he was compensated, if he continued to work, one of the contentions advanced by counsel was that the action was maintainable on the ground that a ratification of an unauthorized contract is inferable where the principal knowingly accepts and retains the benefits thereof. But the applicability of this doctrine to the case was denied for the following reasons: "The defendant had let a contract to Wolf & King for the entire

the phraseology used seems to reflect merely a lack of judicial precision.<sup>4</sup> However this may be, it would seem clear that proof of this fact is, in any possible point of view, a condition precedent to the maintenance of the action.<sup>5</sup>

Whether such proof, when taken in combination with the fact of the ultimate acceptance of the benefits of the

construction of this road. It had, so far as the directors knew, no contractual relation with plaintiff. The work of construction continued, so far as appears, after the making of the alleged contract between Merritt and plaintiff, precisely as it had before; the defendant dealing wholly with Wolf & King, and the plaintiff dealing with the latter, just as any subcontractor would. We are unable to conceive how the acts of the defendant in accepting the completed road and settling with Wolf & King, in ignorance, so far as appears, of Merritt's promise to plaintiff, can be construed as an implied ratification of Merritt's act. What the company accepted and retained was the fruits of the contract with Wolf & King, and nothing else."

In *Holmes v. Board of Trade* (1883) 81 Mo. 137 (action for legal services), an instruction which asserted the proposition "that the acceptance and use by the defendant of the work performed by the plaintiffs will alone suffice to render the defendant liable to the plaintiffs for the value thereof" was disapproved for the reason that it was a declaration of law under which the defendant would be liable although it did not know that the agent had professed to employ the plaintiffs on its behalf.

In *Thayer v. Vermont C. R. Co.* (1852) 24 Vt. 440, where a subcontractor had performed certain extra work under the directions of an engineer of a railroad company, the question whether the defendants were liable for his compensation was thus discussed: "He had no general contract with defendants. Their contract, for all this work, was with Belknap. . . . This labor, then, so far as the company was concerned, comes within this contract with Belknap; he was bound to perform it, if required so to do by the engineer, and, of course, could obtain compensation under his contract. But, notwithstanding this, they might employ someone else to do it, or they might adopt the act of someone else, doing it. This could not be claimed upon the mere ground that it was beneficial to defendants. One cannot compel another to become his debtor, even by doing him good. And if this were merely the performance of Belknap's contract, it would really inure to his benefit. There must be shown something which amounts to a consent of the company to have the plaintiff do it upon their credit. The fact that the president and other officers of the company passed along while the work was doing, and might have known that plaintiff was doing it, and it was bene-



contract, should be regarded as sufficient to raise a presumption of ratification, is a question to which the authorities do not, as they stand, furnish a definite or consistent answer, and which may, perhaps, demand a different answer, according to the nature of the functions which the employing agent was hired to discharge.

In §§ 12 and 13 of the note to *BRUTMEL v. NYGREN*, L.R.A. —, —, it was shown that, so far as regards subagents engaged to perform services with respect to the consummation of business transactions of the same description as those which the agents themselves were appointed to handle, the cases which bear upon the effect of the principal's acceptance of the benefits of a contract procured by the claimant are extremely conflicting. The present writer ventured to express a preference for the view that an adoption of the contract by the principal cannot warrantably be inferred from the mere fact of acceptance, even where it also appears that, previous to the acceptance, he knew that the claimant had been hired by the agent. The consideration mainly relied upon as a reason for this preference was this: that it is not unreasonable to take the position that the principal, when he ascertains that a subagent of this character has been employed, is entitled to presume that he was employed by the agent merely as an assistant or substitute, and was consequently looking to the agent alone for his compensation. The situation was deemed, for the pur-

pose of the discussion, to be substantially similar to that which has been presented in the cases by which the doctrine has been established that liability for the compensation of a subcontractor hired by an independent contractor engaged for the performance of a definite piece of work cannot be imputed to the principal employer on the mere ground that he was aware of the hiring and of the services rendered in pursuance of it.<sup>6</sup>

This consideration and this analogy would seem to be equally relevant in a portion of the cases discussed in the present monograph, viz., those in which the intermediate employer was an agent appointed for the purpose of consummating some particular transaction or set of transactions, and the character of those transactions is such as to indicate that he is expected to handle them in person. Under such circumstances the principal is apparently justified in acting upon the supposition that anyone whom he may hire to assist him is hired by him upon his own responsibility, and for his own convenience. In this point of view the fact of the principal's having received the benefit of the services performed in pursuance of the hiring would not of itself warrant the inference that he intended to assume responsibility for the compensation of the subemployee. The theory thus suggested, although it was not in terms propounded in the case which is reviewed in the footnote, seems to be in accord with the language of the court, as well as with the decision actually rendered.<sup>7</sup>

cial, and made no objection, could amount to but little, unless knowledge was brought home to them that plaintiff was doing it upon the credit of the company. They would naturally suppose he was doing it for Belknap [the principal contractor], or that in some way it was being done under Belknap's contract with the company, so far as they were concerned, as they had made no other contract. They would scarcely be required to inquire into the terms of the contract between Belknap and his workmen or subcontractors, and no inference could fairly be made against them as to having made a new contract with some third person, upon that ground, as it seems to us."

<sup>6</sup>See § 50, *supra*.

<sup>7</sup>In *Swayne v. Union Mut. L. Ins. Co.* (1899) — Tex. Civ. App. —, 49 S. W. 518, the defendant, a nonresident corporation represented in Texas by Robertson, an attorney at law, held a mortgage on certain property. In pursuance of an agreement between him and one Imboden, who was interested in having the mortgage foreclosed in order that a sale of the property,

which he had negotiated with one Crowl, might be consummated, the papers necessary for an intervention in receivership proceedings then pending with regard to the property, and for the foreclosure of the mortgage, were forwarded to Imboden. It was also stipulated that Imboden should employ such counsel as might be required. Plaintiff, having been employed in pursuance of this arrangement, sued the defendant for his remuneration. The grounds upon which the court of appeal held that he was not entitled to recover were thus stated: "Nor can it be said, under the circumstances, that the company would be bound on account of the alleged ratification in accepting the benefits of the service rendered by appellant. It was not within its power, after the service had been rendered, to reject such benefits. Ratification as a result of taking the benefits of an unauthorized transaction implies the power of election to take or not to take; that is to say, when the principal discovers that the agent has exceeded his authority, he cannot then, without being bound, hold on to bene-

But in the great majority of the cases with which we are now concerned a different conclusion is apparently indicated by the fact that the services in question were of such a nature that the principal could not have contemplated their performance by the agent himself. Whenever this situation is presented, it is not unreasonable to take the position that the principal, when he learns that the subemployee is doing work which will benefit his property or his business, is bound to presume that the agent entered into the contract of employment on his behalf, and with the intention of creating a privity between him and the subemployee. In this point of view the

conclusion would seem to be irresistible that, if he allows the subemployee to proceed with the work, and ultimately avails himself of its fruits, he should *prima facie* be taken to have adopted the contract of employment. The cases are, on the whole, in harmony with a doctrine of this purport. In some of them the acceptance of the benefits of the work was treated as an element importing that the contract was ratified in such a sense, and to such an extent, as to invest the claimant with the right of maintaining an action upon it.<sup>8</sup> More frequently it has been regarded as the foundation of a liability enforceable in a suit on a quantum meruit.<sup>9</sup>

fits derived from the unauthorized transaction, when it is within his power, by a repudiation of the unauthorized act, to restore such benefits to the one whom they have been acquired. Besides, in this case it appears that the service of appellant was rendered with the understanding on the part of Robertson [defendant's attorney and agent for collection of debt; who had sent the pleadings to Imboden] that he was acting in the interest of Imboden and under independent employment by Imboden, and that settlement was made with Imboden upon this basis, without any reason to suspect on the part of Robertson that appellant was looking to him or the company for his fee. It was the duty of appellant to know the extent of Imboden's authority in employing him, and, if not satisfied with Imboden as his employer or paymaster, to apprise the company, through Robertson, of that fact; at least before the settlement with Imboden was made." The affirming judgment of the supreme court (1899) 92 Tex. 575, 50 S. W. 566, proceeded upon grounds thus stated: "If in fact appellee did not employ appellant, and Imboden had no authority to do so on its behalf, but employed him for the purpose of forwarding the interests of himself and Crowl, appellant understanding that Crowl was to pay his fee, the mere fact that appellee permitted him to represent it in the suit in conjunction with its own counsel would not render it liable as a matter of law."

<sup>8</sup>In *Fister v. La Rue* (1853) 15 Barb. (N. Y.) 323, where a claim for the salary of a school-teacher was founded on a contract made by a single trustee, the court said: "It is well settled, at least in this country, that where a person is employed for a corporation, by one assuming to act in its behalf, and goes on and renders the services according to the agreement, with the knowledge of its officers, and without notice that the contract is not recognized as valid and binding, such corporation will be held to have sanctioned and ratified the contract, and be compelled to pay for the services, according to the agreement."

In *Arkansas Southwestern R. Co. v. Dick-*

*inson* (1906) 78 Ark. 483, 115 Am. St. Rep. 54, 95 S. W. 802, the liability of a railway company for the payment of certain rewards offered by its general manager was affirmed on the ground that knowledge of the facts was imputable to its general manager.

<sup>9</sup>In *Goodwin v. Union Screw Co.* (1857) 34 N. H. 378, the court said: "The defendants would be liable in a quantum meruit, in the absence of any special bargain for services of the plaintiff, performed for them with the knowledge of the directors and general managers of the corporation, and he might recover a quantum meruit on the general counts of his declaration. Even if the special bargain made with the plaintiff was unauthorized and not binding on the defendants, they are still liable to pay him what his work was worth, and on that ground also the nonsuit was properly refused."

In *Hooker v. Eagle Bank* (1864) 30 N. Y. 83, 86 Am. Dec. 351, the grounds upon which an architect was held to be entitled to recover for services rendered in the preparation of plans, etc., for a building, were thus stated: "It is not necessary, in order to charge a corporation for services rendered, that the directors, at a formal meeting, should either have formally authorized or ratified the employment. . . . If an officer employs a person to perform a service for the corporation, and it is performed with the knowledge of the directors, and they receive the benefit of such service without objection, the corporation is liable upon an implied assumpsit."

In *Potter v. New York Infant Asylum* (1887) 44 Hun (N. Y.) 367, where various officers of defendants had actual notice that plaintiffs were for several months engaged in legal work for the corporation under the supervision of their president, the court said: "The conduct of defendants can be explained in two ways. Either they had confidence in the discretion and good judgment of their president and were willing to abide by his acts, or they confided in their supposed inability to contract liabilities without a formal resolution of the board,

and were willing plaintiff's services should continue to the benefit of defendants, without any corresponding liability. In either case good morals require that the laborer should receive his hire."

In *Balet v. New York & N. J. Bridge Co.* (1899) 40 App. Div. 245, 58 N. Y. Supp. 19, where the plaintiff was awarded compensation for preparing certain drawings of a bridge, and attending to other matters, the enforceability of his claim was predicated upon the ground that "this work was done and performed at the particular instance and request of the vice president and secretary of the defendant, and as it operated for the direct benefit of the defendant, it must be held, to that extent, to have ratified and accepted the benefits arising therefrom. Under such circumstances liability would attach for the fair and reasonable value of such services and the use of the plans, lithographs, and drawings, under the principle enunciated in the cases hereinabove cited."

In *Sultan v. Bailey* (1903; Sup. App. T.) 85 N. Y. Supp. 332, where the plaintiff, an attorney retained in a foreclosure suit by a person who assumed to act as the defendant's agent, consented to the discontinuance of the suit, on the understanding that a new loan should be substituted, and that his fees should be paid out of the proceeds, the court was of opinion that, while there was no support for the claim that the services in suit were accepted by the defendant with knowledge of the fact that the attorney was acting in her interest, enough was shown to charge her, as principal, upon the promise that the fees should be paid from the new loan. It was declared that the defendant adopted the agent's acts when concluding the loan, "for she could not accept the benefit of the agency assumed [without] taking the burdens of that instrumentality; and the promise to the attorney was absolutely essential to the transaction concluded by the assumed agent's efforts." A nonsuit was therefore pronounced erroneous.

In *Heinze v. South Green Bay Land & Dock Co.* (1901) 169 Wis. 99, 85 N. W. 145, the evidence under which the plaintiff was held to be entitled to enforce the individual liability of the stockholders of a land company for the compensation of a surveyor was thus stated by the court: "There is no question but that all of the defendants, with the possible exception of Hollman, knew the work was being done. They aided, assisted, and directed its progress. They were present at different times as it was being carried on. They knew, or must be presumed to have known, that the division of the land into lots and blocks was in furtherance of the ostensible purpose of the corporation. The plaintiff came to them with a letter from Marks. The work he entered upon was necessary in order that the property might be developed as contemplated. The circumstances were amply sufficient to put the defendants upon in-

quiry as to the source of plaintiff's authority to do the work. As officers of the company they directed his operations, and it is now too late for them to say that they had no knowledge of the contract, even if that fact should be considered a defense. The fact that they had a secret agreement with Marks that no corporate liability should be incurred until he had provided sufficient funds to pay does not relieve the defendants from liability, if in fact the work was done for the corporation. A stranger dealing with the corporation without notice of such agreement cannot be affected by it. As officers and directors of the company they were chargeable with some degree of diligence in the management of corporate affairs, and they cannot stand idly by, knowing the corporation was receiving the benefit of plaintiff's labor, and escape liability under the statute on the plea that they did not know the terms of his contract."

See also *National L. Ins. Co. v. Headrick* (1916) — Ind. App. —, 112 N. E. 559, (recovery allowed for legal services rendered at the request of the general manager of an insurance company's railroad accident department); *Seever v. Cleveland Coal Co.* (1916) — Iowa, —, 159 N. W. 194 (one ground for allowing the plaintiff's claim for commission on sales was that the defendant had had the advantage of the contracts made by him, and sold the lands in question to the purchaser found by him); *Germania Safety Vault & T. Co. v. Hargis* (1901) 23 Ky. L. Rep. 874, 64 S. W. 516 (recovery allowed for services of counsel appointed by director of defendant); *Verrill v. Parker* (1875) 65 Me. 578 (wife held liable to contractor engaged by her husband, "because the labor was done on her property and for her benefit, and expended before her eyes"); *Traxler v. Minneapolis Cedar & Lumber Co.* (1915) 128 Minn. 295, 150 N. W. 914 (corporation accepted and profited by services of counsel employed by president); *Southgate v. Atlantic & Pac. R. Co.* (1875) 61 Mo. 89 (railway company availed itself of plaintiff's services as counsel for several years); *Silver v. Missouri, K. & T. R. Co.* (1907) 125 Mo. App. 402, 102 S. W. 621 (general rule laid down that, "if the service was performed for defendant under circumstances and conditions which showed that defendant must have known the service was for it, and not another, it would be liable"); *Prindle v. Washington L. Ins. Co.* (1893) 73 Hun, 448, 26 N. Y. Supp. 474 (defendants must have known that plaintiff was acting as their counsel in respect of certain actions); *Lozier Motor Co. v. Ziegler* (1909; Sup. App. T.) 115 N. Y. Supp. 134 (acceptance of benefits of contract made by chauffeur); *Blowers v. Southern R. Co.* (1906) 74 S. C. 221, 54 S. E. 368 (railway company held to be chargeable with notice that mails were being transported by someone between two stations in the same city); *Thomas v. Seou-gale* (1916) 90 Wash. 162, 155 Pac. 847

A portion of the cases decided upon the latter footing have had relation to contracts which did not contain any specific stipulation concerning the rate of remuneration; but where such a stipulation was a part of the contract, it is perhaps permissible, as a matter of juristic theory, to regard the asserted right of recovery as being referable to one or other of two conceptions; viz., that of an incomplete ratification, amounting to a recognition of the contract merely in so far as it purported to create a privity between the principal and the claimant, or that of a new obligation brought into existence at the time when the benefits of the services are accepted.

In one case it was laid down broadly that the doctrine under which the principal is charged with liability as a result of his having accepted the benefits of the contract of employment is not applicable to "cases where a third person has expressly contracted to do the work in question, and the defendant was not

informed that plaintiff was working directly for defendant and looking to him for compensation. Not knowing these conditions, it cannot be said that defendant knowingly accepted work done for him."<sup>10</sup> Having regard to the facts with reference to which this statement was made, the decision cannot, it is manifest, be harmonized with the theory above suggested, that the effect of an acceptance of the benefits of the work for which compensation is claimed may properly be treated as a matter depending upon the question whether the services which the hiring agent himself undertook to perform were or were not of the same character as those covered by his contract with the subemployee.

The decisions are conflicting with regard to the question whether an acceptance of the benefits of the contract is to be deemed an element importing ratification, where the work was of such a nature that its material results had become a part of the principal's real property or of something affixed thereto.<sup>11</sup>

(married woman liable for legal services rendered by counsel employed by her husband in litigation to establish interest in community lands); *Wheeler v. Hall* (1877) 41 Wis. 447 (rule recognized in a case where the actual evidence was that the plaintiff had been employed by the defendant's brother with her approbation and consent).

In *Gibson County v. Motherwell Iron & Steel Co.* (1889) 123 Ind. 364, 24 N. E. 115, an architect having the full supervision of the construction of a courthouse ordered a change in the work which caused an increase in the expense, and the building, when completed, was accepted by the defendants. Held, that the county became liable for this extra work.

Compare also *Libbey v. Harney* (1913) 41 App. D. C. 205 (defendant held liable for materials purchased by architect); *French Gas Saving Co. v. Desbarats Advertising Agency* (1912; K. B.) — Quebec, —, 1 D. L. R. 136 (defendant liable for goods supplied).

<sup>10</sup> *Alabama Western R. Co. v. Bush* (1913) 182 Ala. 113, 62 So. 89 (subcontractor not entitled to recover for extra work performed by the direction of the defendant's engineer).

(a) Cases denying the right of recovery.

<sup>11</sup> In *Woodruff v. Rochester & P. R. Co.* (1887) 108 N. Y. 39, 14 N. E. 832, the court, in discussing the right of a subcontractor to recover for extra work ordered by the defendant's engineer, said: "It is true that after the road was completed it took possession thereof, as it had the right to do, and that in that way it had the benefit of the work done by the plaintiffs; but that

was no ratification of the contracts made by the engineers, and did not make it responsible for such work unless it in some way agreed to pay therefor."

In *Hill v. Coates* (1901; Sup. App. T.) 34 Misc. 535, 69 N. Y. Supp. 964, the court, referring to certain repairs carried out by the plaintiff in the plumbing of a house, observed: "There could, of course, be no ratification by an implied acceptance through silence, inasmuch as the repairs became part of the freehold, thus precluding restitution."

In *McLaren v. Hall* (1868) 26 Iowa, 297, where an instruction which embodied the theory that the defendant was liable simply because she accepted the work done under a contract made with her husband was held erroneous, the court said: "Where work done upon the real estate of another becomes part of such real estate as the work progresses, the owner cannot do otherwise than accept it. Such an acceptance from necessity cannot properly be relied upon as evidence showing a contract."

In *Moyle v. Congregational Soc.* (1897) 16 Utah, 69, 50 Pac. 806, the court declared that "it does not follow that because the church used the building after its completion, thereby unavoidably having the benefit of the work and materials furnished, the church would therefore be liable for the value thereof."

In *Linn v. Alameda Min. & Mill. Co.* (1909) 17 Idaho, 45, 104 Pac. 668, the work in question had been done through a tunnel of a mine adjacent to that of the defendant, and its sole object was to enable a prospective purchaser to satisfy himself with regard to the value of the defendant's property, on which he had obtained an

An examination of the footnote will show that there is a preponderance of authority in favor of the view that, under such circumstances, liability is not imputable to him, because the alternative of restitution is no longer open to him. But it may be that this consideration is not necessarily conclusive as regards all cases. In the final analysis, the rationale of the imputation of liability to the principal on the ground of his having accepted the benefits of a contract which to his knowledge had been entered into by his agent is his failure to make, after obtaining such knowledge, an explicit election between the repudiation and adoption of the contract. It is not apparent why a doctrine which rests upon this basis should not be controlling, irrespective of the nature of the subject-matter with relation to which the services in question were rendered. The impossibility of restitution may be an adequate reason for denying

recovery in respect of that part of the work, if any, which had already been completed when the principal was informed of the claimant's employment. But it is submitted that, so far as work done afterwards is concerned, this factor is entirely irrelevant, for the simple reason that the failure of the principle to repudiate the contract operates so as to render it his personal obligation for all purposes, and to the same extent as if it had been originally made by himself.

**§ 59. Estoppel as a ground imputing liability to the principal.**

The doctrine that the principal's silent acquiescence in the performance of work under a contract made with his agent will, in some states of the evidence, operate so as to preclude him, on the ground of estoppel, from denying his liability for the compensation due in respect of those services has been recognized in a few cases.<sup>1</sup> This doctrine is,

option. Commenting on this state of the evidence, the court said: "The work was not done for the development or permanent improvement of the company's property. It may or may not have resulted in improving the property. While it demonstrated that the property is of some value, this work done through the Success tunnel cannot be of any permanent use to the Alameda property unless they can secure the right to work the property through the Success tunnel No. 2. It is of such a character that the thing received cannot be returned or be of any possible benefit to the one who did the work, and so he cannot suffer on account of mere failure to return. We do not mean to be understood as holding that the Alameda Company could not obligate itself to pay this claim. On the contrary, it could undoubtedly assume this debt and obligate itself to pay the same, but not under the law of ratification. This was clearly the debt of another. The credit was not extended to the Alameda Company, but was given to Mayo and his firm." But the consideration relied upon in the earlier part of the extract, that the work could not be "of any permanent use" to the defendants' property, seems to be somewhat irrelevant. It is submitted that the significance of the element of benefit conferred and received does not depend upon the permanency of the effects produced.

**(b) Cases affirming the right of recovery.**

In *Jefferson Hotel Co. v. Brumbaugh* (1909) 94 C. C. A. 279, 168 Fed. 867, the conclusions of the court were thus summed up: "We are convinced, first, that the hotel company cannot now deny the general authority of its agent Elwood & Sons to order and contract for these extras after having allowed them to be done under such orders,

without protest at the time when done, and being now in the possession and enjoyment of them; second, that under such circumstances it has become immaterial whether the technical requirements of the contract as to these extras being ordered in writing was strictly carried out or not, because it must be held to have been waived; third, that, after careful examination of the evidence, the items allowed as extras were in fact extras and not 'changes' under the terms of the contract; and, finally that the compensation allowed therefor was reasonable."

In *Crowley v. Genesee Min. Co.* (1880) 55 Cal. 273, 4 Mor. Min. Rep. 71, one of the grounds assigned for the decision in favor of a claimant who had done work in a mine was that the defendant had derived benefit therefrom.

In *W. H. Stubbins Co. v. World's Columbian Exposition Co.* (1903) 110 Ill. App. 210, it was held that the defendant's acceptance operated so as to render it liable for certain extra work done in pursuance of a verbal direction of the supervising architect, although the contract provided that the contractor expressly waived all claim for any allowance of extra work unless it should have been furnished upon a written order.

In *Whitcomb v. Oller* (1913) 41 Okla. 331, 137 Pac. 709, the right to recover for work done upon a furnace at the request of a person who was allowed by the defendant to occupy the premises free of rent was predicated on the grounds that statements of the claimant's account had been sent to the defendant's agent, and afterwards to defendant himself, and that he not only had not repudiated the act of his agent in ordering the repairs to be made, but had

of course, applicable only to the authorized contract of one who was for some purposes the agent of the defendant, and not to the unauthorized contract of one who was not this agent for any purpose.<sup>2</sup>

**V. Right of recovery considered with reference to the question of liability as between principal and agent.**

The cases involving the question whether a contract of employment was in point of fact made with a husband or his wife as principal are reviewed in § 18, *supra*.

by his passive conduct availed himself of the plaintiff's material and labor in installing those repairs which, if the furnace was to be longer used, were a necessity.

<sup>1</sup> In *Starkweather v. Goodman* (1880) 48 Conn. 101, 40 Am. Rep. 152, it was laid down that an estoppel against insisting upon a certain restrictive stipulation as to payment for extra work on a house was not created against the owner by the fact that, "when the house was nearly completed he received in silence a statement of work and materials not specified in the written contract, which included some which he had not ordered; for these had been wrought into the building and were then beyond possibility of withdrawal, . . . however strongly the defendant might have protested against payment for them."

In *Louisville & N. R. Co. v. Vaughn Transfer Co.* (1909) — Ky. —, 123 S. W. 253, the plaintiff was, in circumstances of emergency, employed by a station agent of the defendant railroad company to carry a portion of the mails to the depot of another company, and with the knowledge and acquiescence of the defendant's superintendent, continued to perform this work for about three years. Held, that, under such circumstances, the defendant would not be permitted to avail himself of the plaintiff's services or permit him to remain under the impression that he should be rewarded, and not pay him. Commenting on the exclusion of certain evidence, which tended to show that, after Vaughn began to work, a ruling was made by the postoffice, permitting or requiring all mail to be taken to the postoffice, the court said "There is no evidence that Vaughn was ever notified of this ruling, and it was manifestly the duty of Logsdon [the superintendent], who testified that he knew of it, to tell Vaughn that it was not necessary to carry the mails from one depot to the other . . . As his employment in the first instance was authorized, it was the duty of the company to notify him when his services were not needed. Having failed to do this, they should pay him a reasonable price for his labor. When an agent or servant who has no authority to regularly employ persons does so in an emergency, without notifying the person so employed how long he is ex-

**§ 60. Claimant employed under sealed contract.**

Some cases involving claims for work and labor illustrate the operation of the technical rule that "the agent of an individual or corporation, covenanting under his seal, for the act of his principal, although he describes himself as contracting for and on behalf of his principal, is liable on his express covenant, whether he had the authority of the person whom he thus professes to bind or not."<sup>1</sup> In the case in which this rule was formulated the court relied

pected to render service, such person may continue until notified to stop, or until the labor for which he was employed is finished."

In *Schwartz v. Saunders* (1867) 46 Ill. 18, the liability of a married woman for work performed by a building contractor in pursuance of a contract made with her husband was affirmed for the reason that the contract "was made with her full knowledge, approbation, and consent, . . . and she did not disclose her interest. She knew very well what was going on and she took no steps to prevent it, and ought now to be estopped from objecting or setting up her right to defeat the plaintiff."

In *National L. Ins. Co. v. Headrick* (1916) — Ind. App. —, 112 N. E. 559, it was laid down that "knowingly accepting benefits of an unauthorized employment amounts to a ratification of such contract of employment, and is in the nature of an estoppel to deny the authority to make such contract." But clearly "ratification" and "estoppel" are entirely distinct grounds for the imputation of liability.

<sup>2</sup> In *Daly v. Arkadelphia Mill Co.* (1916) 126 Ark. 405, 189 S. W. 1053, the court, after adverting to the fact that the person who had, as a prospective purchaser, been allowed by the owner's agent to occupy the property, had no authority to enter into contracts for improvements on the defendant's property, added: "The case, therefore, is not like that of the owner who stands by and expressly consents to or silently acquiesces in contracts for improvements entered into by mechanics or materialmen with one who claims to be his agent, or one who represents himself to be the owner, without repudiating the agency or revealing his own identity as the owner and disclosing the condition of his title. Of course, in such cases the owner would be estopped from denying the agency or setting up his legal title to the injury of those who had been thus misled by his conduct in the premises. But such is not this case, and the doctrine of estoppel cannot be invoked against the appellant."

<sup>1</sup> *Hopkins v. Mehaffy* (1824) 11 Serg. & R. (Pa.) 126. The authorities cited were Chitty on Pleading, p. 24, and Tippetts v. Walker (1808) 4 Mass. 595 (committee ap-

upon the doctrine that there is a "substantial difference between the covenant of an agent who describes himself as contracting for his principal, and the covenant of a principal, through the means and by the instrumentality of an agent. The first is the individual covenant of the agent; the second is the individual covenant of the principal." It was held that the covenant in question belonged to the second of these categories, and that the defendant was personally liable.<sup>2</sup>

**§ 61. Claimant employed under written contract not sealed.**

The question whether liability in re-

pointed by the directors of a turnpike corporation were held to be personally liable on a covenant, under their hands and seals, to pay money to one who contracted to make part of the turnpike).

See also *Parks v. S. & L. Turnp. Road Co.* (1830) 4 J. J. Marsh. (Ky.) 466 (instrument signed, "R. Winchester, agent for the T. R. Company," was the act and deed of Winchester, and not of the company, which consequently was not liable for the cost of the construction work for which it provided); In *Bannen v. McCahill* (1890) 56 Hun, 640, 30 N. Y. S. R. 305, 8 N. Y. Supp. 916 (defendant not liable on sealed contract, signed by her husband, by which the plaintiff was employed to perform masonry work on a building); *Quigley v. De Haas* (1876) 82 Pa. 267 (agents contracting under their own individual seals for construction work held to be individually liable).

<sup>2</sup>Gibson, J., thought it "somewhat remarkable that the distinction between a parol and a sealed contract was not aken in *Randall v. VanVechten* (1821) 19 Johns. (N. Y.) 60, 10 Am. Dec. 193, and that the authorities cited to prove that an agent who personally covenants in behalf of his principal is liable only in the event of there being no recourse to the principal directly prove the reverse." In the case thus criticized a contract was made by certain persons, by name, purporting to be "a committee of the corporation of the city of Albany," on the one part, and the plaintiff, on the other part. It was sealed by the committee with their seals. Held, that they were not personally bound by the contract, as it was authorized by the corporation, although not under its corporate seal; and that the corporation was alone liable on the contract in an action of assumpsit. In *Story on Agency*, 7th ed. § 277, the general principle embodied in this decision is said to be "that the agents are not affected by any personal responsibility under such a contract, although it is made under their own seals, if the corporation itself has conferred on them a due authority to make the contract on their behalf." But the remarks of the learned judge show that he was not

entirely satisfied as to the correctness of the conclusion arrived at. spect of compensation for services rendered in pursuance of a written contract not under seal should be imputed to the principal or agent is determinable with reference to the following elementary principles: that the intention of the parties "must be determined by the language of the contract, with reference to its subject-matter and contemporaneous circumstances;"<sup>1</sup> that, in construing the contract, "the intent of the parties is to be ascertained from the language employed, unless there is some ambiguity in a material part of the contract, the explanation of which requires proof of the attendant facts and circumstances;"<sup>2</sup> that, if the agent, in exe-

entirely satisfied as to the correctness of the conclusion arrived at.

<sup>1</sup>*Hinsdale v. Partridge* (1841) 14 Vt. 547.

<sup>2</sup>*De Remer v. Brown* (1901) 165 N. Y. 410, 59 N. E. 129, affirming (1899) 36 App. Div. 634, 55 N. Y. Supp. 367.

In *Campbell v. Nicholson* (1846) 12 Rob. (La.) 428, the defendants, as a committee appointed for the purpose by the New Orleans Samaritan Society, made with the plaintiffs, who were physicians, a contract in writing, by which, in consideration of a specified sum per diem, they obliged themselves to receive all the patients that might be sent to their infirmary by the society, to give them proper medical treatment, and to provide for them a sufficient department "which at all times should be subject to the inspection of any committee appointed for the purpose, etc." Held, that the defendants were not liable for the payment of the stipulated compensation.

In *Richmond, F. & P. R. Co. v. Snead* (1869) 19 Gratt. (Va.) 354, 100 Am. Dec. 670 (action of assumpsit for hire of slaves), the plaintiffs gave in evidence the following document, which was "proved to be in the handwriting of Robinson, the president of the [defendant] company, and which was given by him to one of the plaintiffs upon a settlement for the work" upon which the claim was founded: "Due Joseph H. Snead and Benjamin E. Smith \$484, in full, of labor performed on cottage lot of the railroad company, the same payable on demand, with interest from date. [Signed] Ed. Robinson." As it did not distinctly appear, from the terms of this paper, whether it was designed to acknowledge a debt due by Robinson, who signed the paper in his own name, or by the company, whose officer and agent he was, and upon whose lot the work is stated to have been done, parol evidence of the consideration, and of the origin of the paper, was held to be admissible to explain its meaning in this respect. It was proved on the part of the plaintiffs, among other things, that Robinson hired the hands of the plaintiffs for a certain amount per diem for each of them; that during two months the hands worked under the direction of one

cuting the contract, uses his own name, and not that of his principal, he is prima facie personally liable;<sup>3</sup> that the mere fact of his being designated,

Thompson, a section master upon the railroad of the defendants; that the hands were subsequently turned over to the control and management of the plaintiff Smith, who made all the contracts for work done by them and kept the accounts; that they were seen at work under the direction of Thompson, the section master, sometimes upon the railroad of the defendants and sometimes upon the cottage lot, the property of defendants; that some of the first work done by the hands of the plaintiffs was paid for by the defendants; and that between 1852 and 1856 one Taylor was employed by said Robinson to do work upon the cottage lot of the defendants, for which work he was paid by defendants. It was further proved that the plaintiff Smith, when about to remove to another county, was advised by Snead to go down to Richmond and settle the accounts with the defendants; that Smith went down accordingly, and when he returned told Snead that he had taken a note with interest, but that, in consequence of the action of Thompson, he had been compelled to lose about \$100. Held, that the circumstances thus proved showed that the work in question had been done for the defendants, and that the claim of the plaintiffs against them was consequently enforceable.

<sup>3</sup> This rule is taken for granted, or formally stated, in all the cases cited under the present section.

In *Kelner v. Baxter* (1866) L. R. 2 C. P. (Eng.) 174 (187), Byles, J., referred to *Meriel v. Wymondsold* (1662) Hardr. 205, 145 Eng. Reprint, 454, where, upon a bill in equity, the case was this: The plaintiff had agreed with two of the defendants to pave their streets in Putney, and they, on behalf of the parish, agreed to pay him for them, which agreement was put into writing. The work having been done according to the agreement, the plaintiff preferred his bill against those with whom he had agreed, and against others of the parish who had agreed with the undertakers for the parish to pay their shares. And per Curiam: "The plaintiff must have relief against the undertakers, especially in this case, because the written agreement, which is his evidence, is in the hands of one of the defendants; and the undertakers must take their remedy against the rest of the parish."

In *Queensbury v. Cullen* (1787) 1 Bro. P. C. 396, 1 Eng. Reprint, 646, affirming (1781) 1 Bro. Ch. 101, 28 Eng. Reprint, 1011, the headnote is as follows: Where A, B, and C, on behalf of themselves and other members of a club, enter into articles with D to provide necessities for the use and accommodation of the club, they are personally bound by such articles; and D is not obliged to resort to any of the other members for satisfaction of his demands. No judgment is reported, but from the argument of counsel, as stated, it is clear that

the ratio decidendi was that the terms of the contract imported presumptively a personal undertaking on the part of the defendants, and that the extraneous evidence showed that the credit was given to them, and not to the club.

In *Craig v. Fry* (1886) 68 Cal. 636, 9 Pac. 550, the defendants, acting on behalf of the L. Company, and the plaintiff and two other persons, acting on behalf of the S. Company, entered into a contract by which the S. Company covenanted that the plaintiff should perform certain work for the defendants, in consideration of which the defendants promised to pay the plaintiff a stipulated amount. In an action brought to recover a balance alleged to be due to the plaintiff on the contract price, it was held that the plaintiff could maintain the action without joining the other parties of the second part as plaintiffs; that the S. Company was not a necessary party plaintiff, nor the L. Company a necessary party defendant; and that the defendants were personally liable on the contract.

In *Sadler v. Young* (1909; Err. & App.) 78 N. J. L. 594, 75 Atl. 890, the plaintiff entered into the following agreement in writing with the defendant: "It is agreed between James C. Young and B. F. Sadler that B. F. Sadler devote his entire time to the sale of property at Port-au-peck and Deal, New Jersey, for which James C. Young agrees to pay B. F. Sadler 25 per cent commission and \$100 per week; this agreement to be and remain in effect ten weeks. (Signed) B. F. Sadler, James C. Young." Held, that the case had been improperly taken from the jury.

In *O'Rorke v. Geary* (1903) 207 Pa. 240, 56 Atl. 541, the parties to a contract for building a bridge were described as follows: "D. F. O'Rorke, of Altoona, Pennsylvania, party of the first part, and D. J. Geary, for a bridge company to be organized and incorporated, party of the second part." It was provided that the party of the second part "desires to build across the Allegheny river and in accordance with specifications and plans . . . heretofore submitted to the party of the first part by the party of the second part," and that an estimate was to be made on a certain day, and 75 per cent was to be paid monthly on the estimate "by the party of the second part." The contract concluded as follows: "In witness whereof we have hereunto set our hands and seals," etc.; but it was signed only by plaintiff and defendant, without any seal or scroll. Held, that the defendant was personally bound.

In *Hinsdale v. Partridge* (1841) 14 Vt. 547, where the action was brought to recover for the board of certain cadets, the contention of the defendant, that the parties actually liable were the parents of those cadets, was rejected for reasons thus stated: "The terms here made use of are



either in the body of the contract or after his signature, by the term "agent," or by some other descriptive expression of a similar purport, is not of itself sufficient to relieve him of such liability;<sup>4</sup> that no recovery can be had against him

if the claimant was affected with notice, either from the terms of the contract itself, or from some other source of information, that it was made by him in his representative capacity;<sup>5</sup> that the presumption as to his personal liability

undoubtedly well calculated to induce a belief that the defendant did intend to assume a personal obligation. The contract is entitled, 'Articles of agreement between Alden Partridge and Theodore Hinsdale.' The plaintiff was to furnish board to all the cadets, 'and the said Partridge is to pay the said Hinsdale at the rate of \$1.72 per week for each.' 'No payment is to be considered due until the end of the quarter.' It is then provided 'that if the parents or guardians neglect to pay the bills of the cadets in season, the defendant is not to pay out of his own funds, except for the necessary expenses of the house.' 'At the end of the year the bills of those who have failed or become insolvent are not to be paid by said Partridge, except such proportion as he may have received, to be averaged on their whole bills.' 'And in case of final loss on said bills, plaintiff is to bear his proportion of the loss.' There being no other stipulation found in the contract imposing the risk of any ultimate loss upon the plaintiff, it would seem natural to conclude that other losses were to fall upon the defendant. 'Expressio unius exclusio alterius.'"

Compare also *Lambert v. Knott* (1825) 6 Dowl. & R. (Eng.) 122, where overseers who concurred in an order for supplies to a workhouse under their control were held personally liable for the value thereof.

<sup>4</sup> In *Partridge v. Hollinshead* (1898) 105 Ga. 278, 30 S. E. 787, the addition of the words "building committee" to the names of the signing parties was held not to negative their personal liability on a construction contract.

In *Simonds v. Heard* (1839) 23 Pick. (Mass.) 120, 34 Am. Dec. 41, a committee chosen by a town to rebuild a bridge entered into a contract for that purpose, in which, after describing themselves as a committee of such town, "said committee" agreed to pay the contractor a certain sum when the work should be completed. The contract was signed by the members of the committee with their own names simply. Held, that they were personally responsible on such contract.

In *Landyskowski v. Lark* (1896) 108 Mich. 500, 66 N. W. 371, where an action was held to be maintainable for damages resulting from the breach of a contract for the construction of parochial buildings, defendants, who were described in the instrument as the trustees and building committee of the church, and as acting by authority of the bishop of the diocese, agreed for themselves, their heirs, executors, and administrators, to pay the contract price, and signed as individuals, except that one added to his signature the title "president" and another the title "secretary."

In *Rollins v. Phillips* (1861) 5 Minn. 463, Gil. 373, where the plaintiff agreed to raft certain logs, and the defendants agreed to pay him for doing so, and to furnish him with money and supplies, the contract purported to be "between C. P., party of the first part, and J. R., J. G. R., J. C., and G. H., as agents, authorized by the log owners, parties of the second part." It also appeared from the contract that the logs were marked with the several marks of the owners. The defendants, with the exception of G. H., signed the instrument with their own names, with the addition of the word "agent" to each name. Held, that the whole tenor of the instrument indicated that the employment was a personal one, and so understood between the parties.

For a case in which the terms of a written contract were held to show that the employee who hired the plaintiff as a servant executed it as an agent and not as a principal, see *Noe v. Gregory* (1877) 7 Daly (N. Y.) 283.

<sup>5</sup> In *Sun Printing & Pub. Asso. v. Moore* (1901) 183 U. S. 642, 46 L. ed. 366, 22 Sup. Ct. Rep. 240, where a contract for the hire of a yacht to be used in collecting news during the Cuban War was held to be that of the principals, the decision proceeded upon the ground that, while the agent was referred to in the body of the first of the two writings under review as an individual, he signed the agreement "for the Sun Printing & Publishing Association." This was held to be "a disclosure of the principal and an apt manner of expressing an intent to bind such principal."

In *Bellinger v. Bentley* (1874) 1 Hun (N. Y.) 562, 14 Thomp. & C. 71, where the contract upon which the action was brought purported to be made by the trustees of a cheese manufacturing corporation, the conclusion of the court that it was not binding upon them personally was based on reasons thus set forth: "The contract is for the benefit of the corporation upon its face. It stipulates for the use of the corporate property, the cheese factory, by the plaintiffs, in the manufacturing of cheese—the particular business of said corporation—in the factory of said company. The plaintiffs agreed to manufacture and make cheese at the said factory, during the season of making cheese in 1870. The proofs show that the affairs of said corporation were to be managed by three trustees, and that the trustees named in the said agreement were such trustees for the year 1870, and two of them were authorized by the by-laws to constitute a quorum for the transaction of business, and two of them, in fact, signed the agreement. This made it a valid contract of the corporation. The plaintiffs

cannot be overcome by parol evidence in cases where it is created by unambiguous words in the contract itself;<sup>6</sup> and

that such evidence is admissible for the purpose of showing that a third party is also liable as an undisclosed principal.<sup>7</sup>

knew that the defendants were contracting for the corporation; one of them was a stockholder and the other his son. The factory was on the land of the elder Bellinger, one of the plaintiffs, and was leased to the corporation by him for the use of such factory, and he was a stockholder in said company."

In *Collier v. Myers* (1906; Sup. App. T.) 52 Misc. 116, 101 N. Y. Supp. 659, the plaintiff was an actress. Defendants were theatrical booking agents, and had been theatrical managers. They sent for W. P. Lewis, an actor, and offered to plaintiff and her troupe at a specified rate per week, an engagement, which was accepted by her. Defendants then drew up an agreement, part of which was a general printed form of theatrical employment, and part written in typewriting, to suit the individual case. The agreement in the printed part provided that the party of the first part should deduct from the salary of the party of the second part a 5 per cent commission for Myers and Keller, the defendants. The agreement was signed, not by Glickman, the designated party of the first part, but by defendants, with nothing to indicate that they signed in a representative capacity. The plaintiff's name was signed by Lewis, with addition "per W. P. L." Plaintiff was discharged after the first performance by one Schwartz, acting, as her witnesses stated, for defendants, and not for Glickman, whom plaintiff and her representative never saw. Held, that an action brought against the defendants, as principals, to recover damages for a breach of the contract, could not be maintained.

In *Johnson v. Welch* (1896) 42 W. Va. 18, 24 S. E. 585 (action for materials furnished and labor performed), a proposition for the building of a church was addressed to the building committee, and accepted, over their individual signatures, by the defendants, Welch and Boggess, who were members of the committee. A verdict for the defendants was sustained on the ground that "the plaintiffs concluded no contract with them as individuals when they accepted the bid."

<sup>6</sup>In *Chandler v. Coe* (1874) 54 N. H. 561, the plaintiff, who brought suit for labor performed under a contract signed by one L. E. Dunn in his own name, relied upon the ground that the real contracting parties were the defendants, carrying on business in the name of Dunn, who acted as their agent in making the contract, and so informed the plaintiff at the time of making it. In other words, the plaintiff's position was not merely that Dunn was the agent of the defendants, duly authorized to make the written contract in their behalf, and that the plaintiff understood this at the time when the contract was made, but that it was the contract of the defendants, carrying on business in the name of Dunn. The

court said: "It is very clear that if the defendants carried on business in the name of L. E. Dunn, and Dunn executed this contract in his own name as their agent, it is binding upon them whether he did or did not inform the plaintiff of his agency. . . . But it is indispensable for the plaintiff to prove that the defendants adopted the name of L. E. Dunn as their business name." After adverting to the general rule which declares that a written contract cannot be contradicted or varied by parol evidence, the court continued thus: "If the evidence is that it was understood by the parties that the contract, which was executed by the agent in his own name for his principal, was the contract of the principal, and not of the agent, . . . it is plain that this does contradict and vary what is written. It allows the agent to show by parol evidence that the contract was not drawn up as the parties intended; that it contains not the agreement which they actually made, but something else. It is therefore inadmissible, as all the authorities hold. Our conclusion, therefore, is, that where there is a written contract not under seal, executed in the name of an agent, parol evidence is admissible for the purpose of charging an unknown principal, but not for the purpose of charging a known principal, and that it is inadmissible for the purpose of discharging the agent whether the principal was known or unknown."

In *De Remer v. Brown* (1901) 165 N. Y. 410, 59 N. E. 129, affirming 36 App. Div. 634, 55 N. Y. Supp. 367, the essence of the contract upon which the plaintiff was held entitled to recover was that the plaintiff should perform and furnish certain work and materials according to specifications which were a part of the contract, and that the defendants should pay for such work and materials the prices or sum mentioned therein. The contention of the defendants, that they were the agents for some undisclosed principal or syndicate, or for the promoters of the undertaking, who were intending to form a corporation to build the ditch or canal in question, and consequently that they were not liable, although the contract was made in their names and with no knowledge upon the part of the plaintiff's firm of any principal other than the defendants, was rejected on the ground that "the language of the written agreement was not only plain and unambiguous as to who were the principals and who was to pay the plaintiff's firm for the labor and materials furnished, but the other proof in the case shows quite conclusively that the defendants intended to become such principals."

<sup>7</sup>*Chandler v. Coe* (1874) 54 N. H. 561 (see preceding note); *Weber v. Collins* (1897) 139 Mo. 501, 41 S. W. 249 (husband held liable on building contract signed by his wife); *Meyers v. Kilgen* (1913) 177 Mo.

**§ 62. Claimant employed under oral contract made by agent professedly acting for a disclosed principal.**

The general rule of the law of agency which is applicable to this situation is thus stated by Judge Story (Agency, § 261); "When a man is known to be acting and contracting merely as the agent of another, who is also known as the principal, his acts and contracts, if

he possesses full authority for the purpose, will be deemed the acts and contracts of the principal only, and will involve no personal responsibility on the part of the agent, unless the other circumstances of the case lead to the conclusion that he has either expressly or impliedly incurred, or intended to incur, such personal responsibility."<sup>1</sup>

In a subsequent section of the same

App. 724, 160 S. W. 569 (holding that it was a question for the jury whether the plaintiff looked to the defendant or the company of which he was president for the payment of the commissions stipulated under a contract signed by him).

See also the case cited in § 21, note 5, of the monograph appended to *BRUTMEL v. NYGREN*. L.R.A. —, —.

<sup>1</sup>This passage is quoted in *McCarthy v. Hughes* (1913) 36 R. I. 66, 88 Atl. 984, Ann. Cas. 1915D, 26.

In *Haskett v. Unsell* (1914) 181 Mo. App. 480, 64 S. W. 651, an instruction given at the request of plaintiffs, by which the jury were directed to find for plaintiffs, unless they believed from the evidence that one Pratt authorized defendant to employ plaintiffs to do the work on Pratt's account, and that plaintiffs "accepted said employment, and agreed to do said work on the account of said I. E. Pratt, and to charge the said I. E. Pratt therewith instead of this defendant," was held erroneous, for the reason that, in order to make good his defense, it was only necessary for defendant to show that he, in entire good faith, disclosed the name of his principal, and that he was acting for the latter in the premises.

In *Davenport v. Rutledge* (1916) — Tex. Civ. App. —, 187 S. W. 988, it was held that the liability of the defendant for medical services rendered to her minor child could not be inferred from findings which showed merely that she consented that the claimant should treat the child, and that she verbally agreed thereafter to pay his bill. The rationale of the decision in respect of the latter of these findings was, that she would not be bound personally for the default of her husband by such verbal promise to pay his debt.

For a case in which it was held that a husband acting as agent for his wife was not personally liable, see *Rauer's Law & Collection Co. v. Berthiaume* (1913) 21 Cal. App. 670, 132 Pac. 596, 833.

In *Bonyng v. Field* (1880) 81 N. Y. 159, affirming (1879) 12 Jones & S. 581, it was laid down that the rule stated in the text "applies to the relationship of attorney and client, and except to a certain class of officers who are not within the general rule, attorneys cannot be held personally responsible for services of this kind, rendered in a suit, unless there is a special obligation to that effect." The charges of stenographers were held to be within the principle

thus laid down. The earlier cases cited as authorities for the applicability of the rule to this class of agents were: *Judson v. Gray* (1854) 11 N. Y. 408 (services of stenographer in taking down the testimony); *Sheridan v. Genet* (1878) 12 Hun (N. Y.) 680 (services of stenographer); *Covell v. Hart* (1878) 14 Hun (N. Y.) 252 (defendants being engaged in preparing for a trial a case which involved the settlement of an extended partnership, employed the plaintiff to examine the partnership books).

As to the nonliability of an attorney for the fees of public officers employed with reference to the legal proceedings in which his client is interested, see *Mayberry v. Mansfield* (1846) 9 Q. B. 754, 115 Eng. Reprint, 1465, 16 L. J. Q. B. N. S. 102, 11 Jur. 60; *Preston v. Preston* (1844) 1 Dougl. (Mich.) 292; *Howell v. Kinney* (1845) 1 How. Pr. (N. Y.) 105; *Wires v. Briggs* (1833) 5 Vt. 101, 26 Am. Dec. 284; 6 C. J., "Attorney and Client," p. 623. In *Judson v. Gray* (1854) 11 N. Y. 408, it was declared that the earlier New York decisions were "in conflict with principle, and with the whole current of authorities elsewhere on the subject."

"It is in the power of a merchant abroad to procure repairs to be done upon a ship consigned to him, without making himself liable for the expense, leaving the person employed to his remedy against the owner. This may be done by disclosing his principal, and stating expressly that he himself is not to be looked to for payment. In such a case, if it should appear that the work was necessary for the safety of the ship and the prosecution of the voyage, a duty would be imposed upon the owner to pay, which could be enforced by action at law." *James v. Bixby* (1814) 11 Mass. 34.

Under the doctrine of the maritime law, the master of a ship is personally bound by a contract made by himself for the supply of repairs or necessities to the ship, unless he takes care expressly to warn the creditors to look only to the security of the ship and its owners. *Hussey v. Christie* (1807) 9 East, 426, 103 Eng. Reprint, 636, 13 Ves. Jr. 599, 33 Eng. Reprint, 417, 9 Revised Rep. 585. When the contract is made under circumstances which show that credit was given to the owners alone, there is no right of action against the master upon such contract. *Hoskins v. Slayton* (1737) Cas. t. Hardw. 376, 95 Eng. Reprint, 244. See generally *Abbott, Shipping*, 14th ed. p. 185. The presumption

treatise (p. 279), the learned author lays it down that "in all cases of this sort, the question generally is, to whom credit is given, whether to the principal or to the agent. If to the latter, then he is personally responsible, even although he may be known to be acting for his principal."<sup>2</sup>

Having regard to these criteria, it is manifest that for services rendered under a contract of employment made by him an agent may, on the ground of the actual or implied intention of both parties to the contract, be deemed to have incurred a personal liability whenever the evidence justifies one or other of these two conclusions:

entertained under this doctrine is, it will be observed, precisely the opposite of that which is associated with the general rule stated in the text.

<sup>2</sup> In *Sharp v. Swayne* (1898) 1 Penn. (Del.) 210, 40 Atl. 113, an action on a contract for labor and materials, the court instructed the jury in accordance with the doctrine.

<sup>3</sup> In *Scott v. Messick* (1827) 4 T. B. Mon. (Ky.) 535, a land owner placed money in the hands of Scott to pay for the erection of a building, and appointed him her agent to employ workmen. He accordingly contracted with Messick to do the stone work of the building, and promised to pay him therefor at a certain rate per perch. Held, that under these circumstances, Scott was personally liable.

"If an agent should retain an attorney for his principal, and should promise to pay him his fees, he would be personally liable." Story, *Agency*, 7th ed. § 269, citing *Paley, Agency*, by Lloyd, 378.

In *Simonds v. Heard* (1839) 23 Pick. (Mass.) 120, 34 Am. Dec. 41, one of the grounds on which the members of a building committee were held personally liable on a written construction contract was that it included an express stipulation on their part to pay for the work.

In *Bell v. Teague* (1887) 85 Ala. 211, 3 So. 861, where an action on the common counts, and on a special count to enforce a contractor's lien, was brought against the general superintendent of an association, it was held that the trial judge had properly refused to give, at the request of the defendant, instructions which declared that the plaintiff could not recover if the jury believed from the evidence that the defendant, as the agent of the association, contracted with plaintiff for the building of said house, and that plaintiff knew at the time that defendant was thus acting, or was in possession of such facts as were sufficient to put him on inquiry as to the capacity in which defendant was acting. The court said: "The entire hypothesis of the charge requested by the defendant . . . may be true, and yet, in one aspect of the evidence, the plaintiff may be en-

(1) That he expressly promised to pay the remuneration of the person employed by him."<sup>3</sup>

(2) That, either by language not importing an express promise or by his conduct in relation to the transaction in question, he led the person so employed to suppose, on warrantable grounds, that he was to be responsible for the remuneration.<sup>4</sup> Some of the reported cases exhibit the circumstances under which the personal liability of the agent has, in this point of view, been directly affirmed or denied in actions brought against the agent himself.<sup>5</sup> In other cases the principal was the defendant, and the exis-

tingled to recover. It withdrew from the consideration of the jury the proof tending to show that the defendant contracted in his own name, and on his personal credit."

In *Hovey v. Pitcher* (1850) 13 Mo. 191, where the action was brought to recover a reward offered for the apprehension of a criminal, a judgment for the plaintiff was reversed on the ground that the trial judge had erroneously instructed the jury in language which declared, without any qualification, that, if the defendant had disclosed his agency and given the name of his principal, he would not be personally liable.

<sup>4</sup> In *Savings Bank v. Benton* (1859) 2 Met. (Ky.) 240, an instruction which imported that the defendant bank was liable for the legal services rendered in pursuance of a contract with its president, unless the jury believed not only that the plaintiff had been employed by Sandford, and not by the bank, but also that the plaintiff looked alone to Sandford for pay for his services, was held to be erroneous, as the liability of the defendant depended upon the plaintiff himself, without any regard to the understanding of the bank on the subject.

(a) **Liability on the part of the agent affirmed.**

<sup>5</sup> In *Moody v. Tenney* (1862) 3 Allen (Mass.) 327, an action to recover the price of work done at the request of the defendant, the defense was that the defendant acted only as agent of a corporation, on whose credit the work was performed. Held, that plaintiff might introduce evidence to show that the defendant paid to other workmen employed by him in the same service the amount of their bills, which were made out against him personally.

In *Spencer v. Tozer* (1870) 15 Minn. 146, Gil. 112, where Tozer, one of the building committee of a church, had contracted with Spencer for the performance of work on the church, the inference that it was the understanding of both parties that the credit was in fact given to him was held to be deducible from the following circum-

stances: That the lumber upon which the work was done was sent to Spencer's shop by defendant; that he acted throughout, as far as appears, without reference to his colleagues, either committeemen or trustees; that it did not appear that the church, whether incorporated or not, had any property or funds, or means of payment.

In *Ross v. McAnaw* (1897) 72 Mo. App. 99, the liability of an attorney for work performed in printing a second abstract of the record in a case which had been dismissed because, owing to his inadvertence, a portion of the record was missing, was affirmed on the ground that, according to the testimony of the plaintiff, the defendant requested him, when he (defendant) ordered the printing of the second abstract and brief, "to look to him—defendant—for payment therefor; that he had made an error and purposed to pay for his own mistakes."

In *Foster v. Meeks* (1896; Sup. App. T.) 18 Misc. 461, 41 N. Y. Supp. 950, a finding in favor of the plaintiff, whose assignor had rendered professional services as a physician to the defendant's deceased father, was held to be warranted by evidence to this effect: That the defendant called upon Dr. Kennedy, and said: "Doctor, I want you to come and attend to my father. He had a doctor who was not satisfactory;" that doctor thereupon visited the father, and rendered the services for which compensation was claimed; that after the death of the patient, the doctor sent his bill to the defendant, who replied that the estate should be charged with the amount; and that the defendant told him to send the bill against the estate to his brother, and that he (the defendant) would see it would be paid.

See also *Boynton v. Brannum* (1911) — Ark. —, 136 S. W. 979 (where the evidence, not reported in detail, was held to be sufficient to support a finding that an agent made the contract in his individual capacity); *Hub Pub. Co. v. Richardson* (1891) 59 Hun, 636, 13 N. Y. Supp. 665 (action maintainable against defendants on contract made for printing prospectuses of company which they were promoting); *Presbyterian Church v. Manson* (1826) 4 Rand. (Va.) 197 (general affirmation of rule as to effect of giving credit to the agent).

Compare also, *Wilson v. Zulueta* (1849) 14 Q. B. 405, 117 Eng. Reprint, 159, 14 Jur. 366, 19 L. J. Q. B. N. S. 49, where the intention of the parties that an agent resident in England should be personally liable for the wages of a servant on behalf of a resident in Cuba was inferred from a stipulation in the contract, providing that the principal should be at liberty to confirm the employment or to discharge him upon his arrival in Cuba. The ratio decidendi was that, under any other construction of the contract, the servant would be left entirely without a remedy against anyone, in

case the principal declined to adopt the transaction.

The rule of the English court of chancery is that a London agent employed by a country solicitor is presumed to give credit to the latter, and not to his client. *Farewell v. Coker* (1728) 2 P. Wms. 460, 24 Eng. Reprint, 814 (client, after having paid his solicitor, was not bound to pay clerk in chancery employed by the latter); *Waller v. Holmes* (1860) 1 Johns. & H. 239, 70 Eng. Reprint, 735, 30 L. J. Ch. N. S. 24, 6 Jur. N. S. 1367, 3 L. T. N. S. 289, 9 Week. Rep. 32 (client having paid his solicitor, London agent had no lien on documents of client which had come into his hands in the course of the suit).

In *Ex parte Edwards* (1881) L. K. 7 Q. B. Div. (Eng.) 155, the court of Queen's bench, exercising that summary jurisdiction over its officers which is not circumscribed by technical rules, adjudged that the town agent of a country solicitor should not be allowed to retain, as payment of a debt owed to him by that solicitor, the proceeds of a judgment recovered by a client of the solicitor. The decision, it is apprehended, must have been the same even if it had been rendered with reference to the general law of agency; for, under the circumstances, it would seem reasonably clear that the person to whom credit in respect of the business was given by the town agent was the country solicitor, not the client.

(b) Liability on the part of the agent negatived.

In *Pochin v. Pawley* (1769) 1 W. Bl. 670, 96 Eng. Reprint, 391, the facts and the conclusion arrived at are thus stated in the report: Action of assumpsit against the surveyor of a turnpike road by a farmer, employed by order of the commissioners to repair the road. At Leicester Assizes, Aston, J., was of opinion that there was no evidence of any contract with the surveyor personally and the plaintiff; but that the contract was made with the commissioners, and that the surveyor was only their servant or messenger, and therefore he would have nonsuited the plaintiff; but he refused to be nonsuited, and a jury of farmers gave a verdict for the plaintiff. And now, on a motion for a new trial, the court was unanimously of opinion with Mr. J. Aston; and, though they held that the commissioners could not be personally sued, being too numerous, yet their treasurer might. In a note we find the following criticism: This is a false report, and is so reported to give an ostensible but false reason for setting aside the verdict.—MSS. Serj. Hill, who refers to *Horsley v. Bell* (1778) 2 Ambl. 770, 27 Eng. Reprint, 494, 1 Bro. Ch. 101, note, 28 Eng. Reprint, 1112, where it is said that in the principal case it was held that the action must be against the commissioners. He refers also to 1 Eq. Cas. Abr. 24 (D) 21 Eng. Reprint, 846; *Meriel v. Wymondsoll* (1661) Hardr. 205, 145 Eng. Reprint, 454, 1 Eq. Cas. Abr. 308 (B), 21 Eng. Reprint, 1066. See also *Eaton*

v. Bell (1821) 5 Barn. & Ald. 34, 106 Eng. Reprint, 1106; 3 Geo. IV, chap. 126, § 74.

In *Owen v. Gooch* (1797) 2 Esp. (Eng.) 567, the defendant gave the plaintiff, a paper hanger, an order for work to be done in the house of one Tippel, the plaintiff being informed, when the order was given, that the work was on Tippel's account, and the entry upon the plaintiff's book being "Mr. Tippel, by order of Gooch." The contention that, as the person for whom the work was done may have been unknown to the plaintiff, but the defendant was known to him, the work must be deemed to have been ordered on his credit, was rejected by Lord Kenyon, who said: "Wherever an order is given by one person for another, and he informs the tradesman who the person is for whose use the goods are ordered, he thereby declares himself to be merely an agent, and there is no foundation for holding him to be liable."

In *Great Lakes Towing Co. v. Worthington* (1906) 147 Fed. 926, the evidence held to be insufficient to show any personal liability on the part of the defendants for services rendered in respect of a stranded vessel was thus stated: "Respondents had no interest in either the vessel, cargo, or freight. They were marine insurance agents, pure and simple, a fact which was quite familiar to persons interested in navigation on the Lakes. There is no satisfactory evidence that libellant, in furnishing the services and incurring any expense, did so upon the personal credit of Worthington & Sill. On the contrary, their presumed knowledge of the business of the respondents, the latter's connection with the subject-matter, together with the attendant circumstances, were indicative of their representative relation."

In *Rosenthal v. Myers* (1873) 25 La. Ann. 463, where the plaintiff, after having read a letter received by the defendant from a correspondent who desired to have the rite of circumcision performed on two children in another state, agreed to do this, it was held that, as the defendant had acted merely as the agent of the parents of the two children, and exhibited his authority, and had neither done nor said anything by which he obligated himself to pay the plaintiff any sum, no action for compensation could be maintained against him.

In *Imhoff v. House* (1893) 36 Neb. 28, 53 N. W. 1032, a verdict for the plaintiff in an action brought against Imhoff to recover compensation for certain survey work was held not to be warranted by evidence which showed that the defendant was general manager of a railroad company previously organized; that the contract of hiring was made by him in pursuance of the instruction of the directors to employ someone to make a preliminary survey of the proposed line; that the plaintiff was informed of these facts before the contract was entered into; and that the plaintiff, before suing Imhoff, had presented a bill to the company and repeatedly pressed for payment.

In *Bonyng v. Field* (1880) 81 N. Y. 159, where an action brought against a firm of attorneys for the fees of stenographers was held not to be maintainable, the exclusion of evidence offered as to previous dealings of the plaintiff's assignors with the defendants, when the assignors performed work on like retainers, furnished bills to the defendants, and received from them payment for said bills, was approved for the reason that "what had been done on other occasions would not show that the contract was in reference to this transaction, and render the defendants liable for the plaintiff's claim in this case."

In *Buck v. Amidon* (1871) 4 Daly (N. Y.) 126, 41 How. Pr. 370, it was held that "a person who brings a message to a surgeon from the attending physician of a patient, requesting him to come and perform an operation upon the patient, is [not] by the mere delivery of such a message, chargeable with the obligation of paying the surgeon for his services. He is a mere agent, and nothing more, unless he communicates the message in such a way, or does or says something that fairly warrants the surgeon, before he undertakes the service, in supposing that he is the person who is to pay for it; and in this respect it can make no difference that the bearer of the message happens to be a brother of the patient." The conclusion that it was the patient, and not the defendant, that he looked to for the payment of his bill, was also held to be indicated affirmatively by the following facts: That he made it out to the patient and sent it to the brother in New York, because, to use his own words, he supposed that he was "the proper channel" to send it through; that after eight days had elapsed without its being paid, he sent a letter, not to the defendant, but to the patient, and advised him that he had waited a reasonable time without hearing from him; and that in his next letter he wrote to the patient, declining the amount offered by him, and expressing the hope that there would be no further delay in settling.

In *Balmford v. Peffer* (1900; Supp. App. T.) 31 Misc. 715, 65 N. Y. Supp. 271, it was held that an action for services rendered by an undertaker should have been dismissed, where the following facts were shown by the testimony of the plaintiff himself: That, at the suggestion of the husband of the deceased, he had gone to the house of the husband's aunt to obtain a guaranty of the payment of his bill; that he there met the defendant, who informed him that her mother was ill, and could not be seen, but "she would do as well;" and that, after a conversation, he came to an agreement with her concerning the amount to be charged, and was directed "to go on and do the work, and forward the bill to her mother." It was considered to be clear, even from the plaintiff's version of this conversation, that each of the parties understood that the defendant was acting merely as a representative of her mother, and that

credit was given to the latter. The subsequent acts of the plaintiff confirmed this view, for he sent a bill to the defendant's mother, gave her a receipt for a payment on account, and made several attempts to secure the payment of the balance.

In *Title Guarantee & T. Co. v. Sage* (1911) 146 App. Div. 578, 131 N. Y. Supp. 278, one of the grounds upon which it was held that the plaintiff could not recover for services rendered in searching title was, that its correspondence with the defendant indicated that he was, to its knowledge, acting as agent in the interest of a person who was about to make a mortgage loan, and that the title policy was to be furnished to enable the defendant to determine the title.

In *Johnson v. Armstrong* (1892) 83 Tex. 325, 29 Am. St. Rep. 648, 18 S. W. 594, the grounds upon which the liability of the president and financial agent of Fort Worth University was denied were thus stated: "It clearly appears that plaintiffs knew that the building was intended for a public, and not for a private, purpose. The evidence does not in so many words show that they knew that the building was to be constructed by an existing corporation, so as to apprise them that Johnson had a principal capable of being bound by the contract. But it does show that there was in fact such a corporation and principal, and the circumstances that were known to plaintiffs were sufficient to put them upon inquiry. The inquiry that it was their duty to make, under the circumstances of this case, would have developed a responsible principal, and it is difficult to conclude that plaintiffs did not have actual knowledge that they were dealing with a corporation, notwithstanding the fact that they did not, at the time of making the contract, inquire for or get that information from Johnson, the agent."

In *Cheeny v. Clark* (1830) 3 Vt. 431, 23 Am. Dec. 219, the right of the plaintiff to recover for work done upon a meetinghouse at the request of a building committee appointed by the voluntary association formed to erect it was denied for reasons thus stated: "They [the committee] were appointed by the body of the subscribers to execute a mere trust; were bound to act under the direction and control of the subscribers, and liable to be removed at their pleasure; and it appears that one of them was in fact removed, and another person appointed in his place. The plaintiff was one of the subscribers by whom the defendants were appointed; and in the absence of any express contract or undertaking, he can have no legal or equitable right to look to the personal security or liability of the defendants, and hold them answerable out of their private funds, for work done by him for the benefit of the subscribers generally."

In *Abbott v. Cobb* (1845) 17 Vt. 593, it was held that, where a member of a voluntary association, formed for building a

meetinghouse, was appointed one of the building committee, and acted as such in making contracts and procuring materials for the building, he was not individually liable to pay for services for which he thus contracted with one who knew that he was an agent, that the contract was for the benefit of the association, and that it was entered into by the defendant merely as an agent.

See also *Harper v. Independence Development Co.* (1910) 13 Ariz. 178, 108 Pac. 701 (officer of company employed plaintiff to do work in mine); *Chase v. Debolt* (1845) 7 Ill. 371 (verdict against agent was set aside on the ground that the evidence clearly preponderated in favor of the conclusion that plaintiff knew that defendant was merely an agent of the person for whom the work in question was to be performed); *Meiners v. Munson* (1876) 53 Ind. 138, reversing (1873) 1 Wilson Super. Ct. 459 (evidence showed that person who installed a lightning rod gave credit, not to the defendant husband, but to his wife); *Batchelder v. McKenney* (1853) 36 Me. 555 (no action maintainable by one who had, at the request of the defendant, taken care of one Robbins, an insane person); *Teele v. Otis* (1877) 66 Me. 329 (right of an attorney to recover compensation was not established by evidence which merely showed that he had received from the defendant a letter in which the latter requested him to attend to certain suits against the son of the writer, and referred to the beneficial services which the plaintiff had already rendered in the matter); *Brong v. Spence* (1898) 56 Neb. 638, 77 N. W. 54 (instruction to the effect that the jury were to find for the plaintiff, and against both defendants,—husband and wife,—if they found from the evidence that the husband was acting as the agent of his wife in making with the plaintiff the contract in question for the board and lodging of two workmen employed by a contractor for the drilling of a well, was held erroneous); *Underhill v. Smith* (1906; Sup. Sp. T.) 52 Misc. 349, 102 N. Y. Supp. 142 (action brought to recover for services rendered as an appraiser of a fire loss, and also for services of an umpire in the same matter, which claim was assigned to the plaintiff, was held not to be maintainable against the person who represented the assured in adjusting the loss); *Johnson v. Armstrong* (1892) 83 Tex. 325, 29 Am. St. Rep. 648, 18 S. W. 594 (architect prepared plans and specifications for building); *Lambert v. Phillips* (1909) 109 Va. 632, 64 S. E. 945 (instruction in action brought to recover the value of certain work and labor done and materials furnished by plaintiffs as plumbers was disapproved on the ground that it was not so framed as to make it plain to the jury that, if they believed the evidence that defendant was the agent of the party having the improvements made, and that he made full disclosure of his principal to the plaintiff, then the legal presumption was that

tence or nonexistence of the agent's personal liability is a matter of implication from decisions declaring that the action was or was not maintainable.<sup>6</sup>

the credit was given to the principal, and not to the agent).

Compare also *Beeson v. Lang* (1877) 85 Pa. 197, where it was held that three persons who had been chosen by the creditors of a corporation and elected directors of the company, and charged with the management of its business for the benefit of the creditors, could not be made liable as partners for supplies furnished them and used in the conduct of the corporation business.

**(c) Liability on the part of the principal affirmed.**

<sup>6</sup> In *Mammoth Min. Co. v. Salt Lake Foundry & Mach. Co.* (1893) 151 U. S. 447, 38 L. ed. 229, 14 Sup. Ct. Rep. 384, the defendant mining company, in support of its contention that the work in question was done for one Butler Johnstone and one Bowers, and not for the defendant, or upon its credit urged that the principal error of the courts below consisted in ignoring the operation of certain written contracts. The first of these contracts provided for the sale of all but a small portion of the defendant's stock to Bowers, and the second was a modification of the first. By these contracts, Bowers agreed, among many other things, to build smelting furnaces and refining works and machinery at his own expense; and it was claimed that under them Bowers and Johnstone obtained possession of the company's properties and a right to work its mines, but upon their own sole credit, and not that of the company. But the court took the position that the findings involved the conclusion that the plaintiff had no notice of the existence of the contracts, and was not, therefore, bound by any limitation therein contained. "The question remained the same: Did plaintiff furnish the materials and labor to persons acting in the name of the company, and upon the belief that its contract was with the company? and as the trial court found that, it necessarily found that plaintiff was unaffected by these contracts."

In *Wilson Sewing Mach. Co. v. Boyington* (1874) 73 Ill. 534, the conclusion that the plaintiff supposed, and had the right to suppose, from the conduct of the highest officer and the manager of the defendant company, that he was dealing with the company, and that the company was his employer, and the one upon whose credit his services as architect were rendered, was held to be warranted by evidence which showed that the managing officers of the company engaged him to make plans for a building to be used for the company's business, and that the fact on which the defense relied, viz., that the work was to be done for the company's president personally, had never been communicated to the plaintiff.

In *Kruse v. Seiffert & W. Lumber Co.* (1899) 108 Iowa, 352, 79 N. W. 118, the defendant company sought to escape liability on the ground that, between itself

and the agent who hired the claimant, there was an arrangement under which the agent was to do all the work and pay for the necessary assistance out of money furnished by it, and to be alone responsible for the wages of the men engaged by him. The evidence showed that the claimant, one of the men so engaged, repeatedly stated that he was working for the agent, and, when the latter was discovered to be a defaulter, said he had lost all his wages. In an account of the wages due him, he charged them to the agent, and after the latter's default, took his note for the amount. Letters written by him to the agent indicated that he looked to him alone for pay. Not being dependent on his wages, he paid little attention to collecting them, and testified that, in taking the agent's note, he did not intend to discharge the company. Held, that a finding that the services had been performed for the company, and not for its agent individually, was warranted. The fact that the memoranda of accounts made by the claimant did not show an account with the company, but with its agent, was considered to be merely prima facie evidence that the plaintiff relied on the agent's responsibility. It was also held that the taking of the individual note of the agent in settlement for the services rendered to the company was not conclusive evidence that it was accepted in payment of the claim, or that the person rendering the services did not have a claim against the corporation therefor. The claimant might testify as to the intent with which he took the note.

In *Clarke v. Watt* (1913; Sup. App. T.) 83 Misc. 404, 145 N. Y. Supp. 145, where the action was brought to recover for certain advertisements of defendant's business in the magazine published by plaintiff's assignor, the written contract introduced in evidence did not disclose the name of the defendant, but purported to be made between the plaintiff's assignor and the "H. B. Kohler Advertising Agency." Accordingly, as the court pointed out, it showed upon its face that it was an agency that was making the contract, that the advertising contracted for was for the benefit of some other person than that agency, and consequently that the plaintiff's assignor was entitled to assume that there was an undisclosed principal other than the advertising agency. But before the contract was executed the H. B. Kohler Agency sent to plaintiff's assignor a letter, stating that it could give him a "worth-while contract" for one of its clients, the "National Authors Institute," the name under which defendant was doing business. The uncontradicted evidence of one witness showed that defendant was not ignorant of the employment of plaintiff's assignor by the Kohler Agency, and that, before the completion of the advertising, he requested the full amount of the bill of plaintiff, commenting upon this



state of facts. The court said: "There is no proof in the case that plaintiff charged the work to the Kohler Agency, nor is there any affirmative proof that plaintiff gave credit solely to the Kohler Agency. There are letters from the plaintiff to the agency, it is true, demanding payment; but they do not indicate, and are not sufficient in our judgment to establish affirmatively that the plaintiff charged the work to, and looked exclusively to, the Kohler Agency for his pay. As a matter of fact, the uncontradicted evidence of the witness Latham, detailing the conversations with defendant, rather negatives such a proposition, and, taking the uncontradicted evidence of the witness Latham and the facts disclosed by the record, we are of the opinion that the case is fairly within the rule laid down in the case of *Foster v. Persch* (1877) 68 N. Y. 400, and that the judgment [for the principal] should be reversed."

In *Alexander v. Bank of Rutland* (1852) 24 Vt. 222, the defendants requested one Burdick to perform some building work. On the ground that he had other engagements, he declined to undertake it. They next inquired if "he could not see to the getting out the stone and doing the job;" Burdick replied "that he knew men whom he could employ to do the work, and would see to it as much as he could without neglecting his business on the railroad." This offer the bank accepted. It was held that the arrangement resulting from the acceptance was that he should employ the men, as better knowing those best qualified and competent for the work, and that he undertook simply to exercise his best judgment in employing men for them to do that work, and to see to the manner in which it was done, if his other engagements would allow. On the other hand, it appeared the plaintiff must have had the same understanding at the time of his employment, for Burdick informed him that the bank wanted the work done, and the purposes and objects for which the stone was wanted, and directed him, when he got through, to make out and present his bill, and it would be paid. Held, that the work was not done upon the credit of Burdick, but of the bank.

In *Richmond, F. & P. R. Co. v. Snead* (1869) 19 Gratt. (Va.) 354, 100 Am. Dec. 670, one of the grounds on which the court affirmed plaintiffs' right to recover for the services of slaves hired out to the defendant railway company under a written contract signed by its president (see § 61, note 2. *supra*) was thus discussed: "Whatever Robinson [president] may have done or intended, without the knowledge and assent of the plaintiffs, the work, as we have seen, was done upon a lot belonging to the defendants; it was done under the direction of an agent and servant of the defendants, while they were engaged in making improvements on the said lot; the plaintiffs understood and believed that their contract was with the defendants, and therefore gave

credit to them alone; and they were justified in thus giving credit to the defendants by the fact that the defendants had paid them for part of the labor of the same slaves, and had not notified them that they would be liable no longer, even for work done on their property."

In *Bentley v. Doggett* (1881) 51 Wis. 224, 37 Am. Rep. 827, 8 N. W. 155, the court, in sustaining a verdict against the principal on the ground that there was some evidence to support it, approved the rule laid down in *Champion v. Doty* (1872) 31 Wis. 190, that charging the service in the plaintiff's books to the agent is not conclusive that the credit was given to him, but might be explained.

In *Cannon v. Henry* (1890) 78 Wis. 167, 23 Am. St. Rep. 399, 47 N. W. 186, a finding that the promise of an agent of contractors to pay the board bills of the laborers employed by a subcontractor was made on behalf of the contractors was held to be sustained by evidence which did not show that he named his principals, the defendants, as the parties who were to pay the bills, but merely that he said he would pay them, or, what is the same thing, would see them paid.

#### (4) Liability on the part of the principal negated.

In *James v. Bixby* (1814) 11 Mass. 34, where plaintiff in New York was employed by the agents and consignees there of the owners of a vessel who resided in Boston, to make repairs upon her, the decision that the plaintiff could not maintain an action against the owners for his labor and expenses in making the repairs was referred to considerations thus stated: "The facts in the present case, so far from showing any expectation of charging the defendants as owners, prove that no such intention existed until after a loss had accrued by the failure of the Russells, who were the consignees. They applied to the plaintiff to do the work; and when it was done, the bill was presented to them, and credited in their books in a running account with the plaintiff. They charged the defendants with the amount, as money paid by them, or for which they were liable; and before any demand by the plaintiff on the defendants, the Russells had paid to the plaintiff, by cash and their promissory notes, the whole amount due to him, including the sum now attempted to be fixed on the defendants. It was not until the promissory notes were returned upon the plaintiff, that he appears to have entertained any thought of calling upon the defendants. It is impossible to have stronger evidence of an intention originally to look to the Russells, who employed him, for the pay for his work. The ground upon which it is expected to maintain this action is, that the owners of a ship are in all cases liable for repairs or work done upon her, and that, being so liable, no transactions with the consignee or agent, short of actual pay-

Reference may also be made to some cases in which the controversy was not whether the claimant was entitled to hold the agent or the principal respon-

sible, but whether he performed the services in question on the credit of the agent, or in the expectation of being remunerated out of a certain fund.<sup>7</sup>

ment, will discharge them. . . . This general doctrine is probably true; and the question is only as to its application to the present demand. Where labor is performed upon a ship, or any other chattel, the presumption would naturally and legally be that it was done not only for the benefit but at the request of the owner; and an implied promise to pay would arise which, in law, would charge the owner for a reasonable compensation for the work and labor performed. But this implication of law may be avoided by showing that there was an express contract for the work and the compensation, or that the work was done upon the credit of another person; without any intention of resorting to the owners; in which case, if any remedy existed at all, it might be lost by such delay in calling upon the owner as would subject him to loss and inconvenience. . . . Generally, the merchant who sends his ship to a distant port consigns or addresses her to some merchant there with whom he expects to have an account, and whose bills for disbursements and other expenses he is obliged to honor, without waiting to inquire whether the numerous bills from which the account is made up have been paid. It would be mischievous in the highest degree that merchants, before they accept bills, or otherwise make payments of accounts rendered by their factors abroad, should suspend these operations until they received the vouchers of the several payments made by their consignees; yet this would be the consequence of their liability to pay the various artisans who are usually employed about a ship upon her return from a voyage, and who look to their immediate employers, and have the means of knowing their credit, and of coercing speedy payment, if necessary. Under such circumstances we think there cannot be an implied promise of the owners of a ship to pay the persons who have been engaged in repairing her."

See also *Butcher v. Harvie Drug Co.* (1903) 79 App. Div. 631, 80 N. Y. Supp. 1, where the decision of the trial judge, declaring the defendant company liable on the ground that its president had acted on its behalf in employing the plaintiff to render certain legal services in respect of the purchase of some of its stock, was set aside as being clearly against the weight of evidence, not stated in detail.

In *Banner v. McCahill* (1890; Sup. App. T.) 30 N. Y. S. R. 305, 8 N. Y. Supp. 916, one of the grounds on which the court denied the liability of the defendant for work done in pursuance of a written contract made with her husband was that "all his [the plaintiff's] dealings were with the defendant's husband. The credit was given to him, all payments were received

from him, the contract was made by him, and the work ordered by him."

In *Covington v. Newberger* (1888) 99 N. C. 523, 6 S. E. 205, where the plaintiff, an hotel keeper, sought to hold the defendant liable for the board and lodging of one Davis, his traveling salesman, who had, at various times during a period extending over about twenty months, stopped at the hotel, recovery was denied on the ground that there was no evidence of any express agreement or promise on the part of the defendant to pay the debt, nor any evidence that he knew of its existence till the action was instituted; and that, while all the reasonable and necessary expenses of such an agent (whether he is furnished with the money by his principal to pay them or not), as he travels through the country, might be an implied charge, against his principal, as a necessary incident to the business of the agency, "this must be within the limits and subordinate to well-known custom,"—the general custom, under the circumstance in question, being that "transient patrons" were expected to pay cash for their bills. The court expressed the opinion that if the plaintiff "intended to hold the defendant answerable for the board bill of Davis, it was manifestly his duty, in the absence of any agreement, to notify him of the failure of Davis 'to pay cash,' in accordance with custom. Wharton, Agency & Agents, §§ 134 and 137. The long and continued failure of Davis to pay cash, according to the general custom, ought to have put the plaintiff on inquiry."

In *Carter v. Howard* (1866) 39 Vt 106, the liability of the defendant for the fee of a doctor who had attended his wife was denied on the ground that the claimant's services had been rendered on the credit of the wife, and that the husband's "legal duty as husband to pay for doctoring his wife, in case the doctoring had been done upon the credit of that duty, would not preclude the plaintiff from ignoring such credit and performing the services upon the credit of some other person."

In *Porter v. Terrell* (1907) 2 Ga. App. 269, 58 S. E. 493, the liability of a married woman was denied on the ground that "such contract as plaintiff had was with her husband only; the account was charged to him, and he made all the payments therein."

<sup>7</sup> In *Horsley v. Bell* (1778) 2 Amb. 770, 27 Eng. Reprint, 494, the facts were as follows: A statute was passed to make a brook navigable. The defendants, amongst a great many other persons, were named commissioners to put the act in execution. Certain tolls were to be paid by vessels which should navigate on the brook, and the commissioners were empowered to bor-

§ 63. *Same subject further discussed.*

Other general doctrines of the law of agency are illustrated by the cases in which the personal liability of an agent has, irrespective of his actual intention, been affirmed or denied on the ground that one of the following situations was or was not predicable:

(1) That some artifice or deception was used by him in making the contract.<sup>1</sup>

(2) That he made the contract as agent, but at a time when there was no existing responsible principal.<sup>2</sup>

row money on the tolls. Large subscriptions were made, and the work was begun. The commissioners appointed a treasurer and a surveyor. The defendants were, or represented, all the acting commissioners, who employed the plaintiff to make cuts on different parts of the brook, and to do works in prosecution of the scheme, at certain prices and gave orders for that purpose at their several meetings. Several orders were made at different meetings, and by such of the defendants as were present at those meetings, but none of the defendants were present at all the meetings, or joined in all the orders; but every one of them was present and joined in making some of the orders. One of the questions discussed, viz., were the defendants personally liable, their contention being that they were exercising a public trust, and that the credit was given to the undertaking itself, not personally to them, and that the remedy was therefore in rem, was answered adversely to the defendants. The case was argued in the court of chancery before Lord Thurlow, who was assisted by two justices of the court of King's bench. A part of the Lord Chancellor's judgment is reported in a note to Cullen v. Queensberry (1781) 1 Bro. Ch. 101, 28 Eng. Reprint, 1011. Lord Thurlow, Ch., said: "Who would make a contract on the credit of tolls, which it is in the power of the commissioners to raise or not, at pleasure? Then, upon whose credit must the contract be? Certainly that of the commissioners who act. It is their fault, if they enter into contracts when they have not money to answer them. They have made themselves liable by their own acts. If the plaintiff's claim be in rem, how is he to come in? Not, surely, before the subscribers; and if after them, he will stand a bad chance if he is to wait to see whether there is any remainder."

In *Trastour v. Fallon* (1857) 12 La. Ann. 25, the defendants were appointed a "Permanent Committee" to forward a scheme, proposed at a public meeting of the citizens of New Orleans, for establishing a railway across the Isthmus of Tehuantepec, and in that capacity, as their minutes showed, they decided that *Trastour* should be engaged to obtain full information about the Pacific coast, and that the funds raised by subscription among the citizens, and existing in the treasurer's hands, should be applied for that purpose. Commenting on this evidence, the court said: "The burden of proof as to the terms of the contract is upon the plaintiff. . . . We find no

evidence whatever of an engagement on the part of the defendants in their personal capacities, to pay the plaintiff anything. Indeed, the argument of his counsel seems to waive this point and to rest wholly upon the assumption that their personal liability flows as a legal consequence from their having assumed to act for an irresponsible principal. The extract we have already made from the minutes of the Permanent Committee is the written evidence of their original contract, introduced by *Trastour* himself. This repels every inference of a personal obligation assumed by the members of the committee. It recites the estimated cost of the work for which *Trastour* was employed, and designates the special fund which was to meet the cost. If the committee had appropriated that fund otherwise, they would have become liable themselves to *Trastour* for the amount thus diverted from his use. . . . The minutes of the Permanent Committee, and the letters of the defendants *Fallon* and *Benjamin*, relied upon by the plaintiff as proofs of his contract, all show that he had no right to look to the members of the committee personally for a reward. His own letters advance no such pretension, even at a time when he had gone in debt beyond the sum appropriated to him, and he was most pressed for money. And the hopes held out to him occasionally by *Fallon* and *Benjamin*, as testified to by some of his witnesses, are evidently predicated upon the presumed success of the project of a company, or at least upon the expectation that an indemnity would be procured by our government from the government of Mexico, for what was supposed by the committee to be a breach of national faith and a violation of vested rights; and that some portion of this indemnity would be appropriated to the plaintiff as a recompense for his skill and enterprise devoted to the furtherance of a brilliant but unsuccessful project."

<sup>1</sup> *Trastour v. Fallon* (1857) 12 La. Ann. 25 (no evidence that defendants misled or deceived plaintiff). For facts of case, see § 62, note 7, supra.

<sup>2</sup> In *Hub Pub. Co. v. Richardson* (1891) 59 Hun, 626, 13 N. Y. Supp. 666, the defendants were held liable for the cost of publishing the prospectuses of a company which they were promoting. The authorities relied upon were *Kelner v. Baxter* (1886) L. R. 2 C. P. (Eng.) 174, 36 L. J. C. P. N. S. 94, 12 Jur. N. S. 1016, 15 L. T. N. S. 213, 15 Week. Rep. 278 (sale under written contract); *Scott v. Ebury* (1867)

**§ 64. Claimant employed by professed agent acting in excess of his authority.**

In some cases of the class discussed in

L. R. 2 C. P. (Eng.) 255, 36 L. J. C. P. N. S. 161, 15 L. T. N. S. 506, 15 Week. Rep. 517 (money advanced to promoters). In the former of these cases the true rule was declared by Byles, J., to be, "that persons who contract as agents are generally personally responsible where there is no other person who is responsible as principal."

In *Spencer v. Tozer* (1870) 15 Minn. 146, Gil. 112, where the action was brought against Tozer, one of the building committee of a church who had employed Spencer to do some work upon the church, the defense that plaintiff knew that the work was to be done for the church was rejected, partly for the reason that there was no affirmative evidence to show that it was anything but a voluntary religious society, and as such not a responsible principal.

In *M'Cartee v. Chambers* (1831) 6 Wend. (N. Y.) 649, 22 Am. Dec. 556, it appeared that at a meeting of master and journeymen boatbuilders, held in New York for the purpose of making arrangements to celebrate the completion of the Erie canal, the defendants were appointed a committee of arrangements, who appointed an agent to employ men to build boats to be used in the procession. The plaintiff, the defendants, and the seventeen persons named in the plea, were all, or most of them, present at the meeting when the committee was appointed, and the plaintiff was a principal mover in the business. The plaintiff assisted in the building of the boats, and there was evidence of his being employed by the agent, although at the same time there was room to doubt whether his services were not gratuitous. The conclusions of the court were thus stated: "There is nothing to warrant the conclusion that the workmen employed by the agent looked to the association; that is, all the master and journeymen boatbuilders, for their pay. The committee employed the workmen, and they, if anybody, must be legally responsible. The association, as it is called, was nothing more than a public meeting of a certain class of mechanics, for a special purpose, who designated a committee to carry into effect what had been resolved upon. The committee, and not the individuals composing the meeting, are the responsible persons in such cases."

In *Fredendall v. Taylor* (1868) 23 Wis. 538, 99 Am. Dec. 203, where the action was brought to recover for work performed in constructing a tank, the defendants, Taylor and Kriess, were both members of the committee appointed by the State Firemen's Association to make the necessary arrangements for holding its annual tournament. In contracting with the plaintiff they did not act personally, the committee having delegated its authority to a subcommittee composed

of the present monograph, the courts have applied or recognized, arguendo, the doctrine that an agent who exceeds his authority in making a contract on be-

of *Spencer and Leitch*. But these persons, in making the contract, were acting as agents of the committee, so that the liability of the whole committee was the same as though all had acted in making the contract. The grounds upon which it was held that the trial judge had improperly directed a verdict in favor of the defendants were thus stated: "It is conceded that the State Firemen's Association was not incorporated at this time, and had no legal existence, so that it could contract or be sued as such. And where such is the case, a committee which assumes to contract for services for such an irresponsible, intangible association must become personally liable, else there is no liability whatever. One professing to act as agent, if he does not bind his principal, binds himself. *Dennison v. Austin* (1862) 15 Wis. 335. And it can make no difference that the reason why he does not bind his principal is because the principal for whom he professes to act has no existence." The case was considered to be indistinguishable in principle from *M'Cartee v. Chambers* (N. Y.) supra. On the second appeal (1870) 28 Wis. 286, the court again relied upon the proposition that the liability of the defendants sprang "from the fact that there was no responsible body or corporation behind them, which they could bind, and against which the plaintiff could have had his remedy. When, therefore, Spencer was acting in the name of the association by the direction of these defendants, he was, for all purposes of this action, acting in their names, and binding them personally by his contract; and when they ratified his acts or contract, although in form as officers of the association, it was, in legal effect and operation, as individuals, and not as officers."

In *Chilcott v. Washington State Colonization Co.* (1906) 45 Wash. 148, 88 Pac. 113, the personal liability of a promoter was held to be negated by evidence showing that the company had, when organized, accepted the benefits of the contract and adopted it.

It may be useful in this connection to advert to the somewhat analogous doctrine that the members of official bodies who covenant in their own names, but professedly in a corporate character, are deemed to have covenanted as individuals, if they were not entitled to covenant as a corporation. *Furnivall v. Coombs* (1843) 5 Mann. & G. 736, 134 Eng. Reprint, 756, 6 Scott, N. R. 522, 12 L. J. C. P. N. S. 265, 7 Jur. 399, where C., D., E., and F., "churchwardens and overseers of the poor of the parish of Z., for themselves and for their successors, churchwardens and overseers of the said parish, and their assigns," covenanted with A., that they, the said churchwardens and overseers of the poor, their successors,

half of a disclosed principal renders himself *prima facie* personally liable.<sup>1</sup> This presumption is rebutted if it appears that the claimant had knowledge

etc. An express proviso that the deed should not be construed as imposing any personal liability upon the signers was disregarded as being repugnant to the covenant itself.

(a) Written contracts.

<sup>1</sup>*Savage v. Rix* (1838) 9 N. H. 263 (selectmen who had been appointed a committee to lay out money voted for the repair of a road were held liable on a promissory note executed by them in their "official capacity" for the cost of the work); *Johnson v. Welch* (1896) 42 W. Va. 18, 24 S. E. 585 (liability of agent denied in view of facts proved).

In *Woodes v. Dennett* (1837) 9 N. H. 55, where the signer of a contract to pay for the support of a pauper intended to act as a selectman, but failed to bind the town, because he could not, alone, lawfully act as agent, the court declared him to be liable on the ground that, while an action on the case might have been maintained against him for assuming to act without authority, "this is not a necessary course where the instrument or contract, rejecting what the person assuming to act as agent was not authorized to put to it, contains his personal obligation. If the defendant used apt words by which to charge himself on a personal contract to pay, this action may well be maintained. Having no other authority, he must be understood in such case to have contracted on his individual account."

(b) Oral contracts.

In *Dale v. Donaldson Lumber Co.* (1886) 48 Ark. 188, 3 Am. St. Rep. 224, 2 S. W. 703, an employee acting as secretary, treasurer, and business manager of a lumber company, was held personally liable for services which a doctor had rendered at his request to a laborer who had been shot in a private brawl.

The syllabus prepared by the court for *Sholes v. Kreamer* (1889) 26 Neb. 556, 42 N. W. 724, is as follows: W., who was temporarily absent, was the owner of a frame building on the lot of an owner who was about to commence an excavation for the purpose of rebuilding, and who had given out his intention to tear the frame building down unless it was immediately removed. S., a friend of W., applied to K., engaged in removing frame buildings, and employed him to remove the building to a designated lot, informing him that he was acting for W., who had a chattel mortgage on the building and was amply able to pay; but that if he did not, he, S., would see that he had his pay. On these terms, K. moved the building to the extent of his contract, and went after W. for his wages; but not finding him at his place of business, and getting no satisfaction for his labor, sued S. as principal. Held, that S. was liable.

In *Bentley v. Doggett* (1881) 51 Wis. 224, 37 Am. Rep. 827, 8 N. W. 155, the court remarked, *arguendo*, that if the party rendering the service knew that the agent had been supplied by his principal with the money to pay for the service, and had been forbidden to pledge the credit of his principal for such service, he would be held to have rendered it upon the sole credit of the agent.

See also *Lasater v. Crutchfield* (1909) 92 Ark. 535, 123 S. W. 394 (employment to survey land); *Dale v. Donaldson Lumber Co.* (Ark.) *supra* (physician employed to attend on servant); *Bellinger v. Bentley* (1874) 1 Hun (N. Y.) 562 (*arguendo*); *Edwards v. Annan* (1910) — Tex. Civ. App. —, 127 S. W. 299 (architect); *Royce v. Allen* (1856) 28 Vt. 234 (employment of counsel).

In *Terre Haute & I. R. Co. v. Brown* (1886) 107 Ind. 336 8 N. E. 218, it was held that, if a surgeon employed by a railway conductor in an emergency to attend on an injured servant finds it convenient or necessary to engage other surgeons to assist him, they must look to him for their compensation.

In *Hopkins v. Mehaffy* (1824) 11 Serg. & R. (Pa.) 126, Gibson, J. observed, *arguendo*, that where the contract is by parol, the agent "is liable only where he had no authority to bind his principal." That this statement is wanting in precision appears from the cases cited in the preceding section.

In *Bay v. Cook* (1850) 22 N. J. L. 343, where an overseer of the poor was held to be personally liable for the fees of a physician with whom he had made a contract to attend on paupers, the court proceeded upon a general rule, thus formulated: "If an agent, either public or private, exceeds his authority in making a contract, he is personally liable for its performances, for the law will esteem him as acting in his individual capacity rather than suffer the contract to fall." This decision was followed in *State, Timken, Prosecutor, v. Tallmadge* (1891) 54 N. J. L. 117, 22 Atl. 996, where a mayor of a city, who had officially promised to pay a reward for the apprehension of a fugitive municipal employee, was held to be personally liable on the ground that he had no power to bind the corporation by such a promise. But the more generally accepted doctrine is that the circumstance of a public agent's having exceeded his authority in making a contract is not of itself sufficient to render him personally liable to the other party. See *Story, Agency*, § 302; *Mechem, Pub. Off.* §§ 805 et seq.; *Clark & S. Agency*, §§ 576 et seq.

In *Noyes v. Loring* (1867) 55 Me. 408, a case in which a collector of taxes had, without being authorized to do so, directed plaintiff to publish an advertisement, the

of the fact that the agent was exceeding his authority.<sup>2</sup>

The precise juristic footing upon which the personal liability of the agent is affirmed is a matter concerning which there has been much difference of opinion. See note to *Haupt v. Vint*, 34 L.R.A.(N.S.) 518. Whatever may be the appropriate theory with regard to cases which do not involve the elements of a positive representation on the part of the agent, and reliance thereon by the other party, it is manifest that, wherever these elements are present, the agent's liability may be enforced on the ground of deceit.<sup>3</sup>

The doctrine under discussion has been

effect of the decision was merely that he could not be held liable in an action of assumpsit. The broader question above referred to was not discussed.

<sup>2</sup> In *Swearingen v. Bulger* (1915) 117 Ark. 557, 176 S. W. 328, the building committee of a church, who were to have plans prepared for an edifice not to exceed \$50,000 in cost, employed the plaintiff, an architect, who prepared plans for a more expensive building; but it was proved that the plaintiffs knew that they were exceeding their authority. The court, taking the position that they were not personally liable under these circumstances, disapproved an instruction inconsistent with the statement in the text, and added: "This is true, also, concerning the question of ratification; for, if appellees possessed knowledge of the fact that appellants had exceeded the authority actually conferred upon them by their principal, ratification by payment of a portion of the agreed price did not render appellants personally responsible. On the contrary, any payment made by the church, with knowledge of the fact that the authority conferred had been exceeded, constituted ratification which relieved appellants from existing personal liability by reason of having exceeded the authority of their principal without the knowledge of appellees. This results from the fact that the principal and agent cannot both be liable on the contract, and, if the former is liable, the latter is not."

See generally, *Story, Agency*, §§ 264 et seq.; *Mechem, Agency*, §§ 1269 et seq.

<sup>3</sup> *Noyes v. Loring* (1867) 55 Me 408 (action on the case for deceit, and not action of assumpsit upon the contract, held to be the appropriate remedy against a collector of taxes who had, without being authorized to do so, directed the plaintiffs to publish an advertisement requesting taxpayers to pay their taxes to him forthwith, and charge the price of such publication to the town); *Teale v. Otis* (1877) 66 Me. 329; *Wright v. Baldwin* (1873) 51 Mo. 269; *Plumb v. Milk* (1854) 19 Barb. (N. Y.) 74 (defendant "might be made liable in fraud for the false representation of authority, knowing it to be false"); *New York*

held to be applicable to a case in which the claimant was employed by the agent of a foreign corporation which had not complied with the statutory prerequisites to the transaction of business in the state in which the action is brought.<sup>4</sup> The predication of personal liability under such circumstances has also been referred to the conception that it is a reasonable inference that the agent, being aware of the incapacity of his principal to do business, "would not and did not make a contract with the plaintiff in the name of this corporation in violation of the statutes, . . . and therefore that he made the contract in his own name."<sup>5</sup> But the preferable theory

*Bank Note Co. v. McKeige* (1898) 31 App. Div. 188, 52 N. Y. Supp. 597 (action brought to recover, as damages for the false representation of the defendant, made to the plaintiff company, the amount which it had expended upon a contract for the engraving and printing of certain bonds, before it was notified to stop work upon it).

<sup>4</sup> In *Lasher v. Stimson* (1891) 145 Pa. 30. 23 Atl. 552, it was found by a special verdict that the company which the employing agent represented had not complied with the provisions of the act of assembly of April 22, 1874, but "was nevertheless carrying on the business of the manufacture and sale of soap or washing compound within the state of Pennsylvania," and that the plaintiff was not informed that the company was a foreign corporation, "or that it was a corporation at all." Discussing the question whether, upon the facts so found, the agent was liable for the value of the work done and goods furnished on his order on behalf of the company, the court said: "It is clear that the company could not authorize him to do business for it in this state, and that he must be regarded as cognizant of its non-compliance with the terms prescribed by our statute, and of its consequent incapacity. When a person assumes to act for another, knowing that he is not authorized to do so, he becomes personally liable to the party with whom he deals for or on account of his alleged principal. . . . The appellant was not charged with the duty of inquiring whether the Sudsena company was a foreign corporation, and if so, whether it had complied with the laws which allowed it to transact business here, when, as the special verdict finds, he did not know 'that it was a corporation at all.' A citizen of this state who has a business transaction with another as agent of a foreign corporation may rely on the representation of the agent as to his authority, without releasing him from his common-law liability as principal, if it turns out that his action was unauthorized."

<sup>5</sup> *Boynnton v. Brannum* (1911) — Ark. —, 136 S. W. 979 (action for breach of con-

seems to be that which imputes liability to the agent, as a matter of law, and disregards altogether the element of his intention, actual or implied.

As the principal is *prima facie* liable where a contract of employment is entered into by an agent professedly acting in that capacity, the onus of proving that the agent exceeded his authority lies on the person employed if he seeks to recover against the agent upon that ground.<sup>6</sup>

tract in stopping the work of cutting timber).

<sup>6</sup> *Plumb v. Milk* (1854) 19 Barb. (N. Y.) 71. The court said: "What was the contract of the defendant? He contracted that he had authority from Alida Milk to make a contract that should bind her to pay for carding the wool and dressing the cloth. He did not contract to pay, himself; but if he had no authority to bind Alida, the law says he shall pay. The plaintiff, then, to recover against him, must show a breach of agreement; to wit, the want of authority."

<sup>1</sup> *De Remer v. Brown* (1901) 165 N. Y. 419, 59 N. E. 129.

In *Corrigan v. Reilly* (1896) 64 Ill. App. 531, where the defendant was held liable for work done in a building by his directions, it was declared to be immaterial that the plaintiff knew that the building was to be used as a club.

In *Brigham v. Herrick* (1899) 173 Mass. 460, 53 N. E. 906, the plaintiff was employed as superintendent of sewer construction in a city by a person who assigned his interest in the contract under which the work was done to a third person of whom the defendant was agent. The defendant went on with the work, but did not disclose his agency to the plaintiff, who continued to work in the same capacity. The defendant consulted the plaintiff in regard to the work, and paid him some money. Held, that A was entitled to treat B as a principal, and to maintain an action against him for the balance due for his services.

In *Haskett v. Unsell* (1914) 181 Mo. App. 480, 164 S. W. 651, the refusal of the trial judge to direct a verdict for the defendant was held to be proper, as the plaintiffs' evidence went to show that the defendant had employed them to do certain plastering work, and had not disclosed his alleged principal or indicated that he contracted otherwise than on his own behalf, until after the contract had been entered into, and when, according to plaintiffs, nearly all of the work had been done. "This would not be a timely disclosure."

In *Bradley v. Dodge* (1873; N. Y. C. P.) 45 How. Pr. 57, the defendant called at the office of a physician, and, finding him absent, left his business card with "Call on Mrs. D.—, at No. 769 Broadway," written upon it, in the hands of a clerk, requesting him to hand it to the physician, and to

§ 65. *Claimant employed by agent who did not disclose his agency.*

Other cases illustrate the general rule that "a person, . . . though making an agreement for another, makes himself personally liable thereon if he contracts in his own name without disclosing his principal, although the other party to the contract may suppose that he is acting as agent."<sup>1</sup> Under such circum-

tell him to "come as soon as possible." Held, that the defendant had rendered himself liable for the payment of the physician's bill in attending upon Mrs. D., in pursuance of the message.

In *Good v. Rumsey* (1900) 50 App. Div. 280, 63 N. Y. Supp. 981, the dismissal of the complaint in an action brought against an attorney for work done by the plaintiff as an accountant was held to be error, for the reason that, even assuming it could be held that, from certain information given by the defendant to the plaintiff at the time when the latter was employed, the plaintiff was bound to infer that the defendant was acting as attorney for one Barse, a distinct admission in a subsequent letter that he was acting for another client, and not for Barse, was evidence which would justify a finding of the jury that the defendant did not disclose to the plaintiff the principal for whom he was in fact acting.

In *Brackett v. Van Court* (1915) 59 Pa. Super. Ct. 370, the court, relying on *Eichbaum v. Irons* (1842) 6 Watts & S. (Pa.) 67, 40 Am. Dec. 540 (where the members of a committee appointed by a political meeting to provide a free dinner for the party were held to be personally liable for the bill), held that a person employed by a protective committee for the bondholders of a corporation, who had not disclosed their agency, was entitled to maintain an action against individual members of the committee to recover the expenses incurred in the course of his employment. The fact that the claim was only in respect of expenses, and not of services rendered, was specially adverted to. But it would seem that a claim of the latter description would also have been enforceable on the same footing.

See also *Boynton v. Brannum* (1911) — Ark. —, 136 S. W. 979 (employment to cut timber); *Geiselman v. Roddinghaus* (1910) 158 Ill. App. 316 (shelling corn); *Mace v. McChesney* (1912) 170 Ill. App. 454 (person employing appraiser to value uninsured building which had been destroyed by fire did not disclose that a third person was the owner); *Dulon v. Camp* (1899; Supp. App. T.) 28 Misc. 548, 59 N. Y. Supp. 508 (attorney personally liable for work performed by another attorney); *Beidleman v. Kelly* (1906; Supp. App. T.) 51 Misc. 51, 99 N. Y. Supp. 907 (dismissal of complaint in action for services rendered in installing bell call

stances the credit is presumed to have been given to the agent himself.<sup>2</sup> The agent is not relieved of liability unless he discloses not merely the fact of his being an agent, but also the name of his principal.<sup>3</sup> Nor is it sufficient that the person dealing with the agent should have had "the means of ascertaining

the name of the principal. If so, the neglect to inquire might be deemed sufficient. He must have actual knowledge."<sup>4</sup> Nor is the operation of the rule affected by the circumstance that the agent did not intend to assume a personal liability.<sup>5</sup>

For a general discussion of the right

system, etc., and making repairs in hotel, was held erroneous for the reason that there was absolutely nothing in the evidence to suggest the existence of the Hotel Company, alleged to be the principal, or that the plaintiff had the remotest reason to suppose that defendant was acting as agent for any such company); *Schmerler v. Barasch* (1908; Supp. App. T.) 113 N. Y. Supp. 745 (defendant contracted to forward plaintiff's watch to Europe); *Jablon v. Traynor* (1912; Supp. App. T.) 76 Misc. 532, 135 N. Y. Supp. 545 (work on a building); *Kneeland v. Coataworth* (1890; Buffalo Super. Ct.) 29 N. Y. S. R. 844, 9 N. Y. Supp. 416 (repairs in house); *Deming Invest. Co. v. McGrady* (1916) — *Okla.* —, 157 Pac. 734 (agent of foreign corporation, being informed that the employees of a contractor were apprehensive about their wages, told them to finish the work and they would be paid); *Hauser v. Layne* (1910) — *Tex. Civ. App.* —, 131 S. W. 1156 (work done in digging well); *Royce v. Allen* (1856) 28 Vt. 234 (employment of counsel by person who was acting as agent of a third person in the prosecution of a lawsuit); *Curtis v. Miller* (1914) 73 W. Va. 481, 50 L.R.A.(N.S.) 601, 80 S. E. 775 (surveying land); and the cases cited in § 23, note 1, of the monograph appended to *BRUTMEL v. NYGREN*, L.R.A. —, —.

<sup>2</sup> Story, Agency, § 266.

For cases in which this presumption was corroborated by evidence that the agent expressly promised to pay for the services of the person employed by him, see *Nelson v. Andrews* (1897; Supp. App. T.) 19 Misc. 623, 44 N. Y. Supp. 384; *Curtis v. Miller* (W. Va.) supra.

<sup>3</sup> For cases in which the agent was held liable, see *Nelson v. Andrews* (N. Y.) supra (employee of the defendant testified that before the plaintiff was engaged to do the work, he told him that defendant was the agent of the estate); *Nichols v. Weil* (1900; Supp. App. T.) 30 Misc. 441, 62 N. Y. Supp. 477 (defendant informed plaintiff that he was not the owner, but the attorney for the owner of the house on which the work was done); *Curtis v. Miller* (W. Va.) supra.

<sup>4</sup> *Cobb v. Knapp* (1877) 71 N. Y. 352, 27 Am. Rep. 51, quoted in *De Remer v. Brown* (1901) 165 N. Y. 410, 59 N. E. 129, where the theory of defendants' counsel, that the words "as agreed upon here," contained in the defendants' letter which conferred upon their agent authority to sign the construction contract in question, imposed upon the

plaintiff's firm the duty of ascertaining all that had been previously discussed or considered between Kellogg and the defendants, and constituted constructive notice to the plaintiff's firm of all such matters, was held to be untenable in view of the contract and of the attendant circumstances.

For other cases within the scope of this monograph in which this doctrine was affirmed, see *Nelson v. Andrews* (N. Y.) supra; *Good v. Rumsey* (1900) 50 App. Div. 284, 63 N. Y. Supp. 981; *Cabre v. Sturges* (1856) 1 Hilt. (N. Y.) 160; *Curtis v. Miller* (W. Va.) supra.

See also § 23, note 4, of the monograph appended to *BRUTMEL v. NYGREN*, L.R.A. —, —, and Story, Agency, § 554.

In *Rollins v. Phelps* (1860) 5 Minn. 463, Gil. 373, it was urged that, as the logs which the plaintiff had been employed to haul were marked, the plaintiff could resort to the books of the surveyor general, and there ascertain to whom the marks belonged. But the court said: "The law in force at the time of this contract on the subject of marks was § 16 of chapter 16 of the Laws of 1854. This section only makes it the duty of the surveyor general to keep a book for the record of marks, and to record such as are filed with him. These marks may or may not have been recorded, from anything that appears; but we are not willing to allow the force claimed for these marks, even had it appeared that they were duly recorded. A party is not obliged to follow up every channel of information to discover a principal, when contracting with parties who are willing to place themselves in the position of principals, as these defendants have done by the contract."

The fact that the plaintiff, while previously engaged upon other work, had been paid by the checks of the alleged principal, does not necessarily affect him with notice that he is an employee of the same party in respect of the work for which he is seeking to recover compensation. *Phillips v. Hine* (1901) 61 App. Div. 428, 70 N. Y. Supp. 593 (work on buildings).

In *Hauser v. Layne* (1910) — *Tex. Civ. App.* —, 131 S. W. 1156, it was held that an instruction which laid it down that the plaintiffs could not recover if they knew or could have known by inquiry, that the well in question was to be bored for a certain company, was not open to exception on an appeal taken by the agent from a judgment in favor of the plaintiffs.

<sup>5</sup> *Royce v. Allen* (1856) 28 Vt. 236.



of a person contracting with an agent to hold the principal responsible, when he has been discovered, see *Mechem*, Agency, §§ 1731 et seq.<sup>6</sup>

<sup>6</sup>For cases falling within the scope of the present monograph in which this right was affirmed, see *Maxcy Mfg. Co. v. Burnham* (1897) 89 Me. 538, 56 Am. St. Rep. 436, 36 Atl. 1003; *Fowler v. Seaman* (1869) 40 N. Y. 592; *McGraw v. Godfrey* (1873; N. Y. C. Pl.) 14 Abb. Pr. N. S. 397; *Keller*

*v. Haug* (1905; Supp. App. T.) 96 N. Y. Supp. 1058; *Dages v. Melrose Iron Co.* (1913; Supp. App. T.) 140 N. Y. Supp. 392; *Curtis v. Miller* (1914) 73 W. Va. 481, 50 L.R.A.(N.S.) 601, 80 S. E. 774; *Stovel Co. v. Detremand* (1914) — *Manitoba*, —, 20 D. L. R. 463. C. B. L.

# ALABAMA SUPREME COURT.

MRS. S. HERTZ, Appt.,

v.

ADVERTISER COMPANY.

(— Ala. —, 78 So. 794.)

## Negligence — unsafe premises — trap.

1. The owner of a building used for business purposes is not guilty of maintaining a trap by arranging the entrance through a vestibule a few feet higher than the business floor, with a door opening directly onto the steps leading from the vestibule down to the floor, which will render him liable for injury to a customer who falls down the steps in attempting to pass through the door.

For other cases, see *Negligence*, I. c, 1, in Dig. 1-52 N. S.

## Same — absence of light.

2. Failure to light a vestibule and steps leading down therefrom to business offices to which the public are invited, between which and the vestibule is a door at the top of the steps, is negligence which will render the owner of the building liable for injuries

to a customer proximately caused by the absence of light.

For other cases, see *Negligence*, I. c, 1, in Dig. 1-52 N. S.

## Same — passing through door — different levels of floors.

3. A customer attempting to enter a business office through a vestibule separated from the office by a door is negligent in opening the door and passing through, without ascertaining whether or not the floor on the opposite side of the door is on the same level.

For other cases, see *Negligence*, II. a, in Dig. 1-52 N. S.

## Evidence — other accident.

4. In an action to hold the owner of a building liable for injury received by a customer in falling down steps leading from a vestibule to the office floor, evidence is not admissible that others fell down the steps at about the time of plaintiff's injury, if conditions as to lights are not shown to have been the same at the times of the respective accidents.

For other cases, see *Evidence*, XI. k, in Dig. 1-52 N. S.

(April 18, 1918.)

**Note.** — The case of *HERTZ v. ADVERTISER Co.*, like most other cases involving the liability of the owner for personal injury sustained on his premises, turns mainly upon the particular facts and situation involved. It is clear, of course, as stated in the opinion, that the owner of premises will be liable to one expressly or impliedly invited thereon, who is injured in consequence of a trap or pitfall, but the avoidance of traps and pitfalls is not the full measure of the owner's duty towards such invitees, though it does, approximately at least, measure his duty towards trespassers or bare licensees. The statement which the opinion quotes from *Shearman & Redfield on the Law of Negligence* (§ 704), to the effect that "the occupant of land is bound to use ordinary care and diligence to keep the premises in a safe condition for the access of persons who come thereon by his invitation, express or implied, for the transaction of business, or for any other purpose beneficial to him," expresses in general terms the measure of the owner's duty, though perhaps strict, technical accuracy would require the use of the term "reasonably," or "ordinarily," before the word "safe." For a discussion

of a similar distinction with respect to the duty of the master to a servant respecting the premises, see note to *Armour & Co. v. Russell*, 6 L.R.A.(N.S.) 602.

Cases presenting facts more or less analogous to those involved in the *HERTZ CASE* are cited in the notes to *McDermott v. Sallaway*, 21 L.R.A.(N.S.) 456, and *Smith v. Johnson*, L.R.A.1915F, 572, on the duty of a store or shop keeper toward customer, as to condition of premises. The note in 22 L.R.A.(N.S.) 730, appended to the case of *Hoyt v. Woodbury*, referred to in the *HERTZ CASE*, cites the case of *Sears v. Merrick*, 175 Mass. 25, 55 N. E. 476, 4 Am. Neg. Rep. 58, which involved a state of facts somewhat similar to that in the *Hoyt Case*.

The plaintiff in the *HERTZ CASE* having been found guilty of contributory negligence in walking through the door without discovering the presence of the steps leading down to the lower level, reference is here made to the notes to *Steger v. Immen*, 24 L.R.A.(N.S.) 246; *Speck v. Northern P. R. Co.* 24 L.R.A.(N.S.) 249, and *Illinois C. R. Co. v. Sanderson*, L.R.A.1917D, 892, as to contributory negligence in walking through doorway leading to place of danger.

**A**PPPEAL by plaintiff from a judgment of the Circuit Court for Montgomery County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

Statement by Mayfield, J.:

The case made by the record is thus stated by counsel for appellant:

"Appellant sued appellee for damages occasioned by a fall she received while upon the premises of appellee by invitation; the fall being due to the alleged negligence of defendant in failure to use proper care and diligence to keep the building reasonably safe for plaintiff. The defendant pleaded not guilty and contributory negligence.

"The evidence offered by plaintiff tended to prove that plaintiff had business to transact with defendant, and for that purpose (and after an express invitation over the phone) went to defendant's premises on the night of March 8, 1916. That she entered these premises from the Lawrence street entrance, through which the public was invited and accustomed to go. That upon leaving the public street she entered defendant's vestibule that was on grade or level with the street. A door from this vestibule opened into the office. As the door was opened there was a flight of steps leading abruptly down into the office. It was dark in this place, and as plaintiff opened the door (the door opening to the inside of the office away from the vestibule and over the steps) she fell down the steps and received most serious injuries. This condition of the premises was to plaintiff unknown until after her fall. During the trial of the case plaintiff, after proving the condition of the premises to have been the same, undertook to prove by the witnesses Jones and Leak that they each fell at the place plaintiff fell, and about the same time plaintiff fell. The trial court refused to permit the introduction of this evidence, to which plaintiff duly excepted. Rec. pp. 12-14. After the evidence was closed, at the request of defendant in writing the court gave sixteen charges. To the giving of each plaintiff excepted. Rec. pp. 18-22, 25-27."

Brief of appellee states the case as follows:

"The complaint claims \$25,000 damages for personal injuries received by plaintiff while on defendant's premises, the complaint alleging in various terms that defendant was negligent in respect to maintaining its premises in a reasonably safe condition, and that plaintiff, while on said premises by invitation, received personal in-

juries as a proximate consequence of such negligence. The defenses were the general issue and contributory negligence.

"The Advertiser Company is a corporation engaged in the business of publishing a newspaper in the city of Montgomery; its place of business is on the southeast corner of Dexter avenue and Lawrence street. The building fronts on Dexter avenue and runs back about 110 feet on Lawrence street. There is a decided slope on Lawrence street, the rear of the building being about 2½ feet higher than the front. The business offices of the defendant are on the first floor of the building; the printing presses are in the cellar; the editorial rooms and working rooms are on the second and third floors. On the first floor the offices of the various officers and employees are partitioned off by fixtures similar to banking fixtures, with mahogany bases and glass panels.

"There is a wide entrance to the business offices of the defendant on the corner of Dexter avenue and Lawrence street, having a vestibule and a double door. On the Lawrence street side, to the rear of the building, there is an outer entrance leading into a vestibule 8 or 10 feet wide and 4 or 5 feet deep. To the right of this vestibule a flight of steps leads to the second floor, and to the left of the stairway, after passing through the vestibule, there is an entrance leading down to the business offices on the first floor. It is 16 inches from the level of the floor in the vestibule to the level of the floor in the rear of the business offices on the first floor of the building, and there are two ordinary steps from the vestibule down to this floor. At the head of the short flight of steps is a door opening from the vestibule in towards the rear of the offices. These business offices of the defendant are lighted with a series of 500-watt Mazda or Tungsten electric lamps, suspended from beams in the ceiling, and there is a drop light in the vestibule. Defendant's witnesses testified that on the night of the accident to Mrs. Hertz all of these lights were burning. Plaintiff's witnesses testified, however, that it was dark in the vestibule and in the space to the rear of the offices on the first floor into which the door from the vestibule opened. Rec. pp. 14-18.

"The door opening from the vestibule into the rear of the business offices was put there in order that the employees might go from the first floor up to the operating departments on the second and third floors without going out on the street. Rec. p. 14. This door was used by the employees, and left unlooked for most of the time. There was no sign over the Lawrence street entrance that it was for employees only, and there

was testimony that the public had been accustomed to use this entrance, although defendant's testimony was to the effect that it was designed primarily for and used mainly by its employees.

"At about 8 o'clock on the night of March 8, 1916, plaintiff, in company with another lady and her daughter, went with Mr. Wolff, in the latter's automobile, from the apartment house where the plaintiff lived, down town, intending to go to a picture show. Mr. Wolff stopped his automobile at the sidewalk on Lawrence street, near the Lawrence street entrance to the defendant's building, which was directly across the street from the Lawrence street entrance to the postoffice. Plaintiff wished to go into defendant's offices in order to see about answers to an advertisement which she had inserted in the Advertiser. Plaintiff had been in the defendant's offices on the first floor of the building several times before, always going through the wide entrance facing Dexter avenue. She had also been to the second floor of the building on two occasions, passing through the vestibule and ascending the flight of stairs to the right of the vestibule, but she had never been through the door leading from the vestibule down into the rear of the offices.

"Mr. Wolff got out of the automobile and went across the street to the postoffice. Mrs. Hertz also got out of the car, entered the vestibule above described; went on to the door leading down into the offices, took hold of the doorknob, 'and as soon as she started in she fell. She fell in a heap, and her ankles turned under her. It was dark in where she fell. Her feet crumpled up under her. She remembered she just opened the door and fell in a heap on the floor, and her feet were caught under her body. . . . She did not know any steps were there. She had never noticed any steps in there.' Rec. p. 10. ' . . . That she supposed that her idea was that the floor that she was on was the same level as the floor on the other side.' Rec. p. 11. As the result of her fall, the plaintiff received severe injuries.

"The case was submitted to the jury, which returned a verdict in favor of the defendant, and judgment was entered accordingly."

The negligence alleged and relied upon for a recovery was the construction of and maintenance of dangerous premises. Some counts alleged this negligence in very general terms; others were special. The defenses were the general issue and contributory negligence, which were pleaded in short by consent.

Messrs. Hill, Hill, Whiting, & Stern, for appellant:

It was proper to show that others fell down the same steps at about the time plaintiff fell, as tending to show that the place was dangerous.

Perrine v. Southern Bitulithic Co. 190 Ala. 96, 66 So. 705; Southern R. Co. v. Posey, 124 Ala. 488, 26 So. 914; Birmingham v. Starr, 112 Ala. 98, 20 So. 424; Birmingham Union R. Co. v. Alexander, 93 Ala. 133, 9 So. 525.

The obligation assumed by defendant was that the premises were in a reasonably safe condition, so that the person there by its invitation shall not be injured by them or in their use.

1 Thomp. Neg. § 968; Montgomery & E. R. Co. v. Thompson, 77 Ala. 456, 54 Am. Rep. 72; East Tennessee, V. & G. R. Co. v. Watson, 94 Ala. 634, 10 So. 228; Alabama G. S. R. Co. v. Godfrey, 156 Ala. 202, 130 Am. St. Rep. 76, 47 So. 185.

Plaintiff was not required to look out for pitfalls.

Alabama G. S. R. Co. v. Godfrey, 156 Ala. 202, 130 Am. St. Rep. 76, 47 So. 185; Watson v. Oxanna Land Co. 92 Ala. 320, 8 So. 770; Evans v. Alabama-Georgia Syrup Co. 175 Ala. 85, 56 So. 529; Birmingham v. Tayloe, 105 Ala. 170, 16 So. 576.

It was error to charge the jury that, if they were reasonably satisfied that plaintiff's own negligence proximately contributed to the injury, there could be no recovery.

Montgomery Light & Traction Co. v. Harris, 197 Ala. 236, 72 So. 545.

Messrs. Rushton, Williams, & Crenshaw and Steiner, Crum, & Well, for appellee:

Where the evidence is uncontradicted, and is not susceptible of adverse inference, the question of contributory negligence vel non is for the court, and not the jury.

Hunter v. Louisville & N. R. Co. 150 Ala. 594, 9 L.R.A. (N.S.) 848, 43 So. 802; Columbus & W. R. Co. v. Bradford, 86 Ala. 574, 6 So. 90; Wilson v. Louisville & N. R. Co. 85 Ala. 269, 4 So. 701; Tuscaloosa Waterworks Co. v. Herren, 131 Ala. 81, 31 So. 444; Birmingham R. & Electric Co. v. Baker, 126 Ala. 135, 28 So. 87; Louisville & N. R. Co. v. Pearce, 142 Ala. 680, 39 So. 72.

It is negligence per se for one to walk or step into a dark place which is unfamiliar to him.

Rochrbacher v. Gillig, 203 N. Y. 413, 96 N. E. 733; Brugher v. Buchtenkirch, 167 N. Y. 153, 60 N. E. 420; Brown v. Associated Operating Co. 165 App. Div. 702, 151 N. Y. Supp. 531; Piper v. New York C. & H. R. R. Co. 156 N. Y. 224, 41 L.R.A. 724,

66 Am. St. Rep. 559, 50 N. E. 851, 4 Am. Neg. Rep. 331; *Pattison v. Livingston Amusement Co.* 156 App. Div. 368, 141 N. Y. Supp. 588; *Ridley v. National Casket Co.* 161 N. Y. Supp. 444; *Illinois C. R. Co. v. Sanderson*, 175 Ky. 11, L.R.A.1917D, 890, 192 S. W. 869; *Steger v. Immen*, 157 Mich. 494, 24 L.R.A.(N.S.) 246, 122 N. W. 104; *Gaffney v. Brown*, 150 Mass. 479, 23 N. E. 233; *Massey v. Seller*, 45 Or. 267, 77 Pac. 397, 16 Am. Neg. Rep. 553; *Sauter v. Hinde*, 183 Ill. App. 413; *Dodson v. Herndon*, 147 Ky. 181, 143 S. W. 1011.

A party going from one room to another in a building acts upon his peril in assuming that the floor on both sides of the door is at the same level.

*Ware v. Evangelical Baptist Benev. & Missionary Soc.* 181 Mass. 285, 63 N. E. 885; *Hoyt v. Woodbury*, 200 Mass. 343, 22 L.R.A.(N.S.) 730, 86 N. E. 772; *Dailey v. Distler*, 115 App. Div. 102, 109 N. Y. Supp. 679; *Brugher v. Buchtenkirch*, 167 N. Y. 153, 60 N. E. 420; *Weller v. Consolidated Gas Co.* 198 N. Y. 98, 139 Am. St. Rep. 798, 91 N. E. 286; *Speck v. Northern P. R. Co.* 108 Minn. 435, 24 L.R.A.(N.S.) 249, 122 N. W. 497, 17 Ann. Cas. 460; *McNaughton v. Illinois C. R. Co.* 136 Iowa, 177, 113 S. W. 844.

In order for testimony of similar accidents to be admissible, the conditions as to time and place must be shown to be the same.

*Southern R. Co. v. Lefan*, 195 Ala. 295, 70 So. 249; *Perrine v. Southern Bitulithic Co.* 190 Ala. 96, 66 So. 705.

**Mayfield, J.**, delivered the opinion of the court:

It has been often said by this court that there is a general rule of society, crystallized into law, which imposes a duty on the owner or controller of premises, on which the public is expressly or impliedly invited to enter, that it shall be so constructed and kept as to be free from traps and pitfalls, and that the owner or controller must respond in damages for all injuries suffered by the public in consequence of a breach of this duty. The proposition was thus formulated by Stone, Ch. J., which has been repeatedly followed by this and other courts: "There is a common duty resting on all persons, artificial as well as natural, who own real estate on which the public is expressly or impliedly invited to enter, that it shall be kept free from traps and pitfalls; and, if this duty be neglected, and injury results therefrom to any person, the person suffering by such trap or pitfall may recover damages for the injury. This is a general rule of society, crystallized into law.

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It partakes of the nature of a public nuisance done or suffered, which inflicts special injury on an individual. To a suit for such injury it is no defense that the injury was not intended. Human conduct must be tested by its known general or ordinary consequences." *Montgomery & E. R. Co. v. Thompson*, 77 Ala. 456, 54 Am. Rep. 72.

This rule, however, does not apply to places strictly private, nor to places to which the public are not expected or expressly or impliedly invited to go. The rule also varies as to the liability of owners and proprietors as for constructing and maintaining such premises, and as to the duty the landlord owes to the tenant as to such dangerous premises; but these exceptions and limitations are not important in this case.

We agree with the trial court in this case that the evidence fails to show that the defendant was guilty of culpable negligence in constructing a "trap" or "pitfall" on its premises, within the meaning of the above rule of law. If it was guilty of any negligence, it was as to the maintenance of safe premises, as to those who were on its premises by express or implied invitation, in that it failed to properly light the entrance vestibule, and the entrance into its building at or near the place where the plaintiff fell. The rule of law under which this defendant is to be held liable to this plaintiff, if at all, is thus stated in *Shearman & Redfield on the Law of Negligence*: "The occupant of land is bound to use ordinary care and diligence to keep the premises in a safe condition for the access of persons who come thereon by his invitation, express or implied, for the transaction of business, or for any other purpose beneficial to him; or, if his premises are in any respect dangerous, he must give such visitors sufficient warning of the danger to enable them, by the use of ordinary care, to avoid it. The extent, however, of his legal obligation is to use ordinary care and prudence to keep his premises in such condition that visitors may not be unnecessarily or unreasonably exposed to danger; and the mere fact that one is injured while on the premises is no evidence of negligence on the part of the proprietor." § 704.

This same rule of law has been announced in the following cases decided by this court: "The principle is well settled that if an occupier of premises, either directly or by implication, induces another to come upon them, he thereby assumes an obligation that such premises are in a reasonably safe condition, so that the person there by his invitation shall not be injured by them, or in their use for the purpose for which the

invitation was extended. *Campbell v. Lunsford*, 83 Ala. 512, 3 So. 522, 13 Am. Neg. Cas. 164; *Montgomery & E. R. Co. v. Thompson*, 77 Ala. 457, 54 Am. Rep. 72; *O'Brien v. Tatum*, 84 Ala. 186, 4 So. 158; *Sloss Iron & Steel Co. v. Knowles*, 129 Ala. 410, 30 So. 584; *Lake Shore & M. S. R. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218, 29 N. E. 692; *Alabama Steel & Wire Co. v. Clements*, 146 Ala. 266, 40 So. 971.

The case most in point which we have examined is that of *Hoyt v. Woodbury*, 200 Mass. 343, 22 L.R.A. (N.S.) 730, 86 N. E. 772, which supports our holding that there is no negligence shown as to the construction of the premises. In that case the affirmative charge was directed for the defendant; there being no question as for failure to properly light. The language is so clear in the opinion, and the facts are so similar, that we quote in part what Justice Rugg said in that case: "The ruling of the presiding judge, directing a verdict for the defendant, should be supported on the ground that there was no evidence of negligence on the part of the defendant. He owned a lot of land on a slight hillside, and it abutted upon a street which descended the hill. He had a right to improve his real estate in any reasonable way. He chose to maintain upon it a block with two stores separated by an entrance to upper stories. The problem which confronted him in doing this was so to arrange the means of access to these three entrances as to adapt them to the varying grade of the adjacent sidewalk. This could have been done in any one of several different ways. But it obviously must have been done in some way. So long as the present physical configuration of this commonwealth continues to exist, substantially the same difficulties will confront those who undertake to erect structures for the use of the public. Methods may change, and facilities of access may grow better, but the situation of the buildings abutting upon hilly streets will abide. Persons entering this building were charged with knowledge that they were not entering from a perfectly level sidewalk, and that generally the floors of buildings are not of precisely the same elevation as the sidewalk, even where it is level. Customers entering or leaving stores cannot be unmindful of these almost universally prevailing conditions."

Whether or not the vestibule or steps down which plaintiff fell were properly lighted on the occasion in question was disputed, and the question was submitted to the jury. Neither the court nor the jury were authorized to say or find that there was any negligence in the construction or maintenance of the building or premises,

unless it was in the failure to have it properly lighted, on the evening of the accident. The evidence was without dispute that the building, including the part where the injury occurred, was properly equipped with electric lighting apparatus. The only dispute in the evidence was as to whether or not the lights were burning on the occasion of the accident. Plaintiff's evidence tends to show they were not, while defendant's shows that they were lighted. It was therefore open for the jury to find this question either way.

If this issue was found in favor of plaintiff, and that such failure proximately contributed to her injuries, and she herself was not guilty of any negligence which proximately contributed thereto, she would be entitled to recover. On the other hand, if the lights were burning, and the premises properly lighted, then there was no negligence whatever shown on the part of defendant, and, of course, no liability; or, if the plaintiff was guilty of contributory negligence, then she could not recover, though the jury should find that the defendant was guilty of negligence as to the lights. We are of the opinion that the undisputed evidence showed plaintiff to have been guilty of negligence which proximately contributed to her injury, and that the general affirmative charge should have been given for the defendant.

If the premises were properly lighted, then, of course, there was no negligence, except her own; and if they were not properly lighted, she should have been more careful in going out of the vestibule into the main office building. She had no right to assume that the floor of the office building was on the same level as the floor of the vestibule. There was a door between the two apartments, and this of itself was a warning to those entering, who were not acquainted, to ascertain whether the floor to the main building was on a level with the vestibule and the sidewalk, or whether it was reached by ascending or descending steps. She is shown not to have exercised the slightest degree of care to ascertain what was beyond the door which separated the vestibule from the floor of the main office. Her own evidence shows that this door was shut, that she herself opened it, and stepped or walked right through as if the floors were on a level, and fell down the steps in consequence of her own negligence in failing to ascertain whether or not there were steps or stairs connecting the two floors. We find a number of cases very similar, and in every instance, under like conditions, the plaintiff has been held to have been guilty of contributory negligence,

and it seems to us there could be no doubt about the correctness of the decision. The court of appeals of New York, in a very similar case, said of like conditions: "The presence of stairways leading either to higher or lower stories must be expected in hallways, and we know of no reason or custom which justifies one entering a strange house, in assuming that the hall will continue at the same level. This short flight of steps constituted no reasonable source of danger to anyone who took proper precautions to see where he was stepping. It was in no way similar to a hatchway or elevator shaft, nor even to the usual steep flight of steps leading into a cellar." *Brugher v. Buchtenkirch*, 167 N. Y. 156, 157, 60 N. E. 421.

The courts of Massachusetts have frequently made similar rulings. A recent decision, after reviewing similar cases, thus summed up the doctrine: "It is a matter of common observation that in entering and leaving stores, halls, railway car stations and platforms, office buildings, and other buildings and places, and private houses, adjoining surfaces are frequently at different levels, and the difference in level has to be overcome by one or more steps of greater or less height, or by some other device. The same thing happens in the interior of buildings and structures. We cannot think that such a construction is, of itself, defective or negligent. There is nothing in the nature of things which requires that the floor of a room, which is entered from a hall or corridor, especially in a building like the Tremont Temple Building, should be on the same level as that of the hall or corridor." [*Ware v. Evangelical Baptist Benev. & Missionary Soc.* 181 Mass. 285, 63 N. E. 885.]

The English courts have held to the same doctrine; and so have many other American courts. The Iowa court holds to the same doctrine, and of a similar case it said:

"The fact that a door is there is a warning that it is the means of exit or of entrance from or to some other apartment, and a way up or down stairs, or to a baggage room, or to a closet; and no one has the right to assume, without knowledge, or its equivalent, the character of the place to which it affords access." *McNaughton v. Illinois C. R. Co.* 136 Iowa, 180, 113 N. W. 845.

In speaking of similar arrangements at a railway station, the English court said: "There was nothing to show that the door and the steps beyond were more than ordinarily dangerous, and it was necessary and proper that something of the sort should be there for the convenient use of the station by the company. It would be difficult so to arrange every part of a station as to render it impossible for careless people to meet with injury." *McNaughton v. Illinois C. R. Co.* 136 Iowa, 182, 113 N. W. 846.

It therefore follows that the trial court should have given the affirmative charge for the defendant. It is, for this reason, unnecessary to treat separately other assignments of error, insisted upon; if errors, they were necessarily without possible injury.

The proffered evidence of plaintiff to show that others had fallen down the steps was properly disallowed. It was not shown that the conditions were the same, that is, as to lights or absence thereof, so as to render such evidence admissible for any purpose; it had no tendency to show negligence on the part of defendant, or due care on the part of plaintiff. Moreover, in this particular, if the conditions were the same, then it would necessarily appear that the persons who fell were also guilty of negligence.

We find no error, and the judgment of the trial court must be affirmed.

Anderson, Ch. J., and Somerville and Thomas, JJ., concur.

#### ALABAMA SUPREME COURT.

JOHN W. WYKER, Appt.,  
v.  
TEXAS COMPANY.

(— Ala. —, 79 So. 7.)

**Insurance — subrogation of insurer — action against wrongdoer.**

One whose automobile is insured against accident does not lose his right of action against a person negligently injuring it, by accepting from his insurer settlement of a

portion of the loss and subrogating the insurer to his claim against the wrongdoer to the extent of the sum paid.

*For other cases, see Action or Suit, I. c., in Dig. 1-52 N. S.*

(Sayre, J., dissents.)

(May 9, 1918.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Morgan County in favor of defendant in an action brought to recover damages for injuries to plaintiff's

**Note.** — As to whether one who destroys insured property may defeat an action by the owner upon the ground that the right

of action is in the insurer, see annotation following this case, post, 145, and references therein to annotations on related questions.

automobile resulting from a collision with defendant's team, alleged to have been caused by the negligence of its servant. Reversed.

**Statement by Gardner, J.:**

Suit by appellant against appellee to recover damages in the sum of \$500, resulting from a collision of plaintiff's automobile with a team of the defendant company. The collision, it is alleged, was caused by the negligent conduct of the agent or servant of the defendant, acting within the line and scope of his employment, in and about the management, charge, or control of said team of mules.

Plaintiff's testimony tended to show that, at the time of the accident, he had owned for only a few days the Cadillac car, which was damaged. That he went to defendant's place of business, where it was engaged in the sale of gasoline and oil to the public, for the purpose of supplying his car with gasoline. As he was about to leave defendant's place of business, after securing the supply, the team of the defendant company (two mules attached to a wagon) was standing next to the platform of the plant, to the left of plaintiff, going out. That defendant stopped his car as he neared the wagon, and asked the driver of the team, who was standing on the platform, as to passing the team, and the driver replied: "Come on; they won't move." Thereupon plaintiff drove ahead and, just as he got beside the team, the mules whirled the tongue of the wagon and hit the side of the car, causing the damages enumerated in the testimony, which we deem unnecessary to here set out. Plaintiff states that it was necessary for him to pass this team in order to get out from defendant's place of business. The driver was not in the wagon at the time, but was standing on the platform, about 4 or 5 feet from the team, and did not have the lines in his hand, and, so far as plaintiff knows, made no effort to get hold of the team. Plaintiff further testified that his car, before the accident, was worth \$2,150, and immediately afterwards its reasonable value was \$1,650, and that he was damaged in the sum of \$500.

Upon cross-examination of this witness, he was asked, over the objection of the plaintiff, if he had not been paid a sum of money for damages done to the car; and if the insurance company, in consideration thereof, had not obtained his rights to recover the damages against the Texas Company. The defendant then offered in evidence a release signed by the plaintiff, to the Aetna Accident & Liability Company, in words and figures as follows:

"In consideration of \$200, to me paid by the Aetna Accident & Liability Company, the receipt whereof is hereby acknowledged, I hereby release and forever discharge the said company from all liability under policy No. GA-61629, for or on account of loss or damage to the automobiles described in the above policy (including their machinery or equipment), which occurred on or about the 9th day of April, 1915, at Decatur, Alabama.

"In consideration of the payment of this sum, I hereby subrogate the said Aetna Accident & Liability Company, to the amount of such payment, to all rights of recovery for such loss or expense against the persons, firms, corporations or estates, which have caused or contributed to said losses; and I hereby further agree, upon demand, to execute all documents required of me, and to co-operate with said company in prosecuting all actions to effect such recovery."

Plaintiff objected to the introduction of this release upon the ground that the same is illegal, irrelevant, and immaterial, and that the matters set up therein are *res inter alios acta*, and matters in which the defendant is not interested. The court overruled the objection, and plaintiff reserved exception thereto.

The court gave the affirmative charge at the defendant's request, resulting in a verdict and judgment for the defendant, from which plaintiff prosecutes this appeal.

Messrs. Eyster & Eyster for appellant.  
Messrs. Callahan & Harris for appellee.

Gardner, J., delivered the opinion of the court:

It appears, from the foregoing statement of the case, the plaintiff claimed damages in the sum of \$500, as a result of a collision of his car with the team of the defendant company; and plaintiff insisted in his testimony that his car was damaged in said sum. Upon cross-examination, over the plaintiff's objection, defendant introduced a release executed by the plaintiff to the Aetna Accident & Liability Company, releasing and discharging said company from all liability under the policy of insurance on said car, for the damages which occurred on this occasion. This release was in consideration of the sum of \$200, and further stipulated that the insurance company was subrogated, to the amount of such payment, to the right of recovery of the plaintiff for such loss or expense against the persons who caused or contributed to said loss. The rights of subrogation therefore, as set forth in said release, are limited to the amount of the payment of \$200. Said release is here construed as merely subrogating the insurance company for recovery of the limited sum so

expended by it, and not as a transfer of the plaintiff's right of action for the damages suffered.

In the case of *Birmingham R. Light & P. Co. v. Aetna Acci. & Liability Co.* 184 Ala. 601, 64 So. 44, the action was originally brought in the name of the insurance company, the company having paid in full the damages suffered by the owner of the automobile. It therefore appeared that the insurance company was the only party who had suffered any loss. As to whether or not the cause of action could have been prosecuted under these circumstances by the insurance company, in its own name, was mooted, but not decided. It was there held that, as a matter of course, the company had the right to amend the complaint by adding, as the nominal plaintiff, the name of the owner of the car, and proceed with the cause as thus amended, in the name of the owner, for the use of the company.

In the case of *Coffman v. Louisville & N. R. Co.* 184 Ala. 474, 63 So. 527, was presented a situation somewhat analogous to that here under consideration, in that the amount of insurance paid the owner did not equal the value of the property damaged, and therefore did not cover the full loss to the owner. It was there held that, when property which is insured against loss by fire is burned, through the actionable wrong of another, the insured and insurer are, in contemplation of law, in so far as the loss is concerned, one person, and that the insured may, for his own benefit and for the benefit of the insurer, sue the wrongdoer for the loss caused by the wrong. In that case it was also stated that the subrogation agreement, similar to that here involved, had no bearing upon the issues in the cause, and was of no value as evidence.

In *Alabama G. S. R. Co. v. H. Altman Co.* 191 Ala. 429, 67 So. 589, in discussing the status of nominal and beneficial plaintiffs, the court said: "In all such cases the rights and status of the equitable, beneficial, or use plaintiff are fixed by the rights and status of the nominal plaintiff; the nominal and use plaintiffs, in such cases, being regarded as one person."

In *Southern Garage Co. v. Brown*, 187 Ala. 484, 65 So. 400, it was said that the only effect of bringing the suit to the use of the insurance company was to declare a use for the company, and operated merely as an estoppel on the part of the plaintiff to deny, as against the company, its rights to the proceeds.

In the case of *Long v. Kansas City, M. & B. R. R. Co.* 170 Ala. 635, 54 So. 62, it was held that the question as to who will be entitled to the proceeds of the recovery, the

insurer or the insured, is a matter between them, and constitutes no defense in an action of damages against the wrongdoer.

In *Southern R. Co. v. Blunt* (C. C.) 165 Fed. 258, in discussing the question in whose name the cause of action should be brought in cases of this character, where the owner was reimbursed by the insurance company only partially for the loss sustained, it was said: "If, from the pleadings, it appeared that the Transportation Mutual Insurance Company had paid to the plaintiff only a part of the loss, they would be jointly interested in the recovery from the indemnitors, Blunt & Ward, and the plaintiff could maintain the action in its own name and recover the full amount of the loss. As to the amount paid by the insurance company, it would become a trustee for said company. If the insurance company had paid the plaintiff all of the loss, then this suit should be by the insurance company alone, in the name of the railway company as the nominal plaintiff for the use of the insurance company. If only a part of the loss had been paid by the insurer, the insured would be entitled to the residue; and how the money recovered is to be divided between them is a question which interests them alone, and in which the defendants are not concerned."

The question was again discussed in *Webb v. Southern R. Co.* (D. C.) 235 Fed. 578, where several authorities are collated.

The exact question here presented does not seem to have been previously determined by this court, but we are of the opinion that the logic of our cases, as above cited, as well as those noted in the authorities of other jurisdictions, sustain the view that, in a case of this character, where the owner has been reimbursed by the insurance company, only partially, for the loss suffered, and the latter thereby subrogated to the rights of the owner only to the extent of the payment of such partial loss, the right of action is in the owner, and he may maintain the suit in his own name; and that the question of the distribution of the proceeds of recovery in such cases is a matter concerning only the owner and the insurance company, and with which the wrongdoer is not concerned.

The release here offered in evidence was introduced for the evident purpose of disclosing that the plaintiff had entirely parted with his right of action, and that he could not, therefore, maintain the suit. The record shows that this was the view accepted by the trial court. What we have herein stated is sufficient to disclose our opinion that this release was inadmissible for such purpose—and what is here said on



this question is confined to that particular purpose—and the objection thereto should have been sustained.

We are also of the opinion that the evidence was sufficient for submission to the jury upon the question of negligence as alleged in the complaint, and that the court committed error in giving the affirmative charge for the defendant.

For the errors indicated, the judgment is reversed, and the cause remanded.

Anderson, Ch. J., and McClellan, Mayfield, Somerville, and Thomas, JJ., concur.

Sayre, J., dissents.

**Annotation — May one who destroys insured property defeat an action by the owner upon the ground that the right of action is in the insurer.**

This note supplements the note on the above question, appended to Illinois C. Ro. Co. v. Hicklin, 23 L.R.A.(N.S.) 870.

As to who must bring the action against the party causing the loss, in cases in which the insurer has made good the loss to the insured, and been subrogated to the latter's rights, see note to Cunningham v. Seaboard Air Line R. Co. 2 L.R.A.(N.S.) 921.

For right of insurer which has paid the loss as against insured who has recovered against or settled with third persons responsible for the loss, see note to Shawnee F. Ins. Co. v. Cosgrove, 41 L.R.A.(N.S.) 719.

As to settlement between insured and tort-feasor as affecting insurer's right to subrogation, see note to Fire Asso. of Philadelphia v. Wells, L.R.A.1916A, 1280.

For effect of discharge of person primarily liable for a loss of insured property, or of a contractual provision giving him benefit of insurance upon insured's right of action against insurer, see note to Brown v. Vermont Mut. F. Ins. Co. 29 L.R.A.(N.S.) 698.

As to construction and effect of statute giving one who is responsible for the destruction of property by fire, the benefit of insurance effected by owners, see note to Farren v. Maine C. R. Co. 52 L.R.A.(N.S.) 203.

It will be noted that in WYKER v. TEXAS Co. ante, 142, where the insured had been reimbursed by the insurer, only partially, for the loss suffered by reason of damage to his property by a third person, and the insurer had been subrogated to the insured's rights only to the extent of the payment of the partial loss, the right of action against the one causing the damage to the property was held to be in the insured, and he was held entitled to maintain an action in his own name.

This decision is in harmony with the general rule laid down in the former

note (23 L.R.A.(N.S.) 870), in which it is stated that all of the authorities are in accord upon the proposition that, in the absence of statutes requiring actions to be brought by the real party in interest, the owner of insured property which has been destroyed by another has a right of action for such destruction, regardless of whether or not he has been reimbursed for his loss by the insurer.

The same conclusion was reached in the following later cases: Long v. Kansas City, M. & B. R. Co. (1911) 170 Ala. 635, 54 So. 62 (action by insured against railroad, through the negligence of which his property had been destroyed); Coffman v. Louisville & N. R. Co. (1913) 184 Ala. 474, 63 So. 527 (suit by property owner for his own use, and that of insurer, to recover from railroad, which was claimed to have caused fire). In the first case, the court said: "If A negligently or intentionally burns B's house, and B sues him for damages, surely A cannot defeat this action by pleading and showing that C had paid B the full value of his house, under a contract of insurance between B and C, as to which A is a perfect stranger. It is no concern of A's that C may be, by contract or otherwise, subrogated to the rights of B in the matter. The question, To whom will the damages belong when recovered? is one in which the defendant has no interest. It does no even affect the measure of his liability; and is not a proper issue in the suit by B against A. The insurance of the property is a mere indemnity, and insurer and insured are regarded as one person. The mere fact that the insurer has paid the insured cannot affect the action against the wrongdoer who has destroyed or injured the property, the subject of the insurance. . . . If the owner has recovered of the wrongdoer the full value of the property or dam-

ages, or if the insurer, in the name of the owner, has so recovered, and a second action should be brought by either or both, against the wrongdoer, he could then plead the former recovery; but, until there has been one recovery against him, he cannot defeat the action by the owner against him for the wrongful destruction of the property, by showing that the insurer had paid the owner the value of the property. The payment is not made by the insurer for the benefit of the wrongdoer, but is made in accordance with the contract of insurance. The owner, of course, has paid the insurer for the insurance or indemnity; and whether this be more or less than the damages for which the wrongdoer is liable is no concern of the latter."

And in *Alaska Pacific S. S. Co. v. Sperry Flour Co.* (1917) 94 Wash. 227, 162 Pac. 26, it was held that an employer who had been compelled to pay for an injury to an employee, and had been indemnified by an insurer, was the real party in interest, within the meaning of *Rem. & Bal. Code*, § 179, in an action to recover against the one through whose negligence the employee was injured. The court said: "There is a fatal fallacy in the reasoning which concludes that the insured is made whole upon payment of the loss to him by the insurer, in that the premiums are not refunded to the insured, so paid by him to the insurer for the policy of insurance, and these premiums, if paid over some length of time, would aggregate a considerable sum of money. Nor does it seem that a wrongdoer should not respond for his wrongful acts in damages to the insured, and thereby profit by reason of the sagacity of the insured in keeping his property protected by insurance. It is not a necessary corollary that appellant, by being allowed to recover in this case, would derive double damages, since the insurance company might have a right of action against appellant for the money so recovered. [See, as to that suggestion, note in 41 L.R.A.(N.S.) 719.] In any event, the answer to this contention is that he recovers but once for the wrong done him by the tort-feasor, and once upon his insurance policy, by virtue of a contract with the insurer, to which the tort-feasor is in no way privy."

And in *Swift & Co. v. Wabash R. Co.* (1910) 149 Mo. App. 526, 131 S. W. 124, it was held that the insured was not precluded by the statute requiring actions to be prosecuted in the name of

the real party in interest, from maintaining an action against one responsible for the fire which destroyed its property, where it appeared that the insured received the full value of the property from three insurance companies, and executed three assignments, to the extent of the payment made by each, of the insured's claim against the tort-feasor, the court holding that the wrongful act gave rise to but one liability, and that the legal right to sue remained in the insured, which was entitled to maintain an action in its name for the benefit of the insurers.

In *Southern Garage Co. v. Brown* (1914) 187 Ala. 484, 65 So. 400, where an action was brought in the name of the owner of an automobile, for the use of the insurer, to recover against one who was alleged to have caused damage to the automobile, it was held that the only effect of bringing the suit for the use of the insurer was to declare a use for the latter, and that the defendant had no concern with that, and the plaintiff was not bound to advance proof on the subject.

And in *Louisville & N. R. Co. v. Morse* (1915) 143 Ga. 110, 84 S. E. 428, where the insurers had paid to the owners of property destroyed, an amount for insurance not exceeding the value of the property, and the insured, in instituting an action to recover against the tort-feasor in an equal sum, made the insurer the use of the suit, this was held not to furnish a ground of complaint to the tort-feasor, whether the insurer would have been entitled to recover under the doctrine of subrogation or not.

In *Pittsburgh, C. C. & St. L. R. Co. v. Childs* (1915) 183 Ind. 464, 108 N. E. 583, where an insurer had paid a property owner a part of his loss, and the insurer and insured joined as plaintiffs in an action against the one causing the destruction of the insured property, the insurer seeking to recover the amount it had paid, it was held that they might properly join as plaintiffs.

In *Webb v. Southern R. Co.* (1916) 235 Fed. 578, where a suit was brought by a property owner to recover against one who had negligently caused the destruction of property, a part only of which was covered by insurance, it was held that a statute, which provided that in all cases where suits were brought in the name of the person having the legal right, for the use of another, the beneficiary should be considered as the sole party on the record, had no application,

although the insurers had paid to the extent of the insurance. The court said that the only right the insurance companies had was to be subrogated, pro

tanto, to such share in the judgment recovered for the loss as was equal to the amount paid by them under their policies. J. T. W.

**ALABAMA SUPREME COURT.**

ASHLAND OIL MILL & FERTILIZER COMPANY, Appt.,

v.

J. L. LANE.

(— Ala. —, 79 So. 9.)

**Evidence — exclusion — form of action.**

1. Evidence cannot be excluded under a complaint containing counts in trover and detinue, on the theory that the action is in detinue.

*For other cases, see Evidence, XIII. a, in Dig. 1-52 N. S.*

**Note.** — Where one with whom goods are deposited is not bound to restore the specific goods, but has an option to return them in kind, the transaction is ordinarily to be regarded as a sale rather than as a bailment, since its practical effect must always be to operate as a transfer of the title to the goods deposited. An exception to this doctrine, arising out of the custom of trade and the understanding of the parties, exists in the case of grain deposited in a warehouse or elevator to be commingled with other grain there deposited. In such case the transaction is regarded as a mere bailment, though it is not contemplated that the depository shall return the identical grain stored, but only an equal amount of the same kind and grade. See 3 R. C. L. pp. 73-75, 6 C. J. 1096, 1097. This exception would seem, for similar reasons, to extend to cases where cotton sent to the gin has been commingled with the lint or seed of others in the operation of ginning.

That where cotton is delivered to another to be ginned, for a specified price, there is a bailment for hire, has been held in a number of cases, in which, however, it does not appear that the depositor was not to receive, in its altered form, the identical cotton deposited. *Pattison v. Wallace*, 1 Stew. (Ala.) 48; *Maxwell v. Eason*, 1 Stew. (Ala.) 514; *Hackney v. Perry*, 152 Ala. 626, 44 So. 1029; *Concord Variety Works v. Beckham*, 112 Ga. 242, 37 S. E. 392; *McDonald v. Harder*, — Ga. App. —, 95 S. E. 320; *Broussard v. Declouet*, 6 Mart. N. S. 259; *Batesville Gin Co. v. Whitten*, 96 Miss. 210, 50 So. 695; *Bryan v. Fowler*, 70 N. C. 596; *Foster v. Taylor*, 2 Brev. 348; *McCaw v. Kimbrel*, 4 M'Cord, L. 220; *Robinson v. Southern Cotton Oil Co.* — S. C. —, 93 S. E. 395; *Waller v. Parker*, 5 Coldw. 476; *Kelton v. Taylor*, 11 Lea, 264, 47 Am. Rep. 284, 1 Am. Neg. Cas. 933.

And where cotton is delivered to a compression company for compression, for hire, the transaction constitutes a bailment. See *Ins.*

**Sale — statement on gin ticket — effect.**

2. The owner of a cotton gin cannot effect a purchase of the seed by placing on the ticket issued to farmers to indicate the amount of seed delivered at the gin, a statement that the seed left is sold to the gin company, and that the ticket is not negotiable.

*For other cases, see Bailment, I. in Dig. 1-52 N. S.*

(May 9, 1918.)

**A** PPEAL by defendant from a judgment of the Circuit Court for Clay County in plaintiff's favor in an action brought to

*Co. v. Vicksburg, S. & P. R. Co.* 17 L.R.A. (N. S.) 925, 86 C. C. A. 544, 159 Fed. 676; *Loeb Compress Co. v. Bromberg*, — Tex. Civ. App. —, 140 S. W. 475.

In *Phoenix Cotton Oil Co. v. Pettus*, — Ark. —, 203 S. W. 19, where persons taking seed cotton to be ginned received a ticket on which was marked the bale number and gin weight, reading: "Baled cotton claim ticket. On return of this ticket, properly indorsed, we will deliver one bale cotton ginned for [the name of the party]. All cotton left at gin is at owner's risk of loss or damage by fire or otherwise. *Phoenix Cotton Oil Co.*," it was held that the contract evidenced by such ticket established the relationship of bailor and bailee, for hire, between the parties.

In *First State Bank v. Barnett*, 48 Tex. Civ. App. 82, 106 S. W. 182, where it appeared that the owner of a public cotton gin charged, as compensation for ginning, 40 cents per hundred pounds for each 100 pounds of lint produced, and gave his customers all of the seed out of the cotton ginned, allowing 64 pounds of cotton seed to every 100 pounds of seed cotton, and that, as the cotton was ginned, the seeds, if the owner desired, were caught as they came from the gin and delivered to the owner, but, generally, that they were run from the gin into a large seed house, and the customers given seed out of this house at the rate above mentioned, it was held that the transaction was a bailment, rather than a sale of the seed; that the fact that the seed from a customer's cotton was permitted by him to be run into the seed house, and there commingled with the seed of other parties, so that it was impossible for the identical seed to again be delivered to him, did not convert what would otherwise have been a bailment, into a sale; and that the fact that 64 pounds per 100 pounds of seed cotton was adopted as the quantity each customer should receive did not alter the nature of the relations of the parties.

recover possession of certain cotton seed. Affirmed.

**Statement by Gardner, J.:**

Appellee (plaintiff) sues appellant (defendant) for 15,308 pounds of cotton seed, and also, under a separate count, for the conversion of said seed. The complaint was afterwards amended by adding counts A, B, and C, which are the common counts for money due by account, merchandise, goods, and chattels, sold by the plaintiff to the defendant, and on an account stated; it being alleged that all these different counts arose out of the same transaction, and relate to the same subject-matter. There was verdict and judgment for the plaintiff in the sum of \$497.51, and from this judgment the defendant prosecutes this appeal.

The testimony for the plaintiff tended to show that the defendant company was in possession of the cotton seed, the subject-matter of this suit, under a replevin bond, and demand had been made, before bringing suit, for said seed, which demand was refused. Evidence was also offered to show the value of the seed at the time and place of the demand and conversion. The testimony further tended to show that plaintiff had bought these seed from a number of farmers, who had carried their cotton to the defendant company to be ginned, and after the cotton was ginned the seed were blown into the seed house, and the farmer given a ticket as evidence of the amount of cotton seed due him. The defendant company had these tickets printed, which were in the following form:

355. Scale Ticket. Ashland, Alabama, —, 1916.	
Ashland Oil Mill & Fer-	Gross.....
tilizer Co.	Tare.....
	Net.....
Driver.....	Toll.....
	Net Seed Cot....
*Account.....	Net lbs. seed....
lbs. pr per ton amt.	
Seed left .....	
Seed Settled .....	

Seed left at gin and seedhouse are sold to Ashland Oil Mill & Fertilizer Co., and subject to settlement on or before January 15th after date of ticket and at ruling prices paid by said company on day of settlement. Subject to five per cent shrinkage.

Not negotiable.

[Signed] Ashland Oil Mill & Fertilizer Co.,  
By....., Weigher.

The plaintiff had purchased the seed, the subject-matter of this litigation, from various farmers, and they had delivered to him

tickets representing the amount of seed in defendant's possession; the total amount purchased by the plaintiff, as represented by these tickets, being 15,308 pounds. The evidence shows that plaintiff demanded of the manager of defendant oil mill company the seed, as represented by the tickets, prior to the institution of this suit, and the said manager refused to deliver the seed, but admitted he had them in his possession. Plaintiff then tendered to defendant company \$10 in money as storage charge for said seed, and defendant still refused to deliver the seed, or to give any information as to what the storage charges were, if any. The manager of the defendant company offered to pay plaintiff \$55 per ton for said seed on the day of demand, but seed were, in fact, on that day, worth \$58 per ton. That at the time he (plaintiff) demanded the seed, the manager said, "You can have your seed less 5 per cent shrinkage or storage," and plaintiff answered, "I will pay you your money for the storage."

One of the farmers who sold some of the seed to plaintiff testified that he left some cotton at the defendant's mill, as represented by the ticket which was offered in evidence, with the blanks filled out as to the amount of seed cotton, lint cotton, and the net amount of seed, together with the name. This witness stated that he did not sell the seed to the oil mill, but when he left the mill he was given a ticket, and that he subsequently sold the seed to the plaintiff. He further testified that the ticket was given to him by the weigher at the scales, but he had made no arrangements with the oil mill "to take a ticket like this before the seed were blown in, or before they gave me the ticket;" that he made no arrangement with the oil mill to allow a reduction on the seed of 5 per cent shrinkage, "or any other agreement of that kind." It was agreed, in substance, that the testimony concerning the tickets of the other farmers who sold the seed in question to the plaintiff would be the same as was the testimony of this witness.

The manager for the defendant company testified that, when the seed were demanded of him, he stated he would deliver the seed less 5 per cent shrinkage, or would pay the market value, less 5 per cent, and take the seed; that he did not refuse to let plaintiff have the seed, but told him that he would "deliver them at any time, less the 5 per cent shrinkage," or would buy them at the market price, less 5 per cent. He further stated that he did not refuse to deliver the seed, if plaintiff would settle according to the terms of the ticket; that the tickets had been printed, and he did not know that he

had made any verbal agreement with the farmers, and, in fact, had made no agreement, except as stated on the tickets; that the defendant was paid for the bagging, ginning, and ties, and then bought the seed according to the terms of the ticket; that some of the seed had been in storage for some time, and some for a very short time. There was no evidence tending to show how much, if any, seed would shrink, and what was the actual shrinkage charge or storage charge.

There were some charges refused to the defendant. A written charge was given at the request of defendant, and read to the jury, but this charge is not set out in the record.

**Messrs. Lackey & Rowland** for appellant.

**Messrs. Riddle & Riddle**, for appellee: The measure of damages in an action for the conversion of property, which is of fluctuating value, may be the highest market value between the date of the conversion and the trial, and it is competent to prove the highest market value.

*McGowan v. Lynch*, 151 Ala. 458, 44 So. 573; *Ryan v. Young*, 147 Ala. 660, 41 So. 954; *Hall v. Nix*, 156 Ala. 423, 47 So. 335.

Under no circumstances can a bailee set up title another does not assert, and keep for himself the goods as his own.

*Crosswell v. Lehman*, 54 Ala. 363, 25 Am. Rep. 684.

The appellant is estopped from setting up any claim to the seed involved in this suit.

*Thompson v. Sanborn*, 11 N. H. 201, 35 Am. Dec. 490; *Traun v. Keiffer*, 31 Ala. 136; *Formby v. Hood*, 119 Ala. 231, 24 So. 359; *Herzberg Bros. v. Hollis*, 119 Ala. 496, 24 So. 842; *Ashurst v. Ashurst*, 119 Ala. 219, 24 So. 760; *Sullivan v. Conway*, 81 Ala. 154, 60 Am. Rep. 142, 1 So. 647; *Powers v. Harris*, 68 Ala. 410.

Appellee was entitled to the affirmative charge.

*Riddle v. Blair*, 148 Ala. 463, 42 So. 560, 163 Ala. 314, 51 So. 14, 3 Ala. App. 294, 57 So. 382.

**Gardner, J.**, delivered the opinion of the court:

It is first insisted by counsel for appellant that the court erred in refusing, in the oral instruction, to charge the jury that, if they found for the plaintiff under the first count of the complaint, they must find for the specific property sued for, or its alternate value. Evidently, counsel intend to insist upon the failure of the court, in the oral charge, to use this specific language, as there is nothing in the record to indicate

any refusal of the court to do so. No charge refused to the defendant, as found in the record, has reference to that matter, and no exception was reserved to any portion of the oral charge of the court. Clearly, therefore, this insistence is without merit.

It is next urged that reversible error was committed in overruling the objection to the question, "What is the highest market price of cotton seed in Ashland since this suit was filed?" The ground of the objection is single, and was as follows: "This action was in detinue, and the value of the property at the time of the filing of the suit is the measure." Count 1 of the complaint is in trover, and there was no error, therefore, in overruling this objection. *McGowan v. Lynch*, 151 Ala. 458, 44 So. 573.

As to the other charges refused to the defendant, the argument proceeds upon the assumption that the plaintiff has brought suit upon what is called, in this record, the "scale tickets," and as the same were marked nonnegotiable, and not transferred in writing, therefore the plaintiff is without title, and cannot maintain the action. In our opinion, this is a misconception of the evidence presented. We think the testimony clearly shows that these tickets were mere evidences of the amount of seed in the possession of the defendant company, of which the said company was the bailee. *Riddle v. Blair*, 148 Ala. 461, 42 So. 560; *id.*, 163 Ala. 314, 51 So. 14. The evidence shows, without dispute, that the plaintiff purchased the seed, which, being personal property was, of course, subject to a verbal sale, and no writing was necessary to pass the title. *Riddle v. Blair*, *supra*.

The evidence further shows, without dispute, that the original owner of the seed left the same at the defendant's mill, and subsequently sold the seed here in question to plaintiff; that he made no agreement of sale whatever with the defendant company, or agreement as to deduction for shrinkage, or any agreement of like kind. After the seed were stored the farmers were merely handed these tickets in the printed form, as indicated in the statement of the case. It does not appear that their attention was directed to the matter printed at the bottom of the ticket, or that they had any information as to the same. Indeed, the testimony of the manager for the defendant company, to the effect that he offered to buy the seed from the plaintiff, less the 5 per cent, tends very strongly to show that it was not considered that any sale had, in fact, been made. For the purpose of making a sale or valid contract, there must be a meeting of the minds of the contracting parties, and clearly what was here done, under the un-

disputed evidence in this case, created neither a sale or any binding contract as to a deduction for shrinkage. The case of *Tabler v. Sheffield Land, Iron & Coal Co.* 79 Ala. 377, 58 Am. Rep. 593, cited by counsel for appellant, is without application to the instant case, as is readily disclosed by an examination of that authority.

We do not treat the refused charges separately, as what we have here said sufficiently indicates that no error was committed in their refusal.

There remains only one other question

argued in brief, relating to the objection to a question asked on cross-examination, which we consider so entirely free from prejudicial error as not to call for separate treatment here, though it has been given careful consideration in consultation.

We find no reversible error in the record, and the judgment appealed from will be affirmed.

**Affirmed.**

Anderson, Ch. J., and Mayfield and Somerville, JJ., concur.

## KANSAS SUPREME COURT.

LON GREGORY

v.

WILLIAM NELSON, Appt.

(103 Kan. 192, 173 Pac. 414.)

### Libel and slander — imputation of larceny.

1. One who makes an imputation that another has committed larceny or an offense involving moral turpitude, which is not true nor privileged, cannot escape liability for the slander by stating, in connection with it, the facts or information upon which his belief or opinion of guilt is based.

*For other cases, see Libel and Slander, II. b, in Dig. 1-52 N. S.*

### Appeal — instruction — prejudice.

2. On an examination of the record, it is held, that an instruction in conflict with the rule stated in paragraph 1 has not been rendered immaterial error by the special findings returned by the jury.

*For other cases, see Appeal and Error, VII. k, 4, in Dig. 1-52 N. S.*

(June 8, 1918.)

**A** PPEAL by defendant from an order of the District Court for Sedgwick County granting plaintiff a new trial in an action brought to recover damages for an alleged slander. Affirmed.

The facts are stated in the opinion.

Messrs. R. L. Holmes, Charles G. Yankey, W. E. Holmes, and John W. Adams, for appellant:

If simply an opinion or suspicion, which, of course, precludes the idea of a charge of

Headnotes by JOHNSTON, Ch. J.

**Note.** — The effect of stating the facts upon which the charge is made, to limit the ordinary meaning of the words upon which an action for libel or slander is based, is discussed in the annotation following this case, post, 152.

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misconduct, or a conclusion from the facts stated, is given, such opinion and conclusion cannot be made the basis of an action of slander.

*Williams v. Cawley*, 18 Ala. 206; *Van Rensselaer v. Dole*, 1 Johns. Cas. 279; *McCarty v. Barrett*, 12 Minn. 494, Gil. 398; 25 Cyc. 298; 18 Am. & Eng. Enc. Law, 987.

The facts show a privileged situation.

*Mueller v. Radebaugh*, 79 Kan. 307, 99 Pac. 612; *Miller v. Nuckolls*, 4 L.R.A. (N.S.) 149, note; 25 Cyc. 391; *Taylor v. Chambers*, 2 Ga. App. 178, 58 S. E. 369; *Fames v. Whittaker*, 123 Mass. 342; *Cristman v. Cristman*, 36 Ill. App. 567; *Chapman v. Battle*, 124 Ga. 574, 52 S. E. 812; *Hancock v. Blackwell*, 139 Mo. 440, 41 S. W. 205; 18 Am. & Eng. Enc. Law, 1038; *State v. Wilcox*, 90 Kan. 80, 132 Pac. 982; *Newell, Slander & Libel*, 2d ed. p. 500; *Coleman v. MacLennan*, 78 Kan. 711, 20 L.R.A. (N.S.) 361, 130 Am. St. Rep. 390, 98 Pac. 281.

Messrs. Stanley, Stanley, & Hegler for appellee.

**Johnston, Ch. J.**, delivered the opinion of the court:

This was an action to recover damages for slander. The general verdict and special findings of the jury were in defendant's favor. The defendant appeals from the order of the trial court granting plaintiff a new trial, which was made upon the sole ground that one of the instructions was erroneous.

The petition set forth certain statements alleged to have been made by defendant to several persons, falsely accusing plaintiff of having committed unlawful and criminal acts against defendant's property. Defendant's answer was a general denial, and he further alleged that unlawful acts were, in fact, committed against his property; that he consulted with the county attorney, who directed him to make an investigation as to who committed the acts; that, if defendant

made any of the statements, or statements similar to those charged in the petition, they were privileged communications, spoken only to those in the employ of or assisting defendant, and were made to carry out the instructions of the county attorney, and in an honest effort, without malice, to determine who had committed the wrongs and crimes referred to. The facts, as found by the jury, were that defendant's engine was moved and damaged, some feed burned, a horse killed, a cow stolen, and a water tank punctured with shot; that as soon as these depredations commenced, and from time to time thereafter, he consulted with the county attorney, and was advised by him to ascertain and secure evidence against the guilty parties, and to use his friends or employ detectives for that purpose; that defendant undertook to carry out the county attorney's instructions, and, in so doing, made the statements complained of, without any malicious purpose to injure plaintiff. The instruction complained of was that, if defendant's property was destroyed as alleged, and thereafter he went to the persons mentioned in the petition, and "did, without malice or the intent to falsely accuse plaintiff, state to such persons truthfully all of the facts and information which the defendant had in his possession, and did recite all such facts, and state, or make it fairly appear from his statement that he, the defendant, was merely giving his opinion or suspicions that the plaintiff was guilty of the acts charged, because it was his conclusion from the facts recited that the plaintiff was guilty, then the utterance of such alleged slanderous words could not be the basis of a cause of action for slander. Under such circumstances, the persons hearing such words would have no right to believe that defendant charged plaintiff with such acts, but merely that it was defendant's opinion that such facts indicated or showed that the plaintiff was guilty of the acts charged. The effect of this would not be the charging plaintiff with the commission of such acts, but merely that these facts led defendant's mind to this conclusion."

The court rightfully concluded that the instruction incorrectly stated the law applicable to the case. It conveys the idea that one may charge another with a felony of which he is not guilty, without liability, if, in connection with it, he states the facts and information in his possession, and if he makes it appear that his opinion as to the guilt of the accused is based upon the facts stated. Here, there was no attempt to allege or prove the truth of the criminal charges which had been made against plain-

tiff, and the presumption must be that they were untrue. Charges of criminal acts, such as are alleged in the petition, are of themselves actionable and, prima facie, imply malice. One who makes a false charge of larceny or other crimes of that grade against another cannot escape responsibility, by the mere statement of the grounds of his opinion. An untrue imputation of crime, not privileged, is actionable, and one who makes it should be sure that his charge is based upon reliable information and upon sufficient facts. Nothing is said in the instruction as to the extent of the defendant's knowledge, or the sufficiency of the facts upon which he based his charge of guilt. The effect of a slanderous charge based upon insufficient information may be as injurious to the reputation and standing of the accused, as if it were founded on good and sufficient grounds. The defendant cannot defeat the action, or escape the consequences of a slanderous charge, by showing that he did not intend to make the charge which he, in fact, made; nor can he avoid liability for the false imputation of crime, by the fact that it is an expression of opinion. *Johnson v. St. Louis Dispatch Co.* 2 Mo. App. 565; *Gendron v. St. Pierre*, 73 N. H. 419, 62 Atl. 966; 25 Cyc. 360-361. If infamous and false charges might be preferred and justified by the mere statement of the facts upon which the author based his opinion, there would be little redress for slander, and injuries to reputation and character. The remedy would be of little benefit, if one might falsely charge another with larceny by adding that he based his charge on the fact that he found tracks leading from the place where the property was kept to the home of the party charged, or that he found tracks which appeared to be made with shoes of the size worn by such party. If the slanderous words used are calculated to induce the auditors to think the person charged has committed the crime, the injury has been inflicted, and the author is liable. Of course, if the statement, in its entirety, shows that no crime was committed, as if it had been said that a person had killed one whom the auditors knew was living, or if there is an imputation of a crime of which a person could not be guilty, and of which one hearing the statement must know that he could not by any possibility be guilty, no action would lie. *Newell, Slander & Libel*, 3d ed. page 129. To sustain the instruction the defendant refers to the rule stated in 25 Cyc. 298; "Although the words spoken amount of themselves to a charge of larceny, yet, if accompanied with a specification of acts

upon which the charge is based, which show that no such crime was committed, the person of whom the words were spoken has no cause of action."

That rule applies to cases where all the alleged slanderous words, taken together, show that the act characterized as a crime was not in fact a crime, and is wholly inapplicable to cases where the statement specifically imputes a crime, and where the author fortifies the statement with a recital of the facts which led him to make the charge.

It is further contended that the special findings of the jury rendered the error in the instructions immaterial. The jury found, in effect, that the property of defendant was lost and destroyed as alleged; that he had consulted the county attorney in respect to the loss and injury, and on his advice had endeavored, through detectives, to ascertain who were the guilty parties; and that the statements concerning plaintiff were made in an honest effort to carry out the instructions of the county attorney. The defendant had pleaded the matter of privilege in his answer, but that defense was not submitted to the consideration of the jury, and it does not appear that the defendant requested an instruction on the subject. It is true, as defendant contends, that it is the duty of every one to assist in the detection of crime, and to that end he should communicate to the proper officer what he knows

regarding the commission of a crime. *Muel-ler v. Radebaugh*, 79 Kan. 306, 99 Pac. 612.

Statements in themselves slanderous are protected as privileged if made, in good faith, in prosecuting an inquiry into a suspected crime. In this case, there was testimony that the defendant uttered the slanderous words to a number of persons other than the county attorney, and did not, at the time of such utterance, question them as to their knowledge of the commission of the crime, or as to who might have committed the offense. Whether the defendant had acted in excess of the privilege which the law accords was a question in the case, and, as we have seen, the law relating to privilege was not given to the jury. Instead of submitting that defense, the court instructed the jury that, if the defendant uttered and published the statements charging the plaintiff with having committed a crime, the utterance of such statement constituted slander *per se*, and that they should find against the defendant. In the same connection, the jury were instructed that the defendant had failed to allege or prove any justification for the slanderous words, if they were, in fact, uttered. The jury might have returned very different findings if the law of privilege had been stated, and if the erroneous instruction had not been given. Because of the erroneous instruction the trial court properly granted a new trial, and its judgment is affirmed.

**Annotation — Libel and slander: effect of stating the facts upon which charge is made to limit the ordinary meaning of the words used.**

In line with the general rule that words are not slanderous or libelous unless they convey an express imputation of some crime or offense involving moral turpitude, or subjection to ridicule or disgrace, etc., it is the rule that where, as part of the slander or libelous charge, the facts are stated upon which the charge is based or which serve to explain it, and those facts or explanatory matter show that the words were not used in their ordinary meaning, and were not intended to impute the commission of an offense involving moral turpitude or crime, or to subject a person to ridicule or disgrace, etc., the entire statement, construed as a whole, does not constitute actionable slander or libel, without such explanatory matter, the charge would be slanderous *per se*. *Ivey v. Pioneer Sav. & L. Co.* (1897) 113 Ala. 349, 21 So. 531; *Jones v. Bush* (1908)

131 Ga. 421, 62 S. E. 279; *Miller v. Johnson* (1875) 79 Ill. 58; *Walford v. Herald Printing & Pub. Co.* (1893) 133 Ind. 372, 32 N. E. 929; *McCaleb v. Smith* (1897) 22 Iowa, 242; *Deitchman v. Bowles* (1915) 166 Ky. 285, 179 S. W. 249; *Beams v. Beams* (1915) 138 Ky. 818, 129 S. W. 298; *Hawn v. Smith* (1844) 4 B. Mon. (Ky.) 385; *Trabue v. Mays* (1835) 3 Dana (Ky.) 138, 28 Am. Dec. 61; *Brite v. Gill* (1825) 2 T. B. Mon. (Ky.) 66, 15 Am. Dec. 122, s. c. on subsequent appeal (1827) 6 T. B. Mon. 130; *Blackburn v. Clark* (1897) 19 Ky. L. Rep. 659, 41 S. W. 430; *Maccauley v. Elrod* (1892) 14 Ky. L. Rep. 525; *Wing v. Wing* (1876) 66 Me. 62, 22 Am. Rep. 548; *Fausett v. Clark* (1878) 48 Md. 494, 30 Am. Rep. 481; *Randall v. Evening News Asso.* (1894) 101 Mich. 561, 60 N. W. 301; *Cock v. Weatherby* (1845) 5 Smedes & M.



(Miss.) 333; *Hall v. Adkins* (1875) 59 Mo. 146; *Bridgman v. Armer* (1894) 57 Mo. App. 528; *Norton v. Ladd* (1830) 5 N. H. 203, 20 Am. Dec. 573; *Orden v. Riley* (1833) 14 N. J. L. 186, 25 Am. Dec. 513; *Dexter v. Taber* (1815) 12 Johns. (N. Y.) 239; *Phillips v. Barber* (1831) 7 Wend. (N. Y.) 439; *Dempsey v. Paige* (1855) 4 E. D. Smith (N. Y.) 218; *Barnes v. Crawford* (1894) 115 N. C. 76, 20 S. E. 386; *Idol v. Jones* (1829) 13 N. C. (2 Der. L.) 162; *Brown v. Myers* (1883) 40 Ohio St. 99; *Stitzell v. Reynolds* (1871) 67 Pa. 54, 5 Am. Rep. 396; *Findley v. Bear* (1822) 8 Serg. & R. (Pa.) 571; *Pegram v. Styron* (1830) 1 Bail. L. (S. C.) 595; *Delaney v. Kaetel* (1892) 81 Wis. 353, 51 N. W. 559; *Eaton v. White* (1847) 2 Pinney (Wis.) 42; *Lemon v. Simmons* (1888) 57 L. J. Q. B. N. S. (Eng.) 260, 36 Week. Rep. 351; *Campbell v. Ritchie* [1907] S. C. (Scot.) 1097; *Ward v. McBride* (1911) 24 Ont. L. Rep. 555.

But, as pointed out in *GREGORY v. NELSON*, ante, 150, the foregoing rule has no application to cases where the words used are actionable per se, and the explanatory matter or facts upon which the charge is based have the effect of indicating the basis for the charge, and fortifying or affirming the same, rather than of showing that the words were not used according to their ordinary import.

For example, where the reasons for a charge of the commission of a criminal offense do not serve to explain away the accusation, but, in reality, accentuate it, or merely tend to show the grounds for a belief in the truth of a charge, the statement of such facts does not relieve the slander of its actionable character. *Johnson v. St. Louis Despatch Co.* (1876) 2 Mo. App. 565; *Morgan v. Rice* (1889) 35 Mo. App. 591.

In *Gendron v. St. Pierre* (1905) 73 N. H. 419, 62 Atl. 966, a statement of a suspicion that the plaintiff caused his wife's death in order to realize upon insurance which he held upon her life, accompanied by a statement of facts tending to show that the plaintiff purposely neglected to care for his wife when she was ill, was properly found to be actionable.

And, in *Haynes v. Clinton Printing Co.* (1897) 169 Mass. 512, 48 N. E. 275,

a statement that there is a suspicion that the plaintiff is guilty of murder, followed by a statement of the facts upon which the statement is based, and the further statement that there are many who think that no case can be made against the plaintiff, and that it is even doubted if the death of the person alleged to have been killed can be positively established, was held to be slanderous as tending to injure the plaintiff's reputation and standing.

In *Myers v. Dresden* (1875) 40 Iowa, 660, the action was based upon a charge that the plaintiff was a thief, and that he stole lumber of the defendant, and it was shown that the charge was made in a conversation relative to a trespass by the plaintiff upon the lands of the defendant when the former pulled down and carried away certain buildings thereon, and that those who heard the charge knew that it related to this matter, and it was held that the question whether or not the words related to this transaction and were so understood was properly submitted to the jury, and a finding against the defendant upon this point would not be disturbed.

In *Parker v. McQueen* (1847) 8 B. Mon. (Ky.) 16, a charge that the plaintiff stole property of the defendant, followed by an explanation of the circumstances upon which the charge was based, was, however, held to be slanderous, where the intent of the plaintiff in temporarily assuming control over the property of the defendant was a test as to whether or not he intended to steal it, since, under such circumstances, language used by the defendant, in effect, attributed to the defendant a felonious attempt.

So, where the defendant charged the plaintiff with having inclosed her land with his, and deprived her of the use thereof, and followed the charge by calling the plaintiff a stinker and a thief, and used the further language, "You stole my land, you stole my money," neither the statement of facts nor the language used had the effect of qualifying the ordinary meaning of the charge that the plaintiff had stolen the defendant's money, and, hence, it was actionable. *Hamlin v. Fantl* (1903) 118 Wis. 594, 95 N. W. 955. A. G. S.

## MINNESOTA SUPREME COURT.

LAURA V. CARSON et al., Resp'ts.,  
v.  
HENRY C. TURRISH, Appt.  
(Two cases.)

(— Minn. —, 168 N. W. 349.)

**Negligence — imputed — driver of vehicle.**

1. In an action for damages received in a collision at a street crossing between an auto in which the plaintiffs were riding as guests and an auto of the defendant, the evidence sustains the jury's finding that the chauffeur of the defendant was negligent. The negligence, if any, of the driver of the other car, was not imputable to the plaintiffs; and the finding of the jury against the defendant upon the issue of contributory negligence is sustained by the evidence. *For other cases, see Evidence, XII. d; Negligence, II. e, in Dig. 1-52 N. S.*

**Highway — reciprocal rights.**

2. The relative rights of vehicles in a street are, in general, equal and reciprocal, except as fixed by positive law, and the driver of each is under obligation to act with due regard to the rights of others. The court did not err in so charging the jury relative to the rights of the autos at the crossing; nor did it err in refusing the defendant's offer to prove a general custom over the country, and in the city where the collision occurred; that, at street intersections, traffic on main thoroughfares has the right of way, and traffic coming onto such thoroughfares from side streets must exercise special care and caution to avoid collisions.

*For other cases, see Evidence, XI. b; Negligence, I. d, in Dig. 1-52 N. S.*

Headnotes by DIBELL, C.

Note. — The question whether the negligence of a person operating an automobile is imputable to a passenger, so as to preclude a recovery against a third person for the injury, is considered in the note to *Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co.* L.R.A.1915B, 953; and see later cases, *Lynn v. Goodwin*, L.R.A.1915E, 588; *Anthony v. Kiefner*, L.R.A.1915F, 876; *Knoxville R. & Light Co. v. Vangilder*, L.R.A.1916A, 1111; *St. Louis & S. F. R. Co. v. Bell*, L.R.A.1917A, 543; *Jacobs v. Jacobs*, L.R.A.1917F, 253; *Hardie v. Barrett*, L.R.A.1917F, 444; *Farmers' Bank & T. Co. v. Henderson*, L.R.A.1918C, 646, and *Avery v. Thompson*, L.R.A.1918D, 205.

For rules of the road governing vehicles at intersection of streets or when turning across street, see note to *Molin v. Wark*, 41 L.R.A.(N.S.) 346. For other rules of the road, see L.R.A. Indexes, under the title, "Negligence," subtitles, "On highways, private ways, or waters,—rule of the road."

L.R.A.1918F.

**Evidence — opinion — wheel tracks.**

3. The court did not err in permitting a witness, for whose testimony a foundation was laid, to testify as an expert on rebuttal as to wheel tracks on the pavement at the place of the collision, the morning after, and his opinion of the movements of the car, which they indicated.

*For other cases, see Evidence, VII. n, in Dig. 1-52 N. S.*

**Appeal — nonprejudicial error.**

4. The court gave an instruction, requested by the plaintiffs, to the effect that the burden of proving contributory negligence was upon the defendant, and that the presumption was that the plaintiffs were in the exercise of due care. The statement as to the presumption is disapproved; but the giving of it was not prejudicial, and should not result in a new trial.

*For other cases, see Appeal and Error, VII. m, 4, a, (2), in Dig. 1-52 N. S.*

**Damages — permanent injury.**

5. Damages cannot be awarded as for a permanent injury unless there is reasonable certainty that it will be permanent. A charge to the effect that the plaintiff is entitled to damages compensating her for pain and suffering up to the time of the trial, "and for any pain and suffering which, under the evidence, you believe she will sustain in the future as the result of the accident," correctly states the rule.

*For other cases, see Damages, III. i, 1; Trial, III. c, 2, in Dig. 1-52 N. S.*

**Trial — verdict — excess.**

6. The verdicts are not excessive.

*For other cases, see Damages, III. i, 4, in Dig. 1-52 N. S.*

**Appeal — misconduct of counsel.**

7. There was no misconduct of counsel calling for a new trial.

*For other cases, see Appeal and Error, VII. m, 5, in Dig. 1-52 N. S.*

(July 12, 1918.)

The point made in the opinion, that the rule which places upon the defendant the burden of proving contributory negligence on the part of the plaintiff does not rest on an affirmative presumption of care on the part of the plaintiff, is further discussed and exemplified at page 1097 of the note to *Oklahoma City v. Reed*, 33 L.R.A.(N.S.) 1085, on the general subject of the burden of proof as to contributory negligence. The converse proposition, that a presumption of negligence on the part of the defendant does not relieve the plaintiff of the burden of proof in that regard, is discussed and exemplified in the notes to *Cleveland, C. C. & St. L. R. Co. v. Hadley*, 16 L.R.A.(N.S.) 527, and *Hughes v. Atlantic City & S. R. Co.* L.R.A.1916A, 930, under the title, "Relation of doctrine res ipsa loquitur to burden of proof."

On excessiveness of verdicts in actions for personal injuries other than death, see note to *Padrick v. Great Northern R. Co.* L.R.A.1915F, 30.

**A**PPREAL by defendant from orders of the District Court for St. Louis County denying motions for a new trial in actions brought to recover damages for personal injuries, alleged to have been caused by the negligence of defendant's chauffeur. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Washburn, Bailey, & Mitchell, for appellant:

The damages were excessive, and appear to have been given under the influence of passion and prejudice.

Kennedy v. Chicago, M. & St. P. R. Co. 57 Minn. 227, 58 N. W. 878; Thompson v. Chicago, St. P. & K. C. R. Co. 71 Minn. 98, 73 N. W. 707; Bredeson v. C. A. Smith Lumber Co. 91 Minn. 317, 97 N. W. 977, 15 Am. Neg. Rep. 348; Murphy v. South St. Paul, 101 Minn. 341, 112 N. W. 259; Reick v. Great Northern R. Co. 129 Minn. 14, 151 N. W. 408; Brennan v. Minnesota, D. & W. R. Co. 130 Minn. 314, L.R.A.1915F, 11, 153 N. W. 611.

The opinion evidence of witness Buchanan was not admissible at any time, and it was particularly error to admit it in rebuttal at the close of the case.

Hamberg v. St. Paul F. & M. Ins. Co. 68 Minn. 335, 71 N. W. 388; Akin v. St. Croix Lumber Co. 88 Minn. 119, 92 N. W. 537; Moore v. Townsend, 76 Minn. 64, 78 N. W. 880, 6 Am. Neg. Rep. 95; Carlson v. Marston, 68 Minn. 400, 71 N. W. 398, 3 Am. Neg. Rep. 556.

The court erred in its instructions to the jury as to the damages to be allowed the plaintiffs for future pain and suffering.

L'Herault v. Minneapolis, 69 Minn. 261, 72 N. W. 73; McBride v. St. Paul City R. Co. 72 Minn. 291, 75 N. W. 231; Olson v. Chicago, M. & St. P. R. Co. 94 Minn. 241, 102 N. W. 449; White v. Milwaukee City R. Co. 61 Wis. 536, 50 Am. Rep. 124, 21 N. W. 524; Hardy v. Milwaukee Street R. Co. 89 Wis. 183, 61 N. W. 771, 7 Am. Neg. Cas. 283.

Defendant is entitled to a new trial on the ground of misconduct of counsel.

Atherton v. Defreeze, 129 Mich. 364, 88 N. W. 886; Barton v. Bruley, 119 Wis. 326, 96 N. W. 815; Hood v. Chicago & N. W. R. Co. 95 Iowa, 331, 64 N. W. 261; Hooks v. Sprangers, 113 Wis. 123, 87 N. W. 1101, 89 N. W. 113; Cosselman v. Dunfee, 172 N. Y. 507, 65 N. E. 494; English v. Ricks, 117 Tenn. 73, 95 S. W. 189; Rudiger v. Chicago, St. P. M. & O. R. Co. 101 Wis. 292, 77 N. W. 170; Courier Printing & Pub. Co. v. Wilson, 3 Neb. (Unof.) 136, 90 N. W. 1120; MacCarthy v. Whitcomb, 110 Wis. 113, 85 N. W. 707; People v. Dorthy, 156 N. Y. 237,

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50 N. E. 800; Nolan v. Brooklyn City & N. R. Co. 87 N. Y. 63, 41 Am. Rep. 345, 9 Am. Neg. Cas. 624.

Even as between master and servant, the rule as to presumption seems to be limited to cases where there are no eyewitnesses, and the servant is killed.

Labatt, Mast. & S. 2d ed. § 1609; Wigmore, Ev. § 2510; 29 Cyc. 649.

It was error for the court to exclude the questions to the witness, traffic commissioner of the city, and the offer to prove going to show that traffic on a main thoroughfare has the right of way over traffic coming from a side street onto such main thoroughfares.

Elmer v. Mutual S. S. Co. 114 Minn. 257, 130 N. W. 1104, Ann. Cas. 1912B, 1062.

Messrs. Benjamin M. Goldberg, Harry E. Boyle, and Jessé L. Cohen, for respondents:

The doctrine of imputed negligence does not apply in Minnesota.

Follman v. Mankato, 35 Minn. 522, 59 Am. Rep. 340, 29 N. W. 317; Cotton v. Willmar & S. F. R. Co. 99 Minn. 366, 8 L.R.A. (N.S.) 643, 116 Am. St. Rep. 422, 109 N. W. 835, 9 Ann. Cas. 935; McDonald v. Mesaba R. Co. 137 Minn. 275, 163 N. W. 298.

The verdicts were not excessive.

Kitman v. Chicago, B. & Q. R. Co. 113 Minn. 350, 129 N. W. 844; Theisen v. Durst, 138 Minn. 353, 165 N. W. 128; Powers v. Wilson, 138 Minn. 407, 165 N. W. 231.

Rebutting, as it does, the testimony of Oscar Johnson, as to the speed at which he was traveling and as to the time when he first saw the Beck car, evidence of Ray Buchanan was competent, and seems to demonstrate quite clearly that Johnson did not have proper control over his car, while running it at a high rate of speed.

Minnesota & D. Cattle Co. v. Chicago & N. R. Co. 108 Minn. 470, 122 N. W. 493; 38 Cyc. 1343; Waterman v. Chicago & A. R. Co. 82 Wis. 615, 52 N. W. 247, 1136; Palon v. Great Northern R. Co. 129 Minn. 101, 151 N. W. 894; Owens v. Chicago G. W. R. Co. 113 Minn. 49, 128 N. W. 1011; Akin v. St. Croix Lumber Co. 88 Minn. 119, 92 N. W. 537.

The instructions to the jury as to the damages to be allowed plaintiffs for future pain and suffering were correct.

L'Herault v. Minneapolis, 69 Minn. 261, 72 N. W. 73; McBride v. St. Paul City R. Co. 72 Minn. 291, 75 N. W. 231; Olson v. Chicago, M. & St. P. R. Co. 94 Minn. 241, 102 N. W. 449; Johnson v. Northern P. R. Co. 47 Minn. 430, 50 N. W. 473.

The various questions put to Oscar Johnson, as he took the stand on cross-examina-

tion, were perfectly proper as impeaching questions, and that was their purpose, regardless of the fact of whether or not it was so stated.

*Thompson v. Bankers Mut. Casualty Ins.* Co. 128 Minn. 474, 151 N. W. 180, Ann. Cas. 1916A, 277; *Brennan v. Minnesota, D. & W. R. Co.* 130 Minn. 314, L. R. A. 1915F, 11, 153 N. W. 611.

Actions of the chauffeur Johnson, immediately preceding the accident, and his entire conduct, indicated plainly negligence in itself, and therefore proof of any custom would not excuse liability on defendant's part.

*Minneapolis Sash & Door Co. v. Metropolitan Bank*, 76 Minn. 144, 44 L.R.A. 504, 77 Am. St. Rep. 609, 78 N. W. 980; *Larson v. Ring*, 43 Minn. 88, 44 N. W. 1078; *Braaflatt v. Minneapolis & N. Elevator Co.* 90 Minn. 369, 96 N. W. 920; *Empey v. Lovell*, 117 Minn. 521, 134 N. W. 289; 12 Cyc. 1080.

Usage and custom are not binding upon plaintiffs, in the absence of evidence of actual knowledge of the subject.

*Flatt v. D. M. Osborne & Co.* 33 Minn. 98, 22 N. W. 440; *Thompson v. Minneapolis & St. L. R. Co.* 35 Minn. 428, 29 N. W. 148; *Knapp v. Northern P. R. Co.* — Minn. —, 166 N. W. 409.

Mr. J. A. P. Neal also for respondents.

Dibell, C., filed the following opinion:

Two actions for damages for personal injuries received in an automobile collision, in one of which Laura V. Carson was the plaintiff, and in the other her husband George H. Carson, both against Henry C. Turriah, were tried together. There were verdicts for the plaintiffs, and the defendant appeals from the orders denying his motions for a new trial.

1. The plaintiffs were riding in an automobile in Duluth, as guests of a Mr. and Mrs. Beck, and were injured in a collision with the auto of the defendant, driven by his chauffeur. The defendant and his family had attended the theater, he and his wife had been driven home, and the chauffeur was returning alone for some of the family who had stopped at the club. He was going westerly on East Fourth street. The car in which the plaintiffs were riding was going north on Twenty-first avenue east, which intersects Fourth street at right angles. Mrs. Beck was driving. The two cars came into collision at the crossing near the northeastern corner. The Beck car was struck near the wind shield on the right side. It was at 11:15 P. M. of October 14, 1916, and the night was clear. The claim of the plaintiffs is that the defendant's chauffeur was driving at a negligent rate of speed, and that

his negligence was the proximate cause of the injury. The evidence satisfactorily sustains the finding of the jury to that effect, and a recital of it would serve no useful purpose.

The plaintiffs were the guests of the Becks, and the negligence of Mrs. Beck, if any, was not imputable to them, but their personal negligence, contributing to the injury, would prevent a recovery. *Christison v. St. Paul*, 138 Minn. 456, 165 N. W. 273; *McDonald v. Mesaba R. Co.* 137 Minn. 275, 163 N. W. 298, and cases cited. The question of the contributory negligence of the plaintiff was submitted to the jury, and the verdicts for the plaintiffs necessarily include a finding for the plaintiffs on this issue. There is no fault to be found with it, and the evidence is not worth while discussing.

2. The defendant predicates error upon the charge of the court as follows: "The relative rights of vehicles in a public highway are equal and reciprocal. One has no more right than the other, and each is obliged to act with due regard to the movements of others entitled to be upon the street. The driver of neither vehicle is called upon to anticipate negligence on the part of the driver of the other vehicle."

And, in connection with this, it is urged that it was error to sustain an objection to the following offer of proof: "Defendant offers to prove by the witness now on the stand that it is the uniform custom and practice in this city, as well as generally over the country, that traffic on main thoroughfares and main streets has the right of way over traffic coming from side streets or avenues, onto such main thoroughfares, and that traffic coming from side streets, onto main thoroughfares and streets, is required to exercise special care and caution to avoid collisions with traffic on main thoroughfares."

These two matters are conveniently argued together by counsel, and we consider them together.

It was in evidence that Fourth street is a so-called main thoroughfare, and that Twenty-first avenue east is a so-called side street. They are in a residential district. Fourth street is well paved, and carries the double tracks of the street railway. Twenty-first avenue was recently asphalted, comes to Fourth street from the south on an upgrade, and leaves it on an upgrade as it goes north. They are much-used streets, but there is no congestion of traffic on them.

The charge as to the relative rights of vehicles is in general accord with our decisions. *Dunnell's Dig. & Supp.* (Minn.) § 4166, and cases cited. The streets belong

to the public for purposes of travel. The court has been averse to giving, by its decisions, an arbitrary right or a priority in right of use to one over another. It has applied the general principle stated to the rights of the public and a street railway, due regard being had to the character of the railway use. *Dunnell's Dig. & Supp. (Minn.)* § 9013, and cases cited. All users, pedestrians, drivers of horse-drawn vehicles, chauffeurs, and motormen must respect the reciprocal rights of others, and must exercise due care to avoid injuring them; and the factors to be considered in measuring conduct are many.

The propriety of the proffered proof of custom has had careful attention. That on an issue of negligence a known custom or usage may, in a proper case, be proved, as bearing upon negligence or the absence of it, is not to be questioned. *Dunnell's Dig. & Supp. (Minn.)* §§ 7049, 7050. So, in *O'Neil v. Potts*, 130 Minn. 353, 153 N. W. 856, 10 N. C. C. A. 562, it was held proper to show a practice among drivers of autos to extend the hand to the side before stopping, as a signal to cars following. The question presented by the offer of proof, is different. It was sought to show that main street traffic has a right of way over side street traffic, something more than an equal right at the crossing, and that the side street traffic is bound to exercise "special care and caution to avoid collisions with traffic on main thoroughfares." In effect, it was sought to establish something approximating a rule or law of the road, though we do not understand counsel to claim that the custom for which he contends gives an arbitrary right, though a substantial advantage. We think the ruling was correct. Indeed, it is the rule in many jurisdictions, that the vehicle first at the crossing, without negligence, has the right of way across. *Elgin Dairy Co. v. Shepherd*, 183 Ind. 466, 108 N. E. 234, 109 N. E. 353; *Mayer v. Mellette*, — Ind. App. —, 114 N. E. 241; *New Jersey Electric R. Co. v. Miller*, 59 N. J. L. 423, 36 Atl. 885, 39 Atl. 645, 1 Am. Neg. Rep. 476; *Earle v. Consolidated Traction Co.* 64 N. J. L. 573, 46 Atl. 613, 8 Am. Neg. Rep. 308, 98 Atl. 315; *Knox v. North Jersey Street R. Co.* 70 N. J. L. 347, 57 Atl. 423, 95; *Rabinowitz v. Hawthorne*, 89 N. J. L. 1 Ann. Cas. 164; *McClung v. Pennsylvania Taximeter Cab Co.* 252 Pa. 478, 97 Atl. 694; *Yuill v. Berryman*, 94 Wash. 458, 162 Pac. 513; *Buhrens v. Dry Dock, E. B. & B. R. Co.* 53 Hun, 571, 6 N. Y. Supp. 224, affirmed in 125 N. Y. 702, 26 N. E. 752; *Toledo Electric Street Co. v. Westenhuber*, 12 Ohio C. D. 22; *Rupp v. Keebler*, 175 Ill. App. 619; 13 R. C. L. p. 278, § 230; notes in 1

Ann. Cas. 164, and L.R.A.1917D, 690, 693; *Babbitt, Motor Vehicles*, § 382; *Berry Automobiles*, § 140; *Huddy, Automobiles*, § 84d; 14 Decen. Dig. Mun. Corp. § 705 (2). Such cases as these are not in hostility to the principle of equality of right in the streets. As a part of such equality, they suggest the right of the one first at a crossing to use it. In none is the right an absolute one, exerciseable arbitrarily, or irrespective of other conditions present, or without regard to the rights and safety of others. It is little, if anything, more than a convenient and usually fair rule of guidance for travelers; and in no sense is it a fixed test of negligence. It must be exercised with decent respect to the rights of others, and with due regard to the character of the travel and other conditions present. Some cases seem not to adopt a specific rule, perhaps have had no occasion for doing so in the cases before them, and are content to leave the general question of negligence to be determined from all the facts surrounding. See *Hennessey v. Taylor*, 189 Mass. 583, 3 L.R.A.(N.S.) 345, 76 N. E. 224, 4 Ann. Cas. 396, 19 Am. Neg. Rep. 285; *Gilbert v. Burque*, 72 N. H. 521, 57 Atl. 927, 16 Am. Neg. Rep. 496; *Koeater v. Decker*, 22 Misc. 353, 49 N. Y. Supp. 276; *Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335; *Virgilio v. Walker*, 254 Pa. 241, 98 Atl. 815; 14 Decen. Dig. Mun. Corp. § 705 (2); *Dunnell's Dig. & Supp. (Minn.)* §§ 4166 et seq. Doubtless, the character of the crossing, the topography, the character of the vehicle, the nature and extent of the traffic, and the fact that one is prior in time, and one or the other must yield, are practical considerations. In some states there are traffic regulations, established by statute or ordinance, giving a right of way. We recently had under consideration an ordinance which gave traffic on a specified street the right of way over traffic on a specified intersecting street. *Bruce v. Ryan*, 138 Minn. 264, 164 N. W. 982. In some, the right of way is given to traffic on north and south streets, or on east and west streets, or is made to depend on the right or left approach of the drivers, and in some the right is based on the character of the traffic. See notes in L.R.A. 1915D, 1021, and L.R.A.1917D, 623; 14 Decen. Dig. Mun. Corp. § 703 (1). Our statute now requires a driver to yield to one approaching the intersection from his right. *Laws 1917*, chap. 119, § 22 (*Gen. Stat. Supp. 1917*, § 2552). It is clear that there is no universal custom that traffic on main thoroughfares has the right of way, and that side street traffic must yield and exercise special care. It is contrary to the cases. They recognize a rule inconsistent with it.

We do not understand that there is hostility between the cases suggesting that the one first at the crossing has priority, and those which, without mentioning the question of first arrival, require of all, care appropriate to the situation and commensurate with the dangers. Nor are we now concerned with these matters, except as they bear upon the custom sought to be proved by the defendant. It seems quite clear that the Beck car was there first, but, upon the record, we are not concerned with that question. We may note that there was no offer to prove a particular custom at this crossing, of which the two drivers or either of them was cognizant.

The court was right in its general statement of equality of right at the crossing, and in refusing the offered proof of a custom giving the right of way to the traffic on the street and requiring special care on the part of traffic coming onto the street from the avenue.

3. A witness who had considerable familiarity with autos, their make, equipment, operation and driving, was at the scene of the collision the morning following. He testified as to the wheel marks which he found on the pavement, and gave his opinion of what they indicated relative to the movement of the defendant's car. The witness was sufficiently qualified to give an opinion. The conditions were so nearly as at the time of the accident that it was not error to receive his testimony, and it might be of value to the jury. It had a tendency to contradict the testimony of the chauffeur as to the movements of his car, and was receivable in rebuttal.

4. Upon the request of the plaintiffs this instruction was given: "The burden of proving contributory negligence on the part of the plaintiffs, or either of them, in this action, is upon the defendant. The presumption is that the persons injured were in the exercise of due care at the time of the injury."

Counsel were unfortunate in incorporating a statement of presumption of due care on the part of the plaintiffs. The burden of proof of want of due care, which is simply contributory negligence, was upon the defendant. There was no presumption that either the plaintiffs or the defendant were negligent. There was no presumption that either was not at fault, except in the sense that the burden of proving fault was on the other. Where there is evidence bearing on the question of contributory negligence, and the burden of proof is put upon the defendant, where it belongs in this state, there should not be added a statement that it is presumed that the plaintiff was in the exer-

cise of due care. The statement of the burden of proof gives the law for the guidance of the jury, and the plaintiff is not entitled to the statement of a presumption. When death results, and especially where there is no direct evidence, and in some states only then, the presumption is recognized, and for very evident reasons, and is considered in determining whether the verdict is sustained. The general doctrine is well established in Minnesota. *Dunnell's Dig. & Supp. (Minn.)* § 7032, and cases. And it is held proper to state the presumption in the charge to the jury. *Baltimore & P. R. Co. v. Landrigan*, 191 U. S. 461, 48 L. ed. 262, 24 Sup. Ct. Rep. 137; *Texas & P. R. Co. v. Gentry*, 163 U. S. 353, 41 L. ed. 186, 16 Sup. Ct. Rep. 1104; *Northern P. R. Co. v. Spike*, 57 C. C. A. 384, 121 Fed. 44; *Hutchinson v. Richmond Safety Gate Co.* 247 Mo. 71, 152 S. W. 52. And see generally, *Tiffany, Death by Wrongful Act*, § 189; 1 *Thomp. Neg.* §§ 395-402; 8 *Enc. Ev.* 897; 2 *Jones, Ev.* § 185; *Wigmore, Ev.* § 2510. The question of the propriety of mentioning a presumption in the charge does not seem often to have arisen in other than death cases. A similar instruction to that given in the case before us has been sustained, though without particular consideration. *Baltimore & O. R. Co. v. McKenzie*, 81 Va. 71. It has also been held erroneous. *Rapp v. St. Joseph & I. R. Co.* 106 Mo. 423, 17 S. W. 487, 12 *Am. Neg. Cas.* 190; *Moberly v. Kansas City, St. J. & C. B. R. Co.* 98 Mo. 183, 11 S. W. 569. And it has been disapproved, but the giving of it held not ground for reversal. *Central R. Co. v. Smith*, 74 Md. 212, 21 *Atl.* 706, 3 *Am. Neg. Cas.* 715. The general charge fully covered the essential features of the proof of negligence and contributory negligence. A very favorable instruction was given at the defendant's request. We cannot believe that the jury were misled, and no criticism or suggestion was made at the time. And, on the whole, the claim of contributory negligence of the plaintiffs, who were guests, was not, as we view the evidence, and from a practical standpoint, a very live question. We disapprove the particular portion of the instruction, but hold that, considering the immediate connection in which it was given, the charge as a whole, and the issues for trial, it could not have misled, and should not result in a new trial.

5. In referring to the damages sustained by Mrs. Carson the court instructed the jury: "She is entitled to damages which will fairly compensate her for the pain and suffering which she has sustained up to this time, and for any pain and suffering which, under the evidence, you believe she will sus-

tain in the future, as the result of the accident that we have under consideration. You should allow her such damage as will fairly compensate her for any permanent injuries which she has sustained."

It is the settled law in this jurisdiction that to justify an award of damages as will for permanent injuries, there must be a reasonable certainty that they will be permanent, and not a mere chance or probability. *L'Herauld v. Minneapolis*, 69 Minn. 261, 72 N. W. 73; *McBride v. St. Paul City R. Co.* 72 Minn. 291, 75 N. W. 231; *Olson v. Chicago, M. & St. P. R. Co.* 94 Minn. 241, 102 N. W. 449. Counsel for the defendant excepted to the charge of the court, called attention to the reasonable certainty rule, and referred to the charge as if it were one authorizing a recovery for such suffering as Mrs. Carson "might sustain" in the future. Evidently, this was in misapprehension of the language of the court, for the words used were "will sustain," and not "might sustain." The reason of the reasonable certainty rule is that uncertain and speculative damages are not recoverable. The word "will" is one of certainty, and the word "may" is one of speculation and uncertainty. This is indicated in *Olson v. Chicago, M. & St. P. R. Co.* supra, where it was suggested that a correct charge was like the one given in the case at bar; and, even there, it was held that the use of "may," instead of "will," was not misleading under the facts of the case. The charge of the court was correct. The only complaint that can be made is that the court did not go farther, and say that it must be reasonably certain that the suffering would be permanent. This was not specifically asked, and there was no error.

6. The verdict for Mrs. Carson was for \$8,125, of which we may assume \$125 was for the loss of clothing, and that for Mr. Carson was for \$2,000. The defendant claims that they are excessive.

Mrs. Carson was severely bruised, there were some superficial scalp wounds, one thumb was broken, there was a gash 2½ inches down across the eyebrow, her nose was flattened, her right eye was injured, and apparently she is in a neurasthenic condition. She was unconscious for a day or so, and was in the hospital for two weeks. She claims that she has suffered much and is still suffering. There is some facial disfigurement, the extent of which the record does not make nearly so definite as it might. The most important injury is to the eye. From the testimony of the physicians, the jury might conclude that the double vision, with which it is conceded she is affected, is substantially permanent, cannot be cured or

improved by an operation, nor practically corrected by the use of glasses. Mr. Carson sustained some injury, but the record leaves it indefinite. He did not make much use of a physician. He claims to have pain in his hips, and his osteopathist ascribes it to an injury to the pelvic bones. He claims that it disables him from work. He is the manager of a wholesale drug house. The extent of interference with his work is not shown. There is no evidence as to the value of his time, and no specific claim is made for the value of lost time. He incurred expenses for the care of his wife, amounting to something like \$200. The Carsons were each forty years of age, and had three children. Mrs. Carson was usually able to perform her household duties. It appears that they were accustomed to be together much, and to attend entertainments and social gatherings. If all that the jury might find as to the conditions of Mrs. Carson's eye, and attendant injuries, including facial disfigurement, is taken as established, a very great deal of value personal to herself is taken out of life, and her husband suffers appreciably the loss of her society and companionship, for which he is entitled to compensation. Quite likely the parties exaggerate their injuries. The doctors may be mistaken. Often there is marked improvement at the end of litigation. These were considerations present with the jury. The verdicts seemed, to the trial court, large. So do they to us. The trial court, in much better position than we to determine the question, thought they should not be disturbed. The record does not justify our interference.

7. There is a claim of misconduct of counsel for the plaintiffs. On the cross-examination of the chauffeur relative to convictions in the municipal court, counsel incorporated suggestions that he was a reckless and careless driver. That the purpose of showing convictions was to affect credibility was not suggested. Objections were sustained, and counsel was persistent in repeating questions instead of excepting to the rulings and making his record. Apparently some of the testimony should have been received. There was also an insinuation that the chauffeur had been discharged by a former employer. There was a conscious effort to get to the jury the suggestion that he was a careless and reckless driver. It was not long continued, and does not seem to have been considered at the time very important. While objectionable, and subject to criticism, it was not of a character calling for a new trial. Orders affirmed.

## NORTH DAKOTA SUPREME COURT.

JOHN McCARTY et al.

v.

CHARLES GOODSMAN, also known as  
Charles W. Goodman, et al.

(— N. D. —, 167 N. W. 503.)

**Limitation of actions — mortgage — acceleration clause.**

1. Where an acceleration clause in a mortgage provides that, upon the default of the mortgagor, it shall be legal for the mortgagee to declare the whole sum secured by the mortgage to be due, the entire debt does not become due, upon the failure to pay an instalment note, so as to start the Statute of Limitations running against the action to foreclose, in the absence of a declaration to that effect by the holder of the mortgage.

*For other cases, see Limitation of Actions, II. b, in Dig. 1-52 N. S.*

**Same — what governs.**

2. For the purpose of applying the Statute of Limitations, the cause of action to foreclose a mortgage is to be considered independently, and is not affected by the Statute of Limitations, barring an action to enforce a personal liability upon the notes secured by the mortgage.

*For other cases, see Limitation of Actions, I. c, in Dig. 1-52 N. S.*

**Same — when action accrues.**

3. Where a mortgage is given to secure an entire debt, which is represented by instalment notes, falling due at different dates, and where it does not appear that the holder of the mortgage elected, under the acceleration clause, to treat the whole sum as due upon the default in the payment of one of the notes first maturing, the cause of action to foreclose the mortgage for the entire debt will be held to have first accrued upon the maturity of the last note.

*For other cases, see Limitation of Actions, II. b, in Dig. 1-52 N. S.*

**Statute — construction — constitutionality.**

4. Where the language of a statute is apparently susceptible of an interpretation which would render it unconstitutional, as authorizing the taking of property without due process of law, if possible, the statute will be so construed as to render it constitutional, and to this end it may be given a limited application.

*For other cases, see Statutes, II. a, in Dig. 1-52 N. S.*

**Attorney — lien — foreclosure.**

5. Section 6878, Comp. Laws 1913, construed, and held, not to authorize the fore-

closure of an attorney's lien by advertisement, under the provisions of § 8125, Comp. Laws 1913.

*For other cases, see Attorneys, II. c, 2, in Dig. 1-52 N. S.*

**Subrogation — to attorney's lien.**

6. The purchase, at a void foreclosure sale, of papers which are subject to an attorney's lien, is held, under the circumstances of this case, to entitle the purchaser, in equity, to the benefit of the claim upon which the lien is based.

*For other cases, see Subrogation, I. in Dig. 1-52 N. S.*

(Robinson, J., dissents in part.)

(January 17, 1918.)

CROSS APPEALS from a judgment of the District Court for Pierce County in favor of plaintiffs in an action brought to foreclose a mortgage on certain real estate, plaintiff McCarty appealing from so much of the judgment as ordered payment of certain of the proceeds of the sale to defendant Styles, as assignee of an attorney's lien, and defendant Styles appealing from so much as demanded a review and trial de novo of certain questions of fact. Affirmed.

The facts are stated in the opinion.

Messrs. Harold B. Nelson and Albert E. Cogger, for plaintiff McCarty:

An attorney's lien is strictly dependent upon continuity of possession.

Heard v. Cherry, 145 Ky. 80, 140 S. W. 59; Pollock v. Aikens, 4 S. D. 374, 57 N. W. 1; Wisconsin, I. & N. R. Co. v. Given, 69 Iowa, 581, 29 N. W. 611; Howe v. Mutual Reserve Fund Life Asso. 115 Iowa, 285, 88 N. W. 338; 2 Mechem, Agency, 2d ed. § 2272.

The acknowledgment of the mortgage by Goodman was a re-execution and redelivery of the mortgage.

Lloyd v. Oates, 143 Ala. 231, 111 Am. St. Rep. 39, 38 So. 1022; McClendon v. Equitable Mortg. Co. 122 Ala. 384, 25 So. 30; Chivington v. Colorado Springs, 9 Colo. 597, 14 Pac. 212; First Nat. Bank v. Glenn, 10 Idaho, 224, 109 Am. St. Rep. 204, 77 Pac. 623; Currier v. Clark, 145 Iowa, 613, 124 N. W. 622; Gribben v. Clement, 141 Iowa, 144, 133 Am. St. Rep. 157, 119 N. W. 596; Godsey v. Virginia Iron, Coal & Coke Co. 26 Ky. L. Rep. 657, 82 S. W. 386; Meazels v. Martin, 93 Ky. 50, 18 S. W. 1028; Duff v. Wynkoop, 74 Pa. 300; Northwestern Loan & Bkg. Co. v. Jonasen, 11 S. D. 566, 79 N. W. 840; Newton v. Emerson, 66 Tex. 142, 18 S. W. 348; Clough v. Clough, 73 Me. 487, 40 Am. Rep. 386; Bartlett v. Drake, 100 Mass. 175, 97 Am. Dec. 92, 1 Am. Rep. 101; Adams v. Field, 21

Headnotes by BIRDZELL, J.

**Note.** — As to effect of acceleration provision in mortgage or note to start the Statute of Limitations running, see annotation following this case, post, 169.

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Vt. 267; Harwell v. Zimmerman, 157 Ala. 473, 47 So. 722.

Goodsman's absence from North Dakota after the mortgage had been signed, and before October 27th, 1904, when the deed from Goodsman to the Maddock bank was recorded, tolled the statute.

Colonial & U. S. Mortg. Co. v. Northwest Thresher Co. 14 N. D. 147, 70 L.R.A. 814, 116 Am. St. Rep. 642, 103 N. W. 915, 8 Ann. Cas. 1160; Paine v. Dodds, 14 N. D. 189, 116 Am. St. Rep. 674, 103 N. W. 931.

Persons who are the real defendants in a suit at equity, and who, as solicitors, conduct and control the defense in the name of the nominal defendant, are bound by the decree rendered, as fully as if they were formal parties; as the term "party" includes those who are strictly interested in the subject-matter of the suit, know of its pendency, and have the right to control and direct and defend it.

Parsons v. Urie, 104 Md. 238, 8 L.R.A. (N.S.) 559, 64 Atl. 927, 10 Ann. Cas. 278; Baltimore v. United R. & Electric Co. 108 Md. 64, 16 L.R.A. (N.S.) 1009, 69 Atl. 436; Kaye v. Louisville, 13 Ky. L. Rep. 114, 14 S. W. 679; Sturdivant Bank v. Wilson, 87 Mo. App. 534; Glide v. Dwyer, 83 Cal. 477, 23 Pac. 706.

Campbell never had an attorney's lien, and Styles did not and could not buy it.

Thornton, Attorneys at Law, §§ 272, 575, 576; Jackson v. American Cigar Box Co. 141 App. Div. 195, 126 N. Y. Supp. 58; Dubois's Appeal, 38 Pa. 231, 80 Am. Dec. 478; Clark v. Sullivan, 3 N. D. 280, 55 N. W. 733; Lown v. Casselman, 25 N. D. 44, 141 N. W. 73.

Mr. Asa J. Styles, in propria persona:

By the payment of the principal obligations, all of the pledged notes were released from the lien of the pledges.

31 Cyc. 851, 853.

The fact that a mortgage is given to secure the payment of an entire sum, which is payable in instalments, does not prevent the running of the Statute of Limitations against each instalment as it becomes due.

George v. Butler, 28 Wash. 456, 57 L.R.A. 396, 90 Am. St. Rep. 756, 67 Pac. 263; Presidio County v. Noel-Young Bond & Stock Co. 212 U. S. 75, 53 L. ed. 409, 29 Sup. Ct. Rep. 237; 25 Cyc. 1106; Davis v. Harrington, 53 Ark. 5, 13 S. W. 216; De Uprey v. De Uprey, 23 Cal. 352; Washington Loan & T. Co. v. Darling, 21 App. D. C. 132; Burnham v. Brown, 23 Me. 400; Baltimore & H. de G. Turnp. Co. v. Barnes, 6 Harr. & J. 57; Wood v. Cullen, 13 Minn. 394, Gil. 365; Berry v. Doremus, 30 N. J. L. 399; Mason v. New York, 28 Hun, 116; Pelton v. Bemis, 44 Ohio St. 51, 4 N. E.

714; Adelbert College v. Toledo, W. & W. R. Co. 5 Ohio S. & C. P. Dec. 14, 3 Ohio N. P. 15; Bush v. Stowell, 71 Pa. 208, 10 Am. Rep. 694; Overton v. Tracey, 14 Serg. & R. 311; Miles v. Kelly, — Tex. Civ. App. —, 25 S. W. 724; Morrill v. Smith County, — Tex. Civ. App. —, 33 S. W. 899; 25 Cyc. pp. 1089, note 51, 1107; Clark v. Iowa City, 20 Wall. 583, 22 L. ed. 427; Amy v. Dubuque, 98 U. S. 470, 25 L. ed. 228; Griffin v. Macon County, 2 L.R.A. 353, 36 Fed. 885; Westcott v. Whiteside, 63 Kan. 49, 64 Pac. 1032; Paine v. Dodds, 14 N. D. 197, 116 Am. St. Rep. 674, 103 N. W. 931.

The acceleration clause in the mortgage gave the holder the right to begin foreclosure at once, on default in the earlier notes, and the statute commenced to run from that date, and both the earlier and the later notes are all outlawed.

Boyd v. Buchanan, 176 Mo. App. 56, 162 S. W. 1075; Central Trust Co. v. Meridian Light & R. Co. 106 Miss. 431, 51 L.R.A. (N.S.) 151, 63 So. 575, 64 So. 216; Hemp v. Garland, 4 Q. B. 519, 114 Eng. Reprint, 994, 3 Gale & D. 402, 12 L. J. Q. B. N. S. 134, 7 Jur. 302; Reeves v. Butcher [1891] 2 Q. B. 509, 60 L. J. Q. B. N. S. 619, 65 L. T. N. S. 329, 39 Week. Rep. 626; First Nat. Bank v. Peck, 8 Kan. 660; Ryan v. Caldwell, 106 Ky. 543, 50 S. W. 966; Wheeler & W. Mfg. Co. v. Howard, 28 Fed. 741; Harrison Mach. Works v. Reigor, 64 Tex. 89; Dodge v. Signor, 18 Tex. Civ. App. 45, 44 S. W. 926; Singleton v. Heriott, 3 Rich. L. 321; Snyder v. Miller, 71 Kan. 410, 69 L.R.A. 250, 114 Am. St. Rep. 489, 80 Pac. 970; Pierce v. Shaw, 51 Wis. 316, 8 N. W. 209; San Antonio Real Estate Bldg. & L. Asso. v. Stewart, 94 Tex. 441, 86 Am. St. Rep. 864, 61 S. W. 386; Manitoba Mortg. & Invest. Co. v. Daly, 10 Manitoba L. R. 425; Westcott v. Whiteside, 63 Kan. 49, 64 Pac. 1032; Lycoming F. Ins. Co. v. Batcheller & Sons, 62 Vt. 148, 19 Atl. 982; Hunt v. Roberts, 45 N. Y. 691; Parks v. Cooke, 3 Bush. 168; Noell v. Gaines, 68 Mo. 649; Salmon v. Claggett, 3 Bland, Ch. 179; Green v. Frick, 25 S. D. 342, 126 N. W. 579; Morre v. Sargent, 112 Ind. 484, 14 N. E. 466; McFadden v. Brandon, 8 Ont. L. Rep. 610; Germond v. Hermosa Ice Co. 9 S. D. 387, 69 N. W. 578; Central Trust Co. v. Meridian Light & R. Co. — Miss. —, 51 L.R.A. (N.S.) 156, 64 So. 216, 106 Miss. 431, 63 So. 575; Spesard v. Spesard, 75 Kan. 87, 88 Pac. 576; Buchanan v. Berkshire L. Ins. Co. 96 Ind. 510; White v. Miller, 52 Minn. 367, 19 L.R.A. 673, 54 N. W. 736; Rasmussen v. Levin, 28 Col. 449, 65 Pac. 94; Banzor v. Richter, 68 Misc. 192, 123 N. Y. Supp. 678; Malcom v. Allen, 49 N. Y. 448; Brownlee v. Arnold, 60 Mo. 79; Kelly v. Kershaw, 5 Utah, 295, 14 Pac. 804.

An attorney's lien may be foreclosed by advertisement under § 6878, N. D. Comp. Laws, and this lien foreclosure, under that section, transferred to Styles the title to the notes and mortgage.

*Black v. Minneapolis & N. Elevator Co.* 7 N. D. 129, 73 N. W. 90; *Mitchell v. Monarch Elevator Co.* 15 N. D. 495, 107 N. W. 1085, 11 Ann. Cas. 1001; *Schlosser v. Moores*, 16 N. D. 185, 112 N. W. 78; *Wonser v. Walden Farmers Elevator Co.* 31 N. D. 382, 153 N. W. 1012; *Garr. S. & Co. v. Clements*, 4 N. D. 559, 62 N. W. 640; *Grove v. Great Northern Loan Co.* 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345.

The judgment is not sustained by the findings of fact or conclusions of law.

*Second Nat. Bank v. First Nat. Bank*, 8 N. D. 50, 76 N. W. 504.

*Mr. Paul Campbell*, in propria persona:

It is conclusive on all parties to this action, that there was a debt, and a lien securing same, on the four McCarty notes and the mortgage, and a pledge of the Finch note, making it subject to the lien to the extent of any surplus over the amount of the pledge.

*Noble v. McIntosh*, 23 N. D. 59, 135 N. W. 663; *Powers v. First Nat. Bank*, 15 N. D. 466, 109 N. W. 361; *Tee v. Noble*, 23 N. D. 228, 135 N. W. 769; *Boschker v. Van Beek*, 19 N. D. 104, 122 N. W. 338; *Cotton v. Horton*, 22 N. D. 5, 132 N. W. 225; *Farmers Secur. Bank v. Martin*, 29 N. D. 278, L.R.A. 1915D, 432, 150 N. W. 572.

*Birdzell, J.*, delivered the opinion of the court:

This is an action for the foreclosure of a mortgage on 160 acres of land, securing the payment of \$700 and interest. Judgment was entered in the district court of Pierce county in favor of the plaintiff, but it was ordered that certain of the proceeds of the foreclosure sale be paid to the defendant Styles, as assignee of an attorney's lien, existing in favor of the defendant Campbell. The defendant Styles appealed from the judgment, demanding a review and trial de novo of certain questions of fact, which are set forth in seventy-seven specifications. The plaintiff McCarty also appealed, specifying errors in the holding of the trial court, sustaining the attorney's lien of defendant Campbell and entering judgment therefor in favor of Styles as assignee. The defendant and respondent Campbell moves to dismiss the latter appeal as to him, upon the ground that there has been no settlement of the statement of the case.

The facts necessary to an understanding of the questions involved in this matter are as follows:

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In 1906 Styles purchased from a bank, of which his brother was cashier, a quarter section of land, subject to an encumbrance of \$500 in the shape of a mortgage owned by the Union Central Life Insurance Company. It developed later, however, that, in addition to the mortgage mentioned, the former owner of the land, one Charles W. Goodsman, had given the mortgage in question in this suit to secure the payment of five promissory notes, aggregating \$700. These notes and mortgage ran to Theodore P. Scotland & Company. Soon after the discovery by Styles of the Scotland & Company mortgage, he brought an action (February, 1907) to quiet his title as against the mortgagee. In that action the validity of the Scotland & Company mortgage was upheld by the judgment of the trial court, which judgment was affirmed by this court in *Styles v. Theo. P. Scotland & Co.* 22 N. D. 469, 134 N. W. 708.

In the action to quiet title, the defendant Scotland & Company was represented by Paul Campbell, a party defendant in this action. Campbell had obtained possession of all the above-mentioned notes, and introduced them in evidence to substantiate his client's claim. Not having been fully paid for his services he later claimed an attorney's lien upon them.

In August, 1912, McCarty attempted to foreclose the mortgage in suit by advertisement, claiming to be the owner of the entire obligation secured thereby. In September, a restraining order was obtained, restraining further foreclosure proceedings under the advertisement. This order was based upon three affidavits, setting forth, among other defenses, Campbell's lien. Nothing further having been done by way of realizing upon the securities, Campbell started foreclosure proceedings under his lien in August, 1913. After six days' published notice, the lien was foreclosed, by advertisement, by the sale of all of the notes on August 28, 1913, at which sale Styles became the purchaser, the amount paid by him being \$173.17. On October 18, 1913, or soon thereafter, the exact date being immaterial, this action was begun by McCarty and Finch, Van Slyck, & McConville, for the foreclosure of the mortgage in question. The complaint alleges an assignment from Theodore P. Scotland & Company to John McCarty of all of the notes, excepting a \$100 note, as of July, 1907, and an assignment of the \$100 note to Finch, Van Slyck, & McConville, as of October 1, 1904. It also disputes Campbell's lien, and alleges the facts with reference to the foreclosure thereof. The defendants Styles and Campbell answered separately. The answer of the former

covers fifteen printed pages, and sets forth five defenses to the action. (In reality, it is an argument of the case.) Briefly stated, the defenses set forth are a reliance upon the title secured through the foreclosure of the attorney's lien, an estoppel as against the plaintiffs to foreclose the mortgage on the ground that, in the previous suit of Scotland & Company against Styles, the notes and mortgage had been held to be the property of Scotland & Company; also, that the defendants in this case are not precluded, by the former judgment, from showing that the mortgage itself is void, by reason of not having been executed by the mortgagor.

The answer of Campbell denies the consideration for the alleged assignment of the \$100 note from Scotland & Company to Finch, Van Slyck, & McConville, and alleges that the assignment of the four notes to McCarty was an assignment to him as trustee for the benefit of the creditors of Scotland & Company; also, that the Finch, Van Slyck, & McConville assignment was collateral to indebtedness which was afterwards fully paid; that the possession of the notes was not delivered to the assignees; that plaintiffs, by reason of their knowledge and acquiescence in his defense of the suit against Scotland & Company, are precluded and estopped, as against him and his successor in interest, to dispute the rights which Styles obtained as purchaser at the lien foreclosure sale.

The findings, conclusions, and judgment of the trial court are in accord with the questions and principles discussed in a comprehensive memorandum decision which was rendered in disposing of the case, and the questions which arise on Styles's appeal are foreshadowed in that opinion. The learned trial judge considered that four questions were involved: First, "What is the effect of the judgment and decree entered in the case of Styles v. Theo. P. Scotland & Company, described in finding of fact No. 8?" Second, "Has the Statute of Limitations run since said judgment and decree was entered, so as to bar this foreclosure, sought in the complaint?" Third, "Did defendant Campbell have a lien on the personal property, to wit, the notes and mortgage sought to be foreclosed in this action?" Fourth, "If such an attorney's lien existed, was it foreclosed?"

While the appellant Styles asks for a review of seventy-seven specifications of facts, the mere enumeration of which covers thirty-three pages of his brief, the real questions involved in this appeal are those relating to the propriety of the adverse decision of the trial court, upon the four questions discussed in the memorandum

decision, and the correctness of certain findings of fact necessary to sustain the decision and judgment thereunder. In the argument of the appellant Styles, the errors assigned are grouped under nineteen heads, and the legal propositions therein raised, which merit discussion, will be considered in the order appealing to us as most logical, and with such brevity as is consistent with a comprehensive review of the real questions presented on the record.

It is claimed that the plaintiff's action is barred by the Statute of Limitations. In support of this contention the appellant Styles invites our attention to the fact that two of the notes secured by the mortgage in question fell due October 1, 1903. This action was not commenced until October 18, 1913, or soon thereafter. The mortgage was given to secure a debt of \$700, which was represented by five promissory notes, dated August 21, 1903, the amounts and maturity of which are as follows: \$250, October 1, 1903; \$50, October 1, 1903; \$100, October 1, 1904; \$50, October 1, 1905; and \$250, October 1, 1906. The mortgage securing these notes contains an acceleration clause as follows: "And the said Charlie Goodman does covenant and agree . . . to pay said sums of money above specified at the time and in the manner above mentioned. . . . And if default be made by the party of the first part in any of the foregoing provisions, it shall be legal for the party of the second part, its successors and assigns, or its attorney, to declare the whole sum above specified to be due."

The mortgage also contains a provision, empowering the mortgagee to sell the premises, under the statute, in case of default in the payment of any part of the money due upon the notes. The argument is that, inasmuch as the mortgagee had a right, immediately upon the default in the payment of the first notes, to foreclose the mortgage, and, having allowed more than the statutory period to elapse since the first default before bringing this action, the action is barred by the statute. Comp. Laws, 1913, § 7374. That this contention is unsound appears clear to us, after consideration of the many authorities cited by counsel. The acceleration clause only gives to the mortgagee a right, upon default in any part, to declare the whole debt due. It is clear that such a provision does not operate automatically to make the whole sum due, as a matter of law. It may well be, as contended by counsel, that it is not necessary for the mortgagee to take any affirmative steps whatsoever, before bringing an action or initiating foreclosure proceedings, but from

this it does not follow that there must not be an exercise of the option before the action or the right to foreclose matures. The bringing of an action is, in itself, a sufficient declaration that the remainder of the amount claimed is due, but without the bringing of an action, and without other evidence of an exercise of the option, it cannot be said that a cause of action has accrued. It is one thing to say that the bringing of an action is a sufficient determination of an option to declare the whole sum due (*Doolittle v. Nurnberg*, 27 N. D. 521, 147 N. W. 400), and quite another thing to say that the option must be held to have been exercised, in the absence of any evidence whatever of an election. The logic of the appellant, if applied to a possible situation where more than ten years might elapse between the first default and the maturity of the last notes secured by the mortgage, would require a holding that the right to foreclose the mortgage upon the nonpayment of the last notes was barred, before the arrival of the date of maturity fixed therein.

The authorities generally will be found to support the foregoing conclusion, where the acceleration clause is similar to that in the case at bar. See 27 Cyc. 1101; also *Hall v. Jameson*, 151 Cal. 606, 12 L.R.A. (N.S.) 1190, 121 Am. St. Rep. 137, 91 Pac. 518, and numerous cases cited in the L.R.A. note to the above case. The authorities, however, are divided as to the effect of a default, where the acceleration clause is absolute, as distinguished from optional (see the L.R.A. note, *supra*); but, as we are not dealing with an acceleration clause which is absolute, we express no opinion as to which is the proper rule. Nor are we concerned with such a question as was before the supreme court of Missouri in *Boyd v. Buchanan*, 176 Mo. App. 56, 162 S. W. 1075 (cited by appellant), where the stipulation was that "on failure to pay any instalment of interest when due, the holder . . . may collect the principal and interest at once." It was held, in the latter case, that the cause of action accrued, within the language of the Statute of Limitations, at once, upon the default, and it will be observed that the acceleration clause said nothing about an option to declare any sum due. This case is readily distinguishable from the case at bar, and the acceleration clause involved therein may properly be classified as absolute. The same is true of the acceleration clause involved in the case of *Central Trust Co. v. Meridian Light & R. Co.* 106 Miss. 431, 51 L.R.A. (N.S.) 151, 63 So. 575; also *Central Trust Co. v. Meridian Light & R. Co.* — Miss. —, 64 So. 216.

In holding that the Statute of Limitations does not bar the action to foreclose the mortgage, we do not dispose of the whole question of the statute, as presented by *Styles's* appeal. As to the first two notes, amounting to \$300, it is not questioned that more than ten years elapsed between the date of their maturity and the bringing of this action. The question as to the running of the Statute of Limitations, as to the sum represented by these notes, introduces considerations not applicable to the attempt to invoke the statute as to the whole debt. It is a well-settled rule in this jurisdiction that the Statute of Limitations, barring actions on notes, and the statute barring the remedy of foreclosure, are to be applied independently. A mortgage may be foreclosed, for instance, after the Statute of Limitations has barred an action on the notes for which the mortgage is security. See *Satterlund v. Beal*, 12 N. D. 122, 95 N. W. 518; and this rule has the support of the decided weight of authority. See *Jones, Mortg.* § 1204; also numerous cases cited in the note in 95 Am. St. Rep. 664. It has even been held, in this jurisdiction, that, in the absence of a special Statute of Limitations barring foreclosure by advertisement, such proceedings were not barred by the ordinary Statute of Limitations, applicable to civil actions; and that a foreclosure by advertisement, in the absence of a special Statute of Limitations, may be resorted to years after an action on the note would be barred. *Clark v. Beck*, 14 N. D. 287, 103 N. W. 755. It is true, conversely, that an action to foreclose may be barred, while the legal remedy of the creditor to collect the debt remains. *Colonial & U. S. Mortg. Co. v. Northwest Threshing Co.* 14 N. D. 147, 70 L.R.A. 814, 116 Am. St. Rep. 642, 103 N. W. 915, 8 Ann. Cas. 1160. Thus, the sole question presented by the invocation of the Statute of Limitations as to the first two notes resolves to this: For purposes of foreclosure and the application of the Statute of Limitations thereto, must the accrual of the right to foreclose be controlled by the maturity of a portion of the obligations for which the mortgage is security, or, in the absence of a declaration of an option, may the mortgagee be considered as standing upon the singleness of his cause of action to foreclose? in which case it will be deemed to have first been perfected when the whole debt matures. The mortgage is given to secure the entire debt of \$700, and the fact that the indebtedness is represented by instalment notes, maturing at different dates, cannot affect the creditor's right to stand upon the singleness of his

cause of action to foreclose for the non-payment of the entire debt, when all of it shall become due, in case the mortgagee has not elected to treat it all as due upon the default in the payment of an installment. Since it does not appear that the holder of the mortgage declared the whole sum due, it must be assumed that he elected to treat his cause of action to foreclose the mortgage as a single cause, which was being held in abeyance, awaiting the maturity of the entire debt. It follows that the right to foreclose the mortgage for the nonpayment of the entire debt of \$700 and interest did not arise until the maturity of the last note on October 1, 1906, and that the foreclosure action was not barred as to any portion of such indebtedness. See 27 Cyc. 1560.

Before passing to the next question to be considered, it is proper to remark that there is the gravest doubt in the minds of the members of the court as to whether the cause of action for the foreclosure of the mortgage, in any event, can be considered as having arisen upon the maturity of the first notes. It was established as a fact, in the case of *Styles v. Theo. P. Scotland & Co.* supra, 22 N. D. 469, 134 N. W. 708, that the Goodsman mortgage was executed and redelivered on October 5, 1904, more than a year subsequent to the maturity of the first notes; also that Goodsman did not obtain a receiver's receipt for the land covered by the mortgage until November 4, 1903; also that Goodsman left the state in November, 1903, and deeded the land to Styles's grantor in October, 1904. But we have preferred to consider the propositions advanced by counsel, under the most favorable interpretation possible of the facts in the instant case.

This brings us to a consideration of the foreclosure of the attorney's lien, for the purpose of ascertaining what right Styles derived therefrom. This lien was foreclosed by a sale of the notes, pursuant to a notice published in conformity with the requirements of § 8125, Comp. Laws, 1913, governing the foreclosure of chattel mortgages by advertisement. The legality of this method of foreclosure is assailed by the respondent McCarty, who contends that the statutory provisions, governing foreclosure by advertisement, are not applicable to the foreclosure of an attorney's lien, arising by operation of law. Section 6878, Comp. Laws, 1913, is relied upon by the appellants as authority for the proceedings taken. Section 6878, Comp. Laws, 1913, is the first of two sections which comprise chapter 100 of the Civil Code. This chapter deals with the matter of the "Filing and Foreclosing Liens on Personal

Property." Section 6878 is as follows: "Upon default being made in the payment of a debt secured by a lien upon personal property, such lien may be foreclosed upon the notice, and in the manner provided for the foreclosure of mortgages upon personal property, and the holder of such lien shall be entitled to the possession of the property covered thereby for the purpose of foreclosing the same. The costs and fees for such foreclosure shall be the same as are provided in § 8132. A report of such foreclosure shall be made in the manner set forth in § 8128; provided, that when the lien has not been filed in the office of any register of deeds then a report of such sale shall be filed in the office of the register of deeds of the county wherein the property is sold. Such liens may also be foreclosed by action as provided in chapter 29 of the Code of Civil Procedure."

The appellants argue, with much force, that the foregoing provision authorizes the foreclosure of all liens enumerated in the preceding chapters of the Civil Code, by advertisement, as well as by action, and the language of the section, when considered alone, is apparently susceptible of such interpretation. But when the section is examined in the light of the other statutory provisions respecting liens and their enforcement, and with due regard to the fundamental constitutional requirement of due process of law, it becomes quite apparent that the statute in question cannot properly be construed as authorizing the foreclosure of an attorney's lien in this manner. Of the liens provided by statute, there can be no doubt that mechanics' liens and miners' liens can be foreclosed only by action (see §§ 6825-6841, Comp. Laws, 1913). Of the remaining liens, those for the service of sires, for furnishing seed, for threshing, and for performing farm labor, become effective only upon filing in the office of the register of deeds a statement of the service rendered, or upon the furnishing of the thing which affords the basis of the lien. See §§ 6849, 6852, 6855, 6858, Comp. Laws, 1913. The other liens are the lien for keeping stock, the lien of a vendor of real property for the unpaid purchase price, the lien of a vendor of personalty for the unpaid purchase price, the lien of a purchaser of realty for the amount paid, which arises in cases of failure of consideration, liens for improvements on personalty, factor's lien, banker's lien, seaman's lien, officer's lien, innkeeper's lien, attorney's lien, and blacksmith's and machinist's lien for repairs. Foreclosure by advertisement is expressly excluded in the case of the liens on real estate, and it may safely be said that the procedure is

wholly inappropriate as to the lien of a vendor of personalty. Section 6878 is not applicable to the latter, because the provision giving the lien makes it enforceable in like manner as if the property were pledged to the vendor for the price, and, for the foreclosure of a pledge, actual notice is required. Comp. Laws, 1913, § 6786. As to the remaining liens, they are for the most part, if not entirely, dependent on possession, and are of the character of those that could not have been foreclosed at the common law, either by sale upon notice or by suit in equity. Section 6878 was doubtless enacted for the purpose of giving to the holder of any of the various liens enumerated, a right which would not exist except for the statute, viz., the right to realize, out of the property subject to the lien, the amount for which the property is held.

It will be noted that the statutory liens, with respect to their origin, are of two general classes: Those in which either actual or constructive notice to the owner of the property, of the amount claimed, and to third parties, is required to be given before the lien becomes operative, and those in which no such notice need be given. The attorney's lien upon papers of his client in his possession falls within the latter class. As to liens of the second class, our basic inquiry is, Is the remedy of foreclosure by advertisement available? Without expressing any opinion as to the applicability of this remedy to liens of the first class, we do not hesitate to express the conviction that it is not available to holders of liens of the second class. In dealing with this question, it should be remarked, at the outset, that the remedy of foreclosure by advertisement is a harsh remedy, and one readily capable of being abused to the disadvantage of the one whose property is held by the creditor. A lien of the class under consideration arises by operation of law, and no notice whatever is required to perfect it. There need not even be a notice that any balance is owing to the attorney. The first and only notice required by law, if the contention of the appellant Styles is correct, is the notice of sale which is required to be published for six days under § 8125, Comp. Laws, 1913. It will readily be seen that this interpretation of the statutes would result in transferring the property of a client, which had been intrusted to the attorney, to the purchaser at a foreclosure sale, not only with remarkable facility, but without any notice of any hearing of any sort for the purpose of determining the amount of indebtedness for which the lien is claimed.

It is true that § 6878, Comp. Laws, 1913, makes provision for the releasing of an attorney's lien, upon the execution of a bond in double the amount claimed, or in such sum as may be fixed by a judge, which procedure, if taken, would leave the attorney to a suit on the bond to determine the amount recoverable for his services; and that it is also provided that the lien will be released, upon the failure of the attorney to furnish a bill of particulars of services, within ten days after a demand therefor. But there is nowhere any requirement that the lienor shall serve notice of his claim or lien. Such being the condition of the statutory law with respect to the lien of an attorney, the fundamental constitutional requirement of due process would not be satisfied by a statute that purported to authorize the transfer of title to such papers, at a sale to be conducted upon six days' published notice. It is essential that, at some time previous to such a final consummation, there shall have been a reasonable notice of an appropriate hearing, in which the extent and validity of the claim could have been determined at the election of the debtor party. However appropriate such a procedure may be, as applied to liens for a fixed sum or for a claim, of which the licensee has had either actual or constructive notice before the lien arises (*Martin v. Hawthorne*, 5 N. D. 66, 63 N. W. 895), we are satisfied that it can have no proper application to a lien of the character in question.

As hereinabove pointed out, it is manifest that the broad language of § 6878, Comp. Laws, 1913, cannot, with propriety, be construed as prescribing a procedure to be followed in foreclosing all liens upon personal property, for, as will be seen upon examination, the statutes authorizing certain liens, such as mechanics' and miners' liens, are complete in themselves, and authorize foreclosure by action; and the lien of a vendor of personalty, which is provided for in the chapter immediately preceding section 6878, is enforced in like manner as if the property were pledged for the price. As to such liens, section 6878 is therefore clearly inapplicable, and, in order that it may not be open to the constitutional objection of violating the requirement of due process, it is necessary to construe it as not applicable to those liens, whose foreclosure by advertisement would amount to a legislative authorization to take the property of a licensee without due process of law.

It may be remarked in passing, that the statutory provisions, governing foreclosure of mortgages upon personal property by advertisement show upon their face that

they were enacted in the light of the custom, according to which the mortgagee's property remains in the possession of the mortgagor, and that, while six days' published notice is all that is required to foreclose the mortgage by sale of the property, the mortgagee must first obtain possession of the property. This, in itself, will ordinarily operate to apprise the mortgagor of the approaching foreclosure, and will give him an opportunity to enjoin the contemplated sale, if any reasons exist therefor, and to remit the creditor to his right of foreclosure by action. Obviously, when this procedure is undertaken with respect to property already in the possession of the one foreclosing, the likelihood that notice will reach the lienec is much less than in the case of mortgaged personality.

Being of the opinion that the attorney's lien was never legally foreclosed, the question as to the right acquired by Styles as purchaser at the sale remains to be considered. The trial court held that Styles stood in the position of an assignee of the attorney's lien. While this position is contested by the respondent McCarty, and while, in his appeal, he seeks to obtain a reversal of this ruling, we are not prepared to say that the conclusion is not warranted and the result justified, upon a proper application of equitable principles. In a sense, this whole controversy arose over the fruits of the litigation in the former case of *Styles v. Theo. P. Scotland & Co.* 22 N. D. 469, 134 N. W. 708, and it is equitable to require that those who reap the benefits of that litigation should pay therefrom a proper fee to the attorney, through whose efforts the suit was successfully terminated. Where all the equities of a cause are presented to a court possessed of equity powers, in order to accomplish justice, the court may deal with a given subject-matter within its control, regardless of the strictly legal aspects of the case. It matters little whether the abortive foreclosure can be considered sufficient, from a legal standpoint, to constitute Styles the assignee of Campbell's lien; it is but just that Styles should have the benefit of the reasonable claim of Campbell, who no longer asserts it as against him. As we view the record, Campbell's claim appears reasonable and just, and we do not feel warranted in disturbing the findings of the trial court regarding it.

In view of the conclusions reached upon the merits of this case, it is unnecessary to discuss the questions presented by the motion of the respondent Campbell. Neither is it necessary to consider separately the questions presented by McCarty's appeal, as they affect the respondent Styles. The

judgment of the trial court is in all things affirmed, without costs to either party, except as follows: Appellant McCarty shall pay to respondent Campbell \$50, costs of this appeal, and the appellant Styles shall pay to McCarty \$50, a like sum as costs.

**Robinson, J., dissenting in part:**

Charles Goodsman owned the land in question, a quarter section in 21—153—72, To secure \$700 and interest, according to five promissory notes, Goodsman mortgaged the land to Theo. B. Scotland Company. The mortgage is dated November 24, 1903, and is acknowledged and recorded October 5, 1904. Asa Styles acquired the Goodsman title, and brought a suit to test the validity of the mortgage; and it was held valid. 22 N. D. 469, 134 N. W. 708. In that groundless suit, Paul Campbell was retained as attorney for the mortgagee, and he put in evidence the mortgage notes, which were obtained for that purpose from parties who held them as collateral, though there was no reason for obtaining the notes or putting them in evidence. After the trial, Campbell secured possession of the notes by an order directing the clerk of the court to deliver them to him. Then he claimed a lien on the notes for \$148.30, and sold the notes to Styles under an attempted foreclosure of his lien. On October 25, 1909, the mortgagee made to the plaintiff John McCarty an assignment of the mortgage and the notes. In August, 1912, he attempted to foreclose by advertisement. By order of the court, a stop was put to such foreclosure, on affidavits of Asa Styles, Charles Goodsman, and Paul Campbell, claiming that Styles had a valid defense as the owner of the land and the owner of the mortgage. The complaint is dated October 18, 1913. In August, 1916, a judgment was duly entered directing the sale of the land to pay the mortgage debt, and that the alleged attorney's lien be first satisfied from the proceeds of the sale. This is an action to foreclose a mortgage which the court has adjudged to be valid. 22 N. D. 469, 134 N. W. 708. The action is not barred by the Statute of Limitations, as it was commenced within ten years after the debt matured and came due. The facts stated show the defendant Asa Styles has no interest in or lien upon any of the mortgage notes. Styles appeals, and McCarty appeals from the part of the judgment in regard to the attorney's lien.

By his appeal, Styles seeks to question and relitigate the validity of the mortgage, but that question has been fairly decided against him. Styles pleads that the action was barred because it was not commenced within ten years after the cause of action

accrued. The cause of action did not accrue until ten years after the last three notes became due, and the action was commenced in October, 1913. It is also claimed that Styles is the owner of the notes and mortgage, under a pretended foreclosure of the attorney's lien, as if it were a chattel mortgage. Of course, that is mere nonsense. The only real question is on the appeal of McCarty. He claims that neither Styles nor Paul Campbell ever had a lien on the notes, and that the court erred in decreeing that the lien claimed should be paid from the sale of the mortgaged premises. Certainly, there was no occasion for putting the notes in evidence, or for ever giving them to the attorney. He was not employed by the owner of the collateral notes, and he had no claim or cause of action against them on their notes, and his claim was not improved by transferring it to Styles. The judgment should be modified by striking out all that relates to the attorney's lien, and, as so modified, the judgment should be affirmed.

A petition for rehearing having been filed, Birdzell, J., on April 12, 1918, handed down the following additional opinion:

The appellant Styles has called to the court's attention § 8078 of the Compiled Laws of 1913. The section is as follows: "In case of mortgage given to secure the payment of money by instalments, each of the instalments mentioned in the mortgage shall be taken and deemed to be a separate and independent mortgage, and the mortgage for each of such instalments may be foreclosed in the same manner and with like effect as if a separate mortgage was given each of such instalments and a redemption of any such sale shall have the like effect as if the sale for such instalments had been made upon a prior independent mortgage."

It is contended that the above section operates to mature the cause of action for the foreclosure of the mortgage as to each instalment, at the maturity thereof. Conceding this to be the effect of the statute, it does not follow that it matures the cause as to the entire amount. Where a mortgage is given to secure an entire sum, it will give rise to a cause of action to foreclose the lien for the entire amount, only when the amount becomes due, or is declared due under the acceleration clause. This cause of action may be treated by the mortgagee as being single and indivisible, notwithstanding one or more defaults affecting instalment notes. The effect of a statute such as that quoted above is merely to secure to the holder or holders of instal-

ment notes the right to foreclose the lien of the mortgage applicable to each note, by enabling such holder or holders to exercise the power of sale, and to give a right of redemption from any such sale in like manner as if the instalments represented successive mortgages. The section has no application whatsoever to the right of foreclosure for the entire amount of the mortgage lien.

Considerable argument is expended in an effort to demonstrate that a right to foreclose the mortgage is barred by the Statute of Limitations, by reason of the fact that more than ten years elapsed between the bringing of the action and the maturity of the first instalment note. Throughout this argument, counsel has apparently lost sight of the rule followed in the main opinion, to the effect that the Statute of Limitations applicable to a cause of action on a note, and the statute applicable to a cause of action for foreclosure, operate independently of each other. We are not concerned here with a cause of action upon the notes. The action that is before us is one for the foreclosure of the lien of a mortgage, in which the mortgagor has covenanted for a lien to secure the payment of an entire sum. This cause of action did not mature, as pointed out in the main opinion, until within ten years prior to the bringing of this suit.

In the petition for rehearing, counsel also contend that the plaintiffs and respondents are precluded from maintaining this suit by reason of the finding in the previous suit of *Styles v. Theo. P. Scotland & Co.* 22 N. D. 469, 134 N. W. 708, that Scotland & Company were the owners of the notes. This contention overlooks the effect of the other findings in the same case. The court in that action held that the mortgage was unpaid, and determined the amount as well as the nature of the lien. *Styles v. Theo. P. Scotland & Co.* 22 N. D. 469-479, 134 N. W. 708. It would, of course, have been competent for the appellant to have shown in this action that he had discharged a portion of this lien, or, if a portion of it was held by someone not a party to the proceeding, he could have had such party joined. His argument, however, stops short of this, and seeks, by technicality, to magnify the effect of the previous findings of ownership in favor of Scotland & Company. A finding of ownership in Scotland & Company certainly would not be res judicata as against the interest of a stranger to the proceedings, acquired before the suit was instituted.

The petition for rehearing is denied.



**Annotation — Effect of acceleration provision in mortgage or note to start the Statute of Limitations running.**

The earlier cases upon the above question are covered in the notes to *Hall v. Jameson*, 12 L.R.A.(N.S.) 1190; *Lovell v. Goss*, 22 L.R.A.(N.S.) 1110, and *Central Trust Co. v. Meridan Light & R. Co.* 51 L.R.A.(N.S.) 151.

The decision in *McCarty v. Goodman*, ante, 160, that, where an acceleration clause of a mortgage merely gave the mortgagee the right, in case of default, to declare the whole sum due, the Statute of Limitations did not commence to run from a default in a payment, in the absence of an exercise of the option by the mortgagee, is in accord with the rule laid down in cases in the earlier notes, in which the contract simply gave the creditor the option to declare the principal sum due in case of default.

As stated in the note in 12 L.R.A.(N. S.) 1191, it is held by many courts, where the provision is absolute, that the statute commences running from the date of a default, and some of the following cases support that conclusion.

In *Boyd v. Buchanan* (1914) 176 Mo. App. 56, 162 S. W. 1075, where a note secured by a mortgage provided that, on failure to pay any instalment of interest, when due, "the holder hereof may collect the principal and interest at once," it was held that, upon a default in the payment of interest, a cause of action accrued on the note, and set in motion the Statute of Limitations. The court, in this case, refused to regard the note as merely giving the holder an option to declare the whole sum due upon a default.

In *Buss v. Kemp Lumber Co.* (1918) — N. M. —, L.R.A.1918C, 1015, 170 Pac. 54, the Statute of Limitations was held to commence to run against a cause of action on a note, secured by a mortgage, upon default in the payment of interest, where the note provided that, "in case of a default in the payment of any interest payment, then the whole principal sum shall become due and collectable, it being held that the contract of the parties was absolute, and not merely optional.

And in *Harrison Mach. Works v. Reigor* (1885) 64 Tex. 89, where two notes contained provisions that a failure to pay one, when due, should mature both, it was held that, upon default in the payment of the note falling due first, a cause of action accrued on the second, and that the Statute of Limitations

commenced running from that time, as the contract of the parties was absolute

In *Brinsmade v. Johnson* (1915) 192 Mo. App. 684, 179 S. W. 967, where a bond recited that it was subject to the terms of a mortgage, which contained a provision that in case of default, if a majority of the bondholders should notify the trustee of their election, the whole of the principal secured should be declared due and payable by him, it was held that the two instruments should be read together, and that a default having occurred, and a majority of the bondholders having elected to declare the principal due, the indebtedness on the obligation matured, and a cause of action then accrued on account thereof, and that a contract of guaranty, executed to a bondholder, also became effective and enforceable at that time, and that the Statute of Limitations then commenced to run, so that an action on the contract of guaranty, for the interest provided for in the bond, was barred, where it was not brought within the statutory period, computed from that time; and this was held, although the contract guaranteed the payment of the coupons "as they became due."

There is a dictum in *Standard Dry-Kiln Co. v. Ellington* (1916) 172 N. C. 481, 90 S. E. 564, that, where a debt is due by instalments, with a provision that upon failure to pay one instalment the whole debt shall become due, the provision is for the benefit of the creditor, and that a mere default will not operate to accelerate the maturity of the debt, so that the debtor can take advantage of it in computing the period of limitation.

J. T. W.

**IOWA SUPREME COURT.**

**IOWA STATE SAVINGS BANK OF FAIRFIELD**

v.

**CITY NATIONAL BANK OF TIPTON,**  
Appt.

(— Iowa, —, 168 N. W. 148.)

**Bills and notes — telegraphic acceptance of check.**

1. A telegraphic acceptance of a check is sufficient, under a statute providing that acceptance must be in writing signed by the drawee, but making an unconditional

**Note.** — As to liability of bank upon claimed contract of acceptance extrinsic to

promise to accept the equivalent of actual acceptance.

*For other cases, see Checks, III. in Dig. 1-52 N. S.*

**Same — agreement to accept check — departure.**

2. The addition of the words, "with ex.," to a check drawn by a depositor on his bank, without naming a place on which the exchange is to be paid, is mere surplusage, and not a departure from the terms of the bank's promise to pay a check for the amount named in the instrument.

*For other cases, see Checks, III. in Dig. 1-52 N. S.*

**Same — relief of bank.**

3. When a bank answers, "We will pay," a question as to whether or not it will pay a described check, the court should not indulge in overrefinement of reasoning to discover possible ground upon which to relieve it from performance of its obligation.

*For other cases, see Checks, III. in Dig. 1-52 N. S.*

(June 27, 1918.)

**A** PPEAL by defendant from a judgment of the District Court for Cedar County in plaintiff's favor in an action brought to recover on an acceptance of a draft. Affirmed.

The facts are stated in the opinion.

Mr. J. C. France for appellant.

Messrs. Leggett & McKemey and C. O. Boling for appellee.

Weaver, J., delivered the opinion of the court:

On June 14, 1914, one Lon Fraseur drew and delivered to one H. I. Ball a check on the defendant bank as follows:

Tipton, Iowa, June 4, 1914.

City National Bank

Pay to the order of H. I. Ball \$1,035.00, ten hundred thirty-five and no/100 dollars with ex.

Lon Fraseur.

Thereafter on the same day Ball indorsed and delivered the check to the plaintiff, but before paying any money thereon, and before giving Ball credit for the same, plaintiff telegraphed an inquiry to the defendant as follows:

Fairfield, Iowa, June 4, 1914.

City National Bank, Tipton, Iowa.

Will you pay check for ten hundred thirty-five dollars signed Lon Fraseur for cattle?

Iowa State Savings Bank.

check, see annotation following this case, post, 172, and references therein to annotations on related questions.

The message was promptly delivered and answered at once in these words:

Tipton, Iowa, June 4, 1914.

Iowa State Savings Bank, Fairfield, Iowa.

We will pay check for ten hundred thirty-five dollars signed Lon Fraseur.

City National Bank.

Plaintiff received the telegram, and, relying thereon, paid Ball the full amount thereof, \$1,035. Thereupon plaintiff promptly forwarded the instrument to its correspondent, the Cedar County State Bank at Tipton, for collection. On the following day the last-named bank, having received the check, presented it to the defendant for payment, but was refused on the ground that "payment had been ordered stopped." The check is still unpaid, and is the property of the plaintiff. A second presentation and demand were made on June 8, 1914, and met again with refusal. Thereafter, this action was begun.

The petition sets out the facts substantially as above related, and demands a recovery of the amount of the check, with interest and protest fees. Defendant demurred to the petition on the ground that it fails to state a cause of action, in that the check does not operate as an assignment of any part of the funds to the credit of Lon Fraseur in the defendant bank; that the petition shows on its face that defendant never accepted the check, and without acceptance defendant cannot be held liable thereon; and that the check does not, in terms, conform to the offer or acceptance. The demurrer was overruled, but the plaintiff thereafter amended its petition by alleging that, neither at the time payment of the check was demanded nor at any time prior to the commencement of this action, did plaintiff demand payment of any exchange on the check, and it avers that the words "with ex.," were not intended to require the bank or any party to the check to pay exchange in any amount. A motion to strike this amendment being denied, defendant answered, denying indebtedness and denying acceptance of the check, but admitting the telegraphic correspondence as pleaded. The cause was tried, submitted, and decided upon an agreed statement, which sets forth the facts as we have hereinbefore recited them. Judgment was rendered for the plaintiff as prayed, and defendant appeals.

I. The first assignment of error argued by counsel for appellant is based upon the proposition that the record shows no acceptance of the check, and that without acceptance appellant cannot be held liable in this action.

If there could be no valid acceptance except by writing and signing the formal words upon the face of the instrument, the exception would have to be sustained; but this is not the law. Our Negotiable Instruments Statute provides that a bill of exchange does not, "of itself," operate as an assignment of the funds in the hands of the drawee, available for the payment thereof, and that, until there is an acceptance, the drawee is not liable on the bill (Code Supp. § 3060a127), and further provides that the acceptance must be in writing, signed by the drawee (Code Supp. § 3060a132); but it nowhere makes it necessary that such acceptance shall, in all cases, be written upon the bill itself. On the contrary, it recognizes the validity of an acceptance written on paper other than the bill, and an action can be maintained thereon against the drawee, in favor of one to whom it is shown, and who, on faith thereof, receives the bill for value (Code Supp. § 3060a134). It also makes the unconditional written promise of the payee to accept a bill before it is drawn the equivalent of an actual acceptance, in favor of every person who, on faith thereof, receives the bill for value. Code Supp. § 3060a135. Precedents to this effect are very numerous, but the clear and explicit terms of the statute make their citation unnecessary. The record before us shows the express promise of the appellant to pay the check of Lou Fraseur for \$1,035, and that the appellee, on faith of such promise, did receive the check for value.

The only question presented by the appeal which is open to argument is the one which is considered in the following paragraph.

II. The defense most confidently relied upon is that, while appellant did promise to pay Fraseur's check for \$1,035, the check actually drawn and presented for payment does not conform to the terms of the promise, in that the language of the instrument so presented concludes with the words "with ex." The theory of counsel in this respect seems to be that the promise to pay was made with reference to a check for \$1,035 only, and that the acceptance of the check, as drawn, would impose upon the drawee an additional liability for exchange, and, because of this unauthorized requirement, appellant was under no legal liability to accept or pay.

That a drawee can be held liable only in accordance with the terms of his acceptance or promise to accept is undeniably true, and the inquiry here is, therefore, whether the addition to the check of the words, "with ex.," is such that the appellant's acceptance thereof would impose upon it any liability in excess of its promise to pay the sum of

\$1,035. In support of its contention, appellant relies largely upon the decision of this court in *Lindley v. First Nat. Bank*, 76 Iowa, 629, 381, 2 L.R.A. 709, 14 Am. St. Rep. 254, 41 N. W. 381. In that case one Barro telegraphed to defendant bank, directing it to transmit \$2,000 by telegraph to plaintiff at Los Angeles, California, and to charge same to his account. To this the bank answered that it would pay Barro's draft upon it for \$2,000. Thereupon Barro drew his draft on the bank for \$2,000, with exchange on New York, and delivered it to Lindley in payment of a debt. On presentation, the bank refused to pay, and Lindley brought suit. It was held that plaintiff could not recover, because the draft, as presented, requested that the sum named therein should be paid in New York or in New York exchange, which provision was not in conformity to its promise. Without in any way questioning the soundness of this precedent as applicable to cases involving a similar state of facts, we regard it as clear that it does not control the question now before us. There is nothing in this check requiring the appellant to pay it elsewhere than over its own counter, to the lawful holder presenting it for payment, or to pay it otherwise than in lawful money of the realm. Had the payee himself presented the check, and demanded not only the sum of \$1,035 therein named, but also an additional sum as exchange on some other named city or town not mentioned in the instrument, no one would for a minute argue that the bank was under any legal obligation to pay such exchange. "Exchange" is generally incident to bills issued or drawn for the transmission of money from one place to another, and is supposed to represent the cost of drawing the bill and transmitting the money to the designated place to meet it. *Flagg v. School Dist.* 4 N. D. 30, 25 L.R.A. 363, 58 N. W. 499; *Nicely v. Commercial Bank*, 15 Ind. App. 563, 57 Am. St. Rep. 245, 44 N. E. 572. It is very apparent, then, that the obligation of a bank to pay its own depositor's check in the usual course of business is to pay the same over its own counter—a draft which negatives the idea of any charge or expense for exchange—and if the words "with ex." appear in the check they are surplusage and have no effect whatever to increase the liability of the paying bank on account of its previous promise to certify or accept a check for the sum of money specifically named in such promise. The words, "with ex.," without naming a place on which the exchange is to be paid, being surplusage, constitute no departure from the terms of the promise, and their insertion in the check will not relieve the

drawee from liability on his promise to pay. The correctness of this view is expressly stated by this court, in *Culbertson v. Nelson*, 93 Iowa, 194, 27 L.R.A. 222, 57 Am. St. Rep. 266, 61 N. W. 854, where, in speaking of a note or bill dated in New York and payable in New York, "with current exchange on New York," we said: "The quoted words were superfluous and surplusage." In the same case, we quote approvingly *Hill v. Todd*, 29 Ill. 101, and *Clauser v. Stone*, 29 Ill. 114, 81 Am. Dec. 299, in both of which it was held that the inclusion of the words, "with exchange," in a promissory note, without designation of the place on which the exchange is to be drawn, was without legal meaning and was to be ignored as surplusage. The same rule is found illustrated in *First Nat. Bank v. Muskogee Pipe Line Co.* 40 Okl. 603, L.R.A.1916B, 1021, 139 Pac. 1136; *North Atchison Bank v. Garretson*, 2 C. C. A. 145, 4 U. S. App. 557, 51 Fed. 168. The promise of the appellant was to pay the check of its depositor for a stated amount, and the check was drawn and negotiated on the faith of such promise and for the amount so mentioned, neither more nor less. There was nothing in the promise to suggest that payment was to be made elsewhere than at the drawee's own place of business, and there is nothing in the check drawn upon it to suggest or require its payment elsewhere. Indeed, the

refusal to pay the check was grounded solely on the alleged fact that "payment had been stopped," presumably by the drawer, and it is only when suit is brought that this defense is raised. We are satisfied that the check was, in every legal essential, in conformity with appellant's promise.

We think it not very material whether the conceded facts constitute, in every technical sense, an acceptance of the check or promise to accept, or whether we treat the act and promise of the appellant as amounting to a certification of the check. The question put to appellant by appellee was, "Will you pay," etc. The answer was in unequivocal terms, "We will pay," etc. When this promise was acted upon, the liability of the promisor was not that of a surety or grantor. The appellant became at once the principal debtor of the plaintiff, and, while it had the right to insist that the check drawn upon it should be such as it promised to pay, the courts should not indulge in over-refinement of reasoning, to discover plausible ground upon which to relieve it from the performance of its fairly assumed obligations.

There is no reversible error in the record, and the judgment below is affirmed.

Preston, Ch. J., and Gaynor and Stevens, JJ., concur.

### Annotation — Liability of bank upon claimed contract of acceptance extrinsic to check.

The earlier cases on this question are discussed in the note to *First Nat. Bank v. Commercial Sav. Bank*, 8 L.R.A.(N.S.) 1148.

The detention of a bill of exchange or check, by drawee, as an acceptance thereof, is discussed in the note to *Wisner v. First Nat. Bank*, 17 L.R.A.(N.S.) 1266.

The effect of the certification of a postdated check is discussed in the note to *Swenson Bros. Co. v. Commercial State Bank*, L.R.A.1917F, 1099.

The right of the holder of a check to maintain an action thereon against the bank is discussed in the note to *Ballard v. Home Nat. Bank*, L.R.A.1916C, 164.

The effect of extrinsic promise to sign or indorse a note or bill is discussed in the note to *Petty v. Gacking*, 33 L.R.A.(N.S.) 175.

It is well settled that a bank may render itself liable upon a contract of acceptance extrinsic to the check or draft. It is provided, by some statutes,

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that an acceptance written on a paper other than the bill itself does not bind the acceptor, except in favor of a person to whom it is shown, and who, on the faith thereof, receives the bill for value. *Neb. Rev. Stat.* 1913, § 5451, cited in *Swenson Bros. Co. v. Commercial State Bank* (1915) 98 Neb. 702, L.R.A.1917F, 1096, 154 N. W. 233.

In the absence of a statute requiring a written acceptance, an oral acceptance is good. 3 R. C. L. 1302, § 536.

In *First Nat. Bank v. San Juan State Bank* (1916) — *Tex. Civ. App.* —, 189 S. W. 745, a bank upon which a check was drawn was held liable thereon, upon its oral statement, over the telephone, in answer to an inquiry in regard to the check, that the check was good and that the bank would pay it.

Some statutes require the acceptance to be in writing.

The Negotiable Instruments Law so requires. In cases decided under the statutes, it is held that an oral accept-

ance is invalid. *Van Buskirk v. State Bank* (1905) 35 Colo. 142, 117 Am. St. Rep. 182, 83 Pac. 778 (telephone conversation); *Rambo v. First State Bank* (1912) 88 Kan. 257, 128 Pac. 182 (telephone conversation); *Ewing v. Citizens Nat. Bank* (1915) 162 Ky. 551, 172 S. W. 955 (Negotiable Instruments Law provides that the acceptance must be in writing and signed by the drawee); *Superior Nat. Bank v. National Bank* (1916) 99 Neb. 833, 157 N. W. 1023 (certification of check over telephone); *First Nat. Bank v. School Dist.* (1911) 31 Okla. 139, 39 L.R.A.(N.S.) 655, 120 Pac. 614 (holding that the taking by the bank of the check, and retention of the same, with the statement to the holder that the bank would give him credit for said amount, did not amount to an acceptance); *Ballen v. Bank of Kremlin* (1913) 37 Okla. 112, 44 L.R.A.(N.S.) 621, 130 Pac. 539.

See *IOWA STATE SAV. BANK v. CITY NAT. BANK*, ante, 169.

In *Hanna v. McCrory* (1914) 19 N. M. 183, 141 Pac. 996, an oral acceptance of a negotiable order directed to the cashier of a bank is held ineffectual to bind the bank. It is further held, in this case, that an acceptance is not made out by stamping the order paid and issuing cashier checks therefor, which are retained by the bank until a garnishment proceeding previously begun had been determined.

The question in most cases is whether what has taken place between the bank and the holder of the check amounts to a contract of acceptance. This, of course, depends upon the facts in the individual case.

In the following cases there was held to be a binding acceptance:

In *Wells v. Western U. Teleg. Co.* (1909) 144 Iowa, 605, 24 L.R.A.(N.S.) 1045, 138 Am. St. Rep. 317, 123 N. W. 371, a case involving a forged telegram, purporting to be sent to the payee of a check, by the bank on which the check was drawn. It is stated that a telegram dated and directed to the agent of the payee of the check, saying: "We will honor Barnes draft for \$8,972," amounted in law to an acceptance of the check, from which the bank could not recede, if the message had been authentic.

A demurrer to a petition in an action against the drawee bank, on the theory that there had been an acceptance, was overruled in *First Nat. Bank v. First Nat. Bank* (1913) 210 Fed. 542, where L.R.A.1918F.

the drawee bank, in response to an inquiry as to whether it would pay the check, replied: "Forward your checks. They will undoubtedly be taken care of by the company when presented."

See *IOWA STATE SAV. BANK v. CITY NAT. BANK*, 169.

In the following cases there was held not to be a binding acceptance:

In *Carmichael v. Tishomingo Bkg. Co.* (1917) — Mo. App. —, 191 S. W. 1043, the holder of a draft, drawn by one bank upon its account with another, wired the drawee bank as follows: "Will you protect checks amounting to \$3,700 drawn on you by the Tishomingo Banking Co., signed by James H. Faircloth, president." To this telegram the drawee bank replied as follows: "Answering telegram; cannot certify by wire; account amply good now." To this the holder of the draft responded: "Wire received; we are forwarding checks amounting to \$3,700 for credit." This was held not to be an acceptance of the checks.

In *Colcord v. Banco De Tamaulipas* (1918) 181 App. Div. 295, 168 N. Y. Supp. 710, a bank to which a draft was offered telegraphed to the drawee bank as follows: "Please telegraph us immediately if you will pay a draft signed . . . for . . . dollars." In reply to this telegram the drawee bank replied as follows: "Draft . . . for . . . dollars is good." This was held not to be an acceptance binding upon the bank.

In *Elliott v. First State Bank* (1911) — Tex. Civ. App. —, 135 S. W. 159, there was held to be no acceptance of a check by the drawee bank, where, in reply to a telegram as to whether it would pay the check, the drawee bank telegraphed that the drawer of the check "has deposited with us \$1,790 (the amount of the check) to pay check drawn" by himself in favor of a named person. W. A. E.

#### VERMONT SUPREME COURT.

ALBERT PACKETT

v.

MORETOWN CREAMERY COMPANY,  
Impleaded, etc., Appt.

(— Vt. —, 99 Atl. 638.)

#### Workmen's compensation — effect of findings.

1. A finding of fact by the Industrial Accident Board as to which of two persons

Note. — Upon the question who are employers within the meaning of the Com-

was employer of an injured employee is binding on the courts, on appeal.

*For other cases, see Appeal and Error, VII, 4, in Dig. 1-52 N. S.*

**Master and servant — workmen's compensation — employee of independent contractor.**

2. A creamery company which lets the construction of a building for use in its business to an independent contractor is not liable for injury to an employee of the latter during the performance of the work, under a statute providing that employer includes the owner or other person who is virtually the proprietor of the business, but who, by reason of there being an independent contractor, is not the direct employer of the workman, since the creamery company is not the virtual proprietor of the business in which the injury occurred.

*For other cases, see Master and Servant, II, a, 6, in Dig. 1-52 N. S.*

(January 17, 1917.)

**A**PPEAL by defendant Moretown Creamery Company from an award and order of the Industrial Accident Board in favor of applicant against it, in a proceeding under the Workmen's Compensation Act, to recover compensation for injuries sustained by applicant while employed in the erection of a building. Order vacated and award set aside.

The facts are stated in the opinion.

Messrs. Fred B. Thomas and Dunnett & Shields, for appellant:

There is no liability, unless the relation of employer on the one hand and workman on the other hand exists.

Uphoff v. Industrial Bd. 271 Ill. 312, L.R.A.1916E, 329, 111 N. W. 128, Ann. Cas. 1917D, 1, 13 N. C. C. A. 80; Lawton v. Morgan, Flidner & Boyce, 66 Or. 292, 131 Pac. 314, 134 Pac. 1037; Gibbons v. Chapin, 147 Ill. App. 575; Spiers v. Elderslie S. S. Co. [1909] S. C. 1259, 46 Scot. L. R. 893; Luckwill v. Auchen S. S. Co. [1913] W. C. & Ins. Rep. 167, 108 L. T. N. S. 52, 12 Asp. Mar. L. Cas. 286, 6 B. W. C. C. 51; Zugg v. Cunningham [1908] S. C. 827; Brine v. May [1913] W. C. & Ins. Rep. 148, 6 B. W. C. C. 134; Hockley v. West London Timber & Joinery Co. [1914] 3 K. B. 1013, W. N. 330, 83 L. J. K. B. N. S. 1520, 58 Sol. Jo. 705, 7 B. W. C. C. 652.

Taylor, J., delivered the opinion of the court:

This is a proceeding under the Vermont

compensation Acts, see annotation following Claremont Country Club v. Industrial Commission, post, 179, and references therein to annotations on related questions.

L.R.A.1918F.

Workmen's Compensation Act. No. 164, Acts 1915. From the facts certified by the Industrial Accident Board it appears that the Moretown Creamery Company is engaged in the creamery business in different parts of the state, and employs on an average twenty men. W. C. Flynn was a contractor and builder at the time in question, and ordinarily employed less than ten men. A short time before the injury complained of the creamery company, by its manager, entered into a verbal contract with Flynn to erect for it a new creamery building. By the terms of the contract, Flynn was to erect the building, and was to be paid therefor a reasonable price by the creamery company. Flynn employed most of the help, including Packett, and paid them by checks drawn to his order by the manager of the creamery company. The checks were for the exact amount due each man, and were indorsed over by Flynn. While Packett was at work clapboarding the building, the staging on which he was working gave way, and he fell to the ground, receiving the injury complained of.

The creamery company denied liability, on the ground that Packett was in the employ of Flynn who, if anyone, it says, should be held liable to make compensation for the injury. The board found, and so certified, that Packett was not working for the creamery company, but was employed by Flynn; and that Flynn's contract with the company was not a contract of hiring, within the meaning of the act. It held that Packett was entitled to compensation from the creamery company, and made an order fixing the compensation to be paid. The petition was dismissed as to Flynn, and continued as to the Travelers' Insurance Company, pending payment of the award by the creamery company. The creamery company brings its appeal to this court, which presents for review the questions of law certified up by the Industrial Accident Board. Acts 1915, No. 164, § 37.

The finding that Packett was not working for the creamery company, but was employed by Flynn, settles his status as a workman, so far as it was a question of fact. Dale v. Saunders Bros. 218 N. Y. 59, 112 N. E. 571, Ann. Cas. 1915B, 703. The board held that §§ 9 and 58 (a) of the act "impose upon the principals all obligations resting upon employers for compensation due to their employees." Section 9 provides: "No contract, rule, regulation, or device whatsoever shall operate to relieve the employer in whole or in part from any liability created by this act." [Laws 1915, p. 277.]

Section 58 defines certain terms used in the act, and, at subdivision (a), reads: "Employer," unless otherwise stated, includes any body of persons, corporate or unincorporated, public or private, and the legal representative of a deceased employer. It includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor, or for any other reason, is not the direct employer of the workmen there employed. If the employer is insured it includes his insurer so far as applicable."

Under the Vermont Workmen's Compensation Act, a necessary requisite to liability is the relation of employer and workman, within the contemplation of the act. The holding of the board amounts to a holding that the creamery company was Packett's employer, as the term is used in the act. The question would not seem to be directly affected by § 9, which merely provides against evasion of liability by an employer. It turns on the construction to be given to the definition of an employer found in § 58 (a); but a proper interpretation of this section involves an examination of other provisions, and a just appreciation of the spirit and purposes of the act. An instructive discussion of the scope and purposes of Workmen's Compensation Acts will be found in *Powers v. Hotel Bond Co.* 89 Conn. 143, 93 Atl. 245.

The act provides that it shall apply to all public and all industrial employment, as defined in the act; but shall not apply to domestic servants or to employers who regularly employ not to exceed ten employees, unless such employer elects to come within the provisions of the act. Section 4. The term "employment" is defined, in the case of private employers, as including employment only in a trade or occupation which is carried on by the employer for the sake of pecuniary gain. Section 58 (e). The right to compensation is conferred upon workmen, who receive personal injury by accident arising out of and in the course of such employment. Section 4. The term "workman" is defined as synonymous with "employee," and as meaning any person who has entered into the employment of or works under contract of service or apprenticeship with an employer. It does not include a person whose employment is purely casual, or not for the purpose of the employer's trade or business. Section 58 (b). The act compels an employer to secure compensation to his workmen, either by workmen's compensation or guaranty insurance,

or by a surety bond, unless excused therefrom by the board on a satisfactory showing of his financial responsibility. Section 45. In case of default in the matter of security, the employer may be enjoined from carrying on his business while the default continues. Section 48. The insurance carrier, as well as the employer, is made liable to pay the compensation awarded. Section 4. It is provided that every policy of insurance, and every guaranty contract covering the employer's liability, shall cover the entire liability of the employer to the employees, secured by the policy or contract, and shall contain a provision enabling the employees to enforce the liability of the insurance carrier in their own names, either by filing a separate claim against the carrier or by making the carrier a party to the original claim. Section 49. It is required that every such policy and contract shall contain a provision that the insurance carrier shall be subject to and bound by the findings and awards of the board against the employer, for the payment of compensation under the provisions of the act. Section 50.

With this general view of the provisions of the act in mind, we come to the inquiry whether the creamery company, as the owner of the building which was being erected, while not the direct employer of Packett, by reason of Flynn's being an independent contractor, was "virtually the proprietor or operator of the business there carried on;" in other words, the business in which Packett was then employed, out of and in the course of which he received his injury.

Apart from the requirement of § 63 (a), that the rule that statutes in derogation of the common law are to be strictly construed shall have no application, the act, being remedial in character, should be liberally construed, to effectuate the manifest purpose of the statute.

It was the evident intention of the legislature to make the person or persons, company or corporation, that for practical purposes was the proprietor or operator of the business being carried on, the employer, as the term is used in the act, though not actually the employer of the workmen by reason, among others, of there being an independent contractor who was the direct employer.

In view of other provisions of § 58 presently to be noticed, it is clear that the clause of subsection (a), "who is virtually the proprietor or operator of the business there carried on," was intended to qualify the words, "owner or lessee," as well as the words "other person."

It is important to note at the outset what the business was that was "there carried on." Beyond question, it was no more than the erection of a building for the ultimate use by the company as a creamery. Was the creamery company, in the purview of the act, the proprietor or operator of this business? Subsections (b) and (e) of § 58 shed light upon this question. It is only employment in the trade or occupation carried on by the employer for the sake of pecuniary gain that is within the contemplation of the act, and it does not apply when the employment is casual, or not connected with the employer's trade or business. This negative provision would be meaningless if, as to all work being done by an independent contractor, the owner should be held to be "virtually the proprietor or operator."

The true test is, Did the work being done pertain to the business, trade, or occupation of the creamery company, carried on by it for pecuniary gain? If so, the fact that it was being done through the medium of an independent contractor would not relieve the company from liability. The finding of the board is that the creamery company, at the time of the injury, was engaged in the creamery business. There is nothing to show that the company was engaged in the business of erecting buildings, unless such is the effect of the fact that Flynn was erecting for it a building, under a contract which made him an independent contractor and not an employee. But such is not the reasonable interpretation of employment "for the purpose of the employer's trade or business," and "in a trade or occupation . . . carried on . . . for the sake of pecuniary gain." It would be quite as reasonable to say that Flynn was engaged in the creamery business, in contemplation of the act, as that the creamery company was engaged in the business of erecting buildings. As well say that a farmer who lets a contract to build a barn or corncrib on his premises is engaged in the business of contractor and builder, or that the business of the contractor, while thus engaged, is that of farming.

The absurdity to which this construction leads plainly indicates that the legislature intended no such result, but only to charge, as proprietor or operator of the business being carried on, those engaged therein in the usual course of their business, trade, or occupation. Thus the creamery company might conduct its business of manufacturing butter in such a manner as to make it virtually the proprietor of the business,

though another employed and paid the workmen. Flynn might have sublet a portion of the work under this contract, in such a manner as to have been the employer, in contemplation of the act, of the workmen hired and paid by the subcontractor. But the creamery company did not thus become the "employer" of the workmen engaged by Flynn in erecting the building. Packett was employed by Flynn, both directly and in legal contemplation. For analogous cases supporting these conclusions, see Uphoff v. Industrial Bd. 271 Ill. 312, L.R.A.1916E, 329, 111 N. E. 128, Ann. Cas. 1917D, 1, 13 N. C. C. A. 80; Dale v. Saunders Bros. 218 N. Y. 59, 112 N. E. 571; Bargey v. Massaro Macaroni Co. 218 N. Y. 410, 113 N. E. 407; Comerford's Case, 224 Mass. 571, 113 N. E. 460; Kennedy v. Kaufman, — N. J. L. —, 91 Atl. 99; Blood v. Industrial Acci. Commission, 30 Cal. App. 274, 157 Pac. 1140; Western Indemnity Co. v. Industrial Acci. Commission, 172 Cal. 766, 158 Pac. 1033; Donlon Bros. v. Industrial Acci. Commission, 173 Cal. 250, 159 Pac. 715; Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 Pac. 721; Luckwill v. Auchen S. S. Co. 108 L. T. N. S. 52 [1913] W. C. & Ins. Rep. 167, 12 Asp. Mar. L. Cas. 286, 6 B. W. C. C. 51.

The security feature of the act makes weight for the conclusion we have reached. The act makes the liability of the insurance carrier coextensive with that of the employer. We may assume that the contract of insurance conforms to the requirements of the act. It would be unjust to the insurance company to attempt to extend its agreement to pay the compensation awarded to the employees of the creamery company, for injuries sustained in its business, to every undertaking of the company outside the usual course thereof. However, if the creamery company was Packett's employer while engaged in clapboarding the building, it would equally be the employer of men set to work by the contractor blasting for a foundation, if such work was required by the contract; and it would follow that the insurance company would be liable, in that view of the act, to make compensation on an exceedingly hazardous risk, and one not contemplated when the policy was sold.

We hold that the industrial accident board was without authority to make the award appealed from, and that it should be set aside and held for naught.

Order vacated, award set aside, and claim dismissed, with costs. Let the judgment be certified to the Industrial Accident Board.



**CALIFORNIA SUPREME COURT.**  
(In Banc.)

**CLAREMONT COUNTRY CLUB et al.,**  
Petitioners,

v.

**INDUSTRIAL ACCIDENT COMMISSION**  
**OF THE STATE OF CALIFORNIA.**

(174 Cal. 395, 163 Pac. 209.)

**Workmen's compensation — injury to caddy — liability of club.**

1. A club which, for the convenience of its members, provides caddies who are hired and supervised by its own employee, is the employer of a caddy injured while in the performance of his duties, within the operation of the Workmen's Compensation Act, although the club member utilizing the services of a caddy directs his activities while so doing, and furnishes the compensation therefor.

*For other cases, see Master and Servant, I. b, in Dig. 1-52 N. S.*

**Same — periodic employment — effect.**

2. One employed as caddy by a club does not lose his character of employee within the operation of the Workmen's Compensation Act, by the fact that he reports for duty and is employed only on specified days.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

**Same — injury to minor — compensation — probable earnings.**

3. An award of compensation to an injured caddy is not erroneous, because taking into consideration the earnings of a first-class caddy and what he might earn if he pursued the vocation after reaching majority, under a statute providing that if the injured employee is a minor, and his incapacity is permanent, his average weekly earnings shall be deemed to be the weekly sum that, under ordinary circumstances, he would probably be able to earn after attaining the age of twenty-one years in the occupation in which he was employed at the time of injury, if he had not been injured.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(February 9, 1917.)

**P**ETITION for a writ of review to annul an award by the Industrial Accident Commission to claimant, in a proceeding by him under the Workmen's Compensation Act to recover compensation for injuries sustained while in the employ of the petitioner Country Club. Affirmed.

The facts are stated in the opinion.

**Note.** — Upon the question who are employers within the meaning of the Compensation Statutes, see annotation following this case, post, 179, and references therein to annotations on related questions.

Messrs. Redman & Alexander, for petitioners:

The finding of the Commission that the claimant was an employee of the club is unsupported by and contrary to the evidence.

*Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345, 10 Mor. Min. Rep. 616; *Fay v. German General Benev. Soc.* 163 Cal. 118, 124 Pac. 844; *Brown v. Smith*, 86 Ga. 274, 22 Am. St. Rep. 456, 12 S. E. 411.

The evidence is insufficient to justify the amount awarded by the Commission.

The award, being unsupported by the evidence, should be set aside.

*Great Western Power Co. v. Pillsbury*, 171 Cal. 69, L.R.A.1916A, 281, 151 Pac. 1136, 11 N. C. C. A. 493; *Reck v. Whittlesberger*, 181 Mich. 463, 148 N. W. 247, Ann. Cas. 1916C, 771, 5 N. C. C. A. 917; *International Harvester Co. v. Industrial Commission*, 157 Wis. 167, 145 N. W. 5 N. C. C. A. 822; *Buckley's Case*, 218 Mass. 354, 105 N. E. 979, 5 N. C. C. A. 613, Ann. Cas. 1916B, 474.

Mr. Christopher M. Bradley, for respondent:

The applicant before the Commission was an employee of the Claremont Country Club.

*Walker v. Crystal Palace Football Club* [1910] 1 K. B. 87, 79 L. J. K. B. N. S. 229, 101 L. T. N. S. 645, 26 Times L. R. 71, 54 Sol. Jo. 65, 3 B. W. C. C. 53, Ann. Cas. 1913C, 25; *Dewhurst v. Mather* [1908] 2 K. B. 754, 77 L. J. K. B. N. S. 1077, 24 Times L. R. 819, 99 L. T. N. S. 568, 52 Sol. Jo. 681, 1 B. W. C. C. 328.

The amount awarded by the Commission is justified by the evidence

*Kilberg v. Vitch*, 171 App. Div. 89, 156 N. Y. Supp. 971.

Henshaw, J., delivered the opinion of the court:

Review to annul an award of the Industrial Accident Commission. On March 7, 1915, Raymond Harris, a boy fourteen years of age, while caddying for a member of the Claremont Country Club, leaned against the handrail of a bridge spanning a small creek on the golf course of the club. The rail gave way, and the boy fell backward into the creek, suffering a permanent injury to one of his elbows. He filed his claim for compensation with the Industrial Accident Commission. The Claremont Country Club and its insurer, the Aetna Life Insurance Company, answered, denying only the fact of employment. The Commission, after hearing, awarded the applicant \$1,170 in addition to his outlay for medical attendance.

The principal contention of petitioners is

that the boy was not an employee of the Country Club within the meaning of the provisions of the Code and the terms of the Workmen's Compensation Act (Stat. 1913, p. 279). The undisputed facts are that the club owns and maintains a golf links for the pleasure of such of its members as desire to indulge in the game. The general control over this sport is vested in appropriate committees, selected from the club members. Many golfers have desired and do desire the services of attendants to carry their golf bags, to aid in the search for the ball, and to perform other like familiar services. For these members, the club provides caddies, and over them is a paid employee known as the caddy master. The club also maintains a caddy house, which is the station of the caddies until their services are requisitioned. The caddies are graded into three classes, based on their records and abilities in the service, the best belonging to class A, the next best to class B, and the beginners and least efficient to Class C. A-class caddies are paid 60 cents, B-class caddies 50 cents, and C-class caddies 40 cents a game. A player requisitioning a caddy may not designate the boy whose services he desires. His request is made to the caddy master, who, under a system, summons the caddy whose turn it is to serve. The caddy is supplied with a card, whereon, at the conclusion of the game, the member makes his report to the caddy master, with remarks touching the service and qualifications of the boy, and from time to time the caddy master regrades his caddies in accordance with these reports. At the close of the game the player hands to the caddy master, with his report, the amount earned by his caddy, and this amount is immediately delivered by the caddy master to the boy. Thus each player pays the caddy, and the indirect method of payment through the caddy master is apparently designed for the twofold purpose of convenience in making change, and as a check on "tips" or donations by the members to the caddy, in excess of the actual amount earned. The boys are taken on by the club through the caddy master or Greens Committee, and the caddy master or Greens Committee is empowered to discharge a caddy, or, in other words, to forbid him to frequent the golf links and seek and secure employment. Upon the other hand, while actually caddying, the control of the activities of the boy are wholly with the member using him, and the club, as a club, has, of course, no means of knowing what particular orders or directions a member may give to his caddy, nor what unusual or dangerous duties he may call upon him to perform. For these reasons, petitioners argue that

the caddies are not employees of the club, and that "all that the club does is to afford boys who wish to serve as caddies an opportunity for employment by the members of the club who play golf." For this position, petitioners believe they find full support in § 2009 of the Civil Code, in *Boswell v. Laird*, 8 Cal. 469, 68 Am. Dec. 345, 10 Mor. Min. Rep. 616; in *Fay v. German General Benev. Soc.* 163 Cal. 118, 124 Pac. 844, and *Brown v. Smith*, 86 Ga. 274, 22 Am. St. Rep. 456, 12 S. E. 411. Touching § 2009 of the Civil Code, petitioners insist that the status of the caddy is that of a servant, as he is employed to render personal service, and that if it be conceded that he would be a servant of the club, while rendering personal service at the direction of the club, the relationship ceases entirely when he is actually engaged in caddying for a member, since, by virtue of that engagement, he no longer is "entirely under the control and direction" of the Claremont Country Club, but is entirely under the control and direction of the member, who thus becomes "his master." But such refinement of reasoning makes no stronger appeal to us than it has to other courts. Section 1965 of the same Code has a bearing upon the matter, and that defines a contract of employment (under which, of course, the relationship of employer and employee necessarily arises) to be "a contract by which one, who is called the employer, engages another, who is called the employee, to do something for the benefit of the employer, or of a third person." The reasoning, we say, makes no stronger appeal to us, because the language of § 2009 was never intended to mean, for example, that a housemaid, directed to give personal attention and service to a guest within the house, ceased, for that reason, to be an employee or servant of the householder. No more do waiters in restaurants and cafés who, while attending to the requirements of the patrons, and in contract bound to comply with all the reasonable requests of those patrons, cease to be employees of the owners of the particular establishment. Nor, indeed, is the method of compensation determinative. Taking the single case of waiters, it is a well-known fact that, in some establishments, they receive no wage from their employers, and are dependent entirely upon the "tips" which they receive from the persons they serve; and it is equally a well-known fact that, in some instances, this system is carried to such an extent that the waiters themselves pay the employers to obtain the employment. So, here, it is not of consequence that the members should pay to the caddy directly the amount he has earned, or pay it indi-

rectly through the medium of the caddy master. The employment and discharge of the caddy during all of the time when he is not actually in the service of a member is wholly under the control of the Country Club, and this is the determinative fact in the matter. In certain of its features the case, then, is not dissimilar to *Gaines v. Hard*, 57 Ark. 615, 38 Am. St. Rep. 266, 22 S. W. 570, where it is held that a bathroom attendant, selected and subject to be discharged by the owner, and performing service for him in keeping the bathrooms and the adjacent halls clean, is his servant, notwithstanding the fact that he paid such attendant no compensation, and the only compensation which he received was the donations from the patrons under whose control he was, while performing service for them. The foregoing, we think, will certainly show the inappositeness of such authorities as *Brown v. Smith*, 86 Ga. 274, 22 Am. St. Rep. 456, 12 S. E. 411, where the holding is merely that, where a master has hired his servant to another, giving the other the complete and absolute control and direction of the servant, with the exclusive right to discharge him, the original master is not liable for his negligence. Wherefore, upon this point, our own cases, above cited, dealing with the general features of the relationship of employer and employee and master and servant, do not call for review, for these caddies are employed by the club, are controlled by the club, and the service which they render simply happens, from its nature, to be directed to contribute to the convenience and pleasure of the individual members of the club.

The fact that the injured boy reported for duty and was employed only on specific days does not militate at all against the proposition that he was an employee. *Dew-*

*hurst v. Mather* [1908] 2 K. B. 754, 77 L. J. K. B. N. S. 1077, 24 Times L. R. 819, 99 L. T. N. S. 568, 52 Sol. Jo. 281, 1 B. W. C. C. 328.

The final complaint of petitioners is that the amount of the award is not justified by the evidence. Elements of uncertainty in this evidence are pointed out by the petitioners, as that it was based upon the earning capacity of a first-class caddy, and there was no assurance that the injured boy would become a "class-A" caddy; also, that there was no assurance that, when he attained his majority, he would pursue the vocation of a caddy; and as little assurance that, if he did pursue the vocation, that he would follow it every day instead of only on Saturdays and Sundays, as he was then doing. These statements are unquestionably true, but, nevertheless, the law itself takes knowledge of them, and defines the duties of the Industrial Accident Commission under the indicated circumstances. The evidence did show that the basis of the award was within the earning capacity of good caddies. The act itself (Stat. 1913, § 17, chap. 176) provides as follows: "If the injured employee is a minor, and his incapacity, whether total or partial, is permanent, his average weekly earnings shall be deemed, within the limits fixed, to be the weekly sum, that under ordinary circumstances, he would probably be able to earn after obtaining the age of twenty-one years, in the occupation in which he was employed at the time of the injury, if he had not been injured."

And it is held, supporting such a law, that it is proper to take into consideration the increased wage which a minor may be fairly expected to earn. *Kilberg v. Vitch*, 171 App. Div. 89, 156 N. Y. Supp. 971.

The award is therefore affirmed.

### Annotation — Who are employers within the meaning of the Compensation Statutes.

The general subject of Workmen's Compensation Acts is treated in annotations in L.R.A.1916A, 23, and L.R.A.1917D, 80. For later cases and annotations on Workmen's Compensation Statutes, consult the L.R.A. Indexes for volumes subsequent to L.R.A.1917D, under the title, "Workmen's Compensation."

The question, Who are "Employers," is treated on pages 113 and 245 of the annotation in L.R.A.1916A, and on page 143 of the annotation in L.R.A.1917D. The present annotation is confined to cases handed down subsequent to the preparation of the latter annotations.

As to the applicability of Compensation

Statutes to states, counties, cities, districts, and charitable and other public institutions, and their employees, see annotation to *Griswold v. Wichita*, post, 190.

As to who are employees, within the meaning of the Compensation Statutes, see annotation to *State ex rel. Nienaber v. District Ct.* post, 201. As to the application of Workmen's Compensation Statutes to employment that is casual, or not in the usual course of the employer's business, see annotation to *Marsh v. Groner*, post, 215. As to extrahazardous employment, and other occupations expressly included in the Com-

pensation Act, see annotation to *F. W. Hochspeier v. Industrial Bd.* post, 230.

The Compensation Statutes usually define the term employer with considerable particularity, so that there are but few cases in which the courts have to determine whether or not the person or company sought to be held liable for compensation is, in fact, an employer, within the meaning of the statute. Nevertheless, there are a few cases in which this question has been before the court. The cases are grouped under headings indicative of the cases under them.

**Individual member of partnership as employer.**

One who suffers personal injuries while working for a partnership cannot maintain an action for compensation against a member of the partnership, alone, on the allegation that the individual defendant was the employer. *Dupre v. Coleman* (1918) — *La.* —, 78 So. 241. This decision is based upon the general principle that the employee could be considered as an employee of the partnership only, and not of a member of the partnership.

**Application to employers having limited number of employees.**

The provision of the statute, that only employers employing more than a designated number of employees are within its operation, has been held to apply to the usual condition of the business or trade, and not to unusual conditions.

Thus, a farmer does not, by periodically employing more employees at threshing time and similar occasions, bring himself within the operation of the Compensation Act, applicable, by its terms, to every employer of four or more employees in a common employment; and this, notwithstanding the employee was injured while working in connection with more than four men, in the common employment. *Kelley v. Haylock* (1916) 163 Wis. 326, L.R.A.1916E, 626, 157 N. W. 1094. So, a master plumber, having less than five regular employees in the plumbing business, is not liable for injuries to one of them, although, at the time of the injury, he was at work on a house on which there were also at work a number of carpenters employed by a master carpenter, who, together with the plumber and a master mason, had entered into an agreement to construct several houses, each to furnish at cost the labor and materials of his trade, but each to have

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full control of his workmen; and each of whom had an established business in his trade, aside from the joint adventure. *Coady v. Igo* (1916) 91 Conn. 54, 98 Atl. 328. In this case it does not appear that the employment of more than the statutory number of men had anything to do with the accident. It was, in fact, conceded that the employee's injury arose out of and in the course of his employment, in the respondent's regular individual business, the facts showing that he suffered acute gas poisoning, while attempting to locate a leak in the gas pipes of the employer's shop.

On the other hand, musicians employed in an amusement hall, the duration of whose employment each day and the place where they are to play are under the control of the proprietor of the hall, are employees of such proprietor, and are to be counted in determining the number of employees, to ascertain whether or not the Compensation Act is applicable, although such musicians are furnished by the leader twice each week, and he stipulates the amount of compensation they are to receive. *Boyle v. Mahoney* (1918) 92 Conn. 404, 103 Atl. 127.

**Liability of general or special employer.**

A question which frequently arises under the Compensation Acts is, Which of two persons is liable for compensation for injuries to a workman, who is admittedly the employee of one or the other of them? A number of cases of this kind have been set out; but it should be noted that this question is not peculiar to Compensation Statutes, and is most frequently settled by reference to common-law principles. Those principles are discussed and exemplified in an extensive note in 37 L.R.A. 33.

These cases differ so in the facts presented, that it is impossible to arrange them in any logical manner.

A club, which, for the convenience of its members, provides caddies, who are hired and supervised by its own employee, is the employer of a caddy injured while in the performance of his duties, within the operation of the Workmen's Compensation Act, although the club member utilizing the services of a caddy directs his activities while so doing, and furnishes the compensation therefor. *CLAREMONT COUNTRY CLUB v. INDUSTRIAL ACCI. COMMISSION*, ante, 177.

A motorman must be held to be con-

tinuously in the employ of an interurban railway, although, for a portion of his time each day, he operates his car upon the lines of a street railway company, and the latter company pays his wages for such time, where he has made but one contract of employment, and the wages are paid by the street railway company by virtue of a contract between the two companies, to which the motor-man is in no wise a party. *Chicago & I. Traction Co. v. Industrial Bd.* (1918) 282 Ill. 230, 118 N. E. 464.

A contractor engaged in installing a dust-arrester system in the plant of a manufacturing company, to whom an employee of the company was loaned for such work of installation, and who had full control of such laborer while so employed, is liable for compensation for injuries resulting in the laborer's death, where the company's sole connection with the laborer was its liability to pay him his wages. *Arnett v. Hayes Wheel Co.* (1918) — Mich. —, 166 N. W. 957. The court said that the fact that a person employed and paid a servant does not conclusively show that he was a servant of such persons, where it is further shown that the employee was actually under the control of another person during the process of the work.

A machinist sent by a machine shop to repair machinery at the plant of a third party is not an employee of such third party. *Texas Ref. Co. v. Alexander* (1918) — Tex. Civ. App. —, 202 S. W. 131.

A workman employed by the Public Service Commission in the work of constructing a subway for the city of New York is entitled to compensation from the city for injuries received in the course of his employment, since the city was, under the statute, engaged in the hazardous employment of subway construction; and the mere fact that the employee was engaged by state officials does not prevent the recovery of compensation, where such state officials were, by statute, made the agents of the city in regard to the work in question. *Sexton v. Public Service Commission* (1917) 180 App. Div. 111, 167 N. Y. Supp. 493.

In *Hadden v. Stanton* (1917) 177 App. Div. 938, 163 N. Y. Supp. 1118, the appellate division, without opinion, unanimously affirmed an award of compensation to an employee, who was in the special employ of the respondent at the time of the injury, although the respondent

paid the wages earned by the employee to the latter's general employer.

A man furnished to a street car company by a detective bureau, as a strike breaker, who was injured while riding in the car as a guard, is an employee of the railway company rather than of the detective bureau, and, if injured, cannot maintain an action for damages, since his remedy is under the Compensation Act. *Murray v. Union R. Co.* (1918) 183 App. Div. 209, 170 N. Y. Supp. 601.

An employee engaged to operate a locomotive, by a firm engaged in grading a railroad, is entitled to compensation from the firm for injuries received while assisting the railroad in the work of laying rails, where the railroad was performing the work at the request of the contracting firm, the track being necessary for it to carry on the work which it had contracted to do. *Georgia Casualty Co. v. Industrial Acci. Commission* (1917) — Cal. —, 165 Pac. 704, reaffirmed on writ of review in (1918) — Cal. —, 170 Pac. 625.

This question frequently arises where an employee of a company, or persons, doing a general teaming business, is loaned with his team to another person, who thus becomes his special employer. In a number of cases, it has been held that the employee remains an employee of the general employer, and cannot hold the special employer liable for compensation.

Thus, a teamster whose contract of employment was exclusively with the general employer, who alone was responsible for his wages, cannot recover compensation from the city, where the latter hired from the general employer, horses, cart, and driver to carry material from one place to another, as its officers might direct, the driver being left to deal with the horses in his own way. *Re Clancy* (1917) 228 Mass. 316, 117 N. E. 347.

So, a workman is not an employee of the foreman of the general employer, merely because, at the time that he was injured, he was driving a team which belonged to the foreman personally, where he received the same pay that he would have received had he been working without the team, and the foreman made no profit out of the workman's wages, and the workman was controlled and directed by the foreman precisely as were the other workmen, who were admittedly employees of the general employer. *Yolo Water & P. Co. v. Industrial Acci. Commission* (1917) — Cal. App. —, 168 Pac. 1146.

On the other hand, an employee in the general employment of an ice company, who was injured while at work for a coal company, to which he had been loaned with horses and wagon, has been held to have no claim for compensation against the ice company, where he took his directions from an employee of the coal company, although he was still in the general employment of the ice company. *Scribner's Case* (1918) — *Mass.* —, 119 N. E. 651. The court said: "The transaction between the two companies amounted only to a loan of the ice company's servant to the coal company, the servant became the employee of the latter for the time being, and, on the evidence, he must be found to have assented to this, although remaining in the general employment of the ice company."

Under the New York statute, however, either the general employer, or the special employer to whom his services had been contracted by the general employer, may be held liable for compensation, for injuries received by the employee while working for the special employer. *DeNoyer v. Cavanaugh* (1917) 221 N. Y. 273, 116 N. E. 992; *Dale v. Saunders Bros.* (1916) 218 N. Y. 59, 112 N. E. 571, *Ann. Cas.* 1918B, 703.

So, where one is in the general employment of another, and is injured while he is working under the direction of a special employer, he may look, so far as the provisions of the Compensation Law

are applicable, to the general employer, or to the special employer, or to both, for compensation for injuries due to occupational hazards. *DeNoyer v. Cavanaugh* (N. Y.) *supra*.

So, an employee of one engaged in the general teaming business, who is injured while doing teaming for a third person, has a remedy, under the Workmen's Compensation Act, against such third person, so that an action for damages cannot be maintained, although there may be some doubt whether the injured employee was the servant of the said third person. *Lee v. Cranford Co.* (1918) — *App. Div.* —, 169 N. Y. Supp. 370.

And, in *Nolan v. Cranford Co.* (1915) 171 *App. Div.* 959, 155 N. Y. Supp. 1124, affirmed in (1916) 219 N. Y. 581, 114 N. E. 1074, an award was upheld against a special employer, where the general employer had but one employee, and was himself an employee of the special employer, and was not carrying on the business of teaming, except in the sense that he furnished the truck and team of horses, with the driver, to the special employer.

The court will not disturb a finding of the Commission as to who was the employer of the injured employee, when there was some evidence to sustain the finding. *Sullivan v. Preston* (1917) 177 *App. Div.* 110, 163 N. Y. Supp. 692.

W. M. G.

#### KANSAS SUPREME COURT.

G. S. GRAY  
v.

BOARD OF COUNTY COMMISSIONERS  
OF SEDGWICK COUNTY, KANSAS,  
et al., Appts.

(101 Kan. 195, 165 Pac. 867.)

**Workmen's compensation — purpose of act.**

1. The general purpose of the Workmen's Compensation Act is to provide for compensation to workmen injured in hazardous em-

Headnotes by WEST, J.

**Note.** — As to applicability of Compensation Statutes to states, counties, cities, districts, charitable and other public institutions, and their employees, see annotation to *Griswold v. Wichita*, post, 190, and references therein to annotations on related questions.

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ployments, carried on for the purpose of business, trade, or gain.

For other cases, see *Master and Servant*, II. a, 1, in *Dig.* 1-52 N. S.

**Same — road work — applicability of statute.**

2. A county, in resurfacing a county road, is not engaged in trade or business within the terms or operation of the Workmen's Compensation Act.

For other cases, see *Master and Servant*, II. a, 1, in *Dig.* 1-52 N. S.

(Johnston, Ch. J., dissents.)

(June 9, 1917.)

**A** PPEAL by defendants from an order of the District Court for Sedgwick County overruling a demurrer to a petition filed under the Workmen's Compensation Act, to recover compensation for injuries sustained by plaintiff while in defendant's employ. **Reversed.**

The facts are stated in the opinion.

Messrs. Ross McCormick, Glenn Porter, and H. C. Castor, for appellant:

The county is not an employer, within the meaning of the Workmen's Compensation Act.

Agler v. Michigan Agri. College, 181 Mich. 559, 148 N. W. 341, 5 N. C. C. A. 897; Superior v. Industrial Commission, 160 Wis. 541, 152 N. W. 151, 8 N. C. C. A. 963; Shawnee County v. Jacobs, 79 Kan. 77, 21 L.R.A.(N.S.) 209, 99 Pac. 817.

The amendment of the original Act of 1911, to include county and municipal work, does not make the county liable.

The building of a county road by the county itself is not a business, nor a business for trade or gain, but a function of the government.

Pfefferle v. Lyon County, 39 Kan. 436, 18 Pac. 506; Silver v. Clay County, 78 Kan. 230, 91 Pac. 55; Udey v. Winfield, 97 Kan. 279, 155 Pac. 43; Knoll v. Salina, 98 Kan. 428, 157 Pac. 1167; Griswold v. Wichita, 99 Kan. 502, post, 187, 162 Pac. 276, Ann. Cas. 1917D, 31.

Messrs. J. Graham Campbell and Ray Campbell, for appellee:

The county was an employer within the meaning of the act.

Mackay v. Commission of Port of Toledo, 77 Or. 611, 152 Pac. 250; Allen v. Millville, 87 N. J. L. 356, 95 Atl. 130, 9 N. C. C. A. 749, Udey v. Winfield, 97 Kan. 279, 155 Pac. 43; Knoll v. Salina, 98 Kan. 428, 157 Pac. 1167.

The county is made liable by the amendatory Act of 1913, which includes county or municipal work in the kinds of employment determined to be especially hazardous.

Griswold v. Wichita, 99 Kan. 502, post, 187, 162 Pac. 276, Ann. Cas. 1917D, 31; Brown v. Decatur, 188 Ill. App. 147.

The operation of a sand pit by a county is a proprietary function.

Griswold v. Wichita, supra; Pfefferle v. Lyon County, 39 Kan. 432, 18 Pac. 506; La Clef v. Concordia, 41 Kan. 323, 13 Am. St. Rep. 285, 21 Pac. 272; Bowden v. Kansas City, 69 Kan. 587, 66 L.R.A. 181, 105 Am. St. Rep. 187, 77 Pac. 573, 1 Ann. Cas. 955, 16 Am. Neg. Rep. 339; Freeman v. Chanute, 63 Kan. 573, 66 Pac. 647; Josupeet v. Niagara Falls, 70 Misc. 638, 127 N. Y. Supp. 527; Agler v. Michigan Agri. College, 181 Mich. 559, 148 N. W. 341, 5 N. C. C. A. 897; State ex rel. Northfield v. District Ct. 131 Minn. 352, 155 N. W. 103, Ann. Cas. 1917D, 866, 11 N. C. C. A. 366; Popke v. Waupaca County, cited in 8 N. C. C. A. 960.

West, J., delivered the opinion of the court:

The plaintiff was employed by the county commissioners, to work with his team, hauling gravel for use on a county road in Sedgwick county, which the board and engineer were grading and surfacing. While thus engaged his foot slipped, and was caught under the wheels of his loaded wagon and injured. He sued the county under the Workmen's Compensation Act. A demurrer to the petition was overruled, and the county appeals, averring that it was not an employer engaged in trade or business, within the terms of the statute.

The general scheme of this legislation has been to enable those engaged in operating hazardous industries to compensate workmen injured therein, and add the cost to the price of the product, thus extending the burden to the consumer.

Assuming, without deciding, that hauling gravel from the gravel pit to place on a public highway is within the act, on the theory that the employment is "on, in or about a . . . mine or quarry" (Gen. Stat. 1915, §§ 5900, 5903, defining "mine;" § 5903, subd. D, defining "quarry"), the question arises as to whether the county was an employer engaged in its trade or business. Section 5900 provides: "This act shall apply only to employment in the course of the employer's trade or business on, in or about a railway, factory, mine or quarry, electric, building or engineering work, laundry, natural gas plant, county and municipal work, and all employments wherein a process requiring the use of any dangerous explosive or inflammable materials is carried on, which is conducted for the purpose of business, trade or gain."

This section seems to cover, first, employment in the course of the employer's trade or business, in certain places or kinds of work, and, second, all employments dangerous in the way mentioned, and conducted for the purpose of business, trade, or gain. The words "county and municipal work" were added by the legislature of 1913, and if applied only to the case of one who contracts to do county or municipal work and employs workmen therein, are clear enough. But running through the entire language are the two ideas, not only of an employment in certain classes of work, but an employment therein by an employer in the course of his trade or business, conducted for a profit. The provisions of the statutes of various other states are quoted, showing that in many of them the clear use of terms has left the matter as to municipalities free from doubt, but

they do not aid much in the construction of the statute before us. As applied to this case the amended provision may be thus read: "This act shall apply only to employment in the course of the employer's trade or business on, in or about . . . county and municipal work, and all employments wherein a process . . . is carried on, which (employment) is conducted for the purpose of business, trade or gain; each of which employments (all those previously mentioned) is hereby determined to be especially dangerous . . . and as to each of which employments it is deemed necessary to establish a new system of compensation for injuries to workmen."

If engaged in county work in the course of employer's trade or business for profit, the workman is within the statute, whether the work is actually hazardous or not, such work being deemed and declared dangerous. Agricultural pursuits and employments incident thereto are declared nonhazardous and exempt. In amending the section, it was the intention to add county and municipal work, and exclude agricultural work, thus changing the kinds of employment to which the act was to apply. It was a change in employments, not in employers. Before the amendment, a contractor doing county or municipal work was not within the statute, unless engaged in doing work actually hazardous. Now such work is, in effect, made hazardous by being declared so, and brought within the operation of the act. The definition of "employer" was left, as before, to include "any person or body of persons, corporate or incorporate, and the legal representatives of a deceased employer or the receiver or trustee of a person, corporation, association or partnership." (Gen. Stat. 1915, § 5903, subd. h.) But persons corporate or incorporate, in order to be employers within the act, must employ the workmen in the course of their trade or business, terms which do not naturally or properly apply to a county in the administration of its affairs. "Business" has been held to be synonymous with "calling," "occupation," or "trade," and defined as "any particular occupation or employment engaged in for a livelihood or gain." *Topeka v. Jones*, 74 Kan. 164, 86 Pac. 162, 87 Pac. 1133.

Under the provisions of § 8765 of the General Statutes of 1915, the county engineer or township trustee was required to keep certain roads in repair, and authorized to enter upon adjoining land and carry away gravel, the expense thereof to be allowed by the highway commissioners, and paid by the board of county commissioners,

when such matter is used upon a county or state road. Counsel in his brief asks: "When Sedgwick county undertook to operate a sand pit and to build or resurface the North Lawrence avenue road by direct employment of labor, instead of by contract, the county doing the identical work that a contractor is now doing on the South Lawrence avenue road, was it exercising a governmental function?"

In *Pfefferle v. Lyon County*, 39 Kan. 432, 18 Pac. 508, it was said of counties: "They are usually denominated quasi corporations, and their principal functions are governmental and political, and not private or of a strictly corporate character. Counties are principally mere political subdivisions of the state, mere instrumentalities of the state government, brought into existence merely for the purpose of aiding and assisting the state in promoting justice, in preserving peace, quiet and good order in the state, and of promoting the welfare and happiness of the citizens thereof; and these objects are the ones which counties are designed to subserve when they are authorized to build, own, and keep county jails. These objects do not partake at all of a private character; and they are not engaged in as business transactions, nor for the purpose of increasing the wealth of the county as an organization." (p. 436.)

In *Silver v. Clay County*, 76 Kan. 228, 91 Pac. 55, it was held that counties are mere auxiliaries to the state government, and partake of the state's immunity from liability, and are in no sense business corporations. In that case damages were sought for the abandonment of a highway and the removal of a bridge. In the opinion it was said that, since the organization of the state, it has been the duty of counties and townships to maintain public roads and bridges. In *Shawnee County v. Jacobs*, 79 Kan. 76, 21 L.R.A. (N.S.) 209, 99 Pac. 819, it was held that a county engaged in building a bridge upon a public highway acts as a subdivision of the state government, and is not liable for the negligent performance of such work, unless expressly made so by statute. In the opinion, it was said: "The duty of building bridges and maintaining the public highway has devolved upon the counties and townships of this state since its organization. In performance of this duty the county acts as an agency of the state, and is no more liable for its acts while so engaged than the state itself would have been if doing the same work." (p. 81.)

In *Griewold v. Wichita*, 99 Kan. 502, post, 187, 162 Pac. 277, Ann. Cas. 1917D, 31, an action to recover for the death of a



policeman killed in the discharge of his duties, in holding that the deceased was not a workman, as defined by the Compensation Act, and in speaking of the Amendment of 1913 adding the words "county and municipal work," it was said "that it may have been the intention of the legislature to relieve any doubt that might exist as to the application of the act to the county and municipal work, which is conducted for the purpose of business, trade or gain," "provided the nature of the work is such as to render it especially dangerous and hazardous to life and limb of the workmen engaged therein." (p. 504.) It was also said that the theory of the act is that the employer may, without loss to himself, distribute the burden upon the consumers which constitute the public. "Many good reasons might be suggested for including within the scope of the act workmen employed in hazardous enterprises by cities engaged in conducting a business for profit, as electric light or waterworks plants, because a city, like any private individual engaged in trade or business, could pass on to the public at large the burden, by adding to the cost of the service. But where a city is engaged merely in the exercise of its governmental functions, we think it clear that the workman, no matter how hazardous his employment, would not come with the spirit and purpose of the Compensation Act any more than the clerks and stenographers, in the case of *Udey v. Winfield*, 97 Kan. 279, 155 Pac. 43. So that, even though a policeman

be regarded as a workman in the employ of the city, and notwithstanding the performance of his duties places him at times in a dangerous and hazardous situation, still, the employer, the city, is not engaged in trade or business, and therefore a policeman is not within either the spirit or letter of § 2 of the act, which limits its application to persons employed for the purpose of the employer's trade or business. 99 Kan. 506."

The distinction between cities and counties was pointed out in *Beach v. Leahy*, 11 Kan. 23, and referred to in *Fisher v. Delaware Twp.* 87 Kan. 674, 677, 41 L.R.A. (N.S.) 1074, 125 Pac. 94, Ann. Cas. 1914A, 554, and *Haddock v. McDonald*, 98 Kan. 628, 159 Pac. 402. Cities have been held liable for certain acts or omissions, from which counties are relieved, and, in view of the unvarying rule to relieve the latter from all liability not expressly imposed by statute, it would be a departure to hold the defendant county liable. In *Udey v. Winfield*, supra, and *Knoll v. Salina*, 98 Kan. 428, 157 Pac. 1167, the question before us was not raised. It is now presented for the first time. It must be held that the county was not engaged in trade or business, so as to bring this case within the application of the Compensation Act.

The order overruling the demurrer to the petition is reversed, and the cause remanded, with directions to sustain such demurrer.

*Johnston*, Ch. J., dissents.

#### MASSACHUSETTS SUPREME JUDICIAL COURT.

ARAN ZOULALIAN

v.

NEW ENGLAND SANATORIUM &  
BENEVOLENT ASSOCIATION.

(230 Mass. 102, 119 N. E. 686.)

#### Charity — hospital.

1. A hospital for the care of indigent and other sick and infirm persons, and in no

manner directly or indirectly for private profit, is a public charity.

*For other cases, see Charities, I. b, in Dig.*  
1-52 N. S.

#### Workmen's compensation — right of employees of charities.

2. The rule that a public charity is not liable for negligent injuries to employees is not changed by the Workmen's Compensation Acts, unless a plain intent to effect the change is manifest.

*For other cases, see Charities, II. c, in Dig.*  
1-52 N. S.

**Note.** — As to the applicability of Compensation Acts to states, counties, cities, districts, charitable and other public institutions and their employees, see annotation to *Griswold v. Wichita*, post, 190, and references therein to annotations on related questions.

The liability of charitable institutions, at common law, for personal injuries, is treated in the notes to *Farrigan v. Pevear*, 7 L.R.A. (N.S.) 481; *Bruce v. Central M. E. Church*, 10 L.R.A. (N.S.) 74; *Thornton v. Franklin Square House*, 22 L.R.A. (N.S.)

486; *Hordern v. Salvation Army*, 32 L.R.A. (N.S.) 62; *Basabo v. Salvation Army*, 42 L.R.A. (N.S.) 1144; and *Schloendorff v. Society of New York Hospital*, 52 L.R.A. (N.S.) 505; and see later cases, *Tucker v. Mobile Infirmary Asso.* L.R.A. 1915D, 1167; *Nicholson v. Atchison. T. & S. F. Hospital Asso.* L.R.A. 1916D, 1029; *Loeffler v. Sheppard & E. P. Hospital*, L.R.A. 1917D, 967; *Gamble v. Vanderbilt University*, L.R.A. 1918C, 875, and *Cook v. John N. Norton Memorial Infirmary*, L.R.A. 1918E, 647.

L.R.A. 1918F.

**Master and servant — obvious danger — assumption of risk.**

3. One who undertakes to operate a buzz planer without a guard, the danger of which is obvious, assumes the risk either at common law or under the Employers' Liability Act, even though he is unable to understand English, and is inexperienced.

*For other cases, see Master and Servant, II. b, 2, in Dig. 1-52 N. S.*

(May 22, 1918.)

**E**XCEPTIONS by plaintiff to rulings of Superior Court for Middlesex County made during the trial of an action brought to recover damages for personal injuries received by plaintiff while in the employ of defendant, which resulted in a verdict in its favor. Overruled.

The facts are stated in the opinion.

Mr. George P. Beckford for plaintiff.

Mr. Oscar Storer, for defendant:

A charitable corporation is not liable for torts of its servants.

*McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Benton v. City Hospital*, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836; *Thornton v. Franklin Square House*, 200 Mass. 465, 22 L.R.A. (N.S.) 486, 86 N. E. 909.

Defendant is a charitable corporation.

*New England Sanitarium v. Stoneham*, 205 Mass. 335, 91 N. E. 385; *McDonald v. Massachusetts General Hospital*, and *Thornton v. Franklin Square House*, supra.

Crosby, J., delivered the opinion of the court:

This is an action for personal injuries, received by the plaintiff while in the employ of the defendant, and at work on a buzz planer.

The defendant is a corporation organized "for the purpose of founding a hospital or charitable asylum . . . for the care and relief of indigent or other sick or infirm persons . . . and in no manner, directly or indirectly, for private profit or dividend paying, to anyone." It is plain that, the objects of the corporation being benevolent and charitable, it must be held to be a valid public charity. *Conklin v. John Howard Industrial Home*, 224 Mass. 222, 112 N. E. 606; *Thornton v. Franklin Square House*, 200 Mass. 465, 22 L.R.A. (N.S.) 486, 86 N. E. 909; *Farrigan v. Pevear*, 193 Mass. 147, 7 L.R.A. (N.S.) 481, 118 Am. St. Rep. 484, 78 N. E. 855, 8 Ann. Cas. 1109, and cases cited. In *New England Sanitarium v. Stoneham*, 205 Mass. 335, 91 N. E. 385, it was held that the defendant in the case at bar was a charitable corporation and, as such, was exempt from taxation under Rev. Laws, chap. 12, § 5, cl. 3.

It is the contention of the plaintiff that the defendant is within the provisions of the Workmen's Compensation Act (Stat. 1911, chap. 751, and acts in amendment thereof); but we are unable to agree with this contention. While it is provided by § 2 of part 1, that "the provisions of § 1 shall not apply to actions to recover damages for personal injuries sustained by domestic servants and farm laborers," it does not follow that all other employees who may be injured in the course of their employment are within the terms of the act. Undoubtedly the rules of law declared by this court, relating to persons injured while in the employ of charitable institutions, may be changed by the legislature, still, that such change was made by the Workmen's Compensation Act is not to be inferred, in the absence of a plain intention on the part of the legislature to that effect.

It has often been held that certain persons or classes of persons are excepted, by implication, out of a statute expressed in general words, the rule being that, where the words of a law, in their common and ordinary significance are sufficient to include such persons or classes of persons "the virtual exception must be drawn from the intention of the legislature, manifested by other parts of the law; from the general purpose and design of the law; and from the subject-matter of it." *Bradford v. French*, 110 Mass. 365, 367; *McCall v. Parker*, 13 Met. 372, 381, 46 Am. Dec. 735.

It never has been held in this commonwealth that a charitable institution was liable for negligence; on the other hand, it has been expressly held that such institutions are not liable for the negligence of their servants or agents. *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Farrigan v. Pevear*, supra, and cases cited.

In *Com. v. Rumford Chemical Works*, 16 Gray, 231, at page 232, this court said: "But it is never to be presumed that the legislature intended to make any innovations upon the common law, further than is absolutely required upon a just interpretation of the provisions of its positive enactments. And this, it is said by Chancellor Kent, has been the language of the courts in every age. 1 Kent, Com. 6th ed. 464. In the decisions of our own, it has often been recognized as an established rule that a statute is not to be construed as a repeal of the common law, unless the intent to alter it is clearly expressed."

For many years prior to the enactment of Stat. 1911, chap. 751, this court, in numerous decisions, had uniformly held that a charitable institution was not liable

for personal injuries due to the negligence of its servants or agents; and it is to be assumed that the legislature had the existing law in mind when the statute was passed. We are of opinion that, considering the statute as a whole, together with its manifest purpose and the objects sought to be accomplished by it, it was not intended thereby to change the law as it previously stood, and include employees of charitable institutions. *Hyde v. Gannett*, 175 Mass. 177, 55 N. E. 991. The cases cited by the plaintiff were decided under the English Workmen's Compensation Act, and cannot affect the question whether Stat. 1911, chap. 751, applies to a valid public charity.

The presiding judge submitted to the jury certain questions to be answered by them, the fourth of which was as follows: "Was the danger in operating a buzz planer without a guard an obvious danger, that could be seen by reasonable observation on the part of the plaintiff?" The answer was in the affirmative. This finding makes it plain that the plaintiff is precluded from recovery, either under the Employers' Liability Act or at common law, apart from the fact that the defend-

ant is a charitable corporation. As the jury have found that the danger of operating the planer without a guard was obvious, and could be seen by reasonable observation on the part of the plaintiff, he must be held to have assumed the risk, even though he was unable to speak or understand the English language, and was inexperienced. It is clear that any instructions or warning of the danger would not have informed him of anything which was not plainly to be seen; he was a carpenter, and there is nothing in the record to show that he was not a man of average intelligence. *Chmiel v. Thorndike* Co. 182 Mass. 112, 65 N. E. 47; *Sullivan v. Simplex Electrical Co.* 178 Mass. 35, 59 N. E. 645; *Robinska v. Lyman Mills*, 174 Mass. 432, 75 Am. St. Rep. 364, 54 N. E. 873, 6 Am. Neg. Rep. 571; *Stuart v. West End Street R. Co.* 163 Mass. 391, 40 N. E. 180.

Although the plaintiff is not entitled to recover, for the reasons previously stated, we do not mean to intimate that the defendant could be held liable for its negligence, or for the negligence of its servants or agents; these questions need not be considered in view of the conclusion reached. Exceptions overruled.

# KANSAS SUPREME COURT.

RINDA E. GRISWOLD et al., Appts.,  
v.

CITY OF WICHITA.

(99 Kan. 502, 162 Pac. 276.)

**Workmen's compensation — police officer.**

1. The Workmen's Compensation Act does not apply to the case of a police officer of a city who is killed in the discharge of his duties.

For other cases, see *Master and Servant*, II. a, 1, in Dig. 1-52 N. S.

**Same — officer as workman.**

2. A police officer of a city of the first class is not a "workman," as defined by the Compensation Acts.

For other cases, see *Master and Servant*, II. a, 1, in Dig. 1-52 N. S.

(January 6, 1917.)

Headnotes by PORTER, J.

**Note.** — As to the applicability of Compensation Acts to states, counties, cities, districts, charitable and other public institutions, and their employees, see annotation following this case, post, 190, and references therein to annotations on related questions.

L.R.A.1918F.

**A**PPEAL by plaintiffs from a judgment of the District Court for Sedgwick County sustaining a demurrer to the petition in an action brought under the Workmen's Compensation Act, to recover compensation for the death of plaintiffs' intestate while in the discharge of his duties as a policeman. Affirmed.

The facts are stated in the opinion.

Messrs. Earl Blake, W. A. Ayres, and C. A. McCorkle, for appellants:

A policeman is under the protection of the Workmen's Compensation Act of the state of Kansas.

*Blynn v. Pontiac*, 185 Mich. 35, 151 N. W. 681, 8 N. C. C. A. 793; *Sibley v. State*, 89 Conn. 682, L.R.A.1916C, 1087, 96 Atl. 161; *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398, 10 N. C. C. A. 1; *McNicol's Case*, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522; *Reithel's Case*, 222 Mass. 163, L.R.A.1916A, 304, 109 N. E. 951, 11 N. C. C. A. 235; *Milwaukee v. Althoff*, 156 Wis. 68, L.R.A. 1916A, 327, 145 N. W. 238, 4 N. C. C. A. 110.

Messrs. James A. Conly and J. A. Brubacher, for appellee:

None but persons actually in the employ, acting in the course of their employment

in the trade or business of their employer, can claim the benefit of the act.

*Haney v. Cofran*, 94 Kan. 334, 146 Pac. 1027, Ann. Cas. 1917B, 660; *Peters v. Lindsborg*, 40 Kan. 654, 20 Pac. 490; *Blynn v. Pontiac*, 185 Mich. 35, 151 N. W. 681; 8 N. C. C. A. 793; *McRoberts v. National Zinc Co.* 93 Kan. 366, 144 Pac. 247; *Udey v. Winfield*, 97 Kan. 279, 155 Pac. 43.

*Porter, J.*, delivered the opinion of the court:

This action was brought under the Workmen's Compensation Law, to recover for the benefit of the family of a policeman, who was killed while in the discharge of his duty. The court sustained a demurrer to the petition, and the plaintiffs appeal.

Frank Griswold, the deceased, was a captain of the police force of the city of Wichita; he was killed by a pistol shot fired by some person who had broken into a store building in the nighttime, and whom he was attempting to arrest. The amount sued for is \$3,600, the maximum amount of recovery under the Workmen's Compensation Act, in view of the salary or earnings of the deceased during the year preceding his death.

The sole question to be determined is whether this action can be maintained under the Compensation Act. The exact question has never been decided by this court. In *Udey v. Winfield*, 97 Kan. 279, 155 Pac. 43, the action was by the widow for the benefit of herself and children, to recover damages for the death of her husband, who was killed while working in an electric light and water plant controlled and operated by the city for profit. The city had not elected to come within the provisions of the Compensation Act, but it was contended that it was within the terms of the act, by reason of having fifteen persons in the employ of its light and waterworks department. In order to show that fifteen persons were thus employed, it was necessary to include mere clerical employees in the office of the city clerk. It was held that to include such employees was not within the letter or spirit of the statute, because they were not engaged in the hazardous enterprise of operating the light and waterworks system. In the opinion it was said: "Assuming, without deciding, that a municipal corporation like the defendant, if employing the requisite number of persons in such plant should be deemed to be an employer within the meaning of the act in question, it must be held that the testimony failed to show that fifteen persons were thus employed." (p. 281.)

L.R.A.1018F.

The city, in that case, made no claim of exemption on the ground that, in operating its electric light and water system, it was exercising governmental instead of proprietary functions and so the court found it unnecessary to determine that question.

The plaintiff's contention is that the Compensation Law, as originally adopted (Laws of 1911, chap. 218) has been broadened in its scope by the Amendment of 1913, in which the legislature extended its application to "county and municipal work." Section 2 of chapter 216 of the Laws of 1913, so far as it applies to the question, reads: "Application of the act.—This act shall apply only to employment in the course of the employer's trade or business on, in or about a railway, factory, mine or quarry, electric building or engineering work, laundry, natural gas plant, county and municipal work, and all employments wherein a process requiring the use of any dangerous explosive or inflammable materials is carried on, which is conducted for the purpose of business, trade, or gain; each of which employments is hereby determined to be especially dangerous, in which from the nature, conditions or means of prosecution of the work therein, extraordinary risk to the life and limb of the workman engaged therein are inherent, necessary, or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for injuries to workmen."

This section amended § 6 of the original act, by the addition of the words "county and municipal work." Counsel for plaintiffs insist that the decision in the present case depends on whether the amendment is to be given a narrow or a broad construction by the courts, we have uniformly held it to be our duty to give to the Compensation Act a broad and liberal interpretation, for the purpose of carrying out its wise and beneficent purposes; but the court has also recognized its limitations in this respect. In *Menke v. Hauber*, 99 Kan. 171, 160 Pac. 1017, it was said in the opinion: "This court has always recognized the obligation resting upon it to give to the Compensation Law a liberal construction, in order to carry into effect the provisions of the legislature; but we have no right to extend its construction to cover enterprises and industries not within the scope and intent of the law." (p. 175.)

The precise contention of plaintiffs is that the original act was broad enough to include workmen employed in building and engineering work, whether the employer was a person, county, or corporation, municipal or private; and therefore it is argued that

when the legislature by the Amendment of 1913, added the words "*county and municipal work*," the purpose must have been to extend the application of the law, and that, by a liberal interpretation, we should hold it was the intention to include all employees of the city whose work, for any reason, becomes especially dangerous. It may have been the intention of the legislature to remove any doubt that might exist as to the application of the act to county and municipal work, "which is conducted for the purpose of business, trade, or gain," provided the nature of the work is such as to render it especially dangerous and hazardous to life and limb of the workmen engaged therein. Whatever the purpose of the legislature in including the words, "*county and municipal work*," we think it is clear that, constituting §§ 2 and 4 of the Act of 1913, together with the well-known purpose and objects sought to be attained by the enactment of the Compensation Law, it was not the intention to extend the application of the law to the case of a policeman killed in the discharge of his duty. Section 4 of the act defines "workman" as follows: "Workman" means any person who has entered into the employment of or works under contract of service or apprenticeship with an employer, but does not include a person who is employed otherwise than for the purpose of the employer's trade or business."

The defendant is a city of the first class, governed by the Commission Act. The statute relating to appointive officers in cities of the first class, under the commission form of government, provides for the appointment of a captain of police, and such assistants and other officers as the commissioners may deem necessary for the best interest of the city. The same section provides that "no such officer shall be appointed until his term and salary shall have been fixed by ordinance" (Gen. Stat. 1904, § 1304) and that the terms of all appointive officers shall expire with the term of office of the board appointing them. (Gen. Stat. 1909, § 437, art. 26, chap. 17.) It has been held that a policeman, in performing his duties, is exercising the rights of sovereignty, and represents the state and not the city, inasmuch as the state requires the city to appoint him, and because his duties are those of a public nature. In *Peters v. Lindsborg*, 40 Kan. 654, 20 Pac. 490, it was said: "The police officers of a city are not regarded as the servants or agents of the city; their duties are of a public nature; their appointment is made by the city as a convenient mode of exercising a function of government; their duties are to preserve the good order

and provide for the safety of the people of the city." (p. 656.)

In *Haney v. Cofran*, 94 Kan. 332, at page 334, 146 Pac. 1028, Ann. Cas. 1917B, 660, it was said in the opinion "There is no end of authority that a policeman is a public officer (citing cases). In many respects a policeman is a municipal officer, but in other and important respects the legislature and the courts have raised him out of the class of a mere subordinate or employee, like a fieldman of a local department of health (*Jagger v. Green*, 90 Kan. 153, 133 Pac. 174), or a cell house man at the penitentiary (*Jones v. Botkin*, 92 Kan. 242, 139 Pac. 1198)." (p. 334.)

The primary purpose in the enactment of the Compensation Acts has been considered in former decisions. In *McRoberts v. National Zinc Co.* 93 Kan. 364, 366, 144 Pac. 248, it was said: "In the enactment of the Compensation Law, the legislature recognized that the common-law remedies for injuries sustained in certain hazardous industries were inadequate, unscientific, and unjust, and therefore a substitute was provided by which a more equitable adjustment of such loss could be made, under a system which was intended largely to eliminate controversies and litigation, and place the burden of accidental injuries incident to such employments upon the industries themselves, or, rather, upon the consumers of the products of such industries." (p. 366.)

See also, *Menke v. Hauber*, supra. The theory is that the employer who obtains a profit from the labor of workmen may very easily add to the cost of the manufactured goods a limited amount to cover the cost of compensation to the workmen injured in certain hazardous employments, and thus, without loss to himself, the burden may be distributed upon the consumers which constitute the public. Many good reasons might be suggested for including within the scope of the act workmen employed in hazardous enterprises, by cities engaged in conducting a business for profit, as electric light or waterworks plants, because a city, like any private individual engaged in trade or business, could pass on to the public at large the burden, by adding to the cost of the service. But where a city is engaged merely in the exercise of its governmental functions, we think it clear that the workman, no matter how hazardous his employment, would not come within the spirit and purpose of the Compensation Act, any more than the clerks and stenographers in the case of *Udey v. Winfield*, 97 Kan. 279, 155 Pac. 43. So that, even though a policeman be regarded

as a workman in the employ of the city, and notwithstanding the performance of his duties places him at times in a dangerous and hazardous situation, still the employer, the city, is not engaged in trade or business, and therefore a policeman is not within either the spirit or letter of § 2 of the act, which limits its application to persons employed for the purpose of the employer's trade or business.

In operating electric light and power plants and waterworks systems, cities are engaged in the exercise of their proprietary functions, while, in enforcing the laws of the state against crime, they are exercising a purely governmental function. This proposition is so elementary as not to require the citation of authority.

One or two cases are cited from other courts construing Compensation Acts, the

language of which differs materially from our statute. It is not contended that any of the cases are directly in point, and a discussion of them would be of no benefit.

There may be, as suggested in the brief of the defendant, good reasons why a policeman, sheriff, or other police officer, in the discharge of his duties, should be protected; but this presents a question for the legislature, and not for the courts. The legislature might see fit to provide a pension for the family of a policeman, killed in the discharge of his duties. It could not do so under the Compensation Law, without a very wide departure from the theory and purpose upon which that law was enacted, as expressly declared in the act itself.

The judgment sustaining the demurrer to the petition must be affirmed.

### **Annotation — Applicability of Compensation Acts to states, counties, cities, districts, charitable and other public institutions, and their employees.**

The general subject of Workmen's Compensation Acts is treated in annotations in L.R.A.1916A, 23, and L.R.A. 1917D, 80. For later cases and annotations on Workmen's Compensation Statutes, consult the L.R.A. Indexes for volumes subsequent to L.R.A.1917D, under the title, "Workmen's Compensation."

As to who are employers within the meaning of the Compensation Statutes, see annotation to *Claremont Country Club v. Industrial Acci. Commission*, ante, 179.

As to who are employees within the meaning of the Compensation Statute, see annotation to *State ex rel. Nienaber v. District Ct.* post, 201.

As to the liability of charitable institutions at common law for personal injuries, see references in the footnote to *ZOULALIAN v. NEW ENGLAND SANATORIUM & BENEV. ASSO.* ante, 185.

Whether or not a county, city, or other municipal district or political subdivision is within the operation of the Compensation Statute depends primarily upon the language of the particular statute involved, and also upon the particular work in which the employee was engaged at the time of his injury. As the statutes, in this respect, differ widely, and as the employees were engaged in various occupations at the time of their injuries, it is impossible to lay down any general rules governing this question. The cases, however, will be

grouped, so far as possible, according to the principle involved, so as to show the present trend of judicial opinion.

#### **Miscellaneous employees.**

Under the English acts, public bodies may be employers, such as the central body, constituted under § 1 of the Unemployed Workmen's Act 1905, which has provided temporary work for a workman. *Porton v. Central (Unemployed) Body* [1908] W. N. (Eng.) 242, 25 Times L. R. 102; *Gilroy v. Mackie* [1909] S. C. 466, 46 Scot. L. R. 325.

And the word "employer" covers the *Sidney Harbor Trust Commissioners*. *Re Ryan* (1911) 11 N. S. W. St. Rep. 33.

The Michigan statute is compulsory as to the state, each county, city, township, incorporated village, and school district, but it has been held that this provision is not broad enough to include the state board of agriculture; consequently, an employee of the Agricultural College, who was employed by such state board of agriculture, is not within the act, where the state board has not elected to come within the provisions thereof. *Agler v. Michigan Agri. College* (1914) 181 Mich. 559, 148 N. W. 341, 5 N. C. C. A. 397.

Clerical employees in the office of a city clerk are not employees of the city, as contemplated by § 6 of the Kansas act, merely because the city conducts a light and power plant. *Udey v. Winfield* (1916) 97 Kan. 279, 155 Pac. 43.

A municipal street railway is liable for compensation to injured employees under the Saskatchewan act. *Canadian Northern R. Co. v. Green* (1916) — **Sask.** —, 30 D. L. R. 546.

Counties may be included in the operation of the Workmen's Compensation Act, under a title, "An act Providing for the Protection and Safety of Workmen in All Places of Employment." *Lewis & Clark County v. Industrial Acci. Board* (1916) 52 **Mont.** 6, L.R.A.1916D, 628, 155 **Pac.** 268.

#### **Sheriffs.**

A sheriff is not an employee of the state, within the meaning of the Workmen's Compensation Act, which renders the state liable for injuries to its employees, but defines an employee as any person who has entered into or worked under contract of service with an employer. *Sibley v. State* (1915) 89 **Conn.** 682, L.R.A.1916C, 1087, 96 **Atl.** 161.

A sheriff is not an employee of a county within the meaning of the California act, since he is not in service "under any appointment or contract of hire." *Mono County v. Industrial Acci. Commission* (1917) 175 **Cal.** 752, 167 **Pac.** 377. It was also held that officers, such as sheriffs, were not included within the Compensation Act, merely because the act was silent as to them, and a previous act had expressly excluded them.

#### **Policemen.**

Under the Wisconsin act, policemen are deemed employees, and a village marshal is to be considered a policeman and, consequently, within the protection of the Wisconsin act. *Kiel v. Industrial Commission* (1916) 163 **Wis.** 441, 158 **N. W.** 68.

That a police officer, an employee of a village, was, at the time of his injury, engaged in enforcing the state law, does not prevent him from being the employee of the village, so as to relieve the latter from liability for such injury. *West Salem v. Industrial Commission* (1916) 162 **Wis.** 57, L.R.A.1918C, 1077, 155 **N. W.** 929.

A policeman who is not appointed for a regular term of office is an employee, within the meaning of the Minnesota act, which excepts city officials who have been appointed or elected for a regular term of office. *State ex rel. Duluth v. District Ct.* (1916) 134 **Minn.** 26, 158 **N. W.** 790.

The Iowa act, by an amendment effective July 4, 1917, excludes from its

list of beneficiaries, officers and employees of cities who are entitled to retirement on pension. In *Dickey v. Jackson* (1917) — Iowa, —, 165 **N. W.** 387, it was held that a recovery of compensation by a policeman, for injuries received prior to that time, did not authorize the trustees of the police pension fund to remove him from the pension roll.

The English statute expressly provides that the term "workman" does not include a member of the police force. *Sudell v. Blackburn Corp.* (1910) 3 **B. W. C. C.** (Eng.) 227.

A policeman who is an appointed official, and is required to take an official oath of office, is not an "employee" within the meaning of the Michigan act, but is an "official" of the city and outside the protection of the act. *Blynn v. Pontiac* (1915) 185 **Mich.** 35, 151 **N. W.** 681, 8 **N. C. C. A.** 793.

So, in *GRISWOLD v. WICHITA*, ante, 187, it was held that a police officer of the city is not a "workman," within the meaning of the Compensation Act. The court said that, in the employment of policemen, the city was engaged merely in the exercise of government functions, and, no matter how hazardous the employment, the workman so employed would not come within the spirit and purpose of the Compensation Act. The court said: "So that, even though a policeman be regarded as a workman in the employ of the city, and notwithstanding the performance of his duties places him at times in a dangerous and hazardous situation, still the employer, the city, is not engaged in trade or business, and therefore a policeman is not within either the spirit or letter of § 2 of the act, which limits its application to persons employed for the purpose of the employer's trade or business."

A policeman in a city not accepting the Workmen's Compensation Act is not within the protection of the act, merely because the city maintains a free wagon bridge, where the injuries were in no wise caused by the bridge. *Marshall v. Pekin* (1916) 276 **Ill.** 187, 114 **N. E.** 497.

#### **Firemen.**

A captain in the fire department of the city of Saginaw is, in the contemplation of the Michigan act, an official of the city coming within the exception, and is not entitled to compensation for injuries received while acting in the scope of his employment. *McNally v. Saginaw* (1917) — **Mich.** —, 163 **N. W.**

1015. The court said, however, that it could not be held that all persons in the service of the city, in any capacity, regardless of the nature of their duty, could be made officers within the meaning of the act, by reason of appointment of the city council or commission, and the requirement that they take an oath of office.

A hoseman who is a member of the permanent fire force, and who was, by civil service rule, classified as in the "official service," but not in the "labor service," is not included in the "laborers, workmen, and mechanics," in the employ of the city, to whom the Massachusetts act was extended by chapter 807 of the Laws of 1913. *Devney's Case* (1916) 223 *Mass.* 270, 111 N. E. 788.

A fireman, who is not appointed for a regular term of office, is an employee, within the meaning of the Minnesota act, which excepts city officials who have been appointed or elected for a regular term of office. *State ex rel. Duluth v. District Ct.* (1916) 134 *Minn.* 26, 158 N. W. 790.

#### **School janitors.**

The fact that a janitor of a school building had been appointed as a person within "the official service," under the civil service rules, by force of a statutory provision applicable to the city of Boston alone, is not decisive of the question whether he is within the class of "laborers, workmen, and mechanics," for injuries to whom compensation must be made by municipalities accepting the Massachusetts act. *White's Case* (1917) 226 *Mass.* 517, 116 N. E. 481.

A janitor of two schoolhouses may be found to be within the class defined as "laborers, workmen, and mechanics," for whose injuries a city accepting the Compensation Act is liable in compensation, where the evidence shows that he, with his own hands, did all the work of cleaning, heating, washing windows, care of yards, sidewalks, and lawns, in case of the two schoolhouses, and that the work in question included everything, from keeping the water-closets clean to running the steam boiler in one building and the furnace in the other. *Ibid.*

#### **Election officers.**

The relationship of employer and employee does not exist between a city and an election officer, so that he is entitled to compensation for injuries received while carrying returns from his district

to the proper officer. *Los Angeles v. State Industrial Acci. Commission* (1917) — *Cal. App.* —, 169 *Pac.* 260. The court said that there was no power of direction given to or left in the city regarding the performance of the duties of an election officer, and that it had no right or power to provide means to secure the safety of the officer, which it could require him to take advantage of, and therefore it was without right to safeguard its interests. The city might furnish an entirely safe means of transportation to the election officer, in order to enable him to transport the election returns from the polling place to the city hall, but it was without power to compel him to use such means; and he might elect the most dangerous and hazardous means affording such transportation, and the city would be without power to reduce the possibility of damage accruing by reason of a claim for compensation for injuries which might result.

#### **Employees engaged in constructing public improvements.**

Under the New York statute, as it was prior to the Amendment of 1916, the state, in carrying on the maintenance and repair work of state roads, not being engaged in business for gain, was not liable for compensation to an injured employee. *Allen v. State* (1916) 173 *App. Div.* 455, 160 N. Y. *Supp.* 85. The court said: "It is true, of course, that where the state contracts for work of a hazardous nature, as defined in the statute, the contractor, who carries on the work, is called upon to provide for these accidents, for he is carrying on the business for pecuniary gain, but he is enabled to include this charge in his contract price of the work to be performed; but no such power is given to the Highway Commission in carrying on the work of maintaining the highways, and, as it is not engaged in this work for the purposes of pecuniary gain, it cannot be that the state is to become an insurer of its employees, under conditions where such insurance would not be required of an individual, association, or corporation."

But the Amendment of 1916 added to § 2, which defines the various groups to which the statute was applicable, group 43, which provided that any employment enumerated in the foregoing groups, and carried on by the "state or a municipal corporation or other subdivisions thereof," notwithstanding the definition of the term employment in subdivision 5



of § 3 of the chapter, should be embraced within the statute.

And in *Lanigan v. Saugerties* (1917) 180 App. Div. 227, 167 N. Y. Supp. 654, a town, represented by its superintendent of highways, was held to be an employer, and the work of road building carried on by it was held to be a hazardous employment, so that the town was liable for compensation to an employee injured while engaged in such work.

A city, in constructing a lateral sewer, to be paid for entirely by property owners and in no part by the city at large, is not engaged in an enterprise involving any element of gain or profit, and therefore is not within the terms and operation of the Kansas act. *Roberts v. Ottawa* (1917) 101 Kan. 228, 165 Pac. 869.

A similar decision was rendered in *Redfern v. Eby* (1918) — Kan. —, 170 Pac. 800. The court said: "A sewer is neither constructed nor operated by a city for the purpose of business, trade, or gain. Sewers are paid for by taxation. In operating sewers, there is no sale or purchase of any property or commodity; neither is there any trade nor gain. In constructing sewers, cities, in their corporate capacity, do not engage in trade, within the meaning of the Workmen's Compensation Act, and do not receive any gain or profit."

So, a county engaged in resurfacing a county road is not engaged in trade or business, within the terms or operation of the Compensation Act. *GRAY v. SEDGWICK COUNTY*, ante, 182.

By the express terms of the Illinois statute, townships are subject to its terms and provisions, and, if engaged in any of the hazardous occupations appointed in the statute, they are conclusively presumed to have elected to provide and pay compensation under the act, unless they have elected to the contrary. Consequently, it was held in *McLaughlin v. Industrial Bd.* (1917) 281 Ill. 100, 117 N. E. 819, that a township would be liable for injury to an employee, injured while at work on a road, which work necessitated the use of explosives, but for the fact that the injured employee's connection with the work was merely casual.

#### Sanitary districts.

A sanitary district engaged in an extrahazardous employment is under the Illinois act; but the protection of the act does not extend to employees engaged in departments not hazardous,

the districts not having accepted the act. *Sanitary Dist. v. Industrial Bd.* (1917) 282 Ill. 182, 118 N. E. 475.

#### Reclamation districts.

A reclamation district is not an employer, within the meaning of § 13 of the California act. *Bettencourt v. Industrial Acci. Commission* (1917) 175 Cal. 559, 166 Pac. 323. The California statute provides that the term "employer" shall include the state, each county, city and county, city, school district, etc. It also provides that each county, city and county, city, school district, or other public corporation may insure against this liability for compensation, and the premium thereof shall be a proper charge against the general fund of each division of the state. The court held that a reclamation district is not a political subdivision of the state, and has no general fund, and has no power to raise money for benefit of lands within the district.

#### Employees of charitable institutions.

The Massachusetts act does not apply to employees of charitable institutions, notwithstanding the statute is silent as to such employees, and expressly provides that it shall not apply to domestic servants and farm laborers, where it is the rule of the state that charitable institutions are not liable for negligence of their servants or agents, since a change in the policy of the state toward such institutions will not be inferred, in the absence of a plain intention on the part of the legislature to that effect. *ZOULALIAN v. NEW ENGLAND SANATORIUM & BENEV. ASSO.* ante, 185.

W. M. G.

#### MASSACHUSETTS SUPREME JUDICIAL COURT.

RE ELIZA S. HUMPHREY.

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, Limited, Appt.

(227 Mass. 166, 116 N. E. 412.)

**Workmen's compensation — wife as employee.**

A woman cannot be an employee of her husband within the Workmen's Compensation Act providing that "employee" shall

Note. — As to who are "employees" within the meaning of the Compensation Statutes, see annotation to *State ex rel Nienaber v. District Ct.* post, 201, and references therein to annotations on related questions.

include every person in the service of another under contract.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(May 25, 1917.)

**A**PPPEAL by the insurer from a decree of the Superior Court for Suffolk County in favor of claimant in a proceeding under the Workmen's Compensation Act to recover for an injury received from falling on ice. Reversed.

The facts are stated in the opinion.

Messrs. Sawyer, Hardy, Stone, & Morrison and Gay Gleason, for appellant.

Mr. Arthur V. Harper, for appellee:

Claimant received an injury in the course of and arising out of her employment.

Madden's Case, 222 Mass. 487, L.R.A. 1916D, 1000, 111 N. E. 379; 1 Cooley, Briefs on Ins. 610.

Rugg, Ch. J., delivered the opinion of the court:

Eliza S. Humphrey acted as cashier and bookkeeper for her husband, who was conducting a store business. They lived together in a house near the store. She was injured within the plot of land occupied by the store, while going to the home. She received regular wages from her husband, who was a "subscriber" under the Workmen's Compensation Act. Her service began at the time when her husband and his brother as copartners, were carrying on the business, but the husband subsequently acquired the interest of his brother, and she continued her work as before. The question is, whether a wife can be an employee of her husband, under the Workmen's Compensation Act. It is provided by Stat. 1911, chap. 751, pt. 5, § 2, that "'employee' shall include every person in the service of another, under any contract of hire, express or implied, oral or written," with exceptions not here material. Plainly, a wife working for her husband is not within the scope of this definition. Obviously, one cannot be an employee without a contract. That is recognized by the words of the act. Employment presupposes a contractual relation. A married woman cannot make a contract, express or implied, with her husband. Rev. Laws, chap. 153, §§ 2 and 4; Woodward v. Spurr, 141 Mass. 283, 284, 6 N. E. 521; National Bank v. Delano, 185 Mass. 424, 70 N. E. 444. A married woman cannot make a valid contract with a partnership of which her husband is a member. Edwards v. Stevens, 3 Allen, 315; Fowle v. Torrey, 135 Mass. 87. The circumstance that, in the case at bar, the wife began working for the partnership

composed of her husband and his brother, is immaterial. It is clear, also, aside from the definition, that the Workmen's Compensation Act does not purport to extend the obligations of the employer to persons who were not employees at common law, or outside the act (except in the unusual case, provided for in pt. 3, § 17. See White v. George A. Fuller Co. 226 Mass. 1, 114 N. E. 829). It is mainly a substitute for other common-law and statutory remedies, for those persons who rightly are included within the descriptive phrase of employees at common law. This is clear from the several sections of part 1 as to "Modification of Remedies." Manifestly, a wife cannot be an employee of her husband outside the Workmen's Compensation Act. She cannot be an employee of her husband under the terms of that act.

There is no ground for the application of the doctrine of estoppel against the insurer. Estoppel can result only from words or conduct which have induced another to change his position to his harm, and which, to a reasonable person, ought to have seemed likely to produce that result. Tyler v. Odd Fellows' Mut. Relief Asso. 145 Mass. 134, 138, 13 N. E. 360; Huntress v. Hanley, 195 Mass. 236, 241, 80 N. E. 946. The record is utterly devoid of evidence upon which to base a finding of such conduct on the part of the insurer.

It becomes unnecessary to determine whether the wife sustained injuries arising out of and in the course of her work in aid of her husband. The decree must be reversed, and a new decree be entered to the effect that there is no claim against the insurer.

So ordered.

#### CALIFORNIA SUPREME COURT. (In Banc.)

ÆTNA LIFE INSURANCE COMPANY  
v.  
INDUSTRIAL ACCIDENT COMMISSION  
et al.

(175 Cal. 91, 165 Pac. 15.)

**Workmen's compensation — child as employee of father.**

1. A minor doing such work as his father directs him to do about the father's place, and receiving such sums as his father gives him, without any contract of employment between them, is not, where, by statute, the

**Note.** — As to who are employees within the meaning of the Compensation Statutes, see annotation to State ex rel. Nienaber v. District Ct. post, 201, and references therein to annotations on related questions.

father is entitled to the services of the minor, an employee within the meaning of the Workmen's Compensation Act, so as to render the father's insurer liable for injury arising out of services which he was rendering to the father.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

**Parent and child — emancipation — payment of money.**

2. A son is not emancipated by the fact that his father pays him money from time to time for services performed.

*For other cases, see Parent and Child, I. in Dig. 1-52 N. S.*

(May 9, 1917.)

**PROCEEDING** by petitioner to review an award of the Industrial Commission to respondent Rieck, in a proceeding under the Workmen's Compensation Act to recover compensation for injuries sustained by him while in the employ of his father. Award annulled.

The facts are stated in the opinion.

Messrs. Redman & Alexander, for petitioner:

The relationship between Rieck, Sr., and Rieck, Jr., was that of father and unemancipated minor son. The relationship was not that of employer and employee, and the service performed by the son was not under a contract of hire.

Labatt, Mast. & S. § 635; Schouler, Dom. Rel. 5th ed. § 267a; Arnold v. Norton, 25 Conn. 92; Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218; Sturdivant v. Pillsbury, 172 Cal. 581, 158 Pac. 222.

There is no proof that, at the time of the accident, Rieck, Jr., was performing services growing out of his employment, or that the accident arose out of or in the course of the employment, or that the injury was proximately caused thereby.

Puckhaber v. Southern P. Co. 132 Cal. 363, 64 Pac. 480; Coronado Beach Co. v. Pillsbury, 172 Cal. 682, L.R.A.1916F, 1164, 158 Pac. 212, 12 N. C. C. A. 789; Greene v. Shaw [1912] 2 Ir. R. 430, 46 Ir. L. T. 18, 5 B. W. C. C. 573; Kitchenham v. Johannesburg [1911] A. C. 417, 27 Times L. R. 504, 4 B. W. C. C. 311; Rodger v. Paisley School Bd. [1912] S. C. 584, 40 Scot. L. R. 413, 5 B. W. C. C. 547; Milliken's Case, 216 Mass. 293, L.R.A.1916A, 337, 103 N. E. 898, 4 N. C. C. A. 512; McNichol's Case, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522; Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585.

Mr. Christopher M. Bradley, for respondents:

Neither the relationship of the parties nor the minority of the son makes it legally impossible for them to enter into a contract

of hire, creating the relation of employer and employee, within the meaning of the Workmen's Compensation, Insurance, and Safety Act.

Geary v. Geary, 67 Wis. 248, 30 N. W. 601; Friermuth v. Friermuth, 46 Cal. 42; Miller v. Miller, 16 Ill. 296; Freeman v. Freeman, 65 Ill. 106; Neish v. Gannon, 98 Ill. App. 248; Smith v. Denman, 48 Ind. 65; Hilbish v. Hilbish, 71 Ind. 27; Harrison v. Harrison, 124 Iowa, 525, 100 N. W. 344; Saunders v. Saunders, 90 Me. 284, 38 Atl. 172; Reando v. Misplay, 90 Mo. 251, 59 Am. Rep. 13, 2 S. W. 405; DeCamp v. Wilson, 31 N. J. Eq. 656; Green v. Roberts, 47 Barb. 521; Morrissey v. Faucett, 28 Wash. 52. 68 Pac. 352; Broderick v. Broderick, 28 W. Va. 378; Byrnes v. Clark, 57 Wis. 13, 14 N. W. 815; Geary v. Geary, 67 Wis. 248, 30 N. W. 601; Wessinger v. Roberts, 67 S. C. 240, 45 S. E. 169; Murdock v. Murdock, 7 Cal. 511; Smith v. Myers, 19 Mo. 433; Stansbury v. Stansbury, 20 W. Va. 23; Murrell v. Studstill, 104 Ga. 604, 30 S. E. 750; Cowan v. Musgrave, 73 Iowa, 384, 35 N. W. 496; Davis v. Gallagher, 55 Hun. 593, 9 N. Y. Supp. 11; Disbrow v. Durand, 54 N. J. L. 343, 33 Am. St. Rep. 678, 24 Atl. 545; Fuller v. Mowry, 18 R. I. 424, 28 Atl. 606; Andrus v. Foster, 17 Vt. 556; Spencer v. Spencer, 181 Mass. 471, 63 N. E. 947; Wood v. James, 15 Cal. App. 253, 114 Pac. 587; 29 Cyc. 1629, 1631; Mathias v. Tingey, 39 Utah, 561, 38 L.R.A.(N.S.) 749, 118 Pac. 781; Officer v. Swindlehurst, 41 Mont. 126, 108 Pac. 583; Snyder v. Free, 114 Mo. 360, 21 S. W. 847.

The injury arose out of and in the course of the employment, and while the injured man was performing service incidental to his employment.

Western Grain & Sugar Products Co. v. Pillsbury, 173 Cal. 135, 189 Pac. 423; Heileman Brewing Co. v. Shaw, 161 Wis. 443, 154 N. W. 631; De Fazio v. Goldschmidt Detinning Co. 87 N. J. L. 317, 88 Atl. 705, 4 N. C. C. A. 716; Fitzgerald v. Lozier Motor Co. 187 Mich. 660, 154 N. W. 67; Von Ette's Case, 223 Mass. 56, L.R.A.1916D, 641, 111 N. E. 696, 12 N. C. C. A. 551; Papi-naw v. Grand Trunk R. Co. 189 Mich. 441, 155 N. W. 545, 12 N. C. C. A. 243.

Henshaw, J., delivered the opinion of the court:

Review of an award of the Industrial Accident Commission. Arthur Rieck was discovered on his father's ranch, unconscious, and with a fractured skull. He was, at the time, a minor of the age of nineteen years, who was living with his parents at their home on the ranch. He did such work on the ranch as he was directed to do by

his father. No one was an eyewitness to his accident, but the evidence points with strong probability to the fact that, while riding a horse to round up mules in a field on the ranch, he was thrown and struck on his head. The evidence unquestionably, then, supports the Commission's findings that his injury arose out of the services which he was rendering to his father. The vital question is, whether, under the evidence, he was an employee within the meaning of our law. The case arises under the demand of the father against the petitioner, for the payment of medical and other expenses incurred by the father, and growing out of this injury to his son. The Aetna Life Insurance Company had issued its policy, protecting the father against such claims on the part of his employees. This present claim was pressed upon the ground that the son was such an employee, and the Commission so held, making its award accordingly.

Section 197 of our Civil Code provides that: "The father and mother of a legitimate unmarried minor child are equally entitled to its custody, services and earnings."

In this class belongs Arthur Rieck, and unquestionably, unless there had been some legal change in the status of father and son, each and both were subject to the provisions of this Code section, and the provisions of § 196 of the same Code, which declares that: "The parent entitled to the custody of a child must give him support and education suitable to his circumstances."

Section 14 of the Compensation Act defines an employee as a "person in the service of an employer as defined by § 13 hereof under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens and also including minors." [Stat. 1913, p. 284.]

In this connection § 1965 of the Civil Code defines a contract of employment in the following language: "The contract of employment is a contract by which one, who is called the employer engages another, who is called the employee, to do something for the benefit of the employer, or of a third person."

The evidence upon this matter (that of the father) is as follows:

Q. What was the agreement or arrangement between you and your son, with reference to his employment?

A. There was really no arrangement; he is not of age, and simply works for what I tell him, and there was no contract or agreement whatever between us; he does whatever I tell him to do. . . .

Q. Your book does not show any payments made to him by check or cash?

A. I have no record of that at all. He is not of age. His wages belong to me. I don't have to pay him any wages. . . .

Q. How does it happen that you never had any charge against Felix in this book?

A. He is my son, and I am supposed to furnish him everything until he is of age.

It would seem that this law and this evidence were conclusively determinative of the matter, against the award of the Commission. But the argument in support of the award is that a minor is invested with the power to make a contract of hiring under §§ 33 and 34 of the Civil Code; that § 14 of the Compensation Act above quoted includes, in its definition of employees, minors; that, from the evidence, the Commission was justified in finding an implied contract of service; that such an implied contract of service will support this award; that this implied contract of service need not be for a fixed wage, but may be upon the basis of the usual payment for such services, or upon the expectations of the parties; that, therefore, any testimony which warrants the inference that services were rendered under such expectations, and were accepted by the other party with knowledge, actual or constructive, of such expectations, is sufficient to establish the relationship of employer and employee; and, finally, that herein it is "notable" that both father and son are insisting that the relationship existed, while it is only an outstanding third party—the insurance company—which is denying it.

It is, indeed, notable that father and son have combined in their demand against the insurance company, but it has not the slightest persuasive value, as tending to establish the relationship which they claim to have existed. Their interests in this particular action are identical, and together they are working for a common end. But, aside from this, the fault and fallacy of respondents' argument will at once become apparent, when it is pointed out that the reasoning upon which respondents rely, and the authorities which they bring to the support of that reasoning (where the relationship between parent and minor child is involved), all have to do with the case of an emancipated child, who has, by virtue of that emancipation, become entitled to contract for himself.

We need not here enter into any lengthy discussion of what acts or omissions will effectuate the emancipation of a child, for the simple reason that no emancipation can be here asserted, and the father's testimony, showing rather an unusually clear concep-

tion of his rights and corresponding duties, is an absolute denial of emancipation: "There was no contract or agreement whatever between us." "He does whatever I tell him to do. . . . His wages belong to me. I don't have to pay him any wages." . . . "He is my son, and I am supposed to furnish him everything until he is of age."

Suffice it, upon the question of emancipation, to quote from our own case of *Lackman v. Wood*, 25 Cal. 147, and to refer to 25 Cyc. 1672. In *Lackman v. Wood*, it is said: "The power of a father to emancipate his minor child cannot be questioned; nor can there be any doubt as to the effect of such emancipation upon the relations of the persons who are parties to it. The child is freed by emancipation from parental control; he can claim his earnings thereafter, as against his father, and is in all respects his own man. Emancipation is defined as an act by which a person, who was once in the power of another, is rendered free, and the adjudged cases show that the doctrine of emancipation, as actually administered, is not less comprehensive than the definition."

Nor, finally, does the fact that the father from time to time gave the son small sums of money, even though both father and son should testify that these sums were on account of payment of wages, at all militate against the incontrovertible fact that the son had not been emancipated. A son nineteen years of age was surely entitled to some spending money, and, as his earnings belonged wholly to his father, it would be strange, indeed, if his father did not give him such sums for his own purposes. Many fathers are called upon to do the same thing, and many, to encourage their sons to form habits of industry and frugality, and "to learn the value of money," make these donations dependent, to a greater or less extent, upon the conduct and services of the child. But such payments, in no sense, work an emancipation of the child himself. *Schouler*, Dom. Rel. 5th ed. § 267; *Arnold v. Norton*, 25 Conn. 92.

The award is therefore annulled.

We concur: Angellotti, Ch. J.; Melvin, J.; Shaw, J.; Sloss, J.

**MASSACHUSETTS SUPREME  
JUDICIAL COURT.**

CLARENCE E. LESUER, Deceased,  
v.

CITY OF LOWELL.  
JOSEPH B. LESUER et al., Claimants,  
Appts.

(227 Mass. 44, 116 N. E. 483.)

**Workmen's compensation — teacher of  
mechanics — laborer.**

A teacher in an occupational school who instructs in mechanics by actual demonstration in the repair of automobiles is not a laborer, workman, or mechanic, within the meaning of the Workmen's Compensation Act.

For other cases, see *Master and Servant*, II. a, 1, in Dig. 1-52 N. S.

(May 24, 1917.)

**A** PPEAL by claimants from a decree of the Superior Court for Middlesex County dismissing their claims and affirming an order of the Industrial Accident Board denying them compensation, in a proceeding under the Workmen's Compensation Act to recover for the death of their son. Affirmed.

**Note.** — As to who are employees within the meaning of the Compensation Statutes, see annotation to State ex rel. Nienaber v. District Ct. post, 201, and references therein to annotations on related questions.

L.R.A.1918F.

The facts are stated in the opinion.

Messrs. Qua, Howard, & Rogers, Melvin G. Rogers, and Stanley E. Qua, for appellants:

Decedent was a laborer, workman, or mechanic, within the meaning of the statute.

Devney's Case, 223 Mass. 270, 111 N. E. 788; *Hightower v. Slaton*, 54 Ga. 108, 21 Am. Rep. 273; *Lames v. Armstrong*, 162 Iowa, 327, 49 L.R.A. (N.S.) 691, 144 N. W. 1, Ann. Cas. 1916B, 511; *Com. v. John T. Connor Co.* 222 Mass. 299, L.R.A.1916B, 1236, 110 N. E. 301; *Claghorn v. Saussy*, 51 Ga. 576; *Watt v. Mishawaka Paper & Pulp Co.* 53 Ind. App. 682, 99 N. E. 1029; *Jackson v. State*, 56 Tex. Crim. Rep. 557, 117 S. W. 818; *Terry v. McDaniel*, 103 Tenn. 415, 46 L.R.A. 559, 53 S. W. 732; *State v. Dielenschneider*, 44 La. Ann. 1116, 11 So. 823; *Garrebrant v. Continental Ins. Co.* 75 N. J. L. 577, 12 L.R.A. (N.S.) 443, 67 Atl. 90; *Waite v. Franciola*, 90 Tenn. 191, 16 S. W. 116; *Merrigan v. English*, 9 Mont. 113, 5 L.R.A. 837, 22 Pac. 454; *New Orleans v. Bayley*, 35 La. Ann. 545; *Re Osborn*, 104 Fed. 780; *New Orleans v. Lagman*, 43 La. Ann. 1180, 10 So. 244; *People ex rel. Beck v. Buffalo*, 18 Misc. 533, 42 N. Y. Supp. 545; *Maxon v. Perrott*, 17 Mich. 332, 97 Am. Dec. 191; *Smith v. Osbourn*, 53 Iowa, 474, 5 N. W. 681; *Oliver v. Macon Hardware Co.* 98 Ga. 249, 58 Am. St. Rep. 300, 25 S. E. 403.

Mr. William D. Regan, for appellee:

The statutory phrase, laborers, workmen, and mechanics, defines one whose occupation is principally the exercise of manual labor, with or without the assistance of machinery and tools.

State ex rel. Ives v. Martindale, 47 Kan. 147, 27 Pac. 852; Whitcomb v. Reid, 31 Miss. 567, 66 Am. Dec. 579; Gulf & B. Valley R. Co. v. Berry, 31 Tex. Civ. App. 408, 72 S. W. 1049; Williams v. Alcorn Electric Light Co. 98 Miss. 468, 53 So. 958, Ann. Cas. 1913B, 137.

Lesuer was a teacher, and not a laborer, workman, or mechanic.

1 Ops. Att. Gen. 11; Devney's Case, 223 Mass. 270, 111 N. E. 788.

Pierce, J., delivered the opinion of the court:

The employee was a teacher, employed at an annual salary, in the automobile department of Lowell Industrial and Vocational School, maintained by the city, under Stat. 1911, chap. 471. It was his duty to instruct boys in mechanics, English, arithmetic, and civics. The method of teaching by an instructor in automobile repairing is described specifically in the bill of exceptions, as follows: An automobile is brought in, and the boys given their directions in taking it apart and putting it together again. The teacher gives them oral instructions as to what to do; the boys do the work. He directs them. Occasionally, when the automobile is put together or taken apart, he takes hold and gives them an idea how it is done; where it is possible, he instructs in all kinds of automobile repairing and, at times, gives a practical demonstration himself as to how the thing is done. The school hours were from 8:30 in the morning to 3:30 in the afternoon. The teachers were expected to stay after that time, to get their records and prepare the work for the next day. If there was, at the hour of dismissal, an incompleting piece of work, it was within the discretion of the teacher to go on and complete it. In such instances, it was the custom of the teacher to ask the boys if they would like to stay and do it, and some of the boys were so interested that they would stay around and help. To give boys practice in machine work, lathes were used in the repair work, and it was the duty of the teacher to see that these machines were kept in order.

The accident happened at 4:15 in the afternoon, and was the consequential result of some unknown act or omission of a boy while engaged in welding. This proceeding is brought by the father and the administratrix of the deceased employee, to recover the compensation provided by the Work-

men's Compensation Act (Stat. 1911, chap. 751, and amendments thereof), the defendant city having accepted Stat. 1913, chap. 807, which provides that "laborers, workmen, and mechanics" employed by it shall be within the protection of the Workmen's Compensation Act.

The only question now presented is, whether the deceased was a laborer, workman or mechanic, within the meaning of Stat. 1913, chap. 807. Upon the facts, the vocation of the employee was that of a teacher charged with the duty of imparting to his pupils, through precept and demonstration, knowledge of the use of various tools and machines, and of the practical application of them, sufficient to fit the boys to be practical automobile repairers. The words of the statute, as applied to cities, manifestly are not intended to embrace all persons of whatever rank in the service of a municipality, but are used in a restrictive sense, designed to distinguish certain well-known classes of servants from other classes. The word "mechanic," as used in the statute, connotes a manual occupation; a performance of mechanical labor, or work at one of many constructive trades, as a principal means of livelihood. It seems plain that the work performed by a professor or instructor in a polytechnical or occupational institute, in teaching and demonstrating the theoretical and practical use of mechanics as applied to the use of tools, appliances, and machinery, is not that of a laborer, workman, or mechanic, because the efficiency of the instructor depends in degree upon his skill in the use of tools. Devney's Case, 223 Mass. 270, 111 N. E. 788. See White's Case, 226 Mass. 517, 116 N. E. 481.

Decree affirmed.

#### MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL JOHN BYKLE

v.

DISTRICT COURT OF WATONWAN COUNTY et al.

(— Minn. —, 168 N. W. 130.)

Workmen's compensation — employee on threshing machine.

An employee of one who owns a steam thrasher and threshes grain for farmers un-

Headnote by HALLAM, J.

Note. — As to who are "employees" within the meaning of the Compensation Statutes, see annotation to State ex rel Nienaber v. District Ct. post, 201, and references therein to annotations on related questions.

der contract is, while employed about the threshing machine in the course of threshing grain upon a farm, a "farm laborer," and is excepted from the operation of the Compensation Act.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(June 28, 1918.)

**P**ETITION for a writ of certiorari to review a judgment of the District Court for Watonwan County denying relator's claim for compensation under the Workmen's Compensation Act. Affirmed.

The facts are stated in the opinion.

Mr. Herbert T. Park for relator.

Mr. C. J. Elde, for respondents:

Plaintiff fails to bring himself within the Compensation Act, and, consequently, is not entitled to recover, and for the further reason that the accident did not arise out of or during the course of his employment.

*Dillard v. Webb*, 55 Ala. 468; *Rayner v. Sligh Furniture Co.* L.R.A.1916A, 191, note 91; *Proctor v. Cumisky*, 6 Sc. Sess. Cas. 5th series, 832; *Slycord v. Horn*, — Iowa, —, 162 N. W. 249; *Clem v. Chalmers Motor Co.* L.R.A.1916A, 355.

Hallam, J., delivered the opinion of the court:

Defendant Joseph Mero owned a steam thrasher. Defendant Wolford Mero, his brother, operated it. They went about the country threshing grain for farmers, as the owners and operators of steam threshers usually do. There were seven men in the crew. Plaintiff was employed as "separator man." Wolford was not always on the work and, during his absence, plaintiff was in charge. It was his duty to keep the machine running, to save the grain, and "to repair anything that went wrong with the machine that he could." Repairs were made "at odd hours," at noon hours, and on rainy days, when this could be done, "so as not to lay up the machine and stop the work during working hours." "A good many times those needed repairs were made . . . before or after starting the machine in the morning or evening." Plaintiff was never expressly authorized to do this repair work before starting time in the morning. One afternoon, while threshing for a farmer, the straw blower became out of order. Either Wolford or plaintiff was able to fix it with the use of a few bolts. Wolford tells what passed between them as follows: "Mr. Bykle came to me, and said that he had to have some bolts to fix the blower with; and I says, 'All right, we will go and see what sized bolts it will take to fix it with'; and so we went to the side of the machine and looked at the blower, and I says to him, 'I

have to go to town anyway to get some meat to take home, and I will get the bolts, and when I come in the morning I will fix the blower.'" Work usually started in the morning at 6 o'clock or earlier. Wolford did get the bolts and returned at 6.10 in the morning. In the meantime plaintiff had procured the bolts from the farmer and, with the help of the farmer's hired man, made the repair before 6 o'clock in the morning. As he was about to leave the work he made a misstep, and fell from the deck of the separator and was injured. He asks compensation under the Compensation Act. The court denied him relief.

We entertain no doubt that, under the facts as testified to by defendant, plaintiff was injured by an accident "arising out of and in the course of his employment," as those words are used in the first section of the Compensation Act. Gen. Stat. 1913, § 8195. The doubtful question arises over the construction of the eighth section, Gen. Stat. 1913, § 8202, which provides that the act shall not apply to "farm laborers."

In *White v. Loades*, 178 App. Div. 236, 164 N. Y. Supp. 1023, it was held that a man who is traveling through the country with a machine, stopping from place to place to thresh grain and beans for farmers, for a compensation, is not engaged in farming and his employees are not farm laborers, within the Workmen's Compensation Law of New York.

On the other hand, it was held in *Slycord v. Horn*, — Iowa, —, 162 N. W. 249, that a man going about the country with a corn shredder, shredding corn for farmers under contract, is doing farm work and his employees are farm laborers. We know of no other pertinent decisions.

We think the better rule is to hold that plaintiff is a "farm laborer." The fact that plaintiff was not in the employ of the owner of the farm is not controlling. The important question is: What is the nature of the work? The work is done upon a farm. It is done upon farm crops. The purpose of growing the crops is to provide food for consumption or market. Threshing is as necessary, in order that the farmer may consume or market the crop, as is sowing or harvest. Surely, the man who, years ago, threshed grain with a flail, was doing farm labor, as much as the man who cradled the grain. So is the man who, now, threshes beans with a flail. The fact that more complicated mechanical devices are used in this case does not change the character of the work. Much farm work is done by the use of complicated machinery. There are tractor plows, self-binders, and even combination harvester-threshers, by means of which harvesting and

threshing are done as one operation. These and other operations may be done for others by one who is able to own the more complicated and expensive machinery. But it is all, nevertheless, farm work, and the employee who does such work is a "farm laborer," within the meaning of the Compensation Act.

Any other rule would be impractical, and would lead to discriminations that could not be tolerated. This case illustrates it. Sup-

pose the farmer's hired man, who was helping plaintiff, had also fallen. Both were doing the same work. Surely the hired man was then a "farm laborer." It cannot be said that one was a "farm laborer," and the other was not.

We conclude that plaintiff was a "farm laborer," and, by the exception contained in § 8202, is excluded from the operation of the act.

Judgment affirmed.

### MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL.  
GEORGE B. NIENABER, Plff. in Certiorari,

v.

DISTRICT COURT OF RAMSEY COUNTY  
et al.

(138 Minn. 416, 165 N. W. 268.)

#### Workmen's compensation — voluntary assistant of servant.

1. Relator was engaged in the retail sale and delivery of coal and other fuel; one of his wagons loaded with coal for delivery to a purchaser became mired, and the team hitched thereto was unable to remove it; the driver in charge thereof requested plaintiff, who was passing the scene, to assist in releasing the wagon, and in complying with the request plaintiff was injured.

It is held, that, though not otherwise in relator's employ, plaintiff was its servant and employee in rendering the assistance stated; that the driver in charge of the wagon so mired had implied authority to employ him for the temporary purpose, and plaintiff is entitled, for the injury suffered by him in rendering the assistance, to appropriate relief under the Workmen's Compensation Act (Gen. Stat. 1913, chap. 84a). *For other cases, see Master and Servant, I. a; II. a, 1, in Dig. 1-52 N. S.*

#### Damages — injury to servant.

2. The compensation allowed by the trial court is within the evidence and justified by the statute.

*For other cases, see Damages, III. i, in Dig. 1-52 N. S.*

(Brown, Ch. J., dissents.)

(November 30, 1917.)

CERTIORARI by relator to review a judgment of the District Court for Ramsey County awarding compensation to claimant

Headnotes by BROWN, Ch. J.

**Note.** — As to who are "employees" within the meaning of the Compensation Statutes, see annotation following this case, post, 201, and references therein to annotations on related questions.

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in a proceeding by him under the Workmen's Compensation Act. Affirmed.

The facts are stated in the opinion.

Mr. Raymond N. Caverly, for plaintiff in certiorari:

A person who works for another of his own volition, or at the request of an employee of the person sought to be held as an employer, where there is no proof that said person was acting as the employer's representative, cannot establish the relation of employer and employee between the person for whom the service was done and himself.

26 Cyc. 1085; *Wagen v. Minneapolis & St. L. R. Co.* 80 Minn. 92, 82 N. W. 1107; *Church v. Chicago, M. & St. P. R. Co.* 50 Minn. 218, 16 L.R.A. 861, 52 N. W. 647.

Mr. C. B. Schmidt, for defendants in certiorari:

The question of relationship of master and servant rests upon the contract expressed or implied.

*Caron v. Powers-Simpson Co.* 96 Minn. 193, 104 N. W. 889.

Authority of the servants to employ others may be implied.

*Halluptzok v. Great Northern R. Co.* 55 Minn. 446, 26 L.R.A. 739, 57 N. W. 144; *Meyer v. Kenyon-Rosing Machinery Co.* 95 Minn. 329, 104 N. W. 132, 18 Am. Neg. Rep. 503.

It is an employee's implied duty to exercise reasonable care to preserve from injury the property of his employer, and, in an effort to that end, he is not a mere volunteer.

*United States Cement Co. v. Koch*, 42 Ind. App. 251, 85 N. E. 490; *Cannon v. Fargo*, 138 App. Div. 20, 122 N. Y. Supp. 576; *Marks v. Rochester R. Co.* 41 App. Div. 66, 58 N. Y. Supp. 210; *Geibel v. Elwell*, 19 App. Div. 285, 46 N. Y. Supp. 76; *Yongue v. St. Louis & S. F. R. Co.* 133 Mo. App. 141, 112 S. W. 985; *St. Louis & S. F. R. Co. v. Bagwell*, 33 Okla. 189, 40 L.R.A. (N.S.) 1180, 121 Pac. 320.

A Workmen's Compensation Act is remedial in nature, and is to be liberally construed in favor of the workman.



State ex rel. Virginia & R. Lake Co. v. District Ct. 128 Minn. 43, 150 N. W. 211, 7 N. C. C. A. 1076; State ex rel. Garwin v. District Ct. 129 Minn. 156, 151 N. W. 910, 8 N. C. C. A. 1052; State ex rel. Northfield v. District Ct. 131 Minn. 352, 155 N. W. 103, Ann. Cas. 1917D, 866, 11 N. C. C. A. 366.

**Brown, Ch. J.**, delivered the opinion of the court:

Certiorari to review a judgment in proceedings under the Workmen's Compensation Act.

The facts are not in dispute, and are as follows:

Relator, defendant in the proceeding, was, at the time in question, engaged in the coal and fuel business in the city of St. Paul, and in the conduct thereof had in his employ drivers, who, with teams and wagons owned by relator, carted and delivered coal and other fuel to customers residing in various parts of the city. On June 9, 1917, one of relator's wagons, loaded with coal for delivery, became so mired in the mud of one of the outlying streets that the horses were unable to move it. Plaintiff was in the employ of the city as a street sprinkler, driving his own team. In the course of his work he came up to the mired load of coal, and, at the request of relator's driver, attempted to assist in getting the same out of the mud. To that end he hitched his team in front of the team attached to the coal wagon, and, in urging the horses forward, one of them stepped upon and crushed and seriously injured plaintiff's foot and ankle.

The trial court found, on the facts stated, that relator's driver had implied authority, in the emergency confronting him, to employ

plaintiff for the service stated, and that, by the employment, plaintiff became for the time being an employee of relator and entitled to the benefit of the statute. Compensation was awarded accordingly.

The majority of the court concur in the conclusion of the trial court. The driver of the coal wagon was engaged in the discharge of the duties of his employment, was confronted with an emergency, relief from which required assistance, and was within his implied authority in employing plaintiff to render the necessary help. The service rendered, though casual, standing alone, was in the usual course of relator's business, and therefore within the statute. *Paul v. Nikkel*, 1 Cal. I. A. C. 648; *Ginther v. Knickerbocker Co.* 1 Cal. I. A. C. 458. As to the implied authority of the driver, and the relation thereby created between plaintiff and relator, see *Gunderson v. Eastern Brewing Co.* 71 Misc. 519, 130 N. Y. Supp. 785; *Brooks v. Central Sainte Jeanne*, 228 U. S. 688, 57 L. ed. 1025, 33 Sup. Ct. Rep. 700. The compensation awarded, namely, \$9 per week during the period of disability, not exceeding 300 weeks, is within the evidence, and the assignments of error challenging the same are not sustained.

From the conclusion that plaintiff, by the facts stated, became an employee of relator within the meaning of the Compensation Act, and therefore entitled to compensation for the injury received by him, I respectfully dissent. In my view of the matter, in assisting relator's driver out of the mire, plaintiff acted the part of the Good Samaritan, a kindly volunteer, and not as an employee of relator within the meaning of the Compensation Act.

Judgment affirmed.

### Annotation — Who are "employees" within the meaning of the Compensation Statutes.

The general subject of Workmen's Compensation Acts is treated in annotations in L.R.A.1916A, 23, and L.R.A. 1917D, 80. For later cases and annotations on Workmen's Compensation Statutes, consult the L.R.A. Indexes for volumes subsequent to L.R.A.1917D, under the title, "Workmen's Compensation."

The question, Who are "employees" within the meaning of the Compensation Statutes, is discussed in the annotations in L.R.A.1916A, on pages 115 and 246, and in the annotation in L.R.A.1917D, page 145. The present note is supplementary, and deals only with cases decided subsequent to the preparation of

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the earlier annotations, except that some of the earlier cases are cited in the present annotation, when necessary to show the present state of the law.

As to who are employers within the meaning of the Compensation Statutes, see annotation to *Claremont Country Club v. Industrial Acci. Commission*, ante, 179. As to applicability of Compensation Statutes to the states, counties, cities, districts, and charitable and other public institutions, and their employees, see annotation to *Griswold v. Wichita*, ante, 190. As to what employment is casual, and not in the usual course of the employer's business within the meaning of the Workmen's Compensa-

sation Acts, see annotation to *Marsh v. Groner*, post, 215. As to applicability of Compensation Statutes to minors, see annotation to *Roszek v. Bauerle & S. Co.*, post, 209. As to extrahazardous employments and other occupations expressly included in Workmen's Compensation Acts, see annotation to *F. W. Hochspeier v. Industrial Bd.*, post, 230.

#### **Employees intermittently employed.**

The intermittent character of the employment is not, of itself, sufficient to exclude it from the purview of the California statute. *Walker v. Industrial Acci. Commission (Cal.)*, post, 212.

So, one employed as caddy by a club does not lose his character of employee, within the operation of the Compensation Act, by the fact that he reports for duty and is employed only on specified days. *Claremont Country Club v. Industrial Acci. Commission (Cal.)*, ante, 177.

#### **Persons employed by employees.**

Wholesale dealers, who engaged a truckman to carry goods for them to a pier, are liable for compensation for injuries to a man engaged by the truckman to help him unload the goods in question, where they knew that help was necessary to do the unloading, and regularly furnished the money to pay for such help. *Vance v. Peter A. Frazee & Co.* (1917) — App. Div. —, 166 N. Y. Supp. 1117, unanimously affirming, without opinion, the award of the Commission.

So, the driver of a team who, at the request of one whose team had become mired and unable to draw out its load, hitches his team to the wagon in an attempt to get the same out of the mud, and is injured, is entitled to compensation from the owner of the team that was mired, since the driver of that team had implied authority to employ the necessary assistance to extricate his team. *STATE EX REL. NIENABER v. DISTRICT CT.*, ante, 200.

And the owner of property, and not his agents, is liable for compensation for injury received by one who was employed by the agent to work upon the property, with the owner's consent, express or implied. *Opitz v. Hoertz* (1917) 194 Mich. 626, 161 N. W. 866.

But an employee to do a specific piece of work for a fixed sum is not, by reason of such employment, the agent of the employer to hire such labor as he may see fit, in carrying out the work, so as to make employees so hired the em-

ployees of the owner of the property, and entitled to compensation from him. *Kackel v. Serviss* (1917) 180 App. Div. 54, 167 N. Y. Supp. 348.

#### **Employees injured while off duty.**

The term "employee," as used in the West Virginia act, properly interpreted, does not include an employee who was injured while off duty, by the negligence of another employee in the course of his employment. *Cox v. United States Coal & Coke Co.* (1917) 80 W. Va. 295, L.R.A. 1916B, 1118, 92 S. E. 559. Such an employee is not entitled to compensation out of the state compensation fund, but may have a right of action for negligence. The question presented by this case is somewhat similar to that presented in the cases deciding whether or not the injury from which the employee suffered arose out of and in the course of the employment. As to the earlier cases passing upon the question, What injuries "arise out of and in the course of," the employment, see the annotation in L.R.A.1916A, at pages 40 and 232, and the annotation in L.R.A.1917D, at page 145.

#### **Farm laborers.**

Employees commonly known as farm laborers, who are engaged in the ordinary work of farming, are expressly excluded by the provisions of many of the acts.

A man employed on a farm, who does all kinds of farm work, is a "farm laborer," within the meaning of the Massachusetts statute, and is not within the protection of the act, although the farmer who employs him carries on other business. *Keaney's Case* (1914) 217 Mass. 5, 104 N. E. 438, 4 N. C. C. A. 556.

But one employed as the keeper of hunting preserves, whose duty it is to apprehend trespassers and to protect wild game from poachers, is not engaged in "farm, dairy, agricultural, viticultural, or horticultural labor, in stock or poultry raising," although the acts of the poachers in hunting, if permitted, would expose domestic animals to the danger of being accidentally shot. *O. L. Shafter Estate Co. v. Industrial Acci. Commission* (1917) 175 Cal. 522, 166 Pac. 24.

And in *Raney v. State Industrial Acci. Commission* (1917) 85 Or. 199, 166 Pac. 523, it was held that an ensilage cutter is, in effect, a feed mill, and within the operation of the Oregon statute, and the fact that the operation of

it is merely incidental to farming, the business in which the employer is generally engaged, does not make such operation any the less dangerous.

The New York and Indiana courts have held that an employee of the owner of a threshing outfit, who goes from farm to farm threshing wheat, oats, and other grain, for the various farmers, is not a farm or agricultural laborer, outside of the application of the Compensation Act. *White v. Loades* (1917) 178 App. Div. 236, 164 N. Y. Supp. 1023; *Vincent v. Taylor Bros.* (1917) 180 App. Div. 818, 168 N. Y. Supp. 287; *Re Boyer* (1917) — Ind. App. —, 117 N. E. 507.

The business of threshing grain was not included in the hazardous employments enumerated in the New York statutes, when the decisions of the New York courts were handed down. A recovery was allowed, however, in the *White Case*, because the injury was received while the employee was engaged in operating a vehicle, that is, while putting the threshing machine, which was mounted on wheels, into the barn; in the *Vincent Case*, however, the employee was injured while feeding bundles of grain into the threshing machine, and the award of compensation was reversed, as not being within the operation of the statute, the court rejecting the contention of the applicant that the operation of a threshing machine was "milling business." In the *Boyer Case*, the employee was held entitled to an award under the Indiana statute, since that statute applies to occupations generally, not being restricted to specified hazardous occupations, but excluding merely a few designated cases, including "farm or agricultural laborers."

On the other hand, the Iowa court has held that an applicant must be found to be a "farm or other laborer engaged in agricultural pursuits," expressly excluded from the operation of the Iowa statute, where he was the employee of the owner of a corn shredder, who was engaged in the business of operating the said machine for profit, going from farm to farm. *Slycord v. Horn* (1917) — Iowa, —, 162 N. W. 249. The court said that no authorities were cited by either party on this point; and the decisions of the Indiana and New York cases are subsequent in point of time. The Indiana court cites both the New York and Iowa cases, and expressly adopts the position taken by the New York court.

The Minnesota court has also held that an employee of one who owns a

steam thresher, and threshes grain for farmers under contract, is, while employed about the threshing machine, in the course of threshing grain upon a farm, a "farm laborer," and is exempted from the operation of the Compensation Act. *STATE EX REL. BYKLE v. DISTRICT Ct. ante*, 198. The court cites both the New York and Iowa cases, and adopts the position taken by the court in the latter case.

#### **Officers and stockholders of corporation as employees.**

Although a man may own 95 per cent of the stock of the company, he and the company are separate individuals, and he may be an employee of the company within the meaning of the New York act. *Kennedy v. Kennedy Mfg. & Engineering Co.* (1917) 177 App. Div. 56, 163 N. Y. Supp. 944, reversed on rehearing (1918) — App. Div. —, 168 N. Y. Supp. 1114. And an insurer, who treats the claimant as an employee, and includes his salary in the pay roll, as the basis for the premium to be paid by the employer, cannot subsequently deny that he was an employee.

So, in *Reddy v. National Excavating & Foundation Co.* (1917) 178 App. Div. 943, 164 N. Y. Supp. 1110, the appellate division, without opinion, unanimously affirmed an award of the commission, in which Lyon, commissioner, said that the question in the case, which was answered in the affirmative, was as follows: "Can a man, who has been successful in business, and who has acquired skill and reputation in that business, but who has met with business reverses, so that he is unable to transact business in his own name, incorporate a company in which such good will as he has gathered to himself by his past success in business, and his skill and experience, can be availed of, and place himself in the position of an employee in that corporation, in such wise as to be covered for compensation under the terms of the New York Compensation Law?" 10 N. Y. S. D. R. 621.

So, too, compensation cannot be denied to one, simply because he happened to be the president, or other executive or managing officer, of a corporation that employs him, and that fact alone is not sufficient to eliminate him from among those regarded as employees, within the meaning of the Compensation Act. *Re Raynes* (1918) — Ind. App. —, 118 N. E. 387. The court said that, in a general way, an employee under the

Compensation Act is one whose remuneration is popularly designated as wages rather than salary; whose compensation for services is not munificent; who may reasonably be presumed to be dependent on his wages for the support of himself and family, and whose wife and young children may reasonably be presumed, without proof, to be dependent upon him for support; whose labor is manual or of a like degree of industrial or commercial importance as manual labor when viewed from the standpoint of individual accomplishments.

In passing upon the facts of the case at bar, the court said: "If the corporation is great and powerful, with extensive financial resources, if an official is a large stockholder, and his time is occupied in the discharge of the usual duties of his office, and his salary is fixed because of the discharge of such duties, it would seem apparent that he could not be regarded as an employee under such an act. But, in another corporation of humbler proportions, such an official might serve in a dual capacity; that is, as an officer, and also as a workman. It is not unreasonable to conceive of a case, where the discharge of the official duties would constitute but a small portion of the services rendered by him to the corporation."

But the president and principal executive officer of a corporation which employs workmen in a hazardous occupation, who earns \$75 a week, whose salary is not interrupted by the accident, and whose stock dividends for the preceding year amounted to \$30,000, cannot be considered as an employee, within the meaning of the New York act. *Bowne v. S. W. Bowne Co.* (1917) 221 N. Y. 28, 116 N. E. 364. The court said: "Conceding that a corporation may employ its officers as workmen to handle lumber, operate lathes, or set brakes, or to act as superintendents and foremen, it must also be conceded that the higher executive officers of a corporation are not, as such, its employees, in the ordinary use of the word, nor are they expected to perform manual labor. . . . A workman, in a broad sense, is one who works in any department of physical or mental labor, but, in common speech, is one who is employed in manual labor, such as an artificer, mechanic, or artisan; while an employee, in a broad sense, is one who receives salary or wages or other compensation from another, . . . but, in common speech, the

term is usually applied to clerks, laborers, etc., and not to the higher officers of a corporation. The statutory definition speaks of one 'in the service' of an employer. In a broad sense, the officers of a corporation serve it, but, in common speech, they are not referred to as its servants or employees."

Under the rulings of the court of appeals, a son is not an employee of his father within the meaning of the Compensation Act, where the son was the practical manager of the business, and did not receive a stated salary, but drew from the business, with the consent of the father, from time to time, such moneys as he desired, the amount for the year preceding his death exceeding \$10,000. *Re Howard* (1917) 221 N. Y. 605, 117 N. E. 1072, reversing, without opinion, a judgment of the appellate division reported in (1917) 176 App. Div. 940, 162 N. Y. Supp. 1124, in which the appellate division, without opinion, unanimously affirmed an award of the compensation commission.

#### **Members of a partnership.**

Under the English act, it has been held that one member of a partnership is not entitled to compensation for injuries received while working for the partnership. *Ellis v. Ellis* [1905] 1 K. B. (Eng.) 324, 74 L. J. K. B. N. S. 229, 53 Week. Rep. 311, 92 L. T. N. S. 718, 21 Times L. R. 182.

One of the partners cannot be an employee of the partnership, so that he or his dependents would be entitled to compensation for injuries received by him while working for such partnership. *Cooper v. Industrial Acci. Com.* (1918) — Cal. —, 171 Pac. 684. The court said: "The law relative to compensation, as between master and servant, or employer and employee, for injuries suffered by the latter, contemplates two persons standing in this opposed relation, and not the anomaly of one person occupying the dual relation of master and servant, employer and employee, plaintiff and defendant, or person entitled to a judgment or award in his favor and person bound to pay a part thereof out of his own proportionate share of the partnership property, and the balance, amounting possibly to the whole thereof, out of his own individual estate."

#### **Teachers.**

A teacher in an occupational school is not a laborer, workman, or mechanic, within the meaning of the Massachusetts

act, although he instructs in mechanics by actual demonstration in the repair of automobiles. *LESUER v. LOWELL*, ante, 197.

This decision might be criticized upon the ground that it turns upon a fine definition of terms, and ignores the fact that the employee was subjected to precisely the same dangers as he would have been subjected had he been a regular mechanic or workman, earning his wages by the use of his hands, rather than by instructing others. The decision does not reflect a liberal construction of the act.

**Status as employee as dependent upon amount of wages received.**

The English act provides that the term "workman," as used therein, does not include any person whose remuneration exceeds £250 a year. And it has been held that a retired master mariner, who was employed to take charge of ships in port in the absence of their captains, at wages amounting to about £130 a year, and who was then employed to go abroad to take charge of a vessel and sailed it to a certain port, and then possibly home, and whose wages while going to the foreign port were £10 per month, and whose wages while in command of the vessel would be £20 a month, with board amounting to about £4 and 10 shillings per month, and whose employment in going for the vessel and bringing it home would not exceed six months, is an employee within the meaning of the Compensation Act, so that his dependents are entitled to recover compensation for his death while in charge of the vessel, although, at that particular time, he was earning more than £250 per year; since his earnings for the entire year are to be taken into consideration in determining whether or not the wages exceed £250 a year. *Griffith v. Penrhyn Castle* [1917] 1 K. B. (Eng.) 474, 86 L. J. K. B. N. S. 449, 116 L. T. N. S. 169, 10 B. W. C. C. 114.

**Employees paid by commission or by the piece.**

The fact that an employee is paid a commission does not, in itself, constitute the relationship of independent contractor. *Easton v. Industrial Acci. Commission* (1917) 34 Cal. App. 321, 167 Pac. 288.

So, the mere fact that an employee engaged in the work of selling property is paid by commission upon the amount of his sales does not create the relationship of independent contractor. *Brown*

*v. Industrial Acci. Commission* (1917) 174 Cal. 457, 163 Pac. 664.

And a traveling salesman, selling the wares of his employer on a commission basis, with a guaranteed net return of so much per week for his services, is an employee, within the meaning of the New York act. *Gurnett v. L. P. Ross Co.* (1917) — App. Div. —, 167 N. Y. Supp. 1102, unanimously affirming, without opinion, the award of the Commission.

The fact that an employee is paid in proportion to the amount of work he does does not constitute him an independent contractor, so as to be outside the application of the Wisconsin act. *Komula v. General Acci. F. & Life Assur. Corp.* (1917) 165 Wis. 520, 162 N. W. 919.

**Wives, children, and members of family.**

A wife cannot be an employee of her husband, within the meaning of the Massachusetts act, so as to render his insurer liable for injuries to her; since employment, under the act, presupposes a contractual relationship, and a married woman cannot, under the laws of Massachusetts, make a contract, express or implied, with her husband. *RE HUMPHREY*, ante, 193.

A minor doing such work as his father directs him to do, about the father's place, and receiving such sums as his father gives him, without any contract of employment between them, is not, in a case where, by statute, the father is entitled to the services of the minor, an employee, within the meaning of the Compensation Act, so as to render the father's insurer liable for injury arising out of services which the boy was rendering to the father. *ÆTNA L. INS. CO. v. INDUSTRIAL ACCI. COMMISSION*, ante, 194.

No contract of employment can be inferred between a father and his son, thirteen years of age, where, when the boy went to work, there was nothing at all said about his wages, and he was injured a short time after he began to work, but before any wages had, in fact, been paid to him. *Hillestad v. Industrial Ins. Commission* (1914) 80 Wash. 426, 141 Pac. 913, Ann. Cas. 1916B, 789, 6 N. C. C. A. 763.

The exclusion of "members of the employee's family dwelling in his house" from the class of employees, as defined in the Connecticut statute, does not have the effect of rendering the statute in-

applicable to an employee of a partnership, although he may be a son of one of the partners, and a member of his father's family, residing in the latter's house. *McNamara v. McNamara* (1917) 91 Conn. 380, 100 Atl. 31.

The English statute expressly provides that the term "workman" does not include a member of the employer's family, dwelling in his house.

Thus, a son, twenty-six years of age, who is employed by his father, lives with him, and pays his board and lodging, is a member of the father's family, dwelling in his house, and, consequently, is not a workman. *M'Dougall v. M'Dougall* [1911] S. C. 426, 48 Scot. L. R. 315, 4 B. W. C. C. 373.

So, a son living in the same house with his father, and employed by him to aid in carrying out a contract, cannot recover from the principal, since he could not recover from the contractor, his father, under the definition of workman contained in the act. *Marks v. Carne* [1909] 2 K. B. (Eng.) 516, 78 L. J. K. B. N. S. 853, 100 L. T. N. S. 950, 25 Times L. R. 620, 53 Sol. Jo. 561, 2 B. W. C. C. 186.

#### **Independent contractors, subcontractors, and their employees.**

Cases merely determining whether or not a person is an independent contractor, or an employee, have not been taken, as these cases are determined by principles of general law, which are in no wise controlled by the Compensation Statute.

Independent contractors are not employees within the meaning of the Compensation Acts, and no compensation is recoverable for injuries suffered by them. *Brown v. Industrial Acci. Commission* (1917) 174 Cal. 457, 163 Pac. 664; *Easton v. Industrial Acci. Commission* (1917) 34 Cal. App. 321, 167 Pac. 288; *Columbia School Supply Co. v. Lewis* (1917) — Ind. App. —, 115 N. E. 103; *Zeitlow v. Smock* (1917) — Ind. App. —, 117 N. E. 665; *Sugar Valley Coal Co. v. Drake* (1917) — Ind. App. —, 117 N. E. 937; *McAllister's Case* (1918) 229 Mass. 193, 118 N. E. 326; *Carleton v. Foundry & Mach. Products Co.* (1917) — Mich. —, 165 N. W. 816; *Woods v. Tupper Lake Chemical Co.* (1917) 221 N. Y. 660, 117 N. E. 1087; *Komula v. General Acci. Fire & Life Assur. Corp.* (1917) 165 Wis. 520, 162 N. W. 919.

And a subcontractor is not entitled to compensation, under the Indiana statute.

L.R.A.1918F.

*Mobley v. J. S. Rogers Co.* (1918) — Ind. App. —, 119 N. E. 477.

And employees of an independent contractor cannot hold the principal employer liable for compensation, under the California statute. *Fidelity & D. Co. v. Brush* (1917) — Cal. —, 168 Pac. 890; nor under the New York statute; *Kackel v. Serviss* (1917) 180 App. Div. 54, 167 N. Y. Supp. 348.

But employees of a contractor can recover against the subscriber, if the employee shows he was at work on premises under the control and management of the subscriber, or where the contractor had agreed to perform the particular work, and, in addition, that his injury arose out of and in the course of the employment, which was a part of the subscriber's trade or business, and not merely incidental or ancillary to it. *Comerford's Case* (1918) 229 Mass. 573, 118 N. E. 900.

Some statutes expressly make the principal employer liable, under specified circumstances, for injuries to employees of contractors and subcontractors. If a subcontractor employs another in respect to the work which is the subject of the contract, the rights of the employee, under the Wisconsin act, are not affected by the invalidity of the subcontract. *Wausau Lumber Co. v. Industrial Commission* (1917) 166 Wis. 204, 164 N. W. 836.

Under the Illinois statute, it is the duty of the principal contractor to see to it that a subcontractor insures his liability to pay the compensation provided by the act, or he himself becomes liable to pay such compensation; and he does not become free from liability, merely by insisting and demanding repeatedly that the subcontractor take out insurance, nor even by advancing to him the money with which to pay for the insurance, where the subcontractor fails to take out such insurance. *Butler Street Foundry & Iron Co. v. Industrial Bd.* (1917) 277 Ill. 70, 115 N. E. 122.

But the owner of a building, upon which a contractor is doing work, does not become liable for compensation for injuries to one of the contractor's employees, for failure to require the contractor to take out insurance in accordance with the terms of the Illinois act, where the contractor had already taken out such insurance. *Houlihan v. Sulzberger & Sons Co.* (1917) 282 Ill. 76, 118 N. E. 429.

The burden of proof of showing that

the relationship of employee and employer, rather than that of independent contractor, existed at the time the injury was received, is upon the petitioner, and it is therefore unnecessary for the employer, relying upon such a defense, to introduce any evidence. *Zeitlow v. Smock* (1917) — *Ind. App.* —, 117 N. E. 665.

Whether or not the applicant was an employee within the protection of the statute, or an independent contractor, is a question of fact, and not subject to review if the evidence is conflicting; but where the evidence is undisputed, and is reasonably susceptible of but a single inference, the question of what relation

is shown to exist is a question of law. *Ibid.*

Where there is substantial evidence in support of a finding that the deceased workman was an employee of a subcontractor, the finding must prevail. *Wausau Lumber Co. v. Industrial Commission* (Wis.) *supra*.

A finding by the commission that the relationship of employer and employee existed between the parties, rather than the relation of independent contractor, will not be disturbed, where the court is satisfied that the evidence sustained the conclusion. *Gorter v. Industrial Acci. Commission* (1917) — *Cal. App.* —, 169 Pac. 262. W. M. G.

# ILLINOIS SUPREME COURT.

ALOIZY ROSZEK by His Father and Next Friend, Appt.,  
v.

BAUERLE & STARK COMPANY.

(282 Ill. 557, 118 N. E. 991.)

**Workmen's compensation — minor employed without permit.**

A minor employed without the necessary permit is not an employee, and therefore compensation for injuries to him cannot be made under the Workmen's Compensation Act, but must be adjusted in a common-law action for damages.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(February 20, 1918.)

**A**PPEAL by plaintiff from a judgment of the Appellate Court, First District, reversing a judgment of the Superior Court for Cook County in his favor, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's violation of the Child Labor Act. Reversed.

The facts are stated in the opinion.

Messrs. David K. Tone, Frank A. Rockhold, and Weymouth Kirkland, for appellant:

It is not compulsory, but elective, that the servant's constitutional right to sue for damages and have his case tried by a jury is only taken away, where the servant, "as a part of his contract of hiring, voluntarily elected to relinquish his constitutional rights."

**Note.** — As to applicability of Compensation Statutes to minors, see annotation following this case, post, 209.

L.R.A.1918F.

*Deibeikis v. Link-Belt Co.* 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401.

Plaintiff's contract of hiring to work on the sandpaper machine in question was unlawful—prohibited by a penal statute—and therefore he is not deprived of his right to sue for damages, because he has voluntarily relinquished that right as a part of his contract of hiring.

*Hetzel v. Wasson Piston Ring Co.* 89 N. J. L. 201, L.R.A.1917D, 75, 98 Atl. 306; *Lostutter v. Brown Shoe Co.* 203 Ill. App. 517.

Messrs. Fyffe, Ryner, & Dale for appellee.

**Farmer, J.**, delivered the opinion of the court:

Appellant, Aloizy Roszek (hereafter called plaintiff), by his father as next friend, brought suit against appellee, the Bauerle & Stark Company (hereafter called defendant), in the superior court of Cook county. The declaration alleged the defendant on March 2, 1914, was engaged in the manufacture of sewing machines, and, in the prosecution of such business, was operating sandpaper machines, with rollers and gears; that plaintiff on such date was fifteen years of age, and, contrary to the statute, was employed by defendant to work at and about such a machine; and that, while so working, plaintiff's right hand was caught between the rollers of said machine and injured, to the damage of plaintiff in the sum of \$10,000. During the trial, an amendment to the declaration was added, that plaintiff was otherwise disabled, both internally and externally. Defendant filed a plea of the general issue, and also a special plea setting up the defense that plaintiff could not main-

tain his action at law, because the parties were operating under the provisions of the Workmen's Compensation Act of Illinois. Plaintiff filed a demurrer to the special plea, which was sustained. A trial was had before a jury, which resulted in a verdict and judgment in favor of plaintiff in the sum of \$3,000. Defendant perfected an appeal to the appellate court for the first district, where the judgment of the superior court was reversed, on the ground the superior court was without jurisdiction, and that plaintiff's sole remedy was under the Workmen's Compensation Act. The appellate court granted a certificate of importance, and the cause has been brought to this court by appeal.

It is not controverted that plaintiff was less than sixteen years of age at the time of the injury; that his right hand was caught in the rollers of the machine he was operating, and his fingers crushed, necessitating the amputation of the third finger at the second joint and leaving the little finger stiff; that defendant was operating under the Workmen's Compensation Act, and that plaintiff had never elected not to be bound by the provisions of said act. Plaintiff contended, and offered evidence to prove, that as a result of the injury an infection set in, necessitating plaintiff being taken to a hospital; that he became seriously ill; that lung trouble, fever, and, later, tuberculosis, developed in regular sequence after the injury, and as a result thereof. The question to be determined is whether or not the parties were operating under and bound by the provisions of the Workmen's Compensation Act. If they were, then the superior court did not have jurisdiction. It is admitted defendant was operating under the act. Plaintiff was a minor fifteen years of age, and had not elected not to be bound by the act.

Paragraph 2 of § 5 of the Workmen's Compensation Act (Hurd's Rev. Stat. 1916, p. 1274), provides: "Every person in the service of another under any contract of hire, express or implied, oral or written, including aliens, and minors who are legally permitted to work under the laws of the state, who, for the purpose of this act, shall be considered the same and have the same power to contract, receive payments and give quittances therefor, as adult employees."

The Child Labor Act (Hurd's Rev. Stat. 1916, p. 1239), by ¶ 20, provides no child under the age of fourteen years shall be employed in certain named occupations, which include manufacturing establishments. Paragraph 20c provides that no child under sixteen years of age and over

fourteen shall be employed in various lines of industry mentioned, including manufacturing establishments, unless there is first produced and placed on file in such establishments, and accessible to the state factory inspector, an age and school certificate, as prescribed in ¶ 20d. Paragraph 20j of said act provides no child under the age of sixteen years shall be employed at certain kinds of work (naming them), among which is operating or assisting in operating sand-paper machinery.

Plaintiff was over fourteen years of age at the time of the injury; hence, was old enough to be employed by defendant. He was under sixteen years of age, however, and was not old enough to be employed in operating sand-paper machines. Plaintiff contends he was not "legally permitted to work" at such employment, and, for that reason, is not an "employee," as defined by § 5 before set out. A penalty is provided against any person, firm, corporation, agent, manager, superintendent, or foreman of any firm or corporation for a violation of the Child Labor Law.

Plaintiff was between the ages of fourteen and sixteen years, and might legally be employed in a manufacturing establishment, though not to work with certain appliances or machinery, including sand-paper machines; but he could not be legally employed without the permit, required by law of minors between the ages of fourteen and sixteen years. No such permit was obtained by plaintiff, authorizing his employment in defendant's factory for any purpose, and, as we understand the definition of employees made subject to the Workmen's Compensation Act by § 5 of said act, it embraces only minors who are legally permitted to work. A minor under the age of fourteen years could not lawfully be employed to work in a manufacturing establishment, and if employed contrary to law, and injured while so employed, he could not be regarded as an employee within the provisions of the Workmen's Compensation Act. The same rule applies where a minor between the ages of fourteen and sixteen years is working without a permit having been obtained. In both cases, the employment is unlawful.

Both phases of this question have been passed upon by the supreme court of Wisconsin, under a statute substantially identical with § 5 of the Workmen's Compensation Act of this state. In *Foth v. Macomber & W. Rope Co.* 161 Wis. 549, 154 N. W. 369, 11 N. C. C. A. 599, the plaintiff was of an age where he could, subject to the requirements of the Child Labor Law, be employed in defendant's factory for some purposes. While it is not expressly so stated, we un-



derstand from the statement of the case, and from the opinion, that he was lawfully employed by defendant, but that, at the time of his injury, he was engaged at work he was prohibited from being employed to do. He sued defendant for damages in an action at law, and one of the defenses interposed was that he was legally permitted to work for hire under the laws of Wisconsin, and was, therefore, subject to the provisions of the Workmen's Compensation Act, notwithstanding he was injured while doing work he could not legally be employed or permitted to do. This defense was sustained, and the plaintiff was held not to be entitled to recover in an action at law.

In *Stetz v. F. Mayer Boot & Shoe Co.* 163 Wis. 151, 156 N. W. 971, Ann. Cas. 1918B, 675, the plaintiff was a boy between fourteen and sixteen years of age. The statute of Wisconsin forbade the employment of children of that age in any factory or workshop, unless there was first obtained from the commissioner of labor or other specified persons, a written permit authorizing the employment of such child. Plaintiff was employed by defendant without such permit having been obtained, and, while so employed, received injuries, on account of which he brought a suit in an action at law to recover damages. Defendant contended that the Workmen's Compensation Act applied, and that the suit at law could not be maintained. The court held contrary to defendant's contention, basing its holding on the ground that, no permit for the employment of plaintiff having been obtained, he was not legally permitted to work, and that, his employment being unlawful, he was not within the provisions of the Work-

men's Compensation Act. We do not understand that case to overrule or modify the *Foth Case*. In the *Stetz Case*, the court referred to the *Foth Case* as having been correctly decided, because in that case the minor was legally employed and permitted to work in the employer's factory, though not to work at the machine by which he was injured; while in the *Stetz Case* the employment was unlawful for any purpose, because no permit had been obtained as required by law.

In this case, the plea did not aver that any permit had been obtained, authorizing plaintiff's employment for any purpose, and, as we understand the record, the proof shows no such permit was obtained. Without such permit, he was no more legally permitted to work in defendant's factory than would be a minor under fourteen years of age. In the one case, a minor is not legally permitted to work at all, while, in the other, he is only legally permitted to work upon obtaining the permit required by the Child Labor Law. If plaintiff was not legally permitted to work, he is not embraced within the provisions of the Workmen's Compensation Act, and his action to recover damages was properly brought. *American Car & Foundry Co. v. Armentraut*, 214 Ill. 509, 73 N. E. 766; *Strafford v. Republic Iron & Steel Co.* 238 Ill. 371, 20 L.R.A.(N.S.) 876, 128 Am. St. Rep. 129, 87 N. E. 358; *Beauchamp v. Sturges & B. Mfg. Co.* 250 Ill. 303, 95 N. E. 204.

The judgment of the appellate court is reversed, and the judgment of the superior court is affirmed.

Petition for rehearing denied, April 4, 1918.

## Annotation — Applicability of Compensation Statutes to minors.

The general subject of Workmen's Compensation Acts is treated in annotations in L.R.A.1916A, 23, and L.R.A. 1917D, 80. For later cases and annotations on Workmen's Compensation Statutes, consult the L.R.A. Indexes for volumes subsequent to L.R.A.1917D, under the title "Workmen's Compensation."

As to who are employers within the meaning of the Compensation Statute, see annotation to *Claremont Country Club v. Industrial Acci. Commission*, ante, 179. As to the applicability of compensation statutes to the states, counties, cities, and charitable and other public institutions, and their employees, see annotation to *Griswold v. Wichita*, ante, 190. As to who are employees

within the meaning of the Compensation Statute, see annotation to *State ex rel. Nienaber v. District Ct.* ante, 201. As to what constitutes casual employment not in the usual course of the employer's business, within the meaning of the Compensation Act, see annotation to *Marsh v. Groner*, post, 215. As to extrahazardous employments and other occupations expressly included in the Workmen's Compensation Act, see annotation to *F. W. Hochspeier v. Industrial Bd.* post, 230.

The New Jersey act applies to minors, unless notice to the contrary be given by or to the parent or guardian of the minor. This provision relative to parents and guardians is not unconstitutional, as depriving minor employees of the equal

protection of the law. *Young v. Sterling Leather Works* (1917) — N. J. —, 102 Atl. 395. A notice that an employer elects not to come under the provisions of the act is not sufficient, where it is posted in the works or given to the minor workman in his pay envelop. *Troth v. Millville Bottle Works* (1916) 89 N. J. L. 219, 98 Atl. 435. But where the parent or guardian of the minor actually sees the posted notice or the notice in the pay envelop, then the legal requirements as to notice are fulfilled, and an action at common law may be maintained for injuries to the minor. *Brost v. Whittall-Tatum Co.* (1916) 89 N. J. L. 531, L.R.A.1917D, 71, 99 Atl. 315.

The Wisconsin statute, however, expressly provides with reference to the election of employees to be bound by the Compensation Acts, that minors shall be considered the same and shall have the same power of contracting as adult employees. And it has been held that a minor who neither gives to the employer nor files with the Industrial Commission any notice, electing not to be subject to the provisions of the Compensation Act, is within its provisions, and cannot maintain an action for damages. *Lutz v. Wilmanns Bros. Co.* (1917) 166 Wis. 210, 164 N. W. 1002.

And in *Menominee Bay Shore Lumber Co. v. Industrial Commission* (1916) 162 Wis. 344, 156 N. W. 151, it was held that a minor need not be represented in compensation proceedings by a guardian. The court said: "It is quite significant that minors, mentioned for the purposes indicated, are not only empowered to contract to the same extent as adults, but are, for all such purposes, to be considered the same as adults. This is a pretty plain legislative declaration that a guardian to represent a minor, in matters within the jurisdiction of the Industrial Commission under the Workmen's Compensation Law, is not essential."

So, too, it has been held that the West Virginia act applies to minors the same as to adults, where such minors have been legally employed. *Rhodes v. J. B. B. Coal Co.* (1916) 79 W. Va. 71, 90 S. E. 796.

A minor who is employed under the statutory age, or employed without the necessary permit, is not an employee within the meaning of the Compensation Statutes, and, if he is injured by negligence attributable to the employer, an action for damages for such injuries may be maintained.

L.R.A.1918F.

Thus, a minor employed without the necessary permit is not an employee under the Illinois act, but may maintain a common-law action for damages. *ROSZEK v. BAUERLE & S. Co.* ante, 207.

And in *Messmer v. Industrial Bd.* (1918) 282 Ill. 562, 118 N. E. 993, the supreme court of Illinois reversed an award in favor of the claimant, who was a minor between the ages of fourteen and sixteen years, and who might have been legally employed in the establishment, but for the fact that he had not secured the necessary permit to work.

So, too, the Minnesota act was intended to exclude from its operation minors whose employment is prohibited by law, and, consequently, such a minor has a common-law action for damages, for injuries caused by the negligence of the employer. *Westerlund v. Kettle River Co.* (1917) 137 Minn. 24, 162 N. W. 680. After stating that the language, "minors who are legally permitted to work under the laws of the state," was intended to exclude from the act minors whose employment is prohibited by law, the Minnesota court said: "In the absence of legislation to the contrary, all minors may lawfully engage in such employments or work as their age and capacity fit them, and in this respect are 'legally permitted' to work, though their contracts, except as to necessities, are voidable at their election. In fact, we have no statute expressly permitting the employment of minors, and the use of the words, 'legally permitted to work,' was not intended as a reference to permissive legislation. But we have statutes, and have had for many years, known as the Child Labor Laws, by which the employment of minors of certain age is expressly prohibited, in specified classes of employment deemed detrimental to their moral welfare and dangerous to their life or limb. And, in making use of the language quoted, it is apparent that the legislature intended to preserve the status of minors, in respect to their employment in dangerous occupations, and to remove them from the Compensation Act, when employed in violation of law. No other construction of the statute can be adopted, that would not be in discord with our whole legislative policy upon the subject."

So, in *Hillestad v. Industrial Ins. Commission* (1914) 80 Wash. 426, 141 Pac. 913, Ann. Cas. 1916B, 789, 6 N. C. C. A. 763, it was held that there could be no recovery of compensation for injuries to

a minor who was employed in violation of the statute, forbidding employment of minors under a certain age in any factory, mill, workshop, or store.

So, an action at common law may be maintained for injuries to a child employed under the statutory age, in violation of the New Jersey statute, since the Compensation Act applies only where there is a valid contract of hiring. *Hetzel v. Wasson Piston Ring Co.* (1916) 89 N. J. L. 201, L.R.A.1917D, 75, 98 Atl. 306.

A release by the guardian of a minor, of any claim which the minor might have under the Workmen's Compensation Act, does not preclude a recovery at common law, where the minor was not within the provisions of the Compensation Act, because employed under the statutory age. *Stetz v. F. Mayer Boot & Shoe Co.* (1916) 163 Wis. 151, 156 N. W. 971, Ann. Cas. 1918B, 675.

On the other hand, in *Ive v. Paul* (1917) 179 App. Div. 567, 166 N. Y. Supp. 858, it was held that the fact that a minor was employed in violation of the Labor Law furnished no defense to the employer against the payment of compensation, nor did it to the insurance company, whose contract provided that it should pay any sum due or to become due from the employer because of the Compensation Act, although the contract of insurance also provided that the policy should only cover employees who were legally employed.

And, under the Wisconsin statute, "minors who are legally permitted to work, under the laws of the state," are embraced within the act, and cannot maintain actions for damages, although, at the time of the injury, they were doing work not permitted by law. *Foth v. Macomber & W. Rope Co.* (1915) 161 Wis. 549, 154 N. W. 369, 11 N. C. C. A. 599; *Lutz v. Wilmanns Bros. Co.* (1917) 166 Wis. 210, 164 N. W. 1002.

So, in *Pettee v. Noyes* (1916) 133 Minn. 109, 157 N. W. 995, the court said that the provision by which the statute was made applicable to minors, "who were legally permitted to work under the laws of the state," had no application to a student elevator operator, who was injured while operating the elevator alone, and who was properly employed, but who was not entitled to operate the elevator, because he had no license for that work.

But the Illinois appellate court, in *Lostutter v. Brown Shoe Co.* (1916) 203

Ill. App. 518, held that the provision in the Illinois act, as to "minors who are legally permitted to work under the laws of the state," includes only minors who may legally perform the work, under the laws of the state, at which they are employed. The court went on to say: "It does not appear reasonable that minors, because they are legally permitted to work at some kind of work under the laws of the state, that therefore, under the provisions of the Workmen's Compensation Act, they may also be employed at work which is unlawful under the Child Labor Act." The court called attention to the fact that the supreme court of Wisconsin had placed a somewhat different construction upon similar language concerning the employment of minors, but stated that the construction there adopted appeared to be contrary to the well-recognized rule of construction prevailing in Illinois.

The West Virginia act abrogates the right of action which a parent has for the loss of services of a minor child, and substitutes a mode of compensation therefor. *Adkins v. Hope Engineering & Supply Co.* (1917) — W. Va. —, 94 S. E. 506.

But, under the Massachusetts act, it has been held that the fact that a minor has received full compensation, under the act, for his injuries, does not affect the right of a parent to recover for his loss because of the child's injury; and it was also held that the provision that the insurer shall pay a part of the medical expenses made necessary by injury to an employee does not take away, by implication, the parent's remedy for his own loss in the shape of an injury to the minor, although the parent could not recover expenses which he had not been compelled to pay, but which had been paid by the insurer. *King v. Viscoloid Co.* (1914) 219 Mass. 421, 106 N. E. 988, 7 N. C. C. A. 254, Ann. Cas. 1916D, 1170.

A misrepresentation as to the name and age of an employee, made at the time of entering the employment, does not, in the absence of any proof that the employer was induced to enter into the contract upon such misrepresentation, constitute such a fraud as will operate to relieve him from the statutory obligation to make compensation in a case arising under the statute; especially, where it does not appear that there was any causal connection between the misrepresentation and the injury. *Havey v. Erie R. Co.* (1915) 87 N. J. L. 444, 95 Atl.

124. The employee in this case was, in fact, 18, and it does not appear that he was below the working age.

In the case of the death of a minor, the New York commission properly takes into consideration the fact that, under normal conditions, his wages would probably have increased. *Kilberg v. Vitch* (1916) 171 App. Div. 89, 156 N. Y. Supp. 971. The court held that

the provision of § 60 of the act, that all questions of dependency shall be determined as of the time of the accident, does not relate to the right of the commission to consider the probable earning capacity of a minor, when hurt, but simply is a command to the commission to take into consideration only the circumstances at the time of the accident.  
W. M. G.

**CALIFORNIA SUPREME COURT.**  
(In Banc.)

PEARL P. WALKER

v.

INDUSTRIAL ACCIDENT COMMISSION.

(— Cal. —, 171 Pac. 954.)

**Workmen's compensation — effect of finding by Commission.**

1. A finding by the Industrial Accident Commission on conflicting evidence is binding on the courts.

*For other cases, see Courts, I. c. 1, in Dig. 1-52 N. S.*

**Same — intermittent employment — usual course of business.**

2. The employment at intervals by a boarding house keeper of assistants for the chambermaid, in keeping the house clean by taking up carpets and cleaning walls and windows, is in the usual course of business, within the meaning of the Workmen's Compensation Act, so as to entitle one injured while so employed to compensation under that act.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(March 19, 1918.)

**C**ERTIORARI to review an award of the Industrial Accident Commission to applicant, for an accidental injury sustained by him while in petitioner's employ. Award affirmed.

The facts are stated in the opinion.

Messrs. Webster, Webster, & Blewett, for petitioner:

The employment of Robinson was not in the usual course of the business or occupation of the petitioner.

*Kelly v. Buchanan*, 47 Ir. L. T. 228; *Renzie v. Reid*, 1 B. W. C. C. 324; *Hayes v. Thompson* [1913] W. C. & Ins. Rep. 161, 6 B. W. C. C. 130; *Pearce v. London & S. W. R. Co.* [1900] 2 Q. B. 100, 69 L. J. Q. B.

**Note.** — As to casual employment not in the usual course of the employer's business, within the meaning of the Workmen's Compensation Act, see annotation to *Marsh v. Groner*, post, 215, and references therein to annotations on related questions.

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N. S. 683, 48 Week. Rep. 599, 82 L. T. N. S. 473, 16 Times L. R. 336; *Dempster v. Hunter*, 4 Sc. Sess. Cas. 5th series. 580, 39 Scot. L. R. 395, 9 Scot. L. T. 450; *Maryland Casualty Co. v. Pillsbury*, 172 Cal. 748, 158 Pac. 1031.

Messrs. Christopher M. Bradley and Warren H. Pillsbury, for respondent Commission:

Upon Robinson's evidence, he was employed to perform service regularly and periodically needed in the usual course of operating a lodging house.

*London & L. Guarantee & Acci. Co. v. Industrial Acci. Commission*, 173 Cal. 642, 161 Pac. 2; *Maryland Casualty Co. v. Pillsbury*, 172 Cal. 748, 158 Pac. 1031.

Mr. Max Grimm for respondent Robinson.

Sloss, J., delivered the opinion of the court:

Certiorari to review an award of the Industrial Accident Commission. The petitioner, Pearl P. Walker, conducted at Stockton a lodging house containing seventeen rooms. The applicant, Louis J. Robinson, was employed by Miss Walker to do certain work in cleaning the house, and, while so occupied, met with an accidental injury which destroyed the sight of one of his eyes.

Section 14 of the Workmen's Compensation Act excludes from the benefits of the law any person "whose employment is both casual and not in the usual course of the trade, business, profession, or occupation of his employer." The Commission found that Robinson's employment was casual, but that it was in the usual course of the business or occupation of the petitioner. It is contended, and this is the sole point made, that there was no evidence to support the latter part of this finding.

Our authority, with respect to the Commission's conclusions on questions of fact, goes no further than to permit the annulment of an award where the Commission's finding of a fact is without any evidence whatever to support it. Where there is a conflict in the testimony, or where opposing

inferences may reasonably be drawn, the Commission is the final arbiter.

The evidence embodied in the record indicates that it was a necessary part of petitioner's business to keep the rooms and hallways of her lodging house in a state of cleanliness and good order. A chambermaid was employed continuously. The maid was, however, not able to do all the work, and her efforts had to be supplemented by a man called in from time to time. The work for which Robinson was engaged was the taking up of carpets or matting, and the cleaning of walls, transoms, windows, and curtains. Miss Walker herself testified that she was in the habit of employing someone to do that kind of work occasionally, and the chambermaid stated that, ever since Robinson's injury, another man had been doing similar work off and on. This testimony warranted the conclusion that the employment of Robinson was in the "usual course of the business" of the petitioner. The case is not like those cited by petitioner, in which occasional repairs or overhauling were held not to be covered by this phrase. Various cases of this kind, involving a construction of the English act, were reviewed by us in *London & L. Guarantee & Acci. Co. v. Industrial Accl. Commission*, 173 Cal. 642, 161 Pac. 2, and we there said: "In cases arising under that act the expression

['course of business of the employer'] is held to cover the normal operations which form part of the ordinary business carried on, and not to include incidental and occasional operations, having for their purpose the preservation of the premises or the appliances used in the business."

It would not be questioned that the chambermaid, in doing the cleaning which fell within her province, was engaged in normal operations forming part of the employer's ordinary business. There was no essential difference in character between her work and that done by Robinson. One was as necessary in the conduct of the business as the other, and neither was incidental, in the sense in which that term was used in the passage just quoted. The only distinction is that the maid's work was done daily, while that of the man was called for at intervals. But the intermittent character of the employment is not, of itself, sufficient to exclude it from the purview of the statute. Section 14 does not except employments that are casual simply, but those that are both casual and not in the usual course of the business.

The award is affirmed.

We concur: Angellotti, Ch. J.; Wilbur, J.; Melvin, J.; Victor E. Shaw, Judge pro tem; Richards, Judge pro tem.

#### PENNSYLVANIA SUPREME COURT.

SHERIDAN N. MARSH, Appt.,

v.

IDA GRONER.

(258 Pa. 473, 102 Atl. 127.)

#### Workmen's compensation — business — remodeling residence.

A married woman, in remodeling her family residence, is not engaged in business within the meaning of a Workmen's Compensation Act, excluding from its operation persons whose employment is casual in character and not in the regular course of business of their employer, and therefore is not liable for injury to a plasterer who is injured by fall of a scaffold while engaged in a job of a couple of days' duration on the property, although the entire work on the residence extends over the greater part of a year.

For other cases, see *Master and Servant*, II. a, 1, in *Dig. 1-52 N. S.*

(Moschzisker, J., dissents.)

(June 30, 1917.)

Note. — As to employment, casual, and not in the usual course of the employer's business, within Compensation Statutes, see annotation following this case, post 215.

L.R.A.1918F.

**A**PPEAL by claimant from a judgment of the Court of Common Pleas for Northampton County setting aside an award by the Workmen's Compensation Board, in a proceeding under the Workmen's Compensation Act for compensation for injuries sustained while in the employ of defendant. Affirmed.

The facts are stated in the opinion.

Messrs. Everett Kent and Francis H. Bohlen for appellant.

Mr. J. W. Paff for appellee.

Stewart, J., delivered the opinion of the court:

This case arises under the Workmen's Compensation Act of June 2, 1915 (P. L. 736), and is brought here on appeal from the court of common pleas of Northampton county. It was there considered on appeal from an order of the Workmen's Compensation Board, awarding a claimant—here, the appellant—certain compensation for injuries sustained in the employment of this appellee. The court there held, revoking and setting aside the order of the compensation board, that the claimant's injury was not received while he was engaged in the business of his employer, and that therefore

he was not entitled to compensation under the act.

The appeal brings the same question before us, and to that we are confined. The material facts are few and simple. The defendant is a married woman, residing with her husband in a house owned by herself. In the course of enlarging and remodeling her dwelling, she engaged the claimant to do some plastering work about the premises which, to complete, would require at most a couple of days. Claimant had been engaged in the work for only a few hours, when the scaffolding on which he was standing gave way and with it he fell to the ground and was injured. Further statement of facts is unnecessary, except to say that there is not a suggestion in the case that the defendant, the employer, in remodeling her house, had any other object in view than to make the house more convenient and attractive for her own and her family's comfort and enjoyment; nor is it anywhere suggested that, aside from this work and her household duties, she had anything of business character to engage her time or attention. Admittedly, she had never been engaged in trade. It is the contention of the appellant that the mere circumstance of her being engaged in such work as the remodeling and enlarging of her house, the time consumed in this work extending over the best part of a year, constituted her a person engaged in regular business, and made her liable, under the act, for compensation to any employee who might be injured while engaged upon such work.

It is an indispensable condition to his recovery under this act, that the claimant show that he received his injury while engaged in the regular course of the business of his employer. Section 104 of the act reads: "The term 'employee,' as used in this act is declared to be synonymous with servant, and includes all natural persons who perform services for another for a valuable consideration, exclusive of persons whose employment is casual in character and not in the regular course of the business of the employer."

We derive from this, by necessary implication, that only such employers are made liable under the act as are themselves engaged in regular business. This must be so, if any effect whatever is to be given the exclusion clause. Without attempting to elaborate further this proposition, we proceed at once to inquire as to the actual situation here. Do the facts, as we have indicated them, show that the employer, the appellee, was engaged in any regular business, within the meaning of that term as used in the act? If they do, or can be

reasonably so construed, then the case was improperly decided against the claimant; if otherwise, he could have no right to recover, since the act expressly excludes all not employed in the course of the regular business of the employer. If the employer have no regular business, it follows that the employee was not injured within the condition prescribed. What gives rise to the question is the indefiniteness and want of precision of meaning of the word "business," as it occurs in the act. It is a word which embraces a wide variety of subjects, and, being without a technical or precise meaning, excluding any other, it may convey an entirely different meaning in one connection from what it imports when used in another. In such cases, when, as here, no help can be derived from the context, and none from the use of the same word in other sections of the act, the interpreter has no other recourse than to the presumption that the word was used in the popular sense, if that be found agreeable, that is, not contradictory to the object and intention of the lawmaker.

Statutes are presumed to employ words in their popular sense, and, when the words used are susceptible of more than one meaning, the popular meaning will prevail. Where the meaning involves no absurdity, and is not in conflict with the other parts of the act, it is the only one that can be presumed to have been intended, and there is no room for construction. Cooley, Cons. Lim. pl. 68. There are few words more current in our speech than the word "business;" few that include a greater variety of subjects, and yet none which, in popular speech, has greater or more marked singleness in denotement. When one's business is the subject of common speech, no one can be in doubt as to the reference. It would be a very exceptional person—we do not know how to otherwise describe him—who would not understand that the reference is to the habitual or regular occupation that the party was engaged in, with a view to winning a livelihood or some gain. These objects are necessarily implied, when one's business is spoken of. Eliminate them, livelihood and gain, and it is no longer business, but amusement, which no one ever confounds with business. What we have said as to the popular understanding of the word business is just what Webster defines it: "Some particular occupation or employment habitually engaged in for livelihood or gain."

The points of difference between the employment the defendant was engaged in, and the business which is contemplated by the act and understood in common parlance, are so marked that the two cannot be confounded; one cannot be the equivalent of

the other. The defendant's employment was not in any way dependent on patronage; it had not for its object profit or gain, but simply her own personal gratification and comfort; it was not regular or habitual, but it terminated with the completion of the one thing that engaged her attention at the time, and there is not the slightest indication that she contemplated resuming or doing a like service for another, nor indeed that she had ever attempted anything of the kind before. Other points of difference can readily be suggested, but these are quite sufficient for our purposes. Our conclusion is that the defendant was not engaged in any business, within the proper meaning of that term as used in the act, and therefore the claimant, when injured, was not employed in the manner prescribed by the act. His employment, like that of his employer,

was casual in character. The assignment of error is therefore overruled, and the judgment of the court below is affirmed.

Moschzisker, J., dissenting:

The act of assembly which governs the present case excludes from its operation all "persons, whose employment is casual in character, and not in the regular course of the business of the employer." The majority, in order to arrive at the determination reached by them, in effect, change this phraseology from "the regular course of the business," to "the course of the regular business," of the employer. I believe in as liberal an application of the Workmen's Compensation plan as possible; and, since I see no warrant in law for making this change, which unduly narrows the act, I note my dissent.

### **Annotation — Workmen's Compensation: employment casual and not in the usual course of the employer's business.**

The general subject of Workmen's Compensation Acts is treated in annotations in L.R.A.1916A, 23, and L.R.A.1917D, 80. For later cases and annotations on Workmen's Compensation Statutes, consult the L.R.A. Indexes for volumes subsequent to L.R.A.1917D, under the title, "Workmen's Compensation."

As to who constitute employers within the meaning of the Compensation Statutes, see annotation to *Claremont Country Club v. Industrial Acci. Commission*, ante, 179. As to the applicability of Compensation Statutes to states, counties, cities, districts, charitable and other public institutions, and their employees, see annotation to *Griswold v. Wichita*, ante, 190. As to who are employees within the meaning of the Compensation Statutes, see annotation to *State ex rel. Nienaber v. District Ct.* ante, 201. As to applicability of Compensation Statutes to minors, see annotation to *Roszek v. Bauerle & S. Co.* ante, 209. As to extrahazardous employments and other occupations expressly included in Workmen's Compensation Acts, see annotation to *F. W. Hochspeier v. Industrial Bd.*, post, 230.

The earlier cases, passing upon questions as to what constitutes casual employment, and employment for the purpose of employer's trade or business, will be found in the annotation in L.R.A.1916A, at pages 96, 120 and 247, and in the annotations in L.R.A.1917D, at pages 147 and 151. The present anno-

tation is supplementary and deals only with cases handed down subsequent to the annotations above referred to. Although the questions as to what constitutes casual employment, and what constitutes employment for the employer's trade or business, under some statutes, are distinct, under other statutes, the two questions are so closely involved that it has been considered advisable to bring all of the later cases together into one annotation.

The English act provides that the word, "workman," shall not include a person whose employment is of a casual nature, and who is employed otherwise than for the purpose of the employer's trade or business. A somewhat similar provision is found in many of the American statutes, but the language used in some of these is susceptible of a different construction. The English courts have construed the phrase, "whose employment is of a casual nature," as used in their statutes, to refer to the kind of service done by the employees, rather than to the duration of the service. Some of the American statutes exclude workmen, "whose employment is but casual;" other statutes use the terms, "casual employment," and "persons casually employed." A number of courts have seen, in this change of language, a legislative intent to give to the phrase used, a different meaning than that given by the English courts.

The view of these courts is well shown by the Federal circuit court of appeals,

in *Western U. Teleg. Co. v. Hickman* (1918) — C. C. A. —, 248 Fed. 899, in which, in construing the West Virginia act, the court said: "The English Compensation Act, which some of our states have closely followed, excepts 'a person whose employment is of a casual nature, and who is employed otherwise than for the purpose of the employer's trade or business.' Construing this act, the English courts have held that the kind of work done by the employee, rather than duration of service, is the determining factor. If the work pertain to the business of the employer, and be within the scope of its purpose, the employment is not 'of a casual nature,' although the hiring be only for a short period of time. The Connecticut statute (Pub. Acts 1913, chap. 138) is practically the same as the English, and accordingly the supreme court of that state has held (*Thompson v. Twiss* (1916) 90 Conn. 444, L.R.A.1916E, 506, 97 Atl. 328) that the nature of the employment was measured not by tenure of service, but 'by the character of the work.' The New Jersey statute likewise exempts those 'whose employment is of a casual nature.' But the West Virginia act, in defining exceptions, uses the terms 'casual employment' and 'persons casually employed.' The equivalent exemption of persons, 'whose employment is but casual,' appears in the Compensation Laws of Massachusetts (prior to the Amendment of 1914 [Stat. 1911, chap. 751, as amended by Stat. 1912, chap. 571]), Illinois (Laws 1911, p. 315, as amended by Laws 1913, p. 335), Michigan (Pub. Acts [Ex. Sess.] 1912, No. 10), and Minnesota (Gen. Stat. 1913, §§ 8195-8230). This noticeable departure from the language of the English statute indicates a legislative intent to broaden the exception, and place it on a different basis. Its apparent effect is to make exemption depend not on the nature of the work performed, but on the nature of the contract of employment. If the hiring be incidental or occasional, for a limited and temporary purpose, though within the scope of the master's business, the employment is 'casual,' and covered by the exception. And so it has been held, by the courts of states whose Compensation Acts have substituted 'casual employment,' or words of the same import, for the 'employment of a casual nature,' found in the English statute."

The Illinois supreme court, in *Aurora Brewing Co. v. Industrial Bd.* (1917) L.R.A.1918F.

277 Ill. 142, 115 N. E. 207, after citing *Gaynor's Case* (1914) 217 Mass. 286, L.R.A.1916A, 363, 104 N. E. 339, 4 N. C. C. A. 502, said that it was pointed out, in the Massachusetts case, that a British act did not exempt the workman whose employment was but "casual," but only one whose employment is "of a casual nature," and quoted the following from the Massachusetts case: "The phrase of our act tends to indicate that the contract for service is the thing to be analyzed, in order to determine whether it be casual, while, in the English act, the nature of the service rendered is the decisive test." The Illinois court went on to say that the distinction noticed applied with full force to the wording of the Illinois act, as compared with the British act.

The decision in *Aurora Brewing Co. v. Industrial Bd.* (Ill.) supra, was to the effect that employment of a plasterer by a brewing company, to plaster the ceiling of a room in a building which the company was erecting as an addition to its bottling shop, was only casual, where the work was to continue only about three days, although the workman had worked for the brewing company at various other times for short periods.

So, in *Western U. Teleg. Co. v. Hickman* (Fed.) supra, the court held that an employee, who was employed as a lineman for a job of brief duration, and costing only a small sum, and who was hired for a time not to exceed five days, is a casual employee, and not within the protection of the West Virginia statute, and, consequently, could maintain an action for damages against his employer.

The Illinois court has further held that there can be no recovery of compensation for the death of an employee engaged in the work of repairing an ordinary country dirt road, where the injury was caused by an explosion of dynamite used to remove a stump from the road, and the work of dynamiting would continue but for a few hours, and it was not contemplated that any other use of explosives would be necessary, since the employment of the workmen with the explosives was but casual. *McLaughlin v. Industrial Bd.* (1917) 281 Ill. 100, 117 N. E. 819. It is submitted that the court, by this decision, imposes a serious hardship upon the employee. It is not claimed or stated in any way that his employment was "but casual;" it was the dangerous character of the work that was casual, and the statute expressly provides that the term "em-



ployee," does not include "any person whose employment is but casual."

Although a casual employee of a company had been promised a steady job upon a certain day, and, upon the morning of that day, he was found injured in the alleged employer's place of business, the claimant for compensation must prove that the promise on the part of the employer had not been withdrawn, and that the deceased had, in fact, entered upon his employment under the contract. *Baer's Exp. & Storage Co. v. Industrial Bd.* (1917) 282 Ill. 44, 118 N. E. 412.

An employer, by stipulating in the trial court that both the applicant and the respondent were working under and subject to the Illinois act, does not waive the right to insist that the employment was only casual. *Aurora Brewing Co. v. Industrial Bd.* (Ill.) supra.

Under the California statute, which excludes any person whose "employment is casual," it has been held that an employee engaged in erecting a dwelling house, who has worked for over three months, at day's wages, is not a casual employee. *Armstrong v. Industrial Acci. Commission* (1918) — Cal. App. —, 171 Pac. 321.

Employees of employers conducting an amusement park and amusement hall, who were engaged in repairing the boats and keeping the machinery in order, whenever called upon, and keeping the boats in operation and watching and caring for the property generally, all of whom were drawing pay from the employer, and none of whom had any other occupation, were not engaged in "employment of a casual nature." *Boyle v. Mahoney* (1918) 92 Conn. 404, 103 Atl. 127.

The Wisconsin statute also excludes "any person whose employment is but casual," but the supreme court of that state has given the phrase a different construction than that given to it by the American courts cited above. In *Holmen Creamery Asso. v. Industrial Commission* (1918) — Wis. —, 167 N. W. 808, the court said that the term employment, as used in this section, refers to the nature or kind of service rendered by the employee, rather than to the nature of his contract of employment, and the true test of whether the service rendered or the work done by the employee is of a casual nature. In speaking of the definition of the word "casual," as given in the *Standard Dictionary*, the court said: "The first or

primary meaning of the word is, 'happening or coming to pass without design, and without being foreseen or expected, accidental, coming by chance.' The secondary meaning is, 'coming without regularity or at uncertain times, occasional, incidental.' Neither of these definitions, alone, exactly fits the meaning of the word, as used in the statute. As therein used, it implies an element of chance, or lack of design or intention as to the occasion that gives rise to the employment, but not as to the hiring, or service to be rendered, when such occasion has arisen. Hence, an employment that is only occasional, or comes at uncertain times, or at irregular intervals, and whose happening cannot be reasonably anticipated as certain, or likely to occur, or to become necessary or desirable, is but a casual employment, within the meaning of the statute. It is one that arises occasionally or incidentally, and is not a usual concomitant of the business, trade, or profession of the employer."

Under this construction of the statute, it has been held that compensation is recoverable, where the injured workman was hired to make some repairs on a creamery, consisting of mason work and plastering the inside and outside of the building, and started to work at about 10 o'clock in the forenoon, and was injured at 3 o'clock in the afternoon of the same day (*Holmen Creamery Asso. v. Industrial Commission* (Wis.) supra); and where a workman employed in a butcher shop as a helper, generally upon Saturday, but not every Saturday, and upon other days when the employer needed extra help, or when some regular employee was not working (*Jordan v. Weinman* (1918) — Wis. —, 167 N. W. 810); and where a workman was injured while assisting in doing the cleaning up, necessitated by special repair work which had just been completed (*F. C. Gross & Bros. Co. v. Industrial Commission* (1918) — Wis. —, 167 N. W. 809).

The English statute excludes from the definition of "workman," a person who is employed otherwise than for the purposes of the employer's trade or business. A provision of a similar character is included in the American statutes, but the precise language is not followed in all of them, and, consequently, different constructions have been given to the phrases used.

In the Minnesota statute, it is provided that it shall not apply to persons whose employment, at the time of the

injury, is not "in the usual course of the trade, business, profession, or occupation of his employer," and the words, "usual course," as here used, are to be regarded as more restricted than the language employed in the Connecticut and English acts. *State ex rel. Lennon v. District Ct.* (1917) 138 Minn. 103, 164 N. W. 366.

As is pointed out in the annotation in L.R.A.1917D, 147, it is immaterial, under the English act, that the employment of an employee is but casual, provided it is for the purpose of the employer's trade or business; while, under the Massachusetts and Michigan acts, although the same phrases are used, they are used disjunctively, so that no one whose employment is casual can recover. In the Illinois act, the terms are also used disjunctively, and the construction given to the statute is similar to that given by the Massachusetts and Michigan courts.

Thus, in *Aurora Brewing Co. v. Industrial Bd.* (1917) 277 Ill. 142, 115 N. E. 207, the court said: "It seems quite clear that the British act is broader in scope than our own on this question. The workman, under the British act, can recover, even though his employment is of a casual nature, if his employment is for the purpose of the employer's trade or business; while, under our act, the two clauses are joined by the disjunctive 'or,' so that a workman cannot recover if his employment is casual. Neither can he recover if he is not engaged in the usual course of the trade, etc., of his employer. The word 'or,' in our judgment, cannot be understood, in the Illinois act, as meaning 'and,' as has been suggested. The word should not be given any but its ordinary meaning, unless the context and the principal purpose to be accomplished by all the words used seem to demand it. Such is not the case here. Under practically the same wording of the Massachusetts act, the highest court of that state has held that the word 'or' could not be construed as meaning 'and.'"

The Minnesota statute, however, is similar to the English act, so that, in order to prevent the application of the Compensation Act to an injured employee, it must be shown, both that his employment was casual, and also that it was not in the usual course of the employer's business. *State ex rel. Nienaber v. District Ct. ante*, 200; *State ex rel. Lennon v. District Ct. (Minn.) supra*.

There is considerable difference of  
L.R.A.1918F.

opinion as to what constitutes work, within the phrase, "usual course of the employer's business," or within similar phrases used in the Compensation Acts.

The work of a gamekeeper cannot be said not to be in the usual course of the business conducted by the employer, where the latter owned a large ranch and had leased hunting privileges, under terms which required the lessee to provide a game warden, whose duty it was to prevent unlawful shooting of game by trespassers. *O. L. Shafter Estate Co. v. Industrial Acci. Commission* (1917) 175 Cal. 522, 166 Pac. 24.

A chauffeur who was injured while repairing a touring car, used by his employer for pleasure, is not within the protection of the Compensation Act, merely because he occasionally operated a motor truck in furtherance of his employer's business. *Wincheski v. Morris* (1917) 179 App. Div. 600, 166 N. Y. Supp. 873.

The work of repairing a clamshell dredge is not in the usual course of the business of an employer, who is engaged in leasing certain road-making machinery and outfits. *Stansbury v. Industrial Commission* (1918) — Cal. App. —, 171 Pac. 698.

The work of loading grain onto cars is not work in the ordinary course of the business of the buyer, where, ordinarily, the grain is loaded by the sellers, so that a man employed by the buyer to load grain, at a time when the sellers were not there to do the work, cannot recover compensation from the buyer for injuries received while so employed. *Carter v. Industrial Acci. Commission* (1917) 34 Cal. App. 739, 168 Pac. 1065. It is submitted that the court has taken a wrong view of the statute. Although the work of loading the car was ordinarily done by the seller and not the buyer, nevertheless the work was necessary, in order to further the very business which the buyer was engaged in. It was not an enterprise entirely distinct from that in which he was ordinarily engaged. If he did not procure someone to load the grain, his business would have been at a standstill. It is true he did not ordinarily load the grain himself, but the loading was a necessary incident of his work. The cases cited in support of this ruling are distinguishable. In *Maryland Casualty Co. v. Pillsbury* (1916) 172 Cal. 748, 158 Pac. 1031, a machinist was employed by a farmer, merely to repair a tractor, and it was held that the repairing of tractors

was not in the usual course of the occupation of a farmer. This decision is clearly correct; as is said by the court, it was no more farm labor because the work was done on the farm, than it would have been if the machine had been taken to the machinist's shop, and there repaired. In *London & L. Guarantee & Acci. Co. v. Industrial Acci. Commission* (1916) 173 Cal. 642, 161 Pac. 2, it was held that a railway section hand, who had been procured, in an emergency, to assist the owner of a ranch in extinguishing a fire, was not, while so engaged, employed in the usual course of business of the ranch. So, in *La Grande Laundry Co. v. Pillsbury* (1916) 173 Cal. 777, 161 Pac. 988, it was held that a carpenter, hired temporarily by a laundry company to do work upon the house of a stockholder, was not engaged in the usual course of business of the laundry company. In the latter case, it is plain to be seen that the carpenter's work had absolutely no connection at all with the work of the laundry. In the other cases, while the work in which the injured employee was engaged at the time of his injury had some connection with the business of the employer, nevertheless, it was special work, the necessity for which was created by an emergency. In the *Carter Case*, the work of the grain buyer could never have progressed unless the grain had been loaded by somebody in some way; and, when the persons who usually loaded it were not present to do so, it certainly would seem to be a part of the work of the buyer to see that it was loaded, and this he did, by hiring the applicant to do it.

The erection of a temporary shed by the defendant, upon a farm owned but not operated by him, cannot be held to be an employment within the usual course of the trade, business, profession, or occupation of the defendant, so as to make him liable for compensation to a person accidentally injured in such erection, while casually employed. *State ex rel. Lennon v. District Ct.* (1917) 138 Minn. 103, 164 N. W. 366.

In *Daly v. Bates* (1918) — App. Div. —, 169 N. Y. Supp. 1090, the appellate division, without opinion, affirmed an award of the commission to a laundress, who was employed in the laundry of a hotel, it being held that a large city hotel, in order to properly care for the cleanliness of its table and bed linen, and the needs of its guests in the way of bathing facilities, clearly operates, as a part of its plant, a power laundry, and

work done in such laundry falls within the compensation rule.

Section 58 of the Vermont statute provides that the term "employer" shall include the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor, or for any other reason, is not the direct employer of the workmen there employed. The term, "employment," is defined as including employment only in a trade or occupation which is carried on by the employer for the sake of pecuniary gain, while the term, "workmen," does not include any person whose employment is purely casual, or not for the purpose of the employer's trade or business. Under this statute, it has been held that the work of constructing a new building for a creamery company, which is being carried on by an independent contractor, does not pertain to the business, trade, or occupation of the creamery company, carried on by it for pecuniary gain, so as to make it liable to an employee of the independent contractor, who was injured while at work upon the building. *Packett v. Moretown Creamery Co. (Vt.) ante*, 173.

Whether the work of repairing a building is work in the ordinary course of the business of the owner or occupant of the building has been before the courts of several states, and there is a sharp disagreement in opinion. The courts in Michigan, Pennsylvania, and New York have held that such work is not within the usual course of the business of the owner; while the courts of California, Wisconsin, and Connecticut have taken the opposite view.

Thus, the owner of a hotel is not pursuing his business, within the meaning of the Compensation Law, when he causes rooms to be occasionally painted and decorated, although it is usual to have work of that nature done from time to time. *Holbrook v. Olympia Hotel Co.* (1918) — Mich. —, 166 N. W. 876. The court said: "It would seem that occasionally renovating the rooms of a building, or the building itself, owned and occupied by the owner as a home, with paint or paper or both, is not the usual course of the trade, business, profession, or occupation of the owner, unless he is himself in the business of painting and decorating."

So, a married woman, residing with her husband in a house owned by herself, who, in the course of enlarging and

remodeling her dwelling, engaged a man to do plastering work about the premises, is not liable for compensation for injuries received by the workman while so engaged, since the injuries did not occur "in the regular course of the business of the employer." *MARSH v. GRONER*, ante, 213.

And in *Pelton v. Johnson* (1917) 179 App. Div. 949, 165 N. Y. Supp. 1103, the appellate division unanimously reversed an award and dismissed the claim in a case in which it was sought to hold a hotel proprietor liable for injuries to a carpenter who was engaged in repairing his hotel.

On the other hand, the California court has held that the work of taking up carpets or mattings, and of cleaning walls transoms, and curtains, is a necessary part of the business of keeping the rooms and hallways of a lodging house in a state of cleanliness and good order, so that an employee, injured while engaged in that work, is in the usual course of the trade, business, profession, or occupation of the employer who conducted the lodging house. *WALKER v. INDUSTRIAL ACCIDENT COMMISSION*, ante, 212.

So, one employed to do the work of cleaning up, after repairs upon an industrial plant, is not a "casual employee," and such employment is not without the usual course of the business of the employer. *F. C. Gross & Bros. Co. v. Industrial Commission* (1918) — *Wis.* —, 167 N. W. 809. The court said: "Repairs about an industrial plant, whether such repairs are what might be called usual and to be anticipated, or are of such a nature that they may occur but once in a long industrial life, are none the less repairs, and work on such repairs, either general or special, is neither casual nor without the usual course of the business of the employer."

And the work of repairing the building in which a creamery is conducted is a part of the business of the proprietor of the creamery, since such repairs are essential to a successful prosecution of the business. *Holmen Creamery Asso. v. Industrial Commission* (1918) — *Wis.* —, 167 N. W. 808. The court said: "The defendant creamery association was engaged in the business of conducting a creamery. For the proper conduct of such a business, a building was necessary. It is the common experience of mankind that buildings need repairs from time to time. Indeed, it is so common that the Income Tax Law allows

for the deduction of repairs from rentals received, and all business concerns of any magnitude provide for a repair account, or a fund to meet such expenses. It is in evidence that the claimant here had several times repaired this building. The making of repairs, therefore, belongs to the category of things to be expected and provided for. True, repairs come at irregular intervals, and one cannot accurately foretell just when they will be needed. But needed they will be in any business that endures for any considerable length of time. They are, therefore, a part of the employer's business, to be anticipated and met when necessity or convenience dictates. Being an essential and integral part of every business employing material things in its prosecution, no reason is perceived why one employed to make them should not be classed as an employee of the one for whom they are made. They are essential to the successful prosecution of every business, whose implements are subject to the corroding touch of time, and a usual concomitant thereof. They are foreseen, provided for, and made, when necessary or convenient. The fact that one cannot exactly foretell just when they will have to be made is immaterial.

Employees of an amusement park and amusement hall company, engaged in repairing the boats and keeping the machinery in order, whenever called upon, and keeping the boats in operation, when needed, and watching and caring for the property, are employed for purposes of the employer's business. *Boyle v. Mahoney* (1918) 92 Conn. 404, 103 Atl. 127.  
W. M. G.

#### FLORIDA SUPREME COURT.

*ATLAS DREDGING COMPANY, Plff. in Err.,*  
v.

*SUSIE V. MITCHELL.*

(— Fla. —, 77 So. 542.)

**Master and servant — contributory negligence.**

1. The common-law doctrine of contributory negligence, except in the case of em-

Headnotes by *BROWNE*, Ch. J.

**Note.** — As to extrahazardous employments and other occupations expressly included within the Workmen's Compensation Acts, see annotation to *F. W. Hochspeier v. Industrial Bd.* post, 230, and references therein to annotations on related questions.

ployees of railroad companies, and persons engaged in certain hazardous occupations, is in force in this state.

*For other cases, see Master and Servant, II. c, 1, in Dig. 1-52 N. S.*

**Same — effect.**

2. Where an employee is guilty of negligence which contributes proximately to his injury, he cannot hold the master liable for such injury.

*For other cases, see Master and Servant, II. c, 1, in Dig. 1-52 N. S.*

**Same — care required.**

3. The servant, in the performance of his duties, is bound to exercise ordinary care, or that degree of care which prudent persons usually exercise under similar circumstances; and, if he is injured by failure to exercise such care, his master is not liable.

*For other cases, see Master and Servant, II. c, 1, in Dig. 1-52 N. S.*

**On rehearing.**

**Same — diving — hazardous occupation.**

4. Diving is not one of the hazardous occupations described in § 1, chap. 6521, Laws 1913.

*For other cases, see Master and Servant, II. c, 1, in Dig. 1-52 N. S.*

**Same — absence of steam.**

5. Where a person is employed to do diving, and he goes into the water from a barge or dredge boat which is not propelled by steam, the occupation is not a hazardous one, in contemplation of chapter 6521, Laws 1913.

*For other cases, see Master and Servant, II. c, 1, in Dig. 1-52 N. S.*

(November 15, 1917.)

**ERROR** to the Circuit Court for Hillsborough County to review a judgment in favor of plaintiff in a suit to recover damages for the death of her son, while performing services for defendant as diver. Reversed.

The facts are stated in the opinion.

Messrs. Knight, Thompson, & Turner, and W. F. Himes, for plaintiff in error:

There was no higher duty to inspect the diving suit imposed upon the dredging company than upon the deceased, and, if one was negligent, the other was negligent. And if the deceased was negligent in any appreciable degree, which negligence and want of care upon his part proximately contributed to the injuries received by him, no recovery could, of course, be had.

South Florida R. Co. v. Weese, 32 Fla. 212, 13 So. 436, 13 Am. Neg. Cas. 845; Flowers v. Louisville & N. R. Co. 55 Fla. 603, 46 So. 718; Florida C. & P. R. Co. v. Mooney, 40 Fla. 17, 24 So. 148; German American Lumber Co. v. Brock, 55 Fla. 577, 46 So. 741; Atlantic Coast Line R. Co. v. Ryland, 50 Fla. 191, 40 So. 24; Westing-

L.R.A.1918F.

house, C. K. & Co. v. Callaghan, 19 L.R.A. (N.S.) 361, 83 C. C. A. 669, 155 Fed. 397; Federal Lead Co. v. Swyers, 88 C. C. A. 547, 161 Fed. 687; Portland Gold Min. Co. v. Duke, 90 C. C. A. 166, 164 Fed. 180; Morgan Constr. Co. v. Frank, 86 C. C. A. 168, 158 Fed. 964; Wholey v. British & F. S. S. Co., 158 Fed. 379; Bailey, Master's Liability for Injuries to Servant, p. 112; Southern Turpentine Co. v. Douglass, 61 Fla. 425, 54 So. 385, 1 N. C. C. A. 788.

In an action to recover damages for a negligent injury, where it clearly appears that, from any reasonable aspect of the facts and circumstances alleged or proven, actionable negligence cannot be imputed to the defendant in the premises, the court should, by appropriate procedure, determine the issue in favor of the defendant, as a matter of law.

Southern Exp. Co. v. Williamson, 66 Fla. 286, L.R.A.1916C, 1208, 63 So. 433, 7 N. C. C. A. 365; Girtman Bros. v. Eaton, 64 Fla. 69, 59 So. 397, 2 N. C. C. A. 566; Wade v. Louisville & N. R. Co. 54 Fla. 277, 45 So. 472; Louisville & N. R. Co. v. Yniestra, 21 Fla. 700; Duval v. Hunt, 34 Fla. 85, 15 So. 876, 13 Am. Neg. Cas. 848; Atlantic Coast Line R. Co. v. Ryland, 50 Fla. 190, 40 So. 24, 57 Fla. 143, 49 So. 745; Leynes v. Tampa Foundry & Mach. Co. 56 Fla. 491, 47 So. 918; German-American Lumber Co. v. Hannah, 60 Fla. 70, 30 L.R.A.(N.S.) 882, 53 So. 516; J. G. Christopher v. Russell, 63 Fla. 191, 58 So. 45, Ann. Cas. 1913C, 564; Coronet Phosphate Co. v. Jackson, 65 Fla. 170, 61 So. 318; Perkins v. Morgan Lumber Co. 68 Fla. 503, 67 So. 126; Wauchula Mfg. & Timber Co. v. Jackson, 70 Fla. 596, 70 So. 599; Southern Turpentine Co. v. Douglass, 61 Fla. 424, 54 So. 385, 1 N. C. C. A. 788; 2 Bailey, Personal Injuries, 2nd ed. §§ 394, 400, 402, pp. 1115, 1122-1125, 1134, 1135; Gulf C. & S. F. R. Co. v. Jackson, 12 C. C. A. 507, 27 U. S. App. 519, 65 Fed. 48; Ingram-Dekle Lumber Co. v. Geiger, 71 Fla. 390, 71 So. 552, Ann. Cas. 1918A, 971.

Mr. H. S. Hampton and A. H. King for defendant in error.

Browne, Ch. J., delivered the opinion of the court:

This is a suit by Susie V. Mitchell against the Atlas Dredging Company, a corporation, for damages for the death of her son Joseph Mitchell, who was drowned or otherwise asphyxiated, in a diving suit, while attempting to perform services for the defendant.

The declaration alleges that the services of Joseph Mitchell were engaged by the defendant the Atlas Dredging Company, as a diver in an undertaking that was extremely

hazardous and dangerous and that defendant agreed, as part consideration for such services, that it would furnish the diving suit for use by said Mitchell, but negligently and carelessly failed to inspect and examine the same, so as to discover certain defects therein, which examination thereof was necessary to discover, and that the defendant knew, or in the exercise of ordinary care, by proper inspection, would have known, that the diving suit was unsafe and out of repair, and that Mitchell, relying upon the obligation of the defendant to furnish a safe and suitable diving suit, put it on and went into the waters of Hillsborough Bay as a diver, and, while in the discharge of his duties, the diving suit, by reason of its bad repair, leaked so that by the intruding water Mitchell was drowned.

A demurrer to the declaration was overruled, and defendant filed pleas of "not guilty," of contributory negligence, of assumption of risk, and denying the relation of employer and employee between the defendant and the plaintiff.

Upon issues joined the parties went to trial and, after verdict and judgment for plaintiff, the defendant comes here on writ of error.

There are thirty-eight assignments of error. These relate to the refusal of the court to grant a new trial; in not directing a verdict for the defendant, after the plaintiff had closed his testimony; to the admission and rejection of testimony; and to charges given to the jury on the request of the plaintiff.

The defendant in error makes the point, on each and every one of the assignments of error, that they are not noticed in the brief of the plaintiff in error and not argued by counsel; that they are all, therefore, abandoned, and consequently there is no assignment of errors for this court to consider or determine.

It is true, the plaintiff in error does not designate each assignment of error argued by him by its number, but he quite fully argues several of them, and, at the conclusion of his brief, he says: "We have argued the first, second, third, fourth, fifth, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, and seventeenth" assignments of error. While we think that it is a better practice for attorneys to designate the assignment or assignments of error to which the argument is directed, we do not find that the contention of the defendant in error, that none of the assignments are noticed or argued by the plaintiff in error, is sustained as to all the assignments. He has fully noticed and argued those assignments of error which relate to the admission of certain testimony for the defendant

over the objection of the plaintiff, the refusal of the court to direct a verdict for the defendant after the plaintiff had closed his testimony, the refusal of the court to permit the defendant to cross-examine the witness Gross, and the refusal of the court to grant the defendant's motion for a new trial, on the ground that the verdict was contrary to law and contrary to the evidence and not supported by the evidence.

It will not be necessary to discuss those assignments which relate to the admission or rejection of testimony, or exceptions to the charges given or refused by the court, as the case must be determined on a more vital point, the contributory negligence of the deceased.

The contention of the plaintiff below is that the defendant agreed to furnish a diving suit for Mitchell as part of his compensation, and that it was its duty to furnish one in good state of repair, and safe for the deceased to use, but, instead of doing this, the defendant furnished a diving suit which was unsafe and out of repair, and that the defendant, in the exercise of ordinary care, by proper inspection, would have known its unsafe condition. This theory places solely upon the defendant the obligation of using ordinary care to discover any defects in the suit which rendered it unsafe, whereas, with regard to obvious defects, the law makes it the duty of the plaintiff to exercise ordinary prudence to discover them. His failure to do so, when, by the exercise of the slightest observation, he would have observed them, directly contributed to his misfortune.

It is claimed that the defendant furnished an unsafe diving suit for Mitchell to use, and that its negligence consisted in not examining or properly inspecting it, whereby it would have known that the suit was unsafe and out of repair. The defects in the suit, which, plaintiff contends, permitted water to enter the suit and caused the death of Mitchell by drowning, were the absence of one or two thumbscrews or nuts from the back of the collar, where the helmet is fastened on, and a chafed or worn place and a hole in a seam on the shoulder. A witness for the plaintiff testified that he went with his uncle in a small skiff alongside the barge where Mitchell was preparing to do the diving, and that he got out and went on board, and, while there, saw parties on the barge bringing the suit to Mitchell, and putting it on him. He noticed that there was something wrong about it, in that there was one or two thumbscrews or butterfly nuts missing on the back of the collar, and that there was a worn or chafed place on the shoulder; that he could not tell whether the chafed place

went clear through or not; that he was standing 8 or 10 feet away from Mitchell, and could easily see the chafed or worn place on the shoulder and the absence of the thumbscrews; that he could easily see that these nuts or thumbscrews were off, and that anyone could have observed it, and could have seen the chafed or worn place on the shoulder; that Mitchell himself could have seen it before he put the helmet on; that it was not any of his business to notice any defects in the diving suit, but, nevertheless, he saw the chafed place on the shoulder and that the nuts were missing; that his uncle remained in the skiff alongside the barge, and about 5 feet below, and, if a person were standing up in it, his head would be even with the deck of the barge; that his uncle noticed that the nuts were gone, and that there was a worn or chafed place on the shoulder, and called his attention to it.

Another witness testified that he saw the suit the day after Mitchell died, and that one or two of the nuts were gone, and that there was one hole that he could put his finger in; "It was in a chafed place in the suit, and I put my two fingers in the hole there." He said the suit had the appearance of having "been worn considerably, or had had hard usage." When asked if the holes were plainly visible, he said: "Yes, they were in open plain view, if that is what you mean; that is, they would be to a seafaring man, if he examined it closely; but if he didn't have any reason to examine it closely they wouldn't be; no, sir."

At the conclusion of the plaintiff's testimony the defendant moved the court to direct a verdict for the defendant, on the grounds that no evidence had been submitted upon which the jury could lawfully find a verdict for the plaintiff, because, if there were any defects in the diving suit used by Mitchell, they were patent defects, open to casual observation, and that the defendant was not responsible for injuries received through such defects, which were equally open to the observation of Mitchell, he being a diver, as to the defendant, and, if Mitchell failed to observe the defects, he was guilty of contributory negligence that proximately contributed to his death.

The court denied the motion, and the assignments of error covering the ruling of the court are fully discussed in the plaintiff in error's brief.

We think the court erred in refusing to grant the defendant's motion and direct a verdict.

Chapter 6220, Acts of 1911, § 1 (Comp. Laws 1914, § 1496), amending § 1496 of the General Statutes of 1906, provides:

"Upon the trial of all cases at law in the several courts of this state, the judge presiding on such trial shall charge the jury only upon the law of the case; that is, upon some point or points of law arising in the trial of said cause. If, however, after all the evidence shall have been submitted on behalf of the plaintiff in any civil case, it be apparent to the judge of the circuit court, county court or court of record that no evidence has been submitted upon which the jury could lawfully find a verdict for the plaintiff, the judge may then direct the jury to find a verdict for the defendant."

This question is thus presented: "Was there evidence upon which the jury could lawfully find a verdict for the plaintiff?"

The common-law doctrine of contributory negligence, except in the case of employees of railroad companies, and persons engaged in certain hazardous occupations, is in force in this state. The deceased was not an employee of a railroad company, and, as diving is not one of the hazardous occupations enumerated in chapter 6521, Acts of 1913, and as the testimony is uncontroverted that the barge from which Mitchell dived to his death was not propelled by steam, the business in which he was engaged does not come within the provisions of that statute. In the consideration of this case we must therefore be governed by the common-law rule, and it is too well settled to require elaboration that, where an employee is guilty of negligence that contributes proximately to his injury, he cannot hold the master liable for such injury. *Coronet Phosphate Co. v. Jackson*, 65 Fla. 170, 61 So. 318. In *South Florida R. Co. v. Weese*, 32 Fla. 212, 13 So. 436, 13 Am. Neg. Cas. 845, this court said:

"But the law is well settled that a master must not expose his servant, when acting in the line of employment, to dangers and hazards against which he may be protected by reasonable care and diligence on the part of the master. Among the positive duties resting upon the master to the servant is the obligation to exercise such reasonable care as prudence and the exigencies of the situation require, in providing the servant with safe machinery and suitable instrumentalities and a reasonably safe place in which to work. The negligence of the master in this respect is not one of the perils or risks assumed by the employee in his contract of employment, and he has the right to insist that the master shall strictly comply with his obligation in this respect. . . .

"But, while the rule just announced is clearly established, it is also well settled that it is a complete answer to the claim for damages, resulting from a failure to

furnish suitable instrumentalities and a safe place to work, that the injured servant had full knowledge of the situation, and engaged in the employment or continued therein without objection or protest, and without any promise or assurance on the part of the employer to provide better. There is some conflict of authority on this point, but we think it can be safely stated that the prevailing judicial view is that, where a servant voluntarily engages in a service for another and has full knowledge that the instrumentalities he is to use and the situation in which the service is to be performed are dangerous, and the danger therefrom is apparent, and he makes no protest, and his employer does not mislead him in any way as to these matters, he assumes the risks ordinarily incident to that employment, and cannot recover for injuries resulting therefrom."

In the case of *Florida C. & P. R. Co. v. Mooney*, 40 Fla. 17, 24 So. 148, the court said: "The servant, in the performance of his duties, is bound to exercise ordinary care, or that degree of care which prudent persons usually exercise under similar circumstances, and, if he is injured by failure to exercise such care, his master is not liable."

See also *Flowers v. Louisville & N. R. Co.* 55 Fla. 603, 46 So. 718; *German-American Lumber Co. v. Brock*, 55 Fla. 577, 46 So. 740; *Southern Turpentine Co. v. Douglass*, 61 Fla. 424, 54 So. 385, 1 N. C. C. A. 788.

At the close of the plaintiff's testimony, it was uncontroverted that the diving suit had the appearance of having been worn considerably, and had had hard usage. This should have warned the plaintiff and defendant of the necessity of an inspection of it, but neither did so. Mitchell was a diver, an occupation which requires skill and experience. From the very nature of his calling, he must have known the hazards incident to it, among which are drowning, or being otherwise asphyxiated because of defects in the suit, or the air pump, or hose, or in the adjustment of its parts, in the valves for the outlet of air, or mishaps from insufficient weights or their improper adjustment. The diving suit used by Mitchell did not belong to him or to the Atlas Dredging Company, but to the Edwards Construction Company. From this, we may assume that neither Mitchell nor the defendant knew anything of its condition, and that it was the duty of both to have examined it to see if it were safe to use it. But the failure of the defendant to perform its duty did not relieve Mitchell from his duty to observe defects which rendered it unsafe, which were patent,—so pat-

ent, that they were observed and commented on by bystanders.

The plaintiff's case rests on the theory that Mitchell's death was caused by reason of these patent defects in the suit. No question of inexperience, or directions to incur extra hazards, or lack of knowledge of the danger incident to using a diving suit, particularly one as imperfect as the testimony discloses this one to have been, is presented here. The occupation of a diver using a diving suit and apparatus is recognized as one requiring skill and experience, carrying with it a knowledge of what constitutes a safe suit and apparatus, and a ready ability to detect their defects. This knowledge and skill peculiarly impose on a diver the duty of carefulness, the disregard of which is negligence.

The defendant was entitled to a directed verdict, and the denial of his motion is error, unless the error was cured by subsequent testimony. We do not think it was.

The testimony showing Mitchell's contributory negligence was strengthened by the plaintiff's witness Stafford, who testified, after the court had denied the defendant's motion for a directed verdict, that he saw the hole in the seam of the suit, and that it was big enough to put two fingers through. He said: If a person "had hold of that suit and couldn't see that hole in it, they couldn't see a brick wall 10 feet off. Anybody that wasn't blind couldn't help seeing it."

It is uncontroverted that Mitchell went after the diving suit himself on the day he lost his life; that there were two suits available, and he selected the best one; he picked out the dress, the pump, the helmet, the shoes, the life line, and everything that went with the outfit; he got some men to help use the pump, and took them to the barge from which the diving was done, and before putting on the suit he examined the pump, the hose, the suit, the breast-plate, and everything; that several persons on the barge with Mitchell saw the defects in the suit before Mitchell put it on; that they were plainly visible, and, as one of the plaintiff's witnesses said, if a man "had hold of that suit and couldn't see that hole in it, they couldn't see a brick wall 10 feet off;" and that Mitchell's attention was actually called to the defect, and he said it was all right and did not amount to anything. These undisputed facts show conclusively, to our minds, that Mitchell was grossly negligent, and that he assumed dangerous risks which directly contributed to his death.

It is true the defendant sought to prove that there were no defects in the diving suit which could possibly have caused the



death of Mitchell, but it is absolutely uncontroverted that, if the defects existed, and if they caused his death, they were such patent defects that the failure of Mitchell to observe them charged him with contributory negligence, which was the proximate cause of his death.

The defendant in error has cited *Union P. R. Co. v. Daniels* (Union P. R. Co. v. Snyder) 152 U. S. 684, 38 L. ed. 597, 14 Sup. Ct. Rep. 756, which holds that, where a motion by a defendant for a directed verdict is denied, and defendant excepts, and he then proceeds with his case and introduces testimony in his behalf, he waives the exception, and the action of the court in denying the motion for a directed verdict cannot be assigned as error. It is not necessary for us to decide that point, as the subsequent testimony strengthened that theretofore adduced, showing the defendant's contributory negligence.

The motion for a new trial contained a number of grounds which are not necessary to notice here, as those which attacked the verdict because there was no testimony to support it entitled the defendant to a new trial, and the refusal of the lower court to grant the motion on these grounds is reversible error.

The judgment is reversed, and new trial granted.

Taylor, Whitfield, Ellis, and West, JJ., concur.

A petition for rehearing having been filed, Browne, Ch. J., on January 14, 1918, handed down the following additional opinion:

All the points raised in the petition for rehearing were carefully considered by the court, and those deemed necessary for the proper disposition of the case are discussed in the opinion.

A mistake, however, was made in the date of the death of Mitchell, and upon this the defendant in error bases the thirteenth and fourteenth grounds of her petition.

In considering this case, the court carefully studied the testimony to see if it supported the allegations of the declaration by which the plaintiff below sought to bring her case within the provisions of chapter 6521, Acts of the legislature of 1913, and found that the enterprise of diving, in which the deceased was engaged at the time of his death, is not one of those enumerated in the statute, and the testimony is uncontroverted that the dredge boat from which Mitchell dived to his death was not propelled by steam.

Section 1 of chapter 6521 provides: "That this act shall apply to persons, firms

and corporations engaged in the following hazardous occupations in this state; namely, railroading, operating street railways, generating and selling electricity, telegraph and telephone business, express business, blasting and dynamiting, operating automobiles for public use, boating, when boat is propelled by steam, gas or electricity." Comp. Laws 1914, § 3150b.

To bring her case within the provisions of this act, plaintiff below amended her declaration so as to read that the dredge boat was "propelled by steam," but offered no testimony to support the allegation. It appears from the testimony, however, that the dredge boat or barge was towed to the place where he went into the water, and in answer to the question, "Could it propel itself by steam or otherwise?" propounded to Captain Sullivan, he replied: "No, sir. There was only hand machinery on it, and it had to be towed."

All the charges given by the court on the trial of the case were on the request of the plaintiff and defendant, and neither requested the court to charge the jury on this statute, and it was not discussed in the oral argument or in the briefs of either party, from which it would seem that the plaintiff and defendant in error did not consider the case came within the provisions of chapter 6521.

The mistake with reference to the date of Mitchell's death has been corrected in the opinion.

The petition for rehearing is denied.

## NEW YORK COURT OF APPEALS.

RE CLAIM OF EDNA SAENGER, Respt.

FELIX A. LOCKE et al., Appts.

(220 N. Y. 556, 116 N. E. 367.)

**Workmen's compensation — hazardous occupation — millinery business.**

1. Making hats and feathers in the millinery business is a hazardous employment within the meaning of the Workmen's Compensation Act.

For other cases, see *Master and Servant*, II. a, 1, in Dig. 1-52 N. S.

Same — injury to fainting employee — course of employment.

2. Injury by ammonia thrown by mistake

**Note.** — As to extrahazardous employments and other occupations expressly included within the Workmen's Compensation Acts, see annotation to *F. W. Hochspeier v. Industrial Bd.* post, 230, and references therein to annotations on related questions.

As to what injuries "arise out of and in the course of the employment," see the annotation in L.R.A.1916A, at pages 40 and 232, and in the annotation in L.R.A.1917D, 114.

of a fellow employee into the face of one who had fainted because of a quarrel with the boss, for the purpose of reviving her, does not arise out of the employment within the meaning of the Workmen's Compensation Act.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(May 1, 1917.)

**A**PPEAL by defendants from an order of the Appellate Division of the Supreme Court, Third Department, affirming an award of the State Industrial Commission to claimant, in a proceeding by her under the Workmen's Compensation Act to recover compensation for injuries sustained by her. Reversed.

The facts are stated in the opinion.

Mr. John N. Carlisle, and Mr. Alfred W. Andrews, for appellants:

The injuries received by claimant did not arise out of her employment, and were not ordinary and incident to her employment.

*O'Neil v. Carley Heater Co.* 218 N. Y. 414, L.R.A.1917A, 349, 113 N. E. 406; *DeFilippis v. Falkenberg*, 170 App. Div. 153, 155 N. Y. Supp. 761, affirmed in 219 N. Y. 581, 114 N. E. 1064; *Glatz v. Stumpp*, 220 N. Y. 71, 114 N. E. 1053; *Newman v. Newman*, 218 N. Y. 325, 113 N. E. 332; *Heitz v. Ruppert*, 218 N. Y. 152, L.R.A.1917A, 344, 112 N. E. 750; *Fitzgerald v. W. G. Clarke & Son* [1908] 2 K. B. 796, 77 L. J. K. B. N. S. 1018, 99 L. T. N. S. 101, 1 B. W. C. C. 197; *Sheldon v. Needham*, 111 L. T. N. S. 729, 30 Times L. R. 590, 58 Sol. Jo. 652, 7 B. W. C. C. 471; *Butler v. Burton-on-Trent Union*, 106 L. T. N. S. 824, 5 B. W. C. C. 355; *Rodger v. Paisley School Bd.* [1912] S. C. 584, 49 Scot. L. R. 413, 5 B. W. C. C. 547; *Peel v. William Lawrence & Sons*, 106 L. T. N. S. 482, 28 Times L. R. 318, 5 B. W. C. C. 274.

To sustain an award there must be some relation between the hazardous employment and the accident.

*Fogarty v. National Biscuit Co.* 175 App. Div. 729, 161 N. Y. Supp. 937; *Peel v. William Lawrence & Sons*, supra; *Slade v. Taylor*, 8 B. W. C. C. 65.

The statute does not provide insurance against every accident that may happen.

*Heitz v. Ruppert*, 218 N. Y. 148, L.R.A. 1917A, 344, 112 N. E. 750; *DeVoe v. New York State R. Co.* 218 N. Y. 318, L.R.A. 1917A, 250, 113 N. E. 256; *Newman v. Newman*, 218 N. Y. 325, 113 N. E. 332.

Claimant must show that the accident arose because she was exposed, by the nature of her employment, to the peculiar danger which caused the injury, and that such danger arose out of her employment.

*Willis, Workmen's Compensation Acts,*

15th ed. 1915, p. 28; *Craske v. Wigan* [1909] 2 K. B. 635, 78 L. J. K. B. N. S. 994, 101 L. T. N. S. 6, 25 Times L. R. 632, 53 Sol. Jo. 560; *Butler v. Burton-on-Trent Union*, 106 L. T. N. S. 824, 5 B. W. C. C. 355; *Clifford v. Joy*, 43 Ir. L. T. 192, 2 B. W. C. C. 32; *Amys v. Barton* [1912] 1 K. B. 40, 81 L. J. K. B. N. S. 65, 105 L. T. N. S. 619, 28 Times L. R. 29, 5 B. W. C. C. 124; *Bellam v. J. Humphries & Sons*, 6 B. W. C. C. 53; *Warner v. Couchman* [1911] 1 K. B. 351, 80 L. J. L. K. B. N. S. 526, 103 L. T. N. S. 693, 27 Times L. R. 121, 55 Sol. Jo. 107, 1 N. C. C. A. 51, 4 B. W. C. C. 32, affirmed in House of Lords [1911] W. N. 220.

A wholly unnecessary or unreasonable act which is done during the period of employment cannot be regarded as a risk of the employment.

*Willis, Workmen's Compensation Acts*, 15th ed. 1915, p. 36; *Smith v. South Norhampton Colliery Co.* [1903] 1 K. B. 205, 72 L. J. K. B. N. S. 76, 67 J. P. 381, 51 Week. Rep. 209, 88 L. T. N. S. 5, 19 Times L. R. 128; *M'Laren v. Caledonian R. Co.* [1911] S. C. 1075, 48 Scot. L. R. 885, 5 B. W. C. C. 492; *Horsfall v. The Jura*, 6 B. W. C. C. 213.

Mr. E. C. Aiken, with Mr. E. E. Woodbury, Attorney General, for the State Industrial Commission:

The injuries received by the claimant arose out of and in the course of her employment.

*Heitz v. Ruppert*, 218 N. Y. 148, L.R.A. 1917A, 344, 112 N. E. 750; *Archibald v. Workmen's Compensation Comr.* 77 W. Va. 448, L.R.A.1916D, 1913, 87 S. E. 791; *McKinnon v. Hutchinson*, 52 Scot. L. R. 691, 8 B. W. C. C. 624; *Vennen v. New Dells Lumber Co.* 161 Wis. 370, L.R.A.1916A, 273, 154 N. W. 640, Ann. Cas. 1918B, 293, 10 N. C. C. A. 729; *O'Neil v. Carley Heater Co.* 218 N. Y. 414, L.R.A.1917A, 349, 113 N. E. 406.

No break in the employment is caused by the furnishing of assistance to a fellow workman in an emergency or to rescue him from danger.

*Waters v. William J. Taylor Co.* 218 N. Y. 248, L.R.A.1917A, 347, 112 N. E. 727; *Dragowich v. Iroquois Iron Co.* 269 Ill. 478, 109 N. E. 999, 10 N. C. C. A. 475; *Yates v. South Kirby, F. & H. Collieries*, 3 B. W. C. C. 418.

Andrews, J., delivered the opinion of the court:

Felix A. Locke was engaged in the millinery business and in the making of hats and feathers in New York city. This was a "hazardous employment." Edna Saenger was one of his employees.

On February 11, 1916, while working in the millinery department, she had some difference with her boss with regard to her work. As a result, she became nervous and hysterical and fainted. Two of her co-employees rushed to get water and ammonia. They returned, one with a glass of ammonia and one with a glass of water. In some way these glasses became mixed, and the ammonia was thrown into the face of Edna Saenger, causing the injuries for which an award was made her.

Clearly the injuries so received by her were accidental and arose in the course of her employment, but they did not arise out of such employment. If she had fainted because of fumes present in the workroom, and, so falling, had injured herself, a different question would have been presented; but the claimant fainted because of her physical condition, and, even if her faintness might have been said to have resulted from a quarrel with her boss with regard to her work, the fainting was in no proper sense connected with the accident. The accident was caused by a co-employee mistaking the two glasses containing ammonia and water not because the ammonia was exposed and an error arose as to its nature or use. The employee who obtained it knew precisely what it was. The employer had not furnished the ammonia as medicine for his employees nor had he authorized in any way its use by them as a medicine. A fainting such as is shown in this case, and help such as was given, is not a natural

incident to the business. It has no more connection with it than if a physician had been called in and, having been handed glasses of ammonia and water, had made the same mistake.

In *DeFilippis v. Falkenberg*, 170 App. Div. 153 N. Y. Supp. 761, affirmed in 219 N. Y. 581, 114 N. E. 1064, an employee was injured by being struck in the eye by scissors thrust through a partition by a fellow servant, as a practical joke. Such an injury did not arise out of the employment.

Where injuries result from quarrels, between fellow servants, the rule is that, where the quarrel arose out of matters pertaining to the business, then the accident arises out of the employment. Where the quarrel is an independent affair, having no connection with the master's work, then it does not. *Heitz v. Ruppert*, 218 N. Y. 148, L.R.A.1917A, 344, 112 N. E. 750.

As is said in the case last cited, the injury must be received as a natural incident of the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence, and directly connected with the work. Such is not this case.

The order of the Appellate Division should be reversed, and the claim dismissed, with costs in Appellate Division and in this court against the Industrial Commission.

Hiscock, Ch. J., and Chase, Hogan, Cardozo, and Pound, JJ., concur. McLaughlin, J., not voting.

#### ILLINOIS SUPREME COURT.

F. W. HOCHSPEIER, Plff. in Err.,  
v.

INDUSTRIAL BOARD OF ILLINOIS et al.

(278 Ill. 523, 116 N. E. 121.)

Workmen's compensation — award — review by courts.

1. Whether or not a chauffeur is engaged in carriage by land within the meaning of a Workmen's Compensation Act is a question of law, the decision of the Industrial Board upon which may be reviewed by the courts.

For other cases, see *Master and Servant*, II. a, 1, in *Dig. 1-52 N. S.*

Same — hirer of automobiles as carrier by land.

2. An undertaker maintaining automo-

Note. — As to extrahazardous employment and other occupations expressly included within Workmen's Compensation Acts, see annotation following this case, post, 230.

L.R.A.1918F.

biles for the carriage of people to funerals does not, by letting them to others for hire, become a carrier of passengers by land within the operation of the Workmen's Compensation Act, and therefore no allowance can be made for injury to a chauffeur while driving a car hired for a funeral, under the provisions of the law applicable to such carriers.

For other cases, see *Master and Servant*, II. a, 1, in *Dig. 1-52 N. S.*

(April 19, 1917.)

**E**RROR to the Circuit Court for Cook County to review a judgment confirming the decision of the Industrial Board awarding compensation to claimants, in a proceeding under the Workmen's Compensation Act to recover compensation for the death of decedent. Reversed.

The facts are stated in the opinion.

Messrs. W. J. Weldon and R. J. Folonle, for plaintiff in error:

The business of an undertaker and embalmer is not an extrahazardous business

within the provision of the Compensation Act.

*Uphoff v. Industrial Bd.* 271 Ill. 312, L.R.A.1916E, 329, 111 N. E. 128, Ann. Cas. 1917D, 1, 13 C. C. A. 80; *Parker-Washington Co. v. Industrial Bd.* 274 Ill. 498, 113 N. E. 976; *Suburban Ice Co. v. Industrial Bd.* 274 Ill. 630, 113 N. E. 979; *Vaughan's Seed Store v. Simonini*, 275 Ill. 477, 114 N. E. 163, Ann. Cas. 1918B, 713, 14 N. C. C. A. 1075.

The letting of vehicles, together with drivers, as an incident of such undertaking business is not the business of carriage by land, under the provisions of the Compensation Act.

*Ibid.*; *Story*, Bailm. 9th ed. § 591; *Hutchinson*, Carr. 3d ed. § 96; *Berry*, Automobiles, 2d ed. § 741; *Moore*, Carr. 2d ed. p. 954; *Schouler*, Bailm. & Carr. § 523; 6 Cyc. 536; *Bricker v. Philadelphia & R. R. Co.* 132 Pa. 1, 19 Am. St. Rep. 585, 18 Atl. 983, 10 Am. Neg. Cas. 207.

One who lets conveyances, with drivers, by contract, with no fixed trips, and who gives or withholds such letting at his pleasure, is not a carrier of passengers.

*Story*, Bailm. 9th ed. § 591; *Hutchinson*, Carr. 3d ed. § 96; *Berry*, Automobiles, 2d ed. § 741; *Moore*, Carr. 2d ed. p. 954; *Schouler*, Bailm. & Carr. § 523; 6 Cyc. 536; *Bricker v. Philadelphia & R. R. Co.* 132 Pa. 1, 19 Am. St. Rep. 585, 18 Atl. 983, 10 Am. Neg. Cas. 207.

**Messrs. T. M. Coen and Samuel Friedlander**, for defendants in error:

The question of whether the plaintiff in error was engaged in the business of "carriage by land" is a question of fact for the Industrial Board, and not reviewable in this court.

*People ex rel. Muna v. McGoorty*, 270 Ill. 610, 110 N. E. 791, 10 N. C. C. A. 978; *Armour & Co. v. Industrial Bd.* 273 Ill. 590, 113 N. E. 138; *Munn v. Industrial Bd.* 274 Ill. 70, 113 N. E. 110, 12 N. C. C. A. 652; *Victor Chemical Works v. Industrial Bd.* 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B, 627; *Parker-Washington Co. v. Industrial Bd.* 274 Ill. 498, 113 N. E. 976; *Suburban Ice Co. v. Industrial Bd.* 274 Ill. 630, 113 N. E. 979; *Bloomington, D. & C. R. Co. v. Industrial Bd.* 276 Ill. 239, 114 N. E. 517, 13 N. C. C. A. 490; *Decatur R. & Light Co. v. Industrial Bd.* 276 Ill. 372, 114 N. E. 915; *Illinois Midland Coal Co. v. Industrial Bd.* 277 Ill. 333, 115 N. E. 527; *Chicago Dry Kiln Co. v. Industrial Bd.* 276 Ill. 556, 114 N. E. 1009, Ann. Cas. 1918B, 645.

The business in which the plaintiff in error was engaged and in which deceased was actively employed at the time of the

accident was extrahazardous, within the meaning of § 3 of the Compensation Law.

*Parker-Washington Co. v. Industrial Bd.* 274 Ill. 498, 113 N. E. 976.

Plaintiff in error was, at the time of the accident, engaged in the business of carriage by land.

*Ibid.*; *Vaughan's Seed Store v. Simonini*, 275 Ill. 477, 114 N. E. 165, Ann. Cas. 1918B, 713, 14 N. C. C. A. 1075.

The law classifies carriers of passengers as common and private carriers.

6 Cyc. 364, ¶ A, note 7; 1 *Michie*, Carriers, § 2; 1 *Moore*, Carr. 2d ed. § 4; *Payne v. Halstead*, 44 Ill. App. 97; *McGregor v. Gill*, 114 Tenn. 521, 108 Am. St. Rep. 919, 86 S. W. 318.

The defense of ultra vires cannot be interposed by a corporation against an application for compensation by an employee, who sustained an accidental injury arising out of and in course of his employment, in the performance of his duties, in connection with the business of the employer, not authorized by the carrier.

10 Cyc. 1152, ¶ II, notes 1-5, p. 1156, ¶ 2, § a, ¶ II, note 36, pp. 1157, 1163, note 72; *Heims Brewing Co. v. Flannery*, 137 Ill. 309, 27 N. E. 286; *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656, Mor. Min. Rep. 563.

**Farmer, J.**, delivered the opinion of the court:

Plaintiff in error, **F. W. Hochspeier, Incorporated**, is a corporation engaged in the undertaking business in the city of Chicago. The purpose for which it was incorporated, as stated in its charter, is to conduct the business of undertaking, operating undertaking rooms, conduct and manage funerals, and hire and operate necessary vehicles and cars for the transportation of passengers, packages, and freight, in connection therewith. The corporation owned besides a hearse, ambulance, wagons, and teams, three limousine cars to be used in carrying passengers to funerals and burials. A chauffeur or driver was employed for each car. On May 30, 1915, **Louis Neumann**, the driver of one of the cars, was directed by plaintiff in error to take his car and operate it in carrying passengers to a burial, conducted by another undertaker. He did so, and, while returning from the cemetery, his car collided with a street car, injuring him so that he died the following day. His widow and administrator filed a claim with the Industrial Board against plaintiff in error, for compensation under the Workmen's Compensation Act. A hearing was had before a committee of arbitration, and an award made of \$9 per week for 388 weeks, and \$8 a week for one week, making

a total of \$3,500. The plaintiff in error filed a petition with the Industrial Board for a review of the award made by the committee of arbitration. On a hearing, the Industrial Board confirmed the award, and plaintiff in error sued out a writ of certiorari from the circuit court of Cook county, to review the decision of the Industrial Board. The circuit court confirmed the decision, and made a certificate that the case is one proper to be reviewed by the supreme court, whereupon this writ of error was sued out.

The decision of the Industrial Board was based upon its finding that plaintiff in error was engaged in the occupation, business, or enterprise of carriage by land, which is one of the occupations termed extrahazardous by clause 3 of ¶ "b" of § 3 of the Workmen's Compensation Act. Defendants in error contend that whether plaintiff in error was a carrier by land is a question of fact, and not subject to review by this court. There was no conflict in the testimony, and whether, under the undisputed evidence, plaintiff in error was engaged in the occupation or business of "carriage by land," is a question of law. It is not claimed that one engaged in the business of undertaking is subject to the provisions of the act, in the absence of an election to come under it. The contention is that, by hiring its cars and drivers to others, plaintiff in error became a carrier of passengers by land, and liable to provide compensation to injured employees, under the provisions of the act. The purpose for which plaintiff in error kept cars and employed drivers was to enable it to carry on its business of undertaking and conducting funerals. The use of cars and vehicles to carry passengers was an incident to that business, and the chauffeur, while engaged in driving cars to funerals and burials conducted by plaintiff in error, was not engaged in any of the hazardous occupations enumerated in the statute. Carrying passengers on such occasions did not constitute plaintiff in error a carrier by land, within the meaning of the statute.

It may be conceded that the statute is not limited to common carriers, but embraces private carriers engaged in the occupation of carrying persons or property, and that is the effect of the decision in the case of *Parker-Washington Co. v. Industrial Bd.* 274 Ill. 498, 113 N. E. 976. That case is much relied on by defendants in error, but is clearly distinguishable from the case here under consideration. In that case compensation was claimed, under the Workmen's Compensation Act, for the death of an employee, who was engaged in driving

a team in hauling for others for hire. He was in the employ of the Bessemer Teaming Company, whose business was hauling, with wagons and teams, goods or material for hire. The Parker-Washington Company, engaged in general contracting and construction, employed the Bessemer Teaming Company to haul from a tunnel, which it (the Parker-Washington Company) was constructing, a large quantity of crushed stone, and deliver it upon certain streets for use for paving purposes. The driver of one of the teams furnished by the teaming company to do the hauling fell from his wagon, receiving fatal injuries. The teaming company was insolvent, and claim was made for compensation against the Parker-Washington Company, which was awarded, and the award was confirmed by this court. While it is not expressly so stated in the opinion, the liability of the Parker-Washington Company, on the ground that it was engaged in the occupation of carriage by land, arose from the fact that the teaming company, the employer of deceased, was engaged in the occupation of carriage by land. That company was employed by the Parker-Washington Company to transport for it a quantity of crushed stone to the place where it was to be used. The teaming company was clearly engaged in the business or enterprise of carriage by land, and liable, under clause 3 of ¶ "b" of § 3 of the Workmen's Compensation Act, to provide compensation for injury to its employees. The Parker-Washington Company did not require the teaming company to insure its liability to pay compensation under the act, and, under § 31, the Parker-Washington Company was jointly liable with the teaming company. The latter company being insolvent, the compensation was awarded against the Parker-Washington Company.

In *Vaughan's Seed Store v. Simonini*, 275 Ill. 477, 114 N. E. 163, Ann. Cas. 1918B, 713, 14 N. C. C. A. 1075, it was held one might be engaged at the same time in two disconnected occupations, one of which is in the list of extrahazardous employments and the other not, and not be subject to the provisions of the act with reference to the latter occupation; that an injured employee engaged in the latter occupation is not entitled to compensation under the act, although the employer at another place was engaged in another enterprise or business which required him to provide compensation for injuries to employees engaged in that business. The business of operating undertaking rooms and conducting funerals, for which purpose plaintiff in error was incorporated, is not an employment which is

mentioned in the statute as extrahazardous, and the operation of cars kept for and driven to carry persons to funerals and burials conducted by plaintiff in error is an incident to the business, and would not make it a carrier, so as to bring the occupation or business under the provisions of the statute. If plaintiff in error was bound to provide compensation, under the Workmen's Compensation Act, for the death of Neumann, it was because it was engaged in another occupation, enterprise, or business—that of carriage by land. Hochspeier testified that, in addition to other vehicles used in its business, plaintiff in error kept an ambulance, which was used for carrying patients to hospitals, on private calls from doctors, and three limousine cars. A driver was employed for each car. When these cars were not needed for use by plaintiff in error, it was customary, when called for, to hire them, with the drivers, to other undertakers, who had need of more cars than they owned, to be used in funerals and burials conducted by the undertakers hiring them. In such cases the driver acted under the directions of the undertaker hiring the car, kept a record of the trip, which he turned in to the plaintiff in error, who collected from the person hiring the car the amount charged for its use. The cars were sometimes, but very rarely, used for weddings.

Assuming the statute intended to embrace both common and private carriers, plaintiff in error was not a common carrier of passengers, and, in our opinion, it was not engaged in one of the occupations or enterprises enumerated in the statute as extrahazardous. Plaintiff in error's limousine cars were not permitted to be used to carry passengers generally. Aside from rare occasions, when they were used for weddings, they were only permitted to be used to carry passengers, when requested by other undertakers, and when not needed by plaintiff in error. If the use of the cars for burials conducted by plaintiff in error did not make it a carrier of passengers by land, hiring the car to another undertaker for use at a burial did not make it such carrier. The reason carriers are made sub-

ject to the act is because the occupation is declared to be extrahazardous. The use of conveyances to carry persons to funerals and burials is an incident to the undertaking business, and this was known to the legislature; but the undertaking business is not one of the occupations brought under the provisions of the act as an extrahazardous employment. We must assume that the legislature did not consider that business, with all its incidents, which included carrying persons in vehicles to funerals and burials, an extrahazardous occupation. The dangers or hazards of using the cars to carry persons to a burial were the same, whether that service was performed in a burial conducted by plaintiff in error, or some other undertaker, to whom the car had been hired. Cars were not kept by plaintiff in error for the purpose of hiring them to carry passengers to funerals, but were only occasionally hired to other undertakers for that purpose. How often they were let to other undertakers does not appear, but the proof is that it was a custom among undertakers that, when one had need of extra cars for a burial, he would hire from other undertakers the number needed. We do not think such use of plaintiff in error's cars brings it within the provisions of the statute as a carrier by land, and subjects it to the liability under the Workmen's Compensation Act, when it would not have been liable under said act if Neumann had been driving the car to a burial conducted by plaintiff in error.

In our opinion the Industrial Board had no jurisdiction to make an award under the Workmen's Compensation Act, for the reason that plaintiff in error was not engaged in an occupation, business, or enterprise which brought it within the provisions of that act, and since it had not, by affirmative action elected to come under the act.

The award of the board is set aside, and the judgment of the circuit court, affirming it, is reversed.

Judgment reversed.

Petition for rehearing denied, June 8, 1917.

### **Annotation — Extrahazardous employment and other occupations expressly included within Workmen's Compensation Acts.**

The general subject of Workmen's Compensation Acts is treated in annotations in L.R.A.1916A, 23, and L.R.A. 1917D, 80. For later cases and annotations on Workmen's Compensation Statutes, consult the L.R.A. Indexes for volumes subsequent to L.R.A.1917D, L.R.A.1918F.

under the title "Workmen's Compensation."

The question as to what constitutes extrahazardous employment is discussed in the annotation in L.R.A.1916A, at page 217, and in the annotation in L.R.A. 1917D, at page 152. The present anno-

tation deals merely with cases handed down subsequent to the earlier annotations.

As to who are "employers," within the meaning of the Compensation Statutes, see annotation to *Claremont Country Club v. Industrial Acci. Commission*, ante, 179. As to applicability of Compensation Acts to states, counties, cities, districts, charitable and other public institutions, and their employees, see annotation to *Griswold v. Wichita*, ante, 190. As to who are "employees," within the meaning of the Compensation Statutes, see annotation to *State ex rel. Nienaber v. District Ct.* ante, 201. As to applicability of Compensation Statutes to minors, see annotation to *Roszek v. Bauerle & S. Co.* ante, 209. As to employment that is casual, and not in the usual course of the employer's business, within the meaning of the Compensation Acts, see annotation to *Marsh v. Groner*, ante, 215.

The English Acts of 1897 applied only to employment "on or in or about" railways, factories, mines, etc. The cases construing this phrase will be found in the annotation in *L.R.A.1916A*, at page 193. Although this provision of the English act was repealed by the later Act of 1906, the same phrase, or phrases of similar character, is found in a number of the American statutes, in defining the application of the statutes.

Under the New Hampshire statute, bringing within its operation employees working "on, in connection with, or in proximity to" hoisting apparatus, or any machinery propelled or operated by steam or other mechanical power, one whose employment at times brought him in proximity to dangerous machinery is within the protection of the statute, though, at the time of the accident, he may not have been in such proximity, and his injury was not caused by such machinery. *Morin v. Nashua Mfg. Co.* (1916) — *N. H.* —, 103 *Atl.* 312. In this case it was held that, where an employee worked in a room where there was a movable elevator, used for raising and lowering cases of goods, which was operated by hand power, and, adjacent to this room, was a stamping room containing a power-driven press used for printing the brand or trademark on the finished goods, and, in an adjoining room, there were power-driven elevators, upon which the deceased and other employees rode while in the performance of their work, he was within the protection of the statute. The court said:

*L.R.A.1918F.*

"Little doubt can be entertained that the hand elevator is a 'hoisting apparatus,' within the meaning of the statute, and that the stamping machine and the power-driven elevators are also included in the statutory language. The fact that the stamping machine had not been operated for three weeks before the accident, on account of a strike, did not remove it from the class of machines whose operation involved more or less danger to the employee in the immediate vicinity. It was liable to be put in motion at any time. Its operation was not permanently discontinued. The applicability of the statute to a particular machine does not depend upon its continuous operation while employees are at work. Its liability to be put in motion at any time renders it a dangerous instrumentality, installed by the manufacturer for use in his mill or factory."

The Kansas act, being, in its terms, limited to injuries occurring "on, in or about" a factory or other designated establishment, does not authorize a recovery against the owner of a packing house, on account of injuries received by a truck driver while engaged in delivering meat to customers. *Hicks v. Swift & Co.* (1917) 101 *Kan.* 760, 168 *Pac.* 905.

And an employee of an operator of two mines, located about a mile apart, who was injured, in going from one mine to the other, while crossing an interurban railway which separated the mines, and was located about 30 yards from one of them, is not injured "on or in or about a mine," within the meaning of the Kansas act. *Bevard v. Skidmore-Patterson Coal Co.* (1917) 101 *Kan.* 207, 165 *Pac.* 657. The court said: "The court concludes that the word 'about,' as applied to a mine, fixes the locality of the accident for which compensation may be recovered, and that the accident must occur in such close proximity to the mine that it is within the danger zone necessarily created by those peculiar hazards to workmen, which inhere in the business of operating the mine. If the accident occur outside this zone, the distance from the mine, whether very near or very far, is immaterial. In this case, the workman was a messenger, who left one mine on an errand, and had not arrived at the other. He was injured on the premises of the railway company, which lay between the two mines."

Since the statutes, which are made ap-

pliable to certain specified extrahazardous employments, differ widely in their terms and in the construction which has been given to them, it has been deemed advisable to group the cases construing these statutes upon this point, by jurisdictions.

In *Mueller Constr. Co. v. Industrial Bd.* (1918) 283 Ill. 148, post, —, 118 N. E. 1028, in speaking of the reasons for having the Compensation Act applicable to certain industries only, the court said: "The reason for the classification is that experience has shown that those engaged in such occupations are subject to special risks and hazards, peculiar to those occupations, not common to other employments, and that it is but just that society should be made to bear a portion of the burdens arising from the accidental injuries, peculiar to the risks of those employments, as a part of the cost of such business."

#### Florida.

Diving is not one of the hazardous occupations described in the Florida statute, and where the diver goes into the water from a barge or dredge boat which is not propelled by steam, the occupation is not a hazardous one. *ATLAS DREDGING Co. v. MITCHELL* (Fla.) ante, 220.

#### Illinois.

An employer engaged in extrahazardous employment within the meaning of the Illinois statute, who gives no notice of his election not to be bound by the act, must be presumed to be under the act. *McLaughlin v. Industrial Bd.* (1917) 281 Ill. 100, 117 N. E. 819. This includes townships, by the express language of the act.

An ordinary dirt road is not a structure, and the regular work of building or repairing such a road is not extrahazardous, within the meaning of the Illinois statute; but the statute will apply if, at the time the accident occurred, it was necessary, in such work and repairs, to use dynamite to remove a stump. *Ibid.* Recovery was denied in this case, however, upon the ground that the employment was merely casual.

The cleaning and washing of windows is a hazardous business, included in the "maintaining and repairing of structures." *Chicago Cleaning Co. v. Industrial Bd.* (1918) 283 Ill. 177, 118 N. E. 989. The court said: "The business of washing windows, as such, in large cities, is as much a part of the maintenance of buildings as would be the re-

placing of glass in windows, the painting and decorating of the buildings, or the repointing of the outside, where the mortar between the bricks was giving way."

Although a college or a university, in the course of instruction, and for that purpose only, uses explosive materials and inflammable fluids in its chemical laboratory, and runs a foundry in which molten metal is used, it is not engaged in any "occupation, enterprises, or businesses" enumerated in the Illinois act. *North v. University of Illinois* (1916) 201 Ill. App. 449. The court said: "The university was chartered to furnish instruction to students in various branches of learning. Neither the general nature and character of the work of educational instruction, nor the methods adopted in giving it, can properly be denominated an 'enterprise,' as that term is usually defined. . . . Nor would they be brought within the definition of that term, as employed in the statute, merely by the incidental use and handling of the materials mentioned in the statute."

The operator of a retail furniture store, who maintains a warehouse for the storing of his furniture, and from which distribution of the furniture is made to his customers, operates a warehouse within the meaning of the Illinois act; and an employee of such a store is within the protection of the statute, when injured while he is engaged, with others, in attempting to remove from street car tracks, an automobile truck in which they had been delivering furniture to customers. *Freibel v. Chicago City R. Co.* (1917) 280 Ill. 76, 117 N. E. 467. In connection with this case, see the *New York* cases cited later in the note, which holds that the maintenance of a warehouse by a retail merchant is not warehousing or storage, within the meaning of the statute. Recovery would be allowed, however, by the *New York* courts, in the *Friebel Case*, upon the ground that, at the time of the injury, the employee was engaged in operating a vehicle.

So, a storehouse maintained by a packing company for the storing and vending of its commodities is a warehouse, within the meaning of the Illinois statute. *Armour & Co. v. Industrial Bd.* (1916) 197 Ill. App. 363. The court rejected the contention of the employers that the word "warehouse," as used in the act, must be construed to refer only to public warehouses.

But the maintenance of a bottling sta-



tion by a milk company, at which milk was delivered, and within which building the company had installed machinery and appliances, used by numerous employees in separating and bottling milk and cream, and canning and packing various other dairy products, is not the maintenance and operation of "warehouses," within the meaning of the Illinois statute. *Bishop v. Bowman Dairy Co.* (1916) 198 Ill. App. 312.

The Illinois supreme court has expressly repudiated the view that the business in which the employer is engaged is not the test, but that the employee's right to compensation arises only when he is employed in some line of work enumerated in the statute; that the occupation and employment of the employee, the nature of the work in which he is engaged, is the test, and the injury must be sustained in connection with and incident to some hazardous employment, in which the employee is engaged. The Illinois court bases the applicability of the statute on the occupation of the employer, and permits recovery, although the employee, when injured, was not himself engaged in the hazardous work.

Under this construction, it has been held that a blacksmith is within the protection of the statute, where the shop in which he was employed was operated in connection with the remainder of the employer's plant, and he was required, in going to and from his work, and in going to the office to receive his pay, to pass through a room in which power-driven machinery was operated, although, as a matter of fact, there was no machinery in the blacksmith shop, and he was injured by slipping and falling onto a cement floor, while he was waiting in line, with other employees, to receive his pay envelop at the office window, as he was passing from the building. *Pekin Cooperage Co. v. Industrial Bd.* (1917) 277 Ill. 53, 115 N. E. 128.

It is also expressly provided in the Illinois statute, that hospitals shall be construed to be employers, and that any enterprise in which statutory or municipal ordinance regulations are imposed for regulating and guarding machinery or appliances, for the protection and safeguarding of employees or the public, shall be considered extrahazardous enterprises.

Consequently, a hospital is engaged in an extrahazardous business, within the Illinois statute, where it occupies a seven-story building, equipped with

freight and passenger elevators, power-driven, with engines and high-pressure boilers, and a system of electric wiring and apparatus for lighting and signals throughout the building, the installation and maintenance of which are regulated by a municipal ordinance. *Hahnemann Hospital v. Industrial Bd.* (1918) 282 Ill. 316, 118 N. E. 767.

But municipal sanitary regulations, applying to milk vendors, and general vehicle regulations, applying to all vehicles and operators of vehicles, do not come within the meaning of the Illinois statute, which holds that it shall apply, where the employer is engaged "in any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use, or the placing of machinery or appliances or for the protection and safeguarding of the employees or the public therein." *Bishop v. Bowman Dairy Co.* (1916) 198 Ill. App. 312.

An employee of a sanitary district, whose duties are in connection with the crib maintained by the district in the lake, is not within the protection of the Illinois act, merely because the district, at a point 30 miles away, is engaged in extrahazardous employment, namely, the manufacture of electricity for its own use and for sale, maintaining the necessary dynamos and machinery. *Sanitary Dist. v. Industrial Bd.* (1917) 282 Ill. 182, 118 N. E. 475.

The chauffeur of an automobile, let by one undertaker to another for use at a funeral, is not within the protection of the Illinois statute, since undertaking is not one of the designated employments, and the use of automobiles, in connection with the conduct of funerals, does not constitute "carriage by land;" and the fact that the automobile was hired by another undertaker is immaterial. *F. W. HOCHSPEIER v. INDUSTRIAL BD.* ante, 227.

Nor is a milk company engaged in "carriage by land," so as to be liable for injuries to the driver of one of its wagons, under the Illinois statute. *Bishop v. Bowman Dairy Co.* (Ill.) supra.

#### Louisiana.

The Louisiana statute applies to persons, firms, and corporations engaged, among other named hazardous employments, in "railroading." *Myers v. Louisiana R. & Nav. Co.* (1917) 140 La. 937, 74 So. 256. In this case, a recovery was allowed, where the employee

was injured, while returning from taking measurements of a car which he was repairing, by being struck by the swinging door of a car on an adjacent track.

#### New York.

The New York statute applies only to certain designated hazardous employments which are set out, in the original acts, in forty-two separate groups, and there is a considerable number of decisions, construing this branch of the statute.

Among the occupations designated as extrahazardous is the occupation of "storage of all kinds and storage for hire." The word storage, as so used, is not properly applied to merchandise, which a retail merchant has on hand for immediate sale and disposition.

Thus, in *Roberto v. John F. Schmadeke* (1917) 180 App. Div. 143, 167 N. Y. Supp. 397, it was found that a retail coal dealer, who, if the market was right, "would store, in the summer, coal for their winter supply, which coal would be sold in the winter," might, to that extent and in that respect, be engaged in storing; but, even if that were so, it would have no application or relation to the accident in question, because at that time the supply of coal was nearly exhausted, so that there was no hoarding or storing of coal.

And the proprietor of a retail store does not conduct the hazardous business of warehousing, merely because he keeps a supply of materials in the basement, to be furnished to the retail department from time to time as needed. *Walsh v. F. W. Woolworth Co.* (1917) 180 App. Div. 124, 167 N. Y. Supp. 394.

Ordinary repair work on buildings does not constitute "structural carpentry" within the meaning of the act.

Thus, the superintendent of an apartment house is not engaged in structural carpentry, or any other hazardous employment, within the meaning of the New York statute, when he is planing off the top of a door to prevent it being "bound at the top." *Re Schmidt* (1917) 221 N. Y. 26, 116 N. E. 382.

So, a casual engagement of a carpenter by the hour, to repair a store or office, does not make the proprietor, of the store or office one engaged in structural carpentry. *Geller v. Republic Novelty Works* (1917) 180 App. Div. 762, 168 N. Y. Supp. 263.

A superintendent and general repair man of a building, in lifting a radiator from other radiators located in the store

room of the building, is not engaged in "plumbing," "sanitary or heating engineering, installation and covering of pipes or boilers," within the meaning of the New York act. *Kammer v. Hawk* (1917) 221 N. Y. 378, 117 N. E. 576.

Nor is the work of transporting and setting up a 9,000-gallon water tank from the railroad to a position on the roof of a building, where it is to be connected with a sprinkler system, the installation of "boilers, engines, or heavy machinery," within the meaning of group 42 of § 2 of the New York act. *Maloney v. Levy & G. Co.* (1917) 176 App. Div. 470, 163 N. Y. Supp. 505.

An employee whose sole duty to his employer is feeding bundles of grain to a threshing machine is not engaged in the employment of milling; and the mere fact that the owner of the machine, who takes it from place to place threshing out grain for farmers, at so much per bushel, stated, in his first report of the injury, that he was engaged in "the milling business," does not render him liable for compensation, as being in that business. *Vincent v. Taylor Bros.* (1917) 180 App. Div. 818, 168 N. Y. Supp. 287.

The making of butter is not included in group 33 of § 2 of the New York acts, designating as hazardous employments the following: "Canning or preparation of fruit, vegetables, fish, or food stuffs; pickle factories and sugar refineries." *Pardy v. Boomhower Grocery Co.* (1917) 178 App. Div. 347, 164 N. Y. Supp. 775. The amendment of 1916 added to group 33, the words "manufacturer of dairy products."

The operation of oil and gas wells was not included as a hazardous employment under the New York law, as it stood prior to the amendment of 1916. *Tillburg v. McCarthy* (1917) 179 App. Div. 593, 166 N. Y. Supp. 878.

In *Sexton v. Public Service Commission* (1917) 180 App. Div. 111, 167 N. Y. Supp. 493, it was held that the city of New York, engaged in the hazardous business of subway construction, is liable in compensation for injuries to employee.

Making hats and feathers is the millinery business, and is a hazardous employment. *RE SAENGE, ante*, 225.

A moving picture machine is not an appliance within the meaning of the New York act, which includes as hazardous employments, the "construction, installation, repair, or operation of electric light and electric power line, dynamos, or appliances and power trans-

mission lines," and a person injured while operating such machine is not within the protection of the statute, where the operation of the machine by electricity, or the presence of electricity, had nothing whatever to do with causing the injury to claimant. *Balcom v. El-lintuch* (1917) 179 App. Div. 548, 166 N. Y. Supp. 841.

The occupation of weighing hides on piers, which hides had constituted cargoes or parts of cargoes unloaded from vessels, is a hazardous employment, within § 2, group 10, of the New York act, which includes the handling, on any dock, platform, or place, of materials unloaded from vessels. *Hiers v. John A. Hull & Co.* (1917) 178 App. Div. 350, 164 N. Y. Supp. 767.

Group 41 of the New York acts includes the operation, otherwise than on tracks, on streets, highways, or elsewhere, of cars, trucks, wagons, or other vehicles, and rollers and engines, propelled by steam, gas, gasoline, electric, mechanical, or other power, or drawn by horses or mules.

And an employee, injured while in the course of his employment in unloading a vehicle, is within the protection of the statute, where the unloading of the vehicle is an incident to its operation. *Berg v. Hetzler Bros.* (1917) 179 App. Div. 551, 166 N. Y. Supp. 830.

And a scraper used to remove, roughly, snow from a field of ice, preparatory to marking, cutting, and harvesting the ice, is a vehicle, the operation of which is hazardous within the meaning of the New York statute. *Ibid.*

So, an employee of an employer who is carrying on the business of operating a steam machine for the threshing of grain and beans, the machine being moved from place to place for custom work, is engaged in the hazardous occupation of operating a vehicle, within the meaning of the New York statute. *White v. Loades* (1917) 178 App. Div. 236, 164 N. Y. Supp. 1023. But a threshing machine, after the horses have been detached and it is being operated as a stationary machine, cannot be considered a vehicle. *Vincent v. Taylor Bros.* (1917) 180 App. Div. 818, 168 N. Y. Supp. 287.

An employee, injured while engaged in splitting wood, is not entitled to compensation upon the theory that he was injured in the operation of a vehicle, merely because he or someone else may, at some future time, be called upon to load the wood in a wagon and deliver it

to a customer. *Casterline v. Gillen* (1918) 182 App. Div. 105, 169 N. Y. Supp. 345.

Although an injured employee acted as street commissioner and policeman, and looked after the lights, streets, and engine house, and the water, electric poles, and everything pertaining to the corporation, he cannot recover for injuries received in getting off of a truck, although he was going to the depot to get some lead for use by the corporation, where, at the time, the truckman was going upon another errand, intending to stop at the depot upon his return, and the injured employee was riding upon the truck merely for his own convenience, since the village, as employer, could not, at the time of the injury, be held to be operating a vehicle, within the meaning of the New York statute. *Spinks v. Marcellus* (1917) 180 App. Div. 732, 168 N. Y. Supp. 69.

The New York court of appeals has held that an employee is within the statute, where he was injured in a non-hazardous employment, provided such employment was fairly incidental to the hazardous business conducted by the employer. Thus, in *Larsen v. Paine Drug Co.* (1916) 218 N. Y. 252, 112 N. E. 725, the court said that, where "an employee is injured while performing an act which is fairly incidental to the prosecution of a business, and appropriate in carrying it forward, and providing for its needs, he or his dependents are not to be barred from recovery, because such act is not a step wholly embraced in the precise and characteristic process or operation which has been made the basis of the group in which employment is claimed."

In the *Larsen Case*, it appeared that the employer was engaged in the manufacture of drugs and chemicals. The injured employee was a porter, elevator-man, and handy man and, at the time of the accident, was putting up a small shelf at the foot of the elevator, and lost his balance and fell down the elevator shaft. He did not take any part in the actual manufacture of drugs and chemicals, but the court of appeals held that he was entitled to an award under the Workmen's Compensation Act.

So, a night watchman in a bakery, which is a hazardous business, is himself within the Compensation Law. *Fogarty v. National Biscuit Co.* (1917) 221 N. Y. 20, 116 N. E. 346, reversing the decision of the appellate division in (1916) 175 App. Div. 729, 161 N. Y. Supp. 937.

And assisting in procuring men and material is incidental to the employment of a foreman, on the work of construction, repair, and maintenance of highways and bridges within a town. *Lanigan v. Saugerties* (1917) 180 App. Div. 227, 167 N. Y. Supp. 654, affirmed in (1918) 223 N. Y. 685, 119 N. E. 1053.

So, too, an employee in the cost and pay roll department of a plant manufacturing photographic cameras and supplies, who was injured while engaged in sorting time cards, is within the protection of the statute, since her work must be considered as fairly incidental to the hazardous employment mentioned; and, consequently, she cannot maintain an action for damages, although her work was largely clerical, and she did no work which directly entered into the construction of the cameras and supplies. *Joyce v. Eastman Kodak Co.* (1918) 182 App. Div. 354, 170 N. Y. Supp. 401.

The installation of additional machinery, incidental to the continued operation of a mill as a going concern, is furthering the business of the mill, so as to render one engaged in the work of installing the machinery an employee entitled to compensation for injuries received in such work. *McNally v. Diamond Mills Paper Co.* (1918) 223 N. Y. 83, 119 N. E. 242, reversing the appellate division (1917) 178 App. Div. 342, 164 N. Y. Supp. 793. The court said: "The men who were doing this work were not improving some building belonging to their employer, but unrelated to the business. They were furthering the business itself. The claimant's position was like that of the clerk in *Larsen v. Paine Drug Co.* (1916) 218 N. Y. 252, 112 N. E. 725."

Under the New York statute, prior to the Amendment of 1916, an employee could not recover unless the employer was himself engaged in one of the designated hazardous employments, and it was immaterial that the employee's injury was received while he himself was engaged in a hazardous employment. By § 2, chapter 622, Laws of 1916, the statute defining "employee" was amended to read as follows: "'Employee' means a person engaged in one of the occupations enumerated in § 2, or who is in the service of an employer, whose principal business is that of carrying on or conducting a hazardous employment" on the premises or at the plant, etc.

This amendment apparently has the effect of bringing within the New York statute employees who are engaged in

extrahazardous employments, although the employer's business may not be such, and also employees in the service of employers carrying on hazardous employment, although the employee is not himself actually engaged in such hazardous employment; the latter class of employees would seem to be within the operation of the statute, by the construction given by the court of appeals, provided their work is fairly incidental to the hazardous employment.

Thus, in *Dose v. Moehle Lithographic Co.* (1917) 221 N. Y. 401, 117 N. E. 616, the court said: "The Amendment of 1916 was intended to and does embrace an additional class of employees, viz., those in the service of an employer carrying on a hazardous employment, even though such employee is not actually engaged in a hazardous employment."

So, in *Mulford v. A. S. Pettit & Sons* (1917) 220 N. Y. 540, 116 N. E. 344, it was held that an employee of a corporation engaged in the nonhazardous business of dealing in lumber, coal, and feed, who was injured while riding a motor cycle about the country for the purpose of taking orders and collecting accounts, was entitled to compensation, since he was injured through the operation of a vehicle, which is a hazardous employment in the provisions of group 41 of § 2 of the law.

And, under the Amendment of 1916, a collector for a brewery, who was shot and killed while in the performance of his duty as a collector, in a saloon away from the plant of the employer, was within the statute since the business of brewing is classified as hazardous, although the employee was not himself connected with the hazardous part of the business. *Spang v. Broadway Brewing & Malting Co.* (1918) 182 App. Div. 443, 169 N. Y. Supp. 574.

And a janitor in an apartment house, who was injured while cleaning the windows, which is classified as a hazardous employment, is within the protection of the statute, although the business of the employer, operating apartment houses, was a nonhazardous occupation. *Zubradt v. Shepard* (1917) 180 App. Div. 20, 167 N. Y. Supp. 306.

A number of decisions handed down prior to the Amendment of 1916 may be noted.

Employees engaged in an operation, merely incidental to an occupation which the law does not regard as hazardous, are not within the protection of the New York statute, although the work in

which they are engaged is in itself hazardous. *Tillburg v. McCarthy* (1917) 179 App. Div. 593, 166 N. Y. Supp. 878. The decision in *Bacon v. McCarthy* (1917) — App. Div. —, 166 N. Y. Supp. 880, are similar to the *Tillburg* Case.

In *Re Fitzsimmons* (1917) 177 App. Div. 938, 163 N. Y. Supp. 1116, the appellate division, without opinion, unanimously affirmed the decision of the Industrial Commission, denying compensation to the dependents of an employee, who was employed as a night elevator man in a building, where there was no direct proof connecting the accident with the operation of the elevator, although the operation of the elevator would be considered hazardous.

It has been held that the hazardous employments to which the New York statute applies are only such as are carried on by the employer for pecuniary gain.

Thus, in *Mulford v. A. S. Pettit & Sons* (N. Y.) supra, Pound, J., in holding that a salesman, who was injured while traveling around the country on a motor cycle, taking orders and collecting accounts, was within the protection of the statute, when injured while upon the motor cycle, said: "Of course, the employer in this case was not in the business of operating a motor cycle for gain. Its business was not the operation of motor cycles in any sense. I think, however, that 'pecuniary gain,' as used in the statute, merely means that the employer must be carrying on a trade, business, or occupation for gain, in order to come within the act. If, in that connection, the purpose of using the motor cycle is profit, that is enough."

And in *Dose v. Moehle Lithographic Co.* (N. Y.) supra, the court said: "The appellate division held that the injury to Dose did not arise out of and in the course of an employment 'carried on by the employer for pecuniary gain,' that Dose had no connection whatever with the hazardous employment conducted in the building, that his injury arose, not out of and in the course of the work of lithographing and printing, but of bricklaying, and the employment of bricklaying was not carried on by the employer for pecuniary gain. That conclusion would render meaningless the Amendment of 1916. The company was an employer of workmen. It conducted a hazardous business for pecuniary gain, which term, as used in the statute, merely means that the employer must be carrying on a trade, business or occu-

pation for gain in order to come within the act. *Mulford v. A. S. Pettit & Sons* (N. Y.) supra. The injury received by Dose was accidental, and sustained by him as an employee in the service of the company, which carried on a hazardous employment. The fact that he was employed in bricklaying, which was not carried on for pecuniary gain by the company, is untenable. A proper conduct of the business of the company required a suitable plant, machinery, tools, etc. The company could not, in justice to itself, its business, or its employees, continue business in a plant which was actually unsafe, or in danger of becoming so. Dose was engaged in an employment incidental and requisite to the business carried on by the company, and, under the law, as amended, was clearly entitled to compensation."

So, in *Kammer v. Hawk* (1917) 221 N. Y. 378, 117 N. E. 576, where the superintendent and general repair man of a building was injured while handling a radiator, with the intention of installing it in one of the buildings, the court said that the owner of the building operated the steam-heating plant therein for profit, which was included in the rent paid by the tenants.

And the owner of a large tract of woodland, who cuts and sells the lumber upon it regularly, is engaged in forestry and logging for pecuniary gain, although that work may be incidental to his main business of operating a country club. *Uhl v. Hartwood Club* (1917) 221 N. Y. 588, 116 N. E. 1000.

The New York statute contemplates the operation of vehicles as the principal business or occupation of the employer, for pecuniary gain, and does not contemplate the incidental loading of a wagon, by an employee engaged in splitting wood. *Casterline v. Gillen* (1918) 182 App. Div. 105, 169 N. Y. Supp. 345.

In a number of decisions under the statute prior to the Amendment of 1916, recovery was denied, because the work in which the employee was engaged at the time of his injury was not carried on by the employer for pecuniary gain.

Thus, in *Bargey v. Massaro Macaroni Co.* (1915) 218 N. Y. 410, 113 N. E. 407, it was held that a carpenter and builder, who was injured while repairing the factory of the macaroni manufacturer, was not entitled to compensation as being engaged in the construction, repair, and demolition of buildings, since the company did not carry on the occupation of

constructing, repairing, and demolishing buildings for pecuniary gain.

This decision was followed in *Solomon v. Bonis* (1917) 181 App. Div. 672, 167 N. Y. Supp. 676, and compensation was denied a plasterer who was injured while working for the owner and operator of an apartment house. The majority opinion, apparently, does not consider the effect of the Amendment of 1916. Justice Lyon, in his dissenting opinion, however, called attention to the amendment in question, and said that the employee was engaged in the hazardous occupation of repairing the plaster in one of the bathrooms of the employer's apartment house, and that these repairs were incidental and, in fact, indispensable to the conduct of the nonhazardous business of operating an apartment house, and to come, therefore, squarely within the decision in *Mulford v. A. S. Pettit & Sons* (1917) 220 N. Y. 540, 116 N. E. 344, and he further stated that the *Bargey Case*, together with others cited, related to accidents occurring prior to June 1, 1916, the date when the above amendment took effect.

In *McNally v. Diamond Mills Paper Co.* (1917) 178 App. Div. 342, 164 N. Y. Supp. 793, it was held that an employee, injured in the installation of heavy machinery in a paper manufacturing plant, could not recover compensation from the owner of the plant, although the installing of heavy machinery is a hazardous employment; since that hazardous employment was not carried on by the owner of the plant for pecuniary gain. This decision, however, was reversed by the court of appeals. See (1918) 223 N. Y. 83, 119 N. E. 242, cited above.

The work of employees, injured while putting a fly wheel upon an engine, for an employer operating oil and gas wells, is not included in the operation and repair of stationary engines and boilers, not included in other groups, since the employers were not engaged in the operation or repair of stationary engines for pecuniary gain. *Tillburg v. McCarthy* (1917) 179 App. Div. 593, 166 N. Y. Supp. 878.

A superintendent of an apartment house, while engaged in planing off the top of a door, is not engaged in a hazardous business which the employer is carrying on for gain. *Re Schmidt* (1917) 221 N. Y. 26, 116 N. E. 382.

#### Oregon.

An ensilage cutter, used to cut feed to fill a silo, to furnish food for cattle

kept for dairy purposes, is a feed mill within the express provisions of the Oregon statute, and the operation of such machinery is a hazardous occupation within the meaning of the Oregon statute, although merely incidental to farming. *Raney v. Industrial Acci. Commission* (1917) 85 Or. 199, 166 Pac. 523. The court said: "Where, however, a person, engaged in farming, operates for himself and others any machine or agency that the statute has declared brings such employer automatically within the hazardous occupations, unless he has given, in the manner prescribed, notice that he will not be governed by the provisions of the act, he is not immune from making to the State Industrial Accident Commission the small contributions which the law exacts from the product of business of that kind, in order to create a fund, as a partial compensation to the laborers who have been injured by such means."

#### Washington.

The Washington supreme court, in *State v. Powles & Co.* (1917) 94 Wash. 416, 162 Pac. 569, held that the Commission had no authority, under the law, to arbitrarily declare employment in a private warehouse to be extrahazardous, when the order of the Commission could not be sustained, either by reference to the law or by proof of the fact.

But the statute may be found to be applicable, where it is fairly within the findings that the warehouse was the superstructure of a dock or wharf, and the work was extrahazardous. *O'Brien v. Industrial Ins. Dept.* (1918) — Wash. —, 171 Pac. 1018. And the court further said that it would presume that a fund is or will be collected out of which compensation may be paid.

The act of the legislature in defining the construction of telegraph lines as extrahazardous is conclusive of the fact, especially where judicial notice cannot be taken to the contrary. *State v. Postal Tele.-Cable Co.* (1918) — Wash. —, 172 Pac. 902. The court said: "We are of the opinion that, unless the courts may take notice of the fact that an occupation is not hazardous, it is within the power of the legislature to classify the same as hazardous. The construction of telegraph lines has been declared, by the legislature of this state, to be an extrahazardous occupation. We are of the opinion, therefore, that the denial of the respondent that it was engaged in an extrahazardous occupation is of no

effect, because it is a denial of a legislative declaration."

A vessel upon which a boiler factory was doing some work cannot be considered the plant of the factory, so as to take away the right to maintain an action for damages, under the Washington statute, in a case in which an employee of the factory was injured by the negligence of employees of the owner of the vessel. *Martin v. Matson Nav. Co.* (1917) 244 Fed. 976. The negligent employee opened a valve, permitting a flow of hot water which scalded the injured employee, and the court said: "If the injury causing the death of Brown had been occasioned by reason of defect in

the tools and apparatus furnished, and necessary for the execution of the work in which he was employed, there might be reason for contending that the 'plant' accompanied the employee to the place where the facilities of the enterprise were to be employed, and that, as between the employee and employer, the Compensation Act would be conclusive. But no reasonable construction, it seems to me, can be placed upon the language employed by the legislature and the general terms of the act, which determines that the 'plant' accompanies an employee, wherever he may go to perform services for his employer, as against a third party." W. M. G.

### ILLINOIS SUPREME COURT.

PEOPLE OF THE STATE OF ILLINOIS  
v.

FRANK DEMPSEY, alias James E. Campbell, Impleaded, etc., Plff. in Err.

(283 Ill. 342, 119 N. E. 333.)

**False pretenses — forgery — effect.**

1. That forgery was committed in obtaining money from another does not necessarily prevent the one securing it from being guilty of obtaining money by means of the confidence game.

*For other cases, see False Pretenses, in Dig. 1-52 N. S.*

**Same — forged indorsement on genuine check.**

2. The placing of a forged indorsement upon a genuine traveler's check for the purpose of obtaining money thereon renders it a false or bogus check within the meaning of the Confidence Game Statute.

*For other cases, see False Pretenses, in Dig. 1-52 N. S.*

**Same — representation as to ownership of check.**

3. One who falsely represents himself to be the one named in a traveler's check, and who induces another to cash it by reason of such representations and the similarity of his forged indorsement on the check to the true signature, is guilty of obtaining money by the confidence game.

*For other cases, see False Pretenses, in Dig. 1-52 N. S.*

**Indictment — confidence game — variance.**

4. That the proof shows the money actually obtained to be less than that charged in an indictment for obtaining money by

means of the confidence game is not a fatal variance.

*For other cases, see Evidence, XIII. b, in Dig. 1-52 N. S.*

**Criminal law — sufficiency of identification.**

5. One cannot be convicted of obtaining money by the confidence game upon evidence that he looked like or was of the type of the person who was with the one who actually procured the money.

*For other cases, see Evidence, XII. l, in Dig. 1-52 N. S.*

**Same — statements out of presence of accused.**

6. The relationship of one person to another, who obtains money by the confidence game, cannot be established by statements of the clerk of the hotel where they stopped, made out of the former's presence, that the convicted person had a pal.

*For other cases, see Evidence, X. d, in Dig. 1-52 N. S.*

**Same — materiality — statement by accused.**

7. A statement at the time of his arrest by one on trial for obtaining money by the confidence game by the use of travelers' checks, on which the indorsement was forged by another who actually secured the money, and who was at the time accompanied by another person alleged to be accused, that similar checks found in his room were "phonies," is immaterial, in the absence of any evidence to identify him as the one present when the money was secured.

*For other cases, see Evidence, X. c, in Dig. 1-52 N. S.*

(April 17, 1918.)

**E**RROR to the Circuit Court for Sangamon County to review a judgment convicting defendants of obtaining money by means of the confidence game. Reversed. The facts are stated in the opinion.

Note. — For committing forgery as affecting the offense of obtaining money or goods by false pretenses or confidence game, see annotation following this case, post, 242.

Mr. John G. Friedmeyer, for plaintiff in error:

The courts of this state will not support a conviction in a criminal case, where it appears from the record that the conviction was secured upon prejudice, or is probably due to incompetent evidence.

Keller v. People, 204 Ill. 604, 68 N. E. 512; Mooney v. People, 111 Ill. 388; Clark v. People, 111 Ill. 404; Campbell v. People, 159 Ill. 9, 50 Am. St. Rep. 134, 42 N. E. 123; Waters v. People, 172 Ill. 367, 50 N. E. 148; Pollard v. People, 69 Ill. 148.

In order to convict, the prosecution must prove beyond a reasonable doubt, not only that the crime was committed in manner and form as charged in the indictment, but that such person charged is the identical person who committed the crime.

Lincoln v. People, 20 Ill. 365; Cunningham v. People, 210 Ill. 414, 71 N. E. 389; Briggs v. People, 219 Ill. 330, 76 N. E. 499; Reins v. People, 30 Ill. 256.

Campbell's conviction was brought about by forcing him to be tried jointly with defendant Greenburg, upon much incompetent evidence as to him, and by prejudicial argument on the part of the state's attorney.

Keller v. People, 204 Ill. 604, 68 N. E. 512; Miller v. People, 39 Ill. 462.

It is doubtful, from the evidence, that Campbell, in any way, aided, assisted, encouraged, advised, or abetted the commission of the crime charged.

White v. People, 81 Ill. 333; Watts v. People, 204 Ill. 233, 68 N. E. 563; White v. People, 139 Ill. 143, 32 Am. St. Rep. 196, 28 N. E. 1083; Lamb v. People, 96 Ill. 73.

If a crime was committed, it was forgery, and not confidence game.

Beattie v. National Bank, 174 Ill. 571, 43 L.R.A. 654, 66 Am. St. Rep. 318, 51 N. E. 602; People v. Wilmot, 254 Ill. 554, 98 N. E. 973; People v. Rosenberg, 267 Ill. 202, 108 N. E. 54.

Messrs. Edward J. Brundage, Attorney General, C. F. Mortimer, Edward C. Fitch, Oscar J. Putting, and John P. Snigg, Jr., for the People:

Cooke, J., delivered the opinion of the court:

Frank Dempsey (alias James E. Campbell) and Neil J. Greenberg (alias Henry Russell) were indicted and convicted in the circuit court of Sangamon county, for the crime of obtaining money by means of the confidence game. Dempsey, whose true name appears to be James E. Campbell, and who will be referred to hereafter by the name of Campbell, has sued out this writ of error to review the judgment and record of the circuit court.

The evidence on the part of the people tended to prove that Greenberg, accompanied by another man of the type of Campbell, on May 7, 1917, purchased from the Appel Clothing Company, in Springfield, an overcoat valued at \$18 and a grip or handbag valued at \$10, and presented to Martin Maurer, the clerk who waited upon him, a travelers check or circular note for \$50, payable to Henry Russell, issued by Thomas Cook & Sons, bankers, of Albany, New York. The clerk called the proprietor, Aaron Appel, who questioned Greenberg as to his identity. According to the testimony of Appel and Maurer, Greenberg represented himself to be Henry Russell, produced a letter of identification showing the genuine signature of Russell, and indorsed the name of Henry Russell on the back of the \$50 check or circular note in the presence of Appel, who thereupon accepted the note and gave Greenberg \$22 in cash. The note was cashed by the Appel Clothing Company at a bank in Springfield and, in due course, reached Thomas Cook & Sons, who refused to pay, upon the ground that the indorsement was a forgery. It was proven that this traveler's check or circular note was issued, with others, to Henry Russell by Thomas Cook & Sons, and was lost on February 17, 1917, while Russell was on board a boat bound from New Orleans to Havana, Cuba.

One of the contentions of plaintiff in error is that, if a crime was committed, it was forgery and not the confidence game. Under the facts proven, there is no question but that the crime of forgery was committed; but it does not necessarily follow, from that fact alone, that plaintiff in error and Greenberg were not guilty of obtaining money by means of the confidence game. People v. Zurek, 277 Ill. 621, 115 N. E. 644.

Plaintiff in error contends that the facts proved did not show a violation of the Confidence Game Statute, because the instrument presented to and cashed by the Appel Clothing Company was a true and genuine instrument for the payment of money, transferable by indorsement. While it is true that this was a true and genuine instrument until the forged signature of Henry Russell was indorsed thereon, it is also true that, when that false indorsement was made, it became such a false or bogus check as is contemplated by the statute. It could be negotiated as a true and genuine instrument only when it contained the true indorsement of Henry Russell. Greenberg, by the presentation of the letter of identification, which was lost by Russell at the same time he lost his traveler's checks on the Havana boat,



secured the confidence of Aaron Appel, and induced him to believe that he was Henry Russell. Relying solely upon representations thus made to him, and upon the fact that the handwriting of Greenberg in the indorsement corresponded with the handwriting of Henry Russell on the card of identification, Appel was induced to part with his money. The facts proven here clearly establish the crime of obtaining money by means of the confidence game.

It is further contended that there is a variance between the indictment and the proof. The indictment charges that plaintiff in error and Greenberg obtained from the Appel Clothing Company "fifty (\$50) dollars, of the value of fifty (\$50) dollars, of the money and personal goods and property of the said the Appel Clothing Company by means and use of the confidence game." The proof discloses that Greenberg secured an overcoat of the value of \$18, a hand satchel or grip of the value of \$10, and \$22 in money. This does not constitute a variance from the charge in the indictment. Under an indictment charging a defendant with larceny of a certain amount of money, the amount stolen is not required to be proved as charged in the indictment. A conviction may be obtained by proving a different amount of money and of different value from that charged in the indictment. *People v. Clark*, 256 Ill. 14, 99 N. E. 866, Ann. Cas. 1913E, 214. The proof that Greenberg obtained \$22 in money from the Appel Clothing Company, by means of the confidence game, is sufficient to sustain a conviction under the indictment in this case.

Plaintiff in error insists that the evidence is not sufficient to sustain his conviction, and this contention must be sustained. Greenberg was positively identified as the man who forged the traveler's check and secured the money, overcoat, and satchel from the Appel Clothing Company. He was identified by Appel and Maurer, the only persons present who had an opportunity to see him at the time of this transaction. They also are the only persons who attempted to identify plaintiff in error, and his conviction must be sustained, if at all, upon their testimony. Maurer testified that he waited upon Greenberg, and sold him the overcoat and satchel, and that he was accompanied by a man of the type of plaintiff in error. He was not very positive of his identification of Greenberg, and, as to plaintiff in error, stated: "But as to the other man I can't say at all; I never had any business transactions with the other man, and no occasion to pay any attention to him and no conversation with him."

He further testified that he would not say positively that he had ever seen plaintiff in error before. Appel testified, and positively identified Greenberg as the person from whom he had received the check and to whom he had given the money. He testified that the man with Greenberg looked like plaintiff in error; that he could not tell positively who the second man was, as he did his talking with the one who gave him the check; that he does not know whether plaintiff in error was there at all; that he looks like the man who was there, but that he would not, on oath, say that he was positive that he was the man, because he might be in error. This is, in effect, the testimony of Appel and Maurer, so far as it pertains to the identification of plaintiff in error. This certainly is not sufficient evidence on which to sustain a conviction for a crime.

Greenberg and plaintiff in error were arrested in the city of Chicago, where they were stopping together at a hotel. Plaintiff in error did not testify on the trial, but Greenberg testified that they were chance acquaintances, and had known one another but a few days before their arrest. Greenberg was arrested as a suspicious character, on the street, and the officer accompanied him to the hotel, where plaintiff in error was sick in bed as the result of a protracted debauch. This officer testified that, when he arrived at the hotel with Greenberg, he took him to the desk, where he asked the manager if Greenberg had a pal, and the manager informed him that he had, and gave him the number of his room. This testimony was objected to and the objection should have been sustained, as the conversation was out of the presence of plaintiff in error, and it was not a proper way to prove to the jury the relationship, if any, that existed between the plaintiff in error and Greenberg. Greenberg testified that he had taken his satchel, which was later identified as the one purchased with the bogus check from the Appel Clothing Company, to plaintiff in error's room in order to administer some medicine to him, to relieve the suffering which had resulted from his drunken condition. The officer found this satchel in the room of plaintiff in error, and it contained some of the checks issued by Thomas Cook & Sons to Henry Russell, and also the identification card. The officer testified that he asked plaintiff in error what they were, and that plaintiff in error answered that they were "phonies." Had Maurer and Appel been able to identify plaintiff in error as the person who accompanied Greenberg at the time the money was secured by him from the Appel Clothing Company, the evidence

of the Chicago police officer would be material; but, without the identification of plaintiff in error as the person who accompanied Greenberg, this testimony is unimportant. It is possible, as plaintiff in error claims to be the truth, that he had known Greenberg but a few days prior to the time of their arrest and that he had never been in the city of Springfield until he was brought there under arrest.

The evidence fails to show, beyond a reasonable doubt, that the plaintiff in error was the person who accompanied Greenberg at the time he secured the money from the Appel Clothing Company, or that he was in any way implicated in the perpetration of this crime.

The judgment of the Circuit Court is reversed, and the cause remanded.

**Annotation — Committing forgery as affecting the offense of obtaining money or goods by false pretenses or confidence game.**

In many jurisdictions, the use of a forged or fictitious instrument as a means of obtaining money or goods from another may constitute the offense of obtaining money under false pretenses, even though the crime of forgery is also committed. *PEOPLE v. DEMPSEY*, ante, 239; *Com. v. Coe* (1874) 115 *Mass.* 499; *State v. Bourne* (1902) 86 *Minn.* 432, 90 *N. W.* 1108; *Tyler v. State* (1840) 2 *Humph. (Tenn.)* 37, 36 *Am. Dec.* 298; *Reg. v. Prince* (1868) 38 *L. J. Mag. Cas. N. S. (Eng.)* 8, *L. R. 1 C. C.* 150, 19 *L. T. N. S.* 364, 17 *Week. Rep.* 179, 11 *Cox, C. C.* 193.

And even though the false instrument would not support a conviction for forgery, nevertheless, where it is used as a means of fraudulently obtaining money or goods from another, it will support a conviction for obtaining money under false pretenses. *State v. Stewart* (1900) 9 *N. D.* 409, 83 *N. W.* 869; *Reg. v. Thorn* (1841) *Car. & M. (Eng.)* 206, 2 *Moody, C. C.* 210.

In *Strong v. State* (1882) 86 *Ind.* 208, 44 *Am. Rep.* 292, an indictment was sustained for obtaining money under false pretenses by means of a forged receipt, showing the defendant to be a member of a benevolent society. The question under consideration was not discussed.

In Texas it has been held that a person may be guilty of swindling and forgery in the same transaction, and, if the proof shows that it may be either, the prosecution must be for forgery, and not for swindling. This holding is based upon a statute, which, in effect, provides that, where a person is guilty of obtaining property by swindling, and also of some other offense known to the law, the statute relative to swindling shall not be understood to preclude prosecution for such other offense. *Scott v. State* (1891) 40 *Tex. Crim. Rep.* 105, 48 *S. W.* 523; *Hirshfield v. State* (1881) 11 *Tex. Crim. Rep.* 207; *Witherspoon v. State* (1896) — *Tex. Crim. Rep.* —, 37 *S. W.* 433.

So, where a person is guilty of a felony by uttering an instrument with a fictitious signature, he is not indictable for the offense, under a general penal act relating to cheating and swindling, although he is also guilty of that offense, there being a specific statute relative to the uttering of instruments bearing fictitious signatures; for, under such circumstances, indictments should be based upon a specific rather than a general statute. *Sharp v. State* (1910) 7 *Ga. App.* 605, 67 *S. E.* 699.

It has been held that uttering a forged check on a bank, in which there were no funds to the credit of the person whose name was forged thereto, constitutes the minor offense of obtaining goods by false pretenses, and also the greater crime of forgery; hence, the latter includes the former. *Watson v. People* (1872) 64 *Barb. (N. Y.)* 130.

A person who, with knowledge that goods were consigned to another person bearing his name, claims the goods, and obtains an advance thereon by endorsing a permit for the delivery of the goods to the person making the advance, is guilty of forgery, and not merely of obtaining the goods under false pretenses. *People v. Peacock* (1826) 6 *Cow. (N. Y.)* 72.

In England, it has been held that, where a person obtained goods by means of a forged order, he is not indictable for obtaining goods by false pretenses, but the prosecution should be for uttering the forged instrument, since the latter offense is a felony. *Rex v. Evans* (1833) 5 *Car. & P. (Eng.)* 553.

This difference among the courts on the question may be explained upon the assumption that, where the prosecution may be for obtaining property by false pretenses, etc., the two offenses,—that of obtaining property under false pretenses, and forgery,—are of the same grade; although the cases sustaining the right to prosecute for obtaining prop-

erty by false pretenses do not make a point of this fact, and it does not appear from the reports whether or not the offenses are, in fact, of the same grade.

An indictment for swindling by means of a forged order is not supported by proofs which establish the crime of ut-

tering a forged instrument, but which shows that no swindle was perpetrated, as the fraud or forgery was discovered before possession of the goods, sought to be secured thereby, was parted with. *Mathews v. State* (1870) 33 Tex. 102.

A. G. S.

# NEW MEXICO SUPREME COURT.

W. T. CHILTON

v.

85 MINING COMPANY, Appt.

(— N. M. —, 168 Pac. 1066.)

## Pleading — ejectment — general denial.

Under our Code practice, in actions in ejectment under § 3464, Code 1915, it is sufficient, as a general rule, to deny the plaintiff's title, and, under such denial, evidence of any matters having a tendency to show that the plaintiff was not vested with the title or right of possession at the time of the commencement of the action is admissible.

For other cases, see *Evidence*, XIII. a, in Dig. 1-52 N. S.

(November 12, 1917.)

**A**PPEAL by defendant from a judgment of the District Court for Grant County overruling a motion to dismiss the action and render judgment for defendant, in an action in ejectment brought to recover possession of a mining claim. Reversed.

Statement by HANNA, Ch. J.:

Appellee in this court, who was the plaintiff in the trial court, brought this action in ejectment against the appellant company, for the possession of the Domino mining claim, as described by him in his complaint. It is alleged in the complaint that the defendant on November 2, 1915, made application for patent in the United States Land Office at Las Cruces, New Mexico, for the mining claim known as the Jim Crow mining claim; that on the 4th day of January, 1916, the plaintiff filed his adverse claim, which is now pending in said Land Office; that the action instituted in the district court is brought in support of said adverse claim. This action is therefore instituted for the purpose of determining the right to the possession of the mining claim in question, as it appears from the

record that the two claims in question, the Domino and Jim Crow mining claims, cover substantially the same ground. The defendant, in its answer, admitted that it is a corporation, and that it was in possession of the land described in the complaint and called the Domino mining claim, so far as it conflicted with the Jim Crow lode mining claim, and had been so in possession of said claim long prior to the date of the alleged ouster; that it was withholding possession thereof from the plaintiff, but denied that such withholding was or is unlawful, or that the plaintiff was damaged thereby. It admitted the fact of its application for the patent for the Jim Crow lode mining claim, but denied all other allegations of the complaint, and, by way of further answer, alleged that on April 1, 1897, one Edward C. Belt and one Joseph Young, after discovery of the vein of mineral-bearing quartz in unappropriated, vacant public domain of the United States, then and there located the same as the Jim Crow lode mining claim; further alleging, specifically, as to the performance of conditions necessary to constitute a valid location under the law, and that by virtue of such acts that the said Belt and Young became entitled to the possession of said Jim Crow lode mining claim, and, thereafter, by virtue of various meane conveyances, the defendant became the owner of and entitled to possession of said claim; that the said Belt and Young and the various predecessors in title of defendant, as well as the defendant itself, have, ever since the year of the location of the said Jim Crow mining claim, caused annual labor or assessment work, required by law, to be done on the said claim, and now is entitled to the possession of said Jim Crow mining claim. The plaintiff, in his reply, denied all the allegations of the so-called separate defense, and the cause was tried by the court without jury.

Briefly stated, the evidence discloses that the plaintiff had made location of the so-called Domino claim on June 4, 1914, and subsequently filed his adverse claim and protest, purporting to show failure to do assessment work on the Jim Crow lode mining claim for the years 1912 to 1915,

Headnote by HANNA, Ch. J.

Note.—As to what defenses may be proven under a plea of the general issue or a general denial in an action of ejectment, see annotation following this case, post, 247.

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inclusive, by reason whereof he contends he was entitled to relocate the property. A motion to dismiss the plaintiff's action and render judgment for defendant was overruled.

Defendant introduced as a witness Edward C. Belt, one of the original locators of the Jim Crow claim, who testified to the location of said claim, after which defendant offered in evidence the records of the original and amended location notice of the said Jim Crow mining claim, and the records of the several conveyances through which the defendant claimed title. Objection was urged to these instruments so offered, on the ground that they were referred to in the answer, and were the foundation of defendant's defense, and that by reason of the fact that the originals or copies thereof were not filed with, or exhibited in said answer, as required by the Code, they could not be introduced in evidence. This objection was sustained, to which a proper exception was served by defendant.

During the progress of the trial, it further appears that the defendant tendered an amended answer, containing the same denials as the original answer, and, by further way of defense, an allegation of ownership of the land in controversy; and a further defense, in a cross complaint, sought ejectment against the plaintiff, alleging that it was entitled to possession of the premises in question, which plaintiff had entered on June 4, 1914. The trial court denied the right to file this trial amendment tendered by the defendant.

Messrs. Wilson & Walton, for appellant:

Under the issues raised by defendant's denial, which corresponds to the general issue at common law, each and every of the instruments in writing offered by defendant in the court below should have been received in evidence by the court; and the instruments were not, nor any of them, the foundation or basis of its defense.

Jones v. Rush, 156 Mo. 364, 57 S. W. 118; Dieckman v. Young, 87 Mo. App. 530; Kirk v. Kane, 87 Mo. App. 274; Westbay v. Milligan, 74 Mo. App. 179; Cunningham v. Roush, 157 Mo. 336, 57 S. W. 769; Henderson v. Wanamaker, 25 C. C. A. 181, 49 U. S. App. 174, 79 Fed. 736; 4 Sutherland, Code Pl. § 6381, p. 3503; 7 Enc. Pl. & Pr. 340; 21 Enc. Pl. & Pr. 731; Monaghan v. Agricultural F. Ins. Co. 43 Mich. 238, 18 N. W. 797; Nelson v. Brodhack, 44 Mo. 596, 100 Am. Dec. 328; Mumford v. Keet, 154 Mo. 46, 55 S. W. 271; Patton v. Fox, 169 Mo. 97, 69 S. W. 287; Rausch v. United Brethren in Christ Church, 107 Ind. 1, 8 N. E. 25; Whipple v. Shewalter, 91 Ind. 114; Boyd v. Olvey, 82 Ind. 294; Ragsdale v. Parrish, 74

Ind. 191; Barrett v. Johnson, 2 Ind. App. 25, 27 N. E. 983; Smith v. Schweigerer, 129 Ind. 363, 28 N. E. 696; McMannus v. Smith, 53 Ind. 211; O'Mara v. McCarthy, 45 Ind. App. 147, 90 N. E. 330; McLott v. Savery, 11 Iowa, 323; Brown v. Brown, 45 Mo. 412; Lattonrett v. Cook, 1 Iowa, 1, 63 Am. Dec. 428; Taylor v. Cedar Rapids & St. P. R. Co. 25 Iowa, 371; Boardman v. Beckwith, 18 Iowa, 292; Lohman v. Raymond, 18 N. M. 225, 187 Pac. 375.

Under the general denial, under the Code, in an action to recover possession of realty, want of title in plaintiff, or title in defendant or any third person, may be shown.

Bartleson v. Munson, 105 Minn. 348, 117 N. W. 512; Iba v. Central Asso. 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20.

Messrs. H. D. Terrell and G. T. Black for appellee.

Hanna, Ch. J., delivered the opinion of the court:

The first point relied upon by appellant is, in fact, that the burden of proof rested upon the plaintiff, to prove by a preponderance of evidence that the ground attempted to be located by him as the Domino mining claim was, at the time of the attempted location, unappropriated mineral land, and open to location, and that he properly located the same by doing all of the things required of him, under the statutes covering the location of mining claims. The second point relied upon by appellant is that there was insufficient evidence before the trial court to support certain findings of fact, and conclusions of law based thereupon. Our conclusion, however, makes it unnecessary to pass upon these propositions urged, or the matters presented by the third and fourth points, which likewise deal with evidentiary matters.

The fifth point relied upon is that the court below was in error in rejecting the offer of the location notices, proofs of labor and deeds, by reason of the fact that the defense was not founded on these instruments, and that therefore it was not necessary that they be filed with the answer or incorporated therein. The objection of the plaintiff to the introduction of these several instruments was based upon § 4146, Code 1915, which provides that "when any instrument of writing upon which the action or defense is founded is referred to in the pleadings, the original or a copy thereof shall be filed with the pleading, if within the power or control of the party wishing to use the same, and if such original or a copy thereof be not filed as herein required, or a sufficient reason given for failure to do so, such instrument of writing shall not be admitted in evidence upon the trial."

By the defendant below (appellant here), it is urged that the first defense in its answer specifically denied the right of possession of the land in controversy, and unlawful detention thereof by defendant, and that, by way of second defense, the several steps for proper location of the Jim Crow mining claim were fully set out; that the denial of the right of possession of the land in controversy corresponds to the general issue at common law, and that, under such denial, each and all of the said instruments in writing should have been received in evidence by the court, and that they were not, or any of them, the foundation or basis of its said defense.

By appellee, this contention is met by the argument that prior to the act of March 21, 1907 (Laws 1907, chap. 107), the New Mexico statutes provided that, in ejectment, the defendant might plead not guilty, and under such plea give in evidence any testimony showing that the plaintiff is not entitled to such possession, or that the title is in some other person, but that the Act of 1907, referred to, changed the form of pleading, by requiring that the defendant shall plead to the complaint by a demurrer or an answer, and that the answer, under § 4115, Code 1915, must contain, first, a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief, and, second, a statement of any new matter constituting a defense or counterclaim, in ordinary or concise language, without repetition. Appellee cites 1 Sutherland, Code Pleading, Practice & Forms, § 409, to the effect that "under the general denial authorized by the Code, evidence of a distinctive affirmative defense is not admissible. The defendant is limited to contradicting the plaintiff's proof, and disproving the case made by him."

Appellee urged that, under the present state of the Code, there is no general issue, and that, under a general denial in ejectment, defendant is limited to rebutting proofs of plaintiff, and cannot introduce evidence thereunder of any new matter constituting a defense, which should, under the Code, be pleaded specifically. In other words, it is contended by appellee that the defendant's denial, under our Code, does not correspond to the general issue at common law.

Appellee is laboring under a misapprehension in this matter, and loses sight of the fact that, in ejectment, plaintiff must recover upon the strength of his own title, rather than the weakness of his adversary's. Mr. Sutherland, in his work on Code pleading, under the title "Ejectment," at § 6381,

says: "Title in the defendant need not be pleaded, and may be given under a denial of plaintiff's title, and, if pleaded, such an allegation does not constitute new matter, and is only equivalent to a general denial of title in the plaintiff," citing *Marshall v. Shafter*, 32 Cal. 176.

In *Warvelle on Ejectment*, § 190, with reference to the sufficiency of pleadings in ejectment under the Code, it is said: "As previously remarked, the tendency of modern decisions has been toward a relaxation of the stringent rules that formerly prevailed. This is particularly true in states which have Codes of Procedure, and in a number of instances it has been held that, in respect to actions concerning rights in real property, a general allegation of ownership in a pleading is sufficient to admit proof of any legal title, general or special. Hence, in ejectment, it is sufficient, under these decisions for the plaintiff to allege that he is the owner and entitled to the possession of the land demanded, and that the same is wrongfully withheld, without alleging in detail the particular facts on which his claim of title is based. It is said that the rules which require the plaintiff to set up in his complaint the nature, quality and kind of ownership are too narrow and technical for Code pleading, and that the rule, as first stated, should prevail in all jurisdictions, where the statute requires that the complaint shall contain a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition. The reasoning by which these decisions are supported proceeds upon the theory that ejectment is strictly a possessory action; that it is the 'possessory title' which is important, and that, as plaintiff must show that he is entitled to immediate possession in order to recover, it is comparatively immaterial in what form his title may be."

As to pleadings by the defendant, the same author says at § 205: "The Codes of some of the states have materially changed the common-law rule, by denying the defendant the right to offer in evidence any estate in himself or another, or any license or right to possession, unless the same has been specially pleaded. While the wisdom of this requirement may be open to question, its authoritative force, in the states where it prevails, is beyond question, and the pleader who desires to avail himself of the benefits of title or possessory rights vested in the defendant must specifically aver them in his plea or answer."

In support of this last statement, the author cites *Allen v. Higgins*, 9 Wash. 446, 43 Am. St. Rep. 847, 37 Pac. 671, and *Carman v. Johnson*, 20 Mo. 108, 61 Am. Dec.

593. In this connection, however, it is to be noted that, under the Washington statute (Bal. Codes, § 5509), the defendant in ejectment is required to plead the estate or license whereby he holds possession; the statute specifically providing that a general denial contained in the answer will create no issue. The Missouri case also seems to turn upon a statutory provision, the character of which is not before us, as the statute is not referred to. The court, however, in its opinion in this case said: "If the same facts that would be sufficient to compel such conveyance can be available, under our present practice, in the defense of an ejectment for the possession, they must be set up in the answer, with the same particularity that would be necessary in a bill in chancery."

Mr. Newell in his work on Ejectment, at page 248, says: "Under the modern practice it is sufficient as a general rule to deny the plaintiff's title, and, under such denial, evidence of any matters having a tendency to show that the plaintiff was not vested with the title or right of possession at the time of the commencement of the action is admissible," citing *Wicks v. Smith*, 18 Kan. 508.

The opinion in the Kansas case is by Judge Brewer, and seems to be well considered. It is pointed out that, under the Kansas statute, it is sufficient for the defendant to deny generally the title alleged in the petition. Under our Code practice a similar provision prevails, permitting a general or special denial of the material allegations of the complaint controverted by the defendant. Vide Code 1915, § 4115.

Another case following the same rule as laid down in the Kansas case, although going somewhat further, is *Bartleson v. Munson*, 105 Minn. 348, 117 N. W. 512. In the last-mentioned case the action was for forcible entry and unlawful detainer, but the court held that, the title to real estate being involved, the case became, in substance and effect, an action in ejectment. In passing upon the point under consideration by this court, the supreme court of Minnesota said: "When a complaint merely alleges title in the plaintiff, the defendant may, under a general denial, prove any fact the existence of which necessarily negatives the allegation that the title is in the plaintiff; but, when the plaintiff sets out in detail the specific facts on which his title rests, defendant, under a general denial, can only disprove the facts thus specifically pleaded."

A case throwing a great deal of light upon the question under consideration is that of *Iba v. Central Asso.* 5 Wyo. 355, 40 Pac. 527, and reported in 42 Pac. 20, upon

motion for rehearing. The case was an action in ejectment in support of an adverse claim. The facts as quoted from this case are as follows: "The plaintiff in error filed an adverse claim, and within the period required by the statutes of the United States, commenced this suit in the district court, to determine the question of right to possession. U. S. Rev. Stat. § 2326, Comp. St. at 1916, § 4623. All the material averments requisite in such a case were contained in his petition, including an allegation of citizenship, ownership of the ground in controversy, and right to its possession, a full compliance with the laws of the United States and this state, and the rules and regulations of the mining district, the application of defendant for patent, and the filing of the adverse claim. It was also averred that defendant was in wrongful possession of the land. The defendant filed its answer, specifically denying the material allegations of the petition, except its own corporate existence; and, for a second defense and cross petition, alleging ownership and right to possession in itself, as well as its actual possession, a full compliance on its part with the laws and rules in relation to mining lands, and ending with a prayer that its title to said real estate be quieted as against the plaintiff. No reply was filed to this second defense, and, on motion of the defendant, which was resisted by plaintiff, the court rendered judgment upon the pleadings, assuming the allegations of the second defense to be admitted in default of a reply, and entered a judgment in favor of defendant, specifically finding as true the material facts alleged in said defense. Did the court err in thus rendering judgment upon the pleading? It may be asserted as a primary proposition, and we take it to be considered, that, unless a reply was necessary, there existed no authority for such a judgment. If this suit was an ordinary one to recover possession of real estate, the plaintiff alleging ownership and right to possession, and the defendant not only denying the claims of plaintiff, but averring ownership in himself, it is clear that no reply would have been required. In such a case these allegations of the answer would amount merely to a denial of the claim set up by the plaintiff. Such ownership could have been shown under a general denial."

In the first report of this Wyoming case, found in 5 Wyo. 355, 40 Pac. 527, the court considered at some length the grounds upon which ownership could be shown, under a general denial. After considering the provisions of different Codes as compared with the Wyoming Code, the court said: "It is apparent that, like a general

denial in replevin, under the Code, a general denial in an action for the recovery of realty thereunder is sufficient to let in any legal defense, such as paramount title in the defendant, or in a third person."

It appears that, in the Wyoming case the defendant, as in the case at bar, made, as a matter of first defense, a general denial, and for a second defense alleged its title. The court held that under the Revised Statutes of the United States, under which the adverse claim was brought (U. S. Rev. Stat. § 2326, Comp. St. at 1916, § 4623), which is substantially in accordance with § 3464, Code 1915, a reply is not required. This decision was apparently upon the ground that the allegations of the second ground of defense, or by way of cross complaint, could have been supported by evidence offered under a general denial, and therefore did not constitute new matter calling for a reply.

We therefore conclude that under our Code practice, in actions in ejectment under

§ 3464, Code 1915, it is sufficient, as a general rule, to deny the plaintiff's title, and under such denial, evidence of any matters having a tendency to show that the plaintiff was not vested with the title or right of possession at the time of the commencement of the action is admissible.

The papers in question being admissible under a general denial contained in the answer, it would not be necessary that they should be filed with the pleadings. It also becomes unnecessary to consider the further contention in the matter of the alleged erroneous action of the trial court in overruling the application for leave to file a trial amendment. By virtue of our conclusion in the premises, no trial amendment was necessary.

The matters herein discussed being sufficient for the purposes of this appeal, for the reasons given, the cause is reversed and remanded for a new trial; and it is so ordered.

Parker and Roberts, JJ., concur.

### Annotation — Defenses available under general denial or a plea of the general issue in action of ejectment.

The question whether a given defense is or is not available in an action in the nature of ejectment is not within the scope of this note, which, starting with the assumption that a given defense is available under a proper pleading, deals solely with the question of the scope of the issues raised by a plea of the general issue or, as it is expressed in Code states, by a general denial.

The question as to what the defendant may be permitted to prove under such a plea involves three inquiries: First, what defenses are available under a plea of the general issue, under the common-law system of pleading; second, to what extent the common-law rules have been altered by the various local statutes, regulating actions for the recovery of real property; and, third, to what extent they are affected by the Code system of pleading. These inquiries will not be independently treated, but

will be considered in connection with the admissibility of the various defenses which it has been sought to prove, under plea of the general issue or a general denial.

Owing to the peculiar character of the common-law action of ejectment, special pleading was not ordinarily allowed, and the only plea (apart from pleas in abatement) was the general issue.<sup>1</sup> This rule is, in some states, embodied in statutory form.<sup>2</sup> It follows that many defenses were allowable under a plea of the general issue, in ejectment, which, in other forms of action, were required to be specially pleaded;<sup>3</sup> and this liberal construction is a characteristic of its statutory substitutes as well.<sup>4</sup>

#### Possession and ouster.

Inasmuch as, in a common-law action of ejectment, the tenant in possession was required, as a condition to being ad-

<sup>1</sup> *Moody v. Atkinson* (1910) 165 Ala. 299, 51 So. 621; *Bush v. Thomas* (1911) 172 Ala. 77, 55 So. 622.

In ejectment, defendant can plead only, "Not guilty," and the Statute of Limitations. *Comming v. Butler* (1849) 6 Ga. 88.

<sup>2</sup> Under the New Jersey Ejectment Act (Gen. Stat. page 1282), the defendant is confined to the plea of not guilty. See *Pleasant Cemetery Co. v. Erie R. Co.* (1906) 74 N. J. L. 100, 65 Atl. 192.

Such was also the case in Pennsylvania, prior to 1901. See *Zeigler v. Fisher* (1846) 3 Pa. St. 365.

<sup>3</sup> A general denial, in an ejectment suit, is a favorite plea in the law, and is of unusual breadth, opening a wider door for defenses than in other cases. *Llewellyn v. Llewellyn* (1906) 201 Mo. 303, 100 S. W. 40.

<sup>4</sup> The abolition of the fictions and the common-consent rule, formerly in use in the action of ejectment, in no manner re-

mitted to defend, to enter into the "consent rule," by which the truth of the fictitious averments of lease, entry, and ouster was admitted, the defendant, under a plea of not guilty, was deemed to have admitted his possession of the locus in quo; and, if he wished to dispute the fact, was required to file a disclaimer. It is, accordingly, a rule of general acceptance, except where varied by statute, that the defendant cannot, under a plea of the general issue, dispute the fact of his possession.<sup>5</sup> And this doctrine is, in some states, found in statutory form.<sup>6</sup>

stricts the effect of the general issue plea of not guilty. *Barbour v. Moore* (1894) 4 App. D. C. 535.

<sup>5</sup> *Greer v. Mexes* (1861) 24 How. (U. S.) 268, 16 L. ed. 661; *Holman v. Elliott* (1882) 86 Ind. 231; *Blake v. Dennett* (1861) 49 Me. 102; *Wyman v. Brown* (1863) 50 Me. 139; *Coffin v. Freeman* (1890) 82 Me. 577, 20 Atl. 238; *Wallis v. Wilkinson* (1890) 73 Md. 128, 20 Atl. 787; *Mullen v. Brydon* (1912) 117 Md. 554, 83 Atl. 1025; *French v. Robb* (1902) 67 N. J. L. 260, 57 L.R.A. 956, 91 Am. St. Rep. 433, 51 Atl. 509; *Jacobson v. Hayday* (1912) 83 N. J. L. 537, 83 Atl. 902; *Uish v. Strobe* (1860) 13 Pa. 433; *Hill v. Hill* (1862) 43 Pa. 521; *Kirkland v. Thompson* (1865) 51 Pa. 216.

In a common-law action of ejectment, the plea of not guilty is the equivalent of the "consent rule," which requires the defendant, as a condition to controverting the lessor's title, to admit the truth of the fictitious averments of lease, entry, and ouster. *Perolio v. Doe* (1916) 197 Ala. 560, 73 So. 197.

Defendant cannot deny, under the general issue, the location of the plaintiff's pretensions, as set out in the declaration. *Tongue v. Nutwell* (1861) 17 Md. 212, 79 Am. Dec. 649.

Nontenure cannot be given in evidence, under a plea of the general issue to a writ of entry. *Higbee v. Rice* (1809) 5 Mass. 344, 4 Am. Dec. 63; *Swan v. Stephens* (1868) 99 Mass. 7; *Mills v. Pierce* (1819) 2 N. H. 9; *Graves v. Amoskeag Mfg. Co.* (1863) 44 N. H. 463.

In a writ of entry, if the tenant is not in possession, he may bar the action by a plea of nontenure, or a disclaimer; and if he omits to avail himself of that defense, and pleads the general issue, that, in law, amounts to an admission that he was in possession of the premises when the action was commenced; and he is estopped by his plea to deny the fact, unless he gives notice of his intention so to do by a statement in writing, setting that forth as matter of defense, according to the statute abolishing special pleading in civil actions, and the rule of court in relation thereto. *Mass. Stat. 1896, chap. 273*; *Washington Bank v. Brown* (1841) 2 Met. (Mass.) 293.

To a writ of entry to foreclose a mortgage, a previous entry to foreclose is not

admissible in defense, under the general issue, to show that the tenant was not in possession of the demanded premises. *Devens v. Bower* (1856) 6 Gray (Mass.) 128.

A statute authorizing the defendant, in all civil actions, to plead the general issue, and to give in evidence any special matter in defense of the action, upon filing a brief statement of it, does not take away the admission, which is made by a plea of the general issue in a real action, that the defendant is in possession, claiming a freehold. *Cocheco Mfg. Co. v. Whittier* (1839) 10 N. H. 305.

<sup>6</sup> *King v. Kent* (1857) 29 Ala. 542; *Bernstein v. Humes* (1877) 60 Ala. 582, 31 Am. Rep. 52; *Alexander v. Wheeler* (1881) 69 Ala. 332; *Callan v. McDaniel* (1882) 72 Ala. 102; *Crosby v. Pridgen* (1884) 76 Ala. 385; *Bynum v. Gold* (1894) 106 Ala. 427, 17 So. 667; *Cochran v. Kimbrough* (1908) 157 Ala. 454, 47 So. 709; *Dallam v. Sanchez* (1909) 56 Fla. 779, 47 So. 871; *Bass v. Ramos* (1909) 58 Fla. 161, 50 So. 945, 138 Am. St. Rep. 105; *Walters v. Sheffield* (1918) — Fla. —, 78 So. 539; *Edwardsville R. Co. v. Sawyer* (1899) 92 Ill. 377; *Bromatis v. Amos* (1916) 127 Md. 394, 96 Atl. 554; *Bernard v. Elder* (1874) 50 Miss. 336.

Under § 295 of the Colorado Civil Code, which provides that, in an action for the recovery of possession of real property, if the defendant files or makes any other answer or defense than a disclaimer of title or right of possession, it shall not be necessary for plaintiff to prove him in possession of the premises at any time, the plaintiff is not required, where the defendant files a general denial, to offer proof, either of the possession of the defendant or of acts of ownership by him. *Empire Ranch & Cattle Co. v. Millet* (1913) 24 Colo. App. 464, 135 Pac. 127.

Under the provisions of the Tennessee Code, the plea of not guilty of unlawfully withholding the premises claimed by plaintiff admits that the defendant is in possession of the premises sued for, unless he states distinctly upon the record the extent of his possession. *Lea v. Slatterly* (1874) 7 Baxt. (Tenn.) 235.

<sup>7</sup> *Gallam v. Sanchez* (1909) 76 Fla. 779, 47 So. 871.

<sup>8</sup> Under the Missouri practice, a general



admit ouster,<sup>9</sup> as well as possession, and for the same reason.

#### Matters in abatement.

Since objections not taken by a plea in abatement are considered waived, a plea of the general issue does not, ordinarily, let in proof of matters pleadable in abatement, such as want of jurisdiction in the court,<sup>10</sup> or of capacity in the plaintiff to sue.<sup>11</sup> Although it has been held that defendant may prove, under the general issue, that plaintiff is an alien enemy,<sup>12</sup> this was because the plea of alien enemy was formerly regarded as one in bar as well as in abatement, for a reason which does not now exist. See note in L.R.A.1918B, at p. 194. It is doubtful, therefore, whether such defense would now be regarded as available, under a plea of the general issue. The death of the plaintiff's lessor cannot be taken advantage of under the general issue.<sup>13</sup>

But, under statutes declaring that the plea in ejectment shall be "not guilty," the defendant is allowed to give in evidence matters formerly pleadable in

abatement, such as the death of a plaintiff,<sup>14</sup> coverture of the defendant,<sup>15</sup> or the misnaming of the township in which the land is situate.<sup>16</sup>

#### Matters in bar—in general.

Under the common-law system of pleading, and in the statutory actions in many of the states, whatever operates as a bar may be given in evidence, under the general issue,<sup>17</sup> provided the matter existed at the commencement of the suit.<sup>18</sup>

But, under the Code system of pleading, mere denials only put into issue the allegations of the complaint, and new matter must be specially pleaded,<sup>19</sup> unless an exception to the general rule is created by special Code provision, regulating the pleading in real actions.

So, where statutes exist which provide that the defendant need plead only the general issue,<sup>20</sup> or which require no plea whatever,<sup>21</sup> he may give in evidence anything which tends to defeat the right of the plaintiff to possession of the land in controversy. And the right of the defendant to show, under a general denial,

denial puts the possession in issue. *Carter v. Carter* (1911) 237 Mo. 624, 141 S. W. 873.

Under a statute which provides that the defendant, in an action of trespass to try title, shall not be required to put in any other plea than that of "Not guilty," such plea admits nothing, but puts in issue, not only the title of the plaintiff, but also the possession of the defendant. *Stroud v. Springfield* (1866) 28 Tex. 649.

In Vermont, the statutory plea of not guilty in manner and form as the plaintiff has alleged puts the plaintiff upon the proof of his whole declaration, including possession, and this natural effect of the plea is not varied by the statute relating to a disclaimer. *Stevens v. Griffith* (1831) 3 Vt. 448.

<sup>9</sup> *Tongue v. Nutwell* (1861) 17 Md. 212, 79 Am. Dec. 649; *Clarke v. Hilton* (1883) 75 Me. 426.

<sup>10</sup> The general issue plea of not guilty denies the whole ground of action, and the only exception to the general rule is a plea to the jurisdiction of the court. *Barbour v. Moore* (1894) 4 App. D. C. 535.

<sup>11</sup> Such a plea admits the right of a plaintiff, suing in a representative capacity, to do so. *Clarke v. Clarke* (1874) 51 Ala. 498.

<sup>12</sup> *Jackson ex dem. Johnston v. Decker* (1814) 11 Johns. (N. Y.) 418.

<sup>13</sup> *Worthington v. Etcheson* (1837) 5 Cranch, C. C. 302, Fed. Cas No. 18,053.

<sup>14</sup> *Gosser v. Hickenluper* (1876) 33 Phila. Leg. Int. (Pa.) 24.

<sup>15</sup> *Black v. Tricker* (1866) 52 Pa. 436.

<sup>16</sup> *Stimmel v. Miller* (1890) 8 Pa. Co. Ct. 128.

<sup>17</sup> *Smith v. Cox* (1896) 115 Ala. 503, 22 So. 78; *Edinburgh-American Land Mortg. Co. v. Canterbury* (1910) 169 Ala. 444, 53 So. 823; *Claraday v. Abraham* (1911) 174 Ala. 130, 56 So. 720; *Semple v. Cook* (1875) 50 Cal. 26; *Chicago, R. I. & P. R. Co. v. Welch* (1908) 83 Neb. 106, 118 N. W. 1116; *Martin v. Harvey* (1911) 89 Neb. 173, 130 N. W. 1039.

<sup>18</sup> *Jackson ex dem. Johnston v. Decker* (1814) 11 Johns. (N. Y.) 418; and see also cases cited under heading, "Matters arising subsequently to commencement of suit," *infra*.

<sup>19</sup> *Moss v. Shear* (1866) 30 Cal. 467.

<sup>20</sup> Where the statute provides only for a general denial in proceedings in ejectment, under such plea anything can be shown that tends to defeat the right of the plaintiff to the possession of the land. *Smith v. Hobbs* (1892) 49 Kan. 800, 31 Pac. 687.

In Kansas, a defendant in ejectment, even under a general denial, may interpose any defense which he may have, either legal or equitable in its nature, tending to rebut the right of the plaintiff to the possession of the premises, or tending to establish the right of defendant to possession. *Kelso v. Norton* (1902) 65 Kan. 778, 93 Am. St. Rep. 308, 70 Pa. 896.

In Mississippi, the statute only allows the plea of not guilty, under which all matters of defense may be proved. *Hutto v. Thornton* (1870) 44 Miss. 166.

<sup>21</sup> In an action to recover real estate, brought under the provisions of the Acts

any legal or equitable defense he may have, is, in some jurisdictions, expressly declared by statute.<sup>22</sup> But where the statute provides that, in an ejectment action, "the defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof, unless it may be pleaded in his answer," an answer of general denial creates no issue.<sup>23</sup>

—want of title in plaintiff.

Under the principle above laid down, that all defenses in bar are available under the general issue, the defendant may make proof of any fact tending to show that the plaintiff has no title,<sup>24</sup> such as that the plaintiff's survey does not include the land claimed;<sup>25</sup> that the consideration of a deed, upon which the plaintiff bases his title and right of entry, was illegal,<sup>26</sup> or that it was procured

of May 13, 1852, and March 4, 1853 (2 Rev. Stat. 1876, p. 662), "concerning the unlawful detention of lands," which do not contemplate nor provide for the filing of any pleading or answer by the defendant, all matters of defense may be given in evidence, without pleas. *Boffenberger v. Blackstone* (1877) 57 Ind. 288.

<sup>22</sup> Under the Indiana statute, a defendant in an action for the recovery of real property may show, under a general denial, any legal or equitable defense he may have. *Rowe v. Beckett* (1858) 30 Ind. 154, 95 Am. Dec. 676; *Steele v. Downing* (1878) 60 Ind. 478; *Webster v. Bebinger* (1880) 70 Ind. 9; *Wood v. Eckhouse* (1881) 79 Ind. 354; *West v. West* (1883) 89 Ind. 530; *Hogg v. Link* (1883) 90 Ind. 346; *East v. Peden* (1886) 108 Ind. 92, 8 N. E. 722; *Cincinnati, L. St. L. & C. R. Co. v. Smith* (1890) 127 Ind. 461, 26 N. E. 1009; *Ewing v. Smith* (1892) 132 Ind. 205, 31 N. E. 464; *Waters v. Lyon* (1894) 141 Ind. 170, 40 N. E. 662; *Smith v. American Crystal Monument Co.* (1902) 29 Ind. App. 308, 62 N. E. 1013.

In a proceeding in the nature of a quo warranto, filed by the attorney general for the recovery of certain real estate alleged to have escheated to the state, in which proceeding it is provided by statute that "like proceedings and judgments shall be had as in a civil action for the recovery of property," the defendant, under a general denial, may give in evidence every defense to the action that he may have, either legal or equitable. *State ex rel. Att. Gen. v. Meyer* (1878) 63 Ind. 33.

Under the provision of the Oklahoma Code of Civil Procedure of 1890, that "the answer of the defendant may contain a denial of each material statement, or allegation, in the complaint, under which denial the defendant shall be permitted to give in evidence every defense to the action that he may have, either legal or equitable," all defenses, legal and equitable, may be proven and given in evidence, under a general denial. *Hurst v. Sawyer* (1894) 2 Okla. 470, 37 Pac. 817.

So, under § 6123, Compiled Laws 1909, which provides: "It shall be sufficient in such action if the defendant in his answer deny generally the title alleged in the petition, or that he withholds the possession, as the case may be," the defendant, under

a general denial, may make any defense, legal or equitable, that will strengthen his own title or defeat his adversary's, in the same manner and to the same extent as he could do if the facts were set out with all the circumstantial minuteness and fullness of detail that they usually are in equitable actions. *Rowsey v. Jameson* (1915) 46 Okla. 780, 149 Pac. 880; *Eller v. Noah* (1917) — Okla. —, 168 Pac. 819.

<sup>23</sup> *Allen v. Higgins* (1894) 9 Wash. 446, 43 Am. St. Rep. 847, 37 Pac. 671, construing Washington Code of Procedure, § 532.

<sup>24</sup> *Stockton v. Knock* (1887) 73 Cal. 425, 15 Pac. 51; *Jacob v. Carter* (1893) 4 Cal. Unrep. 543, 36 Pac. 381; *Fitzgerald v. Shelton* (1886) 95 N. C. 519; *Nicholson v. Villepigue* (1913) 97 S. C. 130, 81 S. E. 494; *Orleans County Grammar School v. Parker* (1853) 25 Vt. 696; *Meade v. Lawe* (1873) 32 Wis. 261; *Fowler v. Scott* (1885) 64 Wis. 509, 25 N. W. 716.

Under a plea of "Not guilty" the defendant may show any facts going to title, whether in denial and disproof, merely, of the title relied on by the plaintiff, or in support of a superior and independent right, however acquired, in the defendant. *Bynum v. Gold* (1894) 106 Ala. 427, 17 So. 667.

Under a general denial, the defendant may introduce any evidence which tends to disprove the facts, alleged in the complaint, showing the source and chain of plaintiff's title and right of possession. *Bartleson v. Munson* (1908) 105 Minn. 348, 117 N. W. 512.

<sup>25</sup> Defendant in an action of trespass to try title may prove, without special plea, that the plaintiff's survey does not include the land claimed as in controversy. *Dalby v. Booth* (1856) 16 Tex. 564.

<sup>26</sup> Where the plaintiff claims title under a deed from the defendant, evidence is admissible to show that the consideration of the deed under which the plaintiff bases his title and right of entry was illegal, and that the deed was, therefore, void. *Sparrow v. Rhoades* (1888) 76 Cal. 208, 9 Am. St. Rep. 197, 18 Pac. 245.

Under the general issue, in ejectment, it is competent for the defendant to show that a deed relied on by the plaintiff was made with intent to defraud creditors. *Knox v. McFarren* (1878) 4 Colo. 586.

by fraud,<sup>27</sup> or that it was champertous,<sup>28</sup> or that it was a forgery,<sup>29</sup> or invalid for any other reason.<sup>30</sup> He may attack the

validity of a tax title under which the plaintiff claims.<sup>31</sup>

When the strict legal title is not in-

<sup>27</sup> In ejectment, the defendant may show that the claim of plaintiff is fraudulent and bad, and thus avoid the plaintiff's title. *Springer v. Kleinsorge* (1884) 83 Mo. 156 (dictum).

Under the statutory rules of pleading in Nebraska, the defendant may show fraud in the deed upon which the plaintiff relies, without pleading it. *Franklin v. Kelley* (1873) 2 Neb. 79.

Under a general denial, the defendant may show a deed in plaintiff's chain of title was procured by fraud and undue means. *Staley v. Housel* (1892) 35 Neb. 160, 52 N. W. 888.

In an action for the recovery of real estate, the complaint in which is in the ordinary form, and does not disclose the origin of plaintiff's title, the defendant, under the general denial, may prove that the title offered by the plaintiff is void for fraud. *Mather v. Hutchinson* (1869) 25 Wis. 27.

It is competent, under a general denial, to show that any deed in the chain of title of the plaintiff is void because made contrary to statute, or by a grantor mentally incapable, or for fraud in the factum. *Fleming v. Sexton* (1916) 172 N. C. 250, 90 S. E. 247 (dictum).

Defendant may prove, under a general denial, that a link in the chain of plaintiff's title was obtained by fraud and undue influence. *Carr v. Mouzon* (1912) 93 S. C. 161, 76 S. E. 201, Ann. Cas. 1914C, 731.

<sup>28</sup> *Krauth v. Hahn* (1901) 139 Ky. 607, 65 S. W. 18; *Keaton v. Sublett* (1900) 109 Ky. 106, 58 S. W. 528.

He may show, under a general denial, that the instruments under which the plaintiff claims to have derived title and right to possession, purporting to be grants, are not such in fact, because contrary to the statute, which provides that "every grant of land shall be absolutely void if, at the time of delivery thereof, such land shall be in the actual possession of a person claiming under a title adverse to that of the grantor." *Hughes v. Hughes* (1894) 10 Misc. 180, 30 N. Y. Supp. 937, reargument denied in (1895) 14 Misc. 63, 35 N. Y. Supp. 679.

<sup>29</sup> He may, under a general denial, show that a deed of trust, on which plaintiff's right to possession rests, is a forgery, or otherwise void. *Patton v. Fox* (1902) 169 Mo. 97, 69 S. W. 287.

Under a general denial, the defendant may show that a deed in plaintiff's chain of title is a forgery. *Martin v. Harvey* (1911) 89 Neb. 173, 130 N. W. 1039.

Where title to real property is alleged generally, without derailing the title, the adverse party may show, under the general issue, that a deed forming a link in the chain of title relied on is a forgery, without special plea to that effect. *Chrast v. O'Connor* (1906) 41 Wash. 360, 83 Pac. 238.

<sup>30</sup> Under a statute providing, in relation to possessory actions, that the answer to a complaint "shall either specifically or generally deny the material allegations of the complaint. . . . The answer may also state generally as in the complaint the character of the estate in the premises, or any part thereof which the defendant claims, or any right of possession or occupancy he claims," the defendant may, where the plaintiff claims under a trustee's deed, show, under a general denial, fraud of the trustee, in executing the trustee's deed without having first sold the land at public auction, as required by the deed. *Stratton v. Murray* (1914) 25 Colo. App. 395, 138 Pac. 1015.

Under the general issue, defendant may show that a deed of trust, under which plaintiff claims, was delivered as an escrow, and not absolutely, and that the sale thereunder was made at the wrong place. *Goff v. Roberts* (1880) 72 Mo. 570.

Under a statute which provides that, "in all suits where the defendant relies on a denial of the cause of action as set forth by the plaintiff, he may plead the general issue, and in all other cases the defendant must briefly plead specially the matter of defense," the defendant in ejectment cannot, under the plea of not guilty, prove payment or satisfaction of the mortgage under which the plaintiff claims title. *Slaughter v. Swift* (1880) 67 Ala. 494. But in *Bynum v. Gold* (1894) 106 Ala. 427, 17 So. 667, it is said that the court, in the foregoing case, seems to have overlooked the fact that the only cases to which the plea of not guilty is made appropriate by the Code are actions for defamation, or for injuries to the person or to real or personal property, and that that section does not, therefore, apply to actions of ejectment, or the statutory action for the recovery of land; but that the admissibility of evidence, under the plea of not guilty, in an action prosecuted under the statute for the recovery of land, is governed by the Code provision that "the general issue in an action in the nature of ejectment is 'Not guilty,' and, under it, the defendant may give in evidence the same matters which may be given in evidence under such plea in an action of ejectment."

Where the plaintiff claims title under a patent from the government, defendant may prove that the patentee was dead at the time the patent issued. *Collins v. Brannin* (1825) 1 Mo. 540.

He may show the invalidity of any conveyance produced by the plaintiff, as a link in his chain of title. *Mobley v. Griffin* (1889) 104 N. C. 112, 10 S. E. 142.

Any deed offered as a link in a chain of title is thereby exposed to attack for incapacity in the maker, or because it was void under the Statute of Frauds, though it may not have been mentioned in the plead-

volved, and the plaintiff relies upon a right to recover, founded upon naked possession, the defendant may defeat a recovery by proving that the premises were abandoned by the plaintiff before the alleged entry of defendant; and he may do this under a simple denial of the plaintiff's right to the possession. In such cases, the issue is: Was the plaintiff entitled to the possession at the date of defendant's entry? and anything which shows that he was not is but matter in rebuttal, and competent evidence for the defendant, under the general issue.<sup>33</sup>

Where the plaintiff relies upon title acquired by virtue of an adverse possession for the period prescribed by the Statute of Limitations, but alleges his seisen generally in his complaint, without setting out the statute or the nature of his title, the defendant need not plead an exception to the statute upon which he relies.<sup>34</sup>

He may, where there are several plaintiffs, introduce evidence, under the general issue, disproving their joint title and right of possession.<sup>34</sup>

A general denial of plaintiff's ownership of the land, when the alleged title is set forth specifically, raises no issue, inasmuch as it controverts no facts, but only a legal conclusion.<sup>35</sup>

Where plaintiff pleads title in himself by alleging the source of his title the defendant cannot, under a general denial in his answer, prove that after the plaintiff acquired that title he conveyed it to a third party, as that is not denial, but confession and avoidance.<sup>36</sup> But where the plaintiff in his complaint averred title of the demanded premises in himself, and the answer denies the averment, the defendant may show, on the trial, that the plaintiff had divested himself of the title before the commencement of the action, by executing a deed to a third party.<sup>37</sup>

#### — outstanding title in third person.

Inasmuch as the plaintiff must recover on the strength of his own title and not the weakness of the defendant's, the latter may, under the general issue, show an outstanding title in a third person,<sup>38</sup> except where such defense is not admitted by the local statute,<sup>39</sup> or where

ings. *Helms v. Green* (1890) 105 N. C. 251, 18 Am. St. Rep. 893, 11 S. E. 470.

Under a general denial in an action of ejectment, where the plaintiff does not set out his source of title, but upon the trial relies upon a tax title, it is competent for the defendant to introduce in evidence any facts which might show or tend to show that the plaintiff had no right of entry when the suit was brought, and which might tend to defeat the title of the plaintiff, or show want of consideration for the deed under which plaintiff claims title and right of entry. *Eastman v. Gurrey* (1897) 15 Utah, 415, 49 Pac. 310.

The defendant in an action of ejectment may show, without setting it up especially, any matter which would defeat the plaintiff's title, or render the deed on which he relies for title ineffectual for that purpose, or show that such deed ought to inure to the benefit of the defendant. *Begg v. Begg* (1883) 56 Wis. 536, 14 N. W. 602.

<sup>31</sup> Under a general denial, he may show payment of a tax, on the sale for which plaintiff's title is based. *Lain v. Shepardson* (1868) 23 Wis. 224.

Where the complaint in an ejectment action is general in its terms, making no reference to the character of the title under which the plaintiff claims, and the plaintiff relies on tax deeds to recover, the defendant may, under a general denial, introduce any evidence allowed by the statute, to show the invalidity of the tax deeds or the title acquired under them. *Roberts v. Chan Tin Pen* (1863) 23 Cal. 259.

<sup>33</sup> *Willson v. Cleveland* (1866) 30 Cal. 192.

<sup>35</sup> *Palmer v. Low* (1878) 98 U. S. 1, 25 L. ed. 60, affirming (1872) 2 Sawy. 248, Fed. Cas. No. 10,693.

<sup>34</sup> *Cheney v. Cheney* (1854) 26 Vt. 606.

<sup>35</sup> *Harvey v. Douglass* (1904) 73 Ark. 221, 83 S. W. 946; *Davis v. Beauchamp* (1911) 99 Ark. 404, 138 S. W. 636.

<sup>36</sup> *Kennedy v. McQuaid* (1894) 56 Minn. 450, 58 N. W. 35.

<sup>37</sup> *Dyson v. Bradshaw* (1863) 23 Cal. 528.

<sup>38</sup> *Matkin v. Marx* (1892) 96 Ala. 501, 11 So. 633; *Bleidoran v. Pilot Mountain Coal & Min. Co.* (1890) 89 Tenn. 166, 204, 15 S. W. 737; *Woods v. Bonner* (1890) 89 Tenn. 411, 18 S. W. 67; *Cowan v. Hatcher* (1900) — Tenn. —, 59 S. W. 689; *Townsend v. Donner* (1859) 32 Vt. 183; *Henderson v. Wanamaker* (1897) 25 C. C. A. 181, 49 U. S. App. 174, 79 Fed. 736.

Under a statute authorizing the defendant, in an action of trespass to try title, to offer in evidence any matter material to his defense, under the plea of not guilty, he may give evidence of a superior outstanding title in a third person, although he may not claim thereunder. *Styles v. Gray* (1853) 10 Tex. 503.

<sup>39</sup> Upon a writ of entry under the Maine statute, which provides that "in the trial upon such writ, on the general issue, if the plaintiff proves that he is entitled to such estate in the premises as he has alleged, and had a right of entry therein when he commenced his action, he shall recover the premises, unless the tenant proves a better

he is required to plead specifically the facts constituting his defense.<sup>40</sup>

—title in himself.

A fortiori defendant may show title in himself at the commencement of the action,<sup>41</sup> as, for example, that he is entitled to possession as tenant by the curtesy;<sup>42</sup> and facts which make his title good, such as the confirmation of a deed under which he claims, by an infant grantor, after becoming of age,<sup>43</sup> or that he was a bona fide purchaser for value.<sup>44</sup> In some jurisdictions, however, he is

required by statute to plead title in himself, as a condition to making such defense.<sup>45</sup>

—Statute of Limitations.

While, as a general proposition, the Statute of Limitations must be specially pleaded, yet this is not the case in actions for the recovery of land; but, in such actions the bar of the statute may be proved under the general issue, since, though a special matter in its nature, it goes not only to defeat the pending ac-

title in himself," title in a third party is not an available defense under plea of the general issue. *Wyman v. Brown* (1863) 50 Me. 139.

<sup>40</sup> Under the Code system of pleading, the defendant may prove, under a general denial, that a third party has a better title. *Piercey v. Sabin* (1858) 10 Cal. 22, 70 Am. Dec. 692.

Under the Code provision which requires the parties to allege specifically the facts which constitute the cause of action or defense, an outstanding title cannot be given in evidence, under a general denial. *Millhollin v. Jones* (1856) 7 Ind. 715.

<sup>41</sup> *Marshall v. Shafter* (1867) 32 Cal. 176; *Bruck v. Tucker* (1771) 42 Cal. 346; *Phillips v. Hagart* (1896) 113 Cal. 562, 54 Am. St. Rep. 369, 45 Pac. 843; *Hall v. Dodge* (1877) 18 Kan. 277; *Armstrong v. Brownfield* (1880) 32 Kan. 116, 4 Pac. 185; *Howton v. Roberts* (1899) 20 Ky. L. Rep. 1331, 49 S. W. 340; *Estes v. Long* (1880) 71 Mo. 605; *Macey v. Stark* (1893) 118 Mo. 481, 21 S. W. 1088; *Macey v. Pitillo* (1893) — Mo. —, 21 S. W. 1094; *Meyendorf v. Frohner* (1879) 3 Mont. 282, 5 Mor. Min. Rep. 559; *Raymond v. Timerson* (1866) 46 Barb. 518; *Williams v. Barnett* (1879) 52 Tex. 130; *Kalm v. Old Teleg. Min. Co.* (1877) 2 Utah, 174, 11 Mor. Min. Rep. 645; *Iba v. Central Asso.* (1895) 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20.

In Kansas, a defendant, for the purpose of defeating plaintiff's action in ejectment, may show, under a general denial, a paramount title in himself, provided his title carries with it the right of possession, whether his title to the property in question is legal or equitable, and whether the plaintiff's title to such property is legal or equitable. The statute provides that "it shall be sufficient in such action if the defendant in his answer denies generally the title alleged in the petition, or that he withholds the possession, as the case may be; but if he denies the title of the plaintiff, possession by the defendant shall be taken as admitted." *Clayton v. School Dist.* (1878) 20 Kan. 256.

Defendant may show a title alleged to have been acquired from the plaintiff himself, through a judicial sale. *Brown v. Brown* (1870) 45 Mo. 412; *Meyers v.*

*Gale* (1870) 45 Mo. 416; *Davis v. Peveler* (1877) 65 Mo. 189.

Under the statutory plea of the general issue, defendant may show title in himself. *Stewart v. Camden & A. R. Co.* (1868) 33 N. J. L. 115.

Evidence which is admissible under a plea of liberum tenementum is admissible under the general issue. *Fairfield v. Brown-ing* (1848) 1 Ind. 322.

<sup>42</sup> *Fleming v. Sexton* (1916) 172 N. C. 250, 90 S. E. 247.

<sup>43</sup> *McCormie v. Leggett* (1882) 53 N. C. (8 Jones, L.) 425.

<sup>44</sup> *Bynum v. Gold* (1894) 106 Ala. 427, 17 So. 667.

<sup>45</sup> Under the Illinois statute, the plea of not guilty does not put in issue the defendant's claim of title, or interest therein, but such claim must be set up by special plea, verified by affidavit. *Glos v. Spitzer* (1907) 226 Ill. 82, 80 N. E. 743; *Phillips v. Glos* (1912) 255 Ill. 58, 99 N. E. 77.

Under the provision of Kentucky Civil Code, § 125, subsection 2, that, in an action for the recovery of land, "the answer of the defendant must state whether or not he claims it or any part of it," the defendant cannot set up a claim to the land, unless he pleads it. *Brent v. Long* (1896) 99 Ky. 245, 35 S. W. 640.

Under the Oregon statute, which provides that "the defendant shall not be allowed to give in evidence any estate in himself or another in the property . . . unless the same be pleaded in his answer," he may, under a general denial, merely introduce evidence to show the weakness of the plaintiff's title (*Phillippi v. Thompson* (1880) 8 Or. 428); and a defendant who pleads no right or title may not offer evidence of title. *Gallagher v. Kelliher* (1911) 58 Or. 557, 114 Pac. 943, 115 Pac. 596; *Hall v. Austin* (1864) Deady, 104, Fed. Cas. No. 5,925; *Stark v. Starr* (1870) 1 Sawy. 15, Fed. Cas. No. 13,307; *Thornburn v. Doscher* (1887) 13 Sawy. 60, 32 Fed. 810. Accordingly, the defense that the land sought to be recovered in an ejectment action was a portion of a public road, and was so used up to the time of defendant's occupancy, is not available, unless pleaded. *Oregon R. & Nav. Co. v. Hertzberg* (1894) 26 Or. 216, 37 Pac. 1019.

tion, but to establish title in the defendant.<sup>46</sup> And the rule that the statute need not be pleaded as a defense applies in the case of a special Statute of Limitations

contained in a tax law.<sup>47</sup> The defense has been held admissible, where the only plea required by the statute is a general denial, or "Not guilty."<sup>48</sup> Its admissi-

<sup>46</sup> *Bynum v. Gold* (1894) 106 Ala. 427, 17 So. 667; *Vadeboncoeur v. Hannon* (1909) 159 Ala. 617, 49 So. 292; *Smith v. Bachus* (1915) 195 Ala. 8, 70 So. 281; *Trowbridge v. Royce* (1789) 1 Root (Conn.) 50; *Morris v. Wheat* (1893) 1 App. D. C. 237; *McMillan v. Fuller* (1914) 41 App. D. C. 384; *Wade v. Doyle* (1880) 17 Fla. 522; *Weiskoph v. Dibble* (1881) 18 Fla. 24; *Neal v. Spooner* (1883) 20 Fla. 38; *Payne v. Ormond* (1871) 44 Ga. 514; *Stubblefield v. Borders* (1879) 92 Ill. 279; *Dale v. Frisbie* (1877) 59 Ind. 530; *Brown v. Maher* (1879) 68 Ind. 14; *Asher v. Howard* (1906) 122 Ky. 175, 91 S. W. 270; *Miller v. Beck* (1888) 68 Mich. 76, 35 N. W. 899; *Tegarden v. Carpenter* (1858) 36 Miss. 404; *Wilson v. Williams* (1876) 52 Miss. 487; *Bell v. Coats* (1879) 56 Miss. 776; *Dean v. Tucker* (1880) 58 Miss. 487; *Nelson v. Broadhack* (1869) 44 Mo. 596, 100 Am. Dec. 328; *Bledsoe v. Simms* (1873) 53 Mo. 305; *Hill v. Bailey* (1882) 76 Mo. 454, affirming (1879) 8 Mo. App. 85; *Fulkerson v. Mitchell* (1884) 82 Mo. 13; *Campbell v. Laclede Gaslight Co.* (1884) 84 Mo. 352, affirmed in (1886) 119 U. S. 445, 30 L. ed. 459, 7 Sup. Ct. Rep. 278; *Fairbanks v. Long* (1847) 91 Mo. 628, 4 S. W. 499; *Holmes v. Kring* (1887) 93 Mo. 452, 6 S. W. 347; *Stocker v. Green* (1889) 94 Mo. 280, 4 Am. St. Rep. 392, 7 S. W. 279; *Coleman v. Drane* (1893) 116 Mo. 387, 22 S. W. 801; *Collins v. Pease* (1898) 146 Mo. 135, 47 S. W. 925; *Hedges v. Pollard* (1899) 149 Mo. 216, 50 S. W. 889; *Johnson v. Calvert* (1914) 260 Mo. 442, 169 S. W. 78; *Fink v. Dawson* (1897) 52 Neb. 647, 72 N. W. 1037; *Oldig v. Fisk* (1897) 53 Neb. 156, 73 N. W. 661; *Murray v. Romine* (1900) 60 Neb. 94, 82 N. W. 318; *Freeman v. Sprague* (1880) 82 N. C. 366; *Farrion v. Houston* (1886) 95 N. C. 578; *Cheatham v. Young* (1893) 113 N. C. 161, 37 Am. St. Rep. 617, 18 S. E. 92; *Fleming v. Sexton* (1916) 172 N. C. 250, 90 S. E. 247; *Kyser v. Cannon* (1876) 29 Ohio St. 359; *Rhodes v. Gunn* (1880) 35 Ohio St. 387; *Hogan v. Kurtz* (1876) 94 U. S. 773, 24 L. ed. 317.

In *Taylor v. Horde* (1757) 1 Burr. 119, 97 Eng. Reprint, 190, Lord Mansfield said: "Ejectment is a possessory remedy, and only competent where the lessor of the plaintiff may enter; therefore, it is always necessary for the plaintiff to show that his lessor had a right to enter, by proving a possession within twenty years, or accounting for the want of it under some of the exceptions allowed by the statute. Twenty years' adverse possession is a positive title to the defendant; it is not a bar to the action or remedy of the plaintiff only, but takes away his right of possession. Every plaintiff in ejectment must show a right of possession, as well as of property; and

therefore the defendant need not plead the statute."

The general rule is that the Statute of Limitations must be pleaded, and the reason therefor is, that all defenses of confession and avoidance must be affirmatively pleaded. In their very nature, they cannot be aptly proved, under a plea which simply denies the allegations of the pleading answered. But this rule has no application, where the cause of action alleged to be barred is not set out in the declaration or former pleading. *Emory v. Keighan* (1878) 88 Ill. 482.

The necessity of pleading the Statute of Limitations depends upon its effect, whether it merely suspends the remedy, or vests in the defendant the absolute title to the property. If the latter, there is no more necessity of pleading it than if he held plaintiff's title. *Nelson v. Brodhack* (1869) 44 Mo. 596, 100 Am. Dec. 328.

In *Bird v. Sellers* (1892) 113 Mo. 580, 21 S. W. 91, it is said that it is true that, in some instances, there is a distinction made by law writers between cases where the Statute of Limitations confers absolute title, and cases where it only operates as a suspension of the remedy; but that there is no distinction, where the title to real estate is involved, and the statute is relied on as a defense.

Evidence that defendant's grantor had title by adverse possession, and was in adverse possession when plaintiff's grantor received her deed from the true owner, is admissible, under a general denial. *Stevens v. Smoker* (1911) 84 Conn. 569, 80 Atl. 788.

In ejectment, where the plaintiff relies upon a sale made under a mortgage, after the debt was barred by the statute, the defendant may avail himself of the statute as against the title, under the general issue. *Emory v. Keighan* (Ill.) supra.

In an action in the nature of a writ of right, it is incumbent on the defendant to prove his seisin within the time limited by law, and the defendant is not therefore required to plead the Statute of Limitations. *Ellis v. Murray* (1854) 28 Miss. 129.

<sup>47</sup> *Bird v. Sellers* (1892) 113 Mo. 580, 21 S. W. 91.

<sup>48</sup> Under the Kansas statute, which provides that it shall be sufficient if the defendant deny generally the title alleged in the petition, or that he withholds the possession, the defendant need not plead the Statute of Limitations before it can be interposed as a defense. *Taylor v. Dahley* (1911) 83 Kan. 646, 112 Pac. 595, 21 Ann. Cas. 1241; *Wiggins v. oPwell* (1915) 96 Kan. 478, 152 Pac. 769.

In Ohio, in an action for the recovery of real property under the Code, it is not

bility is sometimes affirmed by statute,<sup>49</sup> and sometimes denied.<sup>50</sup>

It has been held that the rule that, under a plea of not guilty, in an action of ejectment, the defendant may prove an adverse possession, is not changed by a statute, providing that if the defendant wishes to deny possession of the premises, or wishes to deny the complaint adversely to the plaintiff or to his title, it must be done by special plea.<sup>51</sup> But under a statute requiring defendant to plead an estate in himself, or right to possession, the defendant cannot, under a general denial, introduce affirmative evidence to show title in himself by adverse possession.<sup>52</sup>

Under the Code system of pleading, where it does not appear upon the face of the complaint that the action is barred by a Statute of Limitations, the objection must be raised by the answer.<sup>53</sup> And Code provisions, that the objection that the action was not commenced

within the time limited can be taken only by answer, have been held applicable to actions in the nature of ejectment,<sup>54</sup> the only exception being where the facts by which the statute operates as a bar are sufficiently stated in the complaint.<sup>55</sup>

#### —miscellaneous.

Under a plea of the general issue, or a general denial, the defendant may set up a right of homestead in himself.<sup>56</sup>

He may show that the plaintiff has no present right to the possession,<sup>57</sup> or that his own possession is lawful.<sup>58</sup>

#### —equitable defenses.<sup>59</sup>

At common law, an equitable defense was, of course, unavailable in an action of ejectment; so, where it was made available by statute the question arose whether the liberal rule which let in proof of matters in bar, under a plea of the general issue, should be extended to let in equitable defenses. The general rule, both in Code and non-Code states,

necessary for a defendant, relying on the Statute of Limitations, especially to set up the statute in his answer. *Wintermute v. Montgomery* (1860) 11 Ohio St. 442.

Under a statute enacting that "the plea in ejectment shall be not guilty," the defendant need not plead the Statute of Limitations. *Gallagher v. McNutt* (1817) 3 Serg. & R. (Pa.) 409.

<sup>49</sup> Under the Indiana statute, the Statute of Limitations, or any other legal or equitable defense, can be given in evidence under the general denial, without pleading it specially, in actions for the recovery of real estate. *Vail v. Halton* (1860) 14 Ind. 344; *Woodruff v. Garnor* (1863) 20 Ind. 174; *Brown v. Fodder* (1882) 81 Ind. 491; *Brown v. Lee* (1882) 83 Ind. 598.

<sup>50</sup> Under the statute, in Colorado, since 1877, the Statute of Limitations must be specially pleaded in an ejectment suit, or the defense will be considered waived. *Livingston v. Colorado Springs Co.* (1886) 9 Colo. 597, 14 Pac. 212.

In Texas, a claim of title under the Statute of Limitations is required by law to be specially pleaded. *Custard v. Musgrove* (1877) 47 Tex. 217.

<sup>51</sup> *Horn v. Carter* (1883) 20 Fla. 45.

<sup>52</sup> *Brown v. Haley* (1909) 56 Wash. 218, 105 Pac. 478.

<sup>53</sup> *Meeks v. Hahn* (1862) 20 Cal. 620; *McCreery v. Duane* (1877) 52 Cal. 262; *Allen v. McKay* (1902) 6 Cal. Unrep. 993, 70 Pac. 8.

<sup>54</sup> *Hanse v. Mead* (1882) 27 Hun. (N. Y.) 162; *Orton v. Noonan* (1870) 25 Wis. 672; *Lawrence v. Kenney* (1873) 32 Wis. 281; *Paine v. Comstock* (1883) 57 Wis. 159, 14 N. W. 910.

<sup>55</sup> *Paine v. Comstock* (Wis.) supra.

<sup>56</sup> *Morrison v. Watson* (1886) 95 N. C. 479; *Johnson v. Adleman* (1864) 35 Ill.

265; *Swan v. Stephens* (1868) 99 Mass. 7 (under a plea of nul disseisin to a writ of entry).

Where the complaint merely alleges plaintiff's title generally, without disclosing by what means he acquired it, the defendant, under a general denial in the answer, may show that, by reason of the homestead character of the property, the plaintiff did not acquire title thereto under an execution sale. *Kipp v. Bullard* (1882) 30 Minn. 84, 14 N. W. 364.

<sup>57</sup> *Carter v. Scaggs* (1866) 38 Mo. 302.

<sup>58</sup> In a suit in the nature of trespass to try title, a mere possessory right in the defendant may be given in evidence, under the general issue. *Cooley v. O'Connor* (1871) 12 Wall. (U. S.) 391, 20 L. ed. 446.

He may show a right of possession in himself, as a tenant of the plaintiff. *Roosevelt v. Hungate* (1884) 110 Ill. 595.

Or of one through whom plaintiff claims. *Cunningham v. Rouah* (1900) 157 Mo. 336, 57 S. W. 769.

A defendant need not set up, specifically, in the answer, those facts which merely refute the claim of a right of entry, such as an outstanding term. *Crowley v. Murphy* (1895) 11 Misc. 579, 32 N. Y. Supp. 806.

<sup>59</sup> "As to what constitutes an equitable defense, the better view, and that supported by the weight of authority, seems to be that any state of facts which would entitle the defendant, in a proper case, to the reformation of an instrument, or which would, under the former practice, if set up in a bill for that purpose, invoke the aid of a court of chancery for relief against the claim or title put forward by the plaintiff, would be a defense coming within that definition." *East v. Peden* (1886) 108 Ind. 92, 8 N. E. 722.

is that an equitable defense cannot be proven under a general denial or plea of the general issue, but must be set forth with the same particularity as would be required in a bill for equitable relief.<sup>60</sup> But in some states it has been held that, if the defendant possesses an equity which negatives the plaintiff's right of possession, such equity may be proved under a general denial, as it is a mere defense to the action; but if the defendant seeks affirmative relief, such as to

enforce a contract which does not give him the right of possession, but does give him a right to demand a specific execution of the contract by the plaintiff, upon which the right to continue in possession of the premises depends, he must plead the facts entitling him to such relief.<sup>61</sup> A like distinction has been made in jurisdictions in which the right of a defendant to avail himself of an equitable defense, under a general denial, is affirmed by statute,<sup>62</sup> and in jurisdictions where

<sup>60</sup> *Estrada v. Murphy* (1861) 19 Cal. 248; *Lestrade v. Barth* (1862) 19 Cal. 660; *Downer v. Smith* (1864) 24 Cal. 114; *Blum v. Robertson* (1864) 24 Cal. 127; *Cadiz v. Majors* (1867) 33 Cal. 288; *Kenyon v. Quinn* (1871) 41 Cal. 325; *McCauley v. Fulton* (1872) 44 Cal. 355; *Tormey v. True* (1872) 45 Cal. 105; *Miller v. Fulton* (1873) 47 Cal. 146; *Manley v. Howlett* (1880) 55 Cal. 94; *Kentfield v. Hayes* (1881) 57 Cal. 409; *Arguello v. Bours* (1885) 67 Cal. 447, 8 Pac. 49; *Dondero v. O'Hara* (1906) 3 Cal. App. 633, 86 Pac. 985; *Mitchell v. Moses* (1911) 16 Cal. App. 594, 117 Pac. 685; *Petty v. Mays* (1883) 19 Fla. 652; *Freeman v. Brewster* (1897) 70 Minn. 203, 72 N. W. 1068; *Kennedy v. Daniels* (1854) 20 Mo. 104; *Carman v. Johnson* (1854) 20 Mo. 108, 61 Am. Dec. 593; *Le Beau v. Armitage* (1870) 47 Mo. 138; *Russell v. Whitely* (1875) 59 Mo. 196; *Feller v. Lee* (1910) 225 Mo. 319, 124 S. W. 1129; *Lamme v. Dodson* (1883) 4 Mont. 560, 2 Pac. 298; *Ming v. Foote* (1890) 9 Mont. 201, 23 Pac. 515; *Uppfalt v. Nelson* (1886) 18 Neb. 533, 26 N. W. 362; *Brady v. Husby* (1893) 21 Nev. 453, 33 Pac. 801; *Talbert v. Recton* (1892) 111 N. C. 543, 16 S. E. 322; *Patterson v. Galliher* (1898) 122 N. C. 511, 29 S. E. 773; *Windley v. Swain* (1909) 150 N. C. 356, 134 Am. St. Reo. 923, 63 S. E. 1057; *McClory v. Ricks* (1902) 11 N. D. 38, 88 N. W. 1042; *Stewart v. Hoag* (1861) 12 Ohio St. 623; *Anderson v. Rasmussen* (1894) 5 Wyo. 44, 36 Pac. 820.

Where plaintiffs in ejectment claim as pretermitted heirs, defendant may not show, under the general issue, that they have received advancements, and that he has made improvements on the land. *McCracken v. McCracken* (1878) 67 Mo. 590.

A defendant cannot show that a deed in the chain of his adversary's title, absolute in form, was a mere mortgage, unless he expressly pleads it. *Locklear v. Bullard* (1903) 133 N. C. 260, 45 S. E. 580.

<sup>61</sup> *Dale v. Hunneman* (1881) 12 Neb. 221, 10 N. E. 711.

In *Freeman v. Brewster* (1897) 70 Minn. 203, 72 N. W. 1068; *Mitchell, J.*, in a concurring opinion, said: "I think the following is the true test as to whether, in action of ejectment, a defendant can prove an equity under a general denial: If he has an equitable estate, which, as it exists and without any affirmative relief, defeats plaintiff's claim to the possession, it may

be proved under a general denial, being strictly defensive in its nature. But if the equity is such that it does not give the defendant the right of possession as against the legal title, without affirmative relief enforcing the equity, then the defendant must plead the facts entitling him to such relief, the matter being in the nature of a counterclaim." And this statement of the law is cited with approval in *Travelers Ins. Co. v. Walker* (1899) 77 Minn. 438, 80 N. W. 618.

So, if the defendant holds under a contract which does not, of itself, give him the right of possession, but does give him the right to demand a specific performance of the contract with the plaintiff, upon which his right to retain possession of the premises depends, he must plead the facts entitling him to such relief. *Ibid.*

The defendant cannot, under a general denial, prove that he has not been paid the consideration for which he sold the land to the plaintiff. *Colvin v. Republican Valley Land Assn.* (1888) 23 Neb. 75, 8 Am. St. Rep. 114, 36 N. W. 361.

A defendant in the actual occupancy of land may show, under a general denial, that he is the equitable owner. *Pinkham v. Pinkham* (1901) 61 Neb. 336, 85 N. W. 285.

In an action of ejectment by one claiming under the husband's purchase of a title adverse to that of his wife, the defense that such purchase, inured to her benefit may be shown, under a general denial. *Hickman v. Link* (1888) 97 Mo. 482, 10 S. W. 600.

<sup>62</sup> In Indiana, under a general denial, defendant may set up an equitable title (*Tracy v. Kelley* (1876) 52 Ind. 535); but, under such an answer of denial, affirmative relief cannot be granted, and the defendant's title quieted. *Emily v. Harding* (1876) 53 Ind. 102; *Crecelius v. Mann* (1882) 84 Ind. 147.

But a defendant is not compelled to become an actor and ask affirmative relief by way of counterclaim. He may rely upon the facts, as an equitable defense to defeat his adversary's claim. *East v. Pedin* (1886) 108 Ind. 92, 8 N. E. 722.

Under a statute providing that, under the general denial in ejectment, the defendant shall be permitted to give in evidence every defense to the action that he may have, either legal or equitable, the defend-



no other plea than "Not guilty" is required by statute.<sup>63</sup> It has been held, in Kansas and Texas, that the effect of the statute, providing that it shall be sufficient for the defendant to make general denial or plead the general issue, is to let in equitable defenses, without further plea,<sup>64</sup> unless affirmative relief is desired;<sup>65</sup> but a contrary view has been taken in Ohio.<sup>66</sup>

—estoppel.

The same liberality which admits evidence of other defenses, under a plea of the general issue in actions of ejectment, operates to constitute such action an exception to the rule that an estoppel, to be available, must be pleaded.<sup>67</sup> While some courts have held that the defendant in an ejectment action may not avail himself of an equitable estoppel, under a plea of the general issue,<sup>68</sup> they have

ant may introduce evidence tending to show a mistake in the description of the real estate contained in the conveyance under which he claims. *Wienke v. Deputy* (1903) 31 Ind. App. 621, 68 N. E. 921.

<sup>63</sup> See note 65 infra.

<sup>64</sup> Under a statute providing that, in an action of ejectment, it is sufficient for the defendant to deny generally the title alleged in the petition, the defendant may show, under a general denial, that he is the equitable owner of the property. *Wicks v. Smith* (1877) 18 Kan. 508; *Adam v. Johnson* (1901) 63 Kan. 886 (mem.) 65 Pac. 662.

In an action to recover the possession of land, where the defendants answer is a general denial, he may prove a parol agreement between the parties for a division of the land and the making of conveyances to each other, by which they intended to convey the respective tract according to the settlement, notwithstanding the deeds do not convey the land, by reason of an insufficient description. *Anderson v. Canter* (1901) 10 Kan. App. 167, 63 Pac. 285.

Defendant, in an action of trespass to try title, may prove, under a plea of "Not guilty," that his deed to the plaintiff on which the latter relies, although absolute on its face, was in fact a mortgage. *Mann v. Falcom* (1860) 25 Tex. 271.

<sup>65</sup> Although the defendant, in an action of trespass to try title, is not required to put in any other plea than that of not guilty in order to avail himself of an equitable defense, yet, if he wishes to assert an independent, equitable right not involved in the issue as to title directly in controversy, he should present the facts by proper averment, and bring the necessary parties before the court to enable it to grant the relief to which he may be entitled. *Ayres v. Duprey* (1864) 27 Tex. 594, 86 Am. Dec. 657.

Under the plea of not guilty, the defendant in an action of trespass to try title may set up an equitable title by way of defense, but cannot, without some further plea, obtain affirmative equitable relief. *Catlin v. Bennett* (1877) 47 Tex. 165, such as avoiding a sheriff's deed for irregularity in the sale. *Rippetoe v. Dwyer* (1878) 49 Tex. 498.

<sup>66</sup> In *Powers v. Armstrong* (1881) 36 Ohio St. 357, it was held that, notwithstanding the provision of § 559 of the Code,

it shall be sufficient, in an action for the recovery of real property, if the defendant in his answer deny generally the title alleged in the petition, the general requirement of § 92, that "a statement of new matter constituting the defense, counterclaim, or set-off" shall be set forth in ordinary, concise language, precludes the defendant from showing, under a general denial, that he has an equitable title under a contract of sale. The court said: "The rules for pleading here prescribed relate only to cases where the right of the plaintiff, as alleged in his petition, or the fact that the defendant withholds the possession from the plaintiff, is denied. If, however, these facts cannot be denied, and the defendant relies upon new matter as grounds of defense, as, for instance, an equitable title and right of possession in himself, such new matter must be pleaded in his answer, as required by §§ 92 and 93, above quoted."

<sup>67</sup> *Hagan v. Ellis* (1897) 39 Fla. 463, 63 Am. St. Rep. 167, 22 So. 727; *McGill v. Dartist* (1915) 69 Fla. 587, 68 So. 755; *Coram v. Palmer* (1912) 63 Fla. 116, 58 So. 721; *Blackiston v. Smith* (1917) — Fla. —, 73 So. 839; *Mowers v. Evers* (1898) 117 Mich. 93, 75 S. W. 290; *Creque v. Sears* (1879) 17 Hun (N. Y.) 123 (semble); *McCormic v. Leggett* (1862) 53 N. C. (8 Jones, L.) 425 (dictum); *Scarborough v. Woodley* (1908) 81 S. C. 329, 62 S. E. 405; *Witcover v. Grant* (1911) 93 S. C. 190, 76 S. E. 274.

In ejectment, where special pleading is not allowed, the defendant, in support of the possession, may give in evidence any matter which would have operated as a bar, if pleaded by him by way of estoppel, to a real action brought for the recovery of the same premises, or to an action of trespass brought to try the right to the same property. *Wood v. Jackson* (1831) 8 Wend. (N. Y.) 9.

Under a Code provision that "it shall be sufficient in such action if the defendant in his answer denies generally the title alleged in the petition, defendant may prove an estoppel. *Fitch v. Walsh* (1913) 24 Neb. 32, 142 N. E. 293, Ann. Cas. 1914C, 1136.

<sup>68</sup> A party relying upon an equitable estoppel should inform the adverse party of the nature of the cause of action or defense, which he will be obliged to meet. To do this, he must plead it with the same fullness and particularity as is required in cases involving like subjects of inquiry, in

limited such doctrine to cases where the plaintiff has set up the title on which he relies.<sup>69</sup> Where the form of plea is prescribed by statute, the facts tending to establish an equitable estoppel need not be specially pleaded.<sup>70</sup>

Estoppel by deed may be shown, under a plea of the general issue.<sup>71</sup>

— *res judicata*.

Under the common-law or statutory plea of the general issue, a former recovery may be given in evidence;<sup>72</sup> but such defense is not, under the Code system of pleading, let in by a general denial,<sup>73</sup> nor is it available, where the statute requires the defendant to set forth his grounds of defense.<sup>74</sup>

suits of equity. *Davis v. Davis* (1864) 26 Cal. 23, 85 Am. Dec. 157.

Under a general denial, defendant may not introduce proof for the purpose of establishing an estoppel in pais. *Bray v. Marshall* (1882) 75 Mo. 327.

An estoppel, in order to be available, must be pleaded. *Casler v. Gray* (1901) 159 Mo. 588, 60 S. W. 1032.

<sup>69</sup> Where the plaintiff did not set out his title, it is not necessary to plead matters constituting an estoppel. *Jackson v. Lodge* (1868) 36 Cal. 28.

Although it is true, generally, that an estoppel must be pleaded in order to be available as a defense, the rule does not apply to ejectment suits in which the parties do not set up the title on which they rely. *Tyler v. Hall* (1891) 106 Mo. 313, 27 Am. St. Rep. 337, 17 S. W. 319.

Where the plaintiff does not state the source of his title, the defendant may, under a general denial, introduce evidence of an equitable estoppel. *Parker v. Dacres* (1890) 1 Wash. 190, 24 Pac. 192.

<sup>70</sup> Under a statute, providing that "the answer of the defendant, and each, if more than one, must set forth what part of the land he claims and what interest he claims therein, generally and without the facts constituting the right, and if as tenant, the name and residence of his landlord, and need state nothing more," the facts constituting an estoppel in pais need not be specially pleaded. *Phillips v. Blair* (1874) 38 Iowa, 649.

In Texas, the defendant in an action of trespass to try title may, under a plea of the general issue, which is the only plea required, prove facts tending to establish an equitable estoppel. *Ragsdale v. Gohlke* (1871) 36 Tex. 286; *Johnson v. Byler* (1873) 38 Tex. 606; *Mayer v. Ransey* (1876) 46 Tex. 371; *Wright v. Doherty* (1878) 50 Tex. 34; *McDow v. Rabb* (1887) 56 Tex. 154; *Guest v. Guest* (1889) 74 Tex. 644, 12 S. W. 831; *Eddie v. Tinnin* (1894) 7 Tex. Civ. App. 371, 26 S. W. 732; *Parker v. Cockrell* (1895) — Tex. Civ. App. —, 31 S. W. 221.

<sup>71</sup> *Warren v. Jacksonville* (1853) 15 Ill.

— matters arising subsequently to commencement of suit.

Although, in other forms of action, matters of defense arising subsequently to the institution of the suit are ordinarily not available, unless specially pleaded, such matters, if affecting the title, have frequently been let in, under the general issue plea, in actions in the nature of ejectment. Thus it has been held competent, under a plea of the general issue, to show failure of the plaintiff's title after the institution of the suit,<sup>76</sup> or that the plaintiff has conveyed away his title.<sup>77</sup> But under the Code system of pleading, evidence that the plaintiff has, during the pendency of the

236, 58 Am. Dec. 610; *Phillips v. Crist* (1907) 33 Pa. Super. Ct. 445.

<sup>72</sup> *Piercy v. Sabin* (1858) 10 Cal. 22, 70 Am. Dec. 692; *Coffee v. Groover* (1883) 20 Fla. 64, reversed on other grounds in (1887) 123 U. S. 1, 31 L. ed. 51, 8 Sup. Ct. Rep. 1; *McKinnon v. Johnson* (1909) 57 Fla. 120, 48 So. 910; *Brooke v. Gregg* (1899) 89 Md. 234, 43 Atl. 38; *Bruner v. Finley* (1905) 211 Pa. 74, 60 Atl. 488.

<sup>73</sup> Under the Code system of pleading, the defendant may not, under a general denial, give in evidence a former recovery. *Piercy v. Sabin* (Cal.) supra.

<sup>74</sup> The Pennsylvania Act of May 8, 1901, providing that, "in addition to the plea of 'Not guilty' now required by law, the defendant shall file an answer in the nature of a special plea in which he shall set forth his grounds of defense, with an abstract of the title by which he claims," and that no evidence shall be received on the trial, of any matter not appearing in the pleading, the defendant may not give in evidence, without pleading it, the record of a prior suit in equity, claimed to be rec adjudicata of the matter in dispute. *Klick v. Gernert* (1908) 220 Pa. 503, 69 Atl. 1034.

<sup>75</sup> *Doe ex dem. Alexander v. Collins* (1845) 7 Ala. 480 (obiter); *Etowah Min. Co. v. Doe* (1900) 127 Ala. 663, 29 So. 7.

<sup>76</sup> *Burnett v. Roman* (1915) 192 Ala. 188, 68 So. 353; *Roman v. Lentz* (1915) 194 Ala. 610, 69 So. 827; *Johnston v. Griswold* (1875) 8 W. Va. 240.

When matter occurs, pending the suit, which does not affect the title, but merely affords ground for an objection to the further prosecution of the suit as it is then constituted, such matter must be pleaded, or be, in some mode, specially brought to the notice of the court; as when a party dies or marries, or the plaintiff takes possession of the thing sued for. But, where the matter affects the title, it may be given in evidence, under the general issue. *McCormic v. Leggett* (1862) 53 N. C. (8 Jones, L.) 425.

But in *Jenney v. Potts* (1879) 41 Mich. 52, 1 N. W. 898, it was held that proof of a conveyance of the premises by the plain-

action, conveyed the property to another, is inadmissible, under a mere denial of the allegations in the complaint.<sup>78</sup>

A surrender of the premises to one of the lessors, during the pendency of the suit, cannot be proven, in the absence of a plea puis darrein continuance.<sup>79</sup>

Title acquired by the defendant after issue joined, to be available must be pleaded,<sup>80</sup> except where, as in the case

of title acquired by the defendant as the original purchaser at a tax or execution sale the title relates back, by operation of law, to a date prior to the institution of the ejectment suit.<sup>81</sup> And it has been held that, where the statute provides that "Not guilty" shall be a sufficient plea, defendant may show title in himself, under a deed made after the commencement of the suit.<sup>82</sup>

tiff to another person, after issue joined, was not admissible, without special notice in the nature of a plea puis darrein continuance.

<sup>78</sup> Moss v. Shear (1866) 30 Cal. 467.

<sup>79</sup> Jackson ex dem. Colden v. Rich (1810) 7 Johns. (N. Y.) 194.

<sup>80</sup> A conveyance to the defendant from strangers to the plaintiff's title, made after the commencement of the suit, is inadmissible, under a plea of the general issue. Jennings v. Dockham (1894) 99 Mich. 253, 58 N. W. 66.

Title acquired after the commencement of a suit by a writ of entry should be pleaded in bar of the further maintenance of the action. Mowry v. Baldwin (1885) 64 N. H. 3, 4 Atl. 882.

Title acquired by the defendant, by deed after issue joined, must be pleaded puis darrein continuance. Jackson ex dem. De Forest v. Ramsay (1824) 3 Cow. (N. Y.) 75, 15 Am. Dec. 242.

Defendant may not, without a plea puis darrein continuance, set up outstanding mortgages, made by the party plaintiff and purchased by one of the defendants after the commencement of the suit. Fitzpatrick v. Fitzpatrick (1859) 6 R. I. 64, 75 Am. Dec. 681.

Defendant cannot offer in evidence a tax deed to himself, executed after the com-

mencement of the action, unless he has set it up in a supplemental answer. McMinn v. O'Connor (1864) 27 Cal. 248.

Tax deeds issued to defendant in ejectment, after the joinder of issue, cannot be introduced, without something on the record in the nature of a plea puis darrein continuance. Hurd v. Raymond (1883) 50 Mich. 369, 15 N. W. 514.

Evidence that the defendant in ejectment has purchased an outstanding tax title, based upon a sale for taxes, while the action is pending, cannot be received under a general denial. Risher v. Madsen (1913) 94 Neb. 72, 142 N. W. 700.

<sup>81</sup> A sheriff's deed which relates back to the time of sale of the property, on judgment and execution had before the action was brought, may be given in evidence, under the general issue. Jackson ex dem. De Forest v. Ramsay (N. Y.) supra.

A tax deed in the hands of the original purchaser, although taken after issue joined, is admissible under the general issue, where it relates back to the day upon which the party was entitled to it, and such day precedes the date upon which issue was joined. Spratt v. Price (1881) 18 Fla. 269.

<sup>82</sup> Hughes v. Rose (1909) 163 Ala. 368, 50 So. 899. E. S. O.

## OKLAHOMA SUPREME COURT.

URBAN DE HASQUE, Plff. in Err.,  
v.

ATCHISON, TOPEKA & SANTA FE RAIL-  
WAY COMPANY.

(— Okla. —, 173 Pac. 73.)

**Intoxicating Liquors — receipt by priest.**

1. Chapter 186, Session Laws 1917, prohibiting the receiving of liquors, the sale of which is prohibited by the laws of this state, from a common carrier, does not make it an offense for a Roman Catholic priest to re-

ceive altar wine, to be used solely for sacramental purposes in divine worship.

For other cases, see *Intoxicating Liquors*.

III. a, in Dig. 1-52 N. S.

Same — sacramental wine.

2. The provisions of § 46, art. 25, of the Constitution, prohibiting the sale and transportation of intoxicating liquors, does not apply to altar wine, to be used solely for sacramental purposes in divine worship, although such wine be capable of use as a beverage, and, if drunk in sufficient quantities, will produce intoxication.

For other cases, see *Intoxicating Liquors*, III. a, in Dig. 1-52 N. S.

**Statute — within letter.**

3. A thing may be within the letter of the law and yet not within the law, because not within its spirit, nor within the intention of its makers.

For other cases see *Statutes*, II. a, in Dig. 1-52 N. S.

Headnotes by OWEN, J.

**Note.** — The applicability to wines intended for sacramental purposes, of regulations in relation to intoxicating liquors, is treated in the annotation following this case, post, 266.

**Same — construction — intent.**

4. Among other things which may be considered in determining the intent of the lawmakers is the evil which it is designed to remedy; and therefore this court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the intention or the lawmakers.

*For other cases see Statutes, II. a, in Dig. 1-52 N. S.*

**Same — action against religion.**

5. No purpose of action against religion and religious institutions, when properly conducted, can be imputed to any legislative body.

*For other cases see Statutes, II. a, in Dig. 1-52 N. S.*

**Same — intention to govern.**

6. It is a cardinal rule in the construction of constitutions and statutes that the intention of the lawmakers, when ascertained, must govern, and that, to ascertain the intent, all the various portions of the legislative enactments upon the particular subject, including subsequent enactments, should be construed together and given effect as a whole.

*For other cases see Statutes, II. a, in Dig. 1-52 N. S.*

**Same — strict interpretation.**

7. When it is apparent that a strict interpretation of a particular statute, construed alone, would defeat the intention of the legislature as shown by other legislative enactments which relate to the same subject, and which have been enacted in pursuance of and according to a general purpose in accomplishing particular results, the suppression of a particular evil, such construction should not be adopted.

*For other cases, see Statutes, II. b, in Dig. 1-52 N. S.*

**Same — practical construction.**

8. Construction placed on the laws by officers charged with the enforcement thereof in the discharge of their duties, at or near the time of their enactment, which has long been acquiesced in, is a just medium for their judicial interpretation.

*For other cases see Statutes, II. a, in Dig. 1-52 N. S.*

(May 21, 1918.)

**E**RROR to the District Court for Oklahoma County to review a judgment in favor of defendant in an action for a writ of mandamus to compel it to accept certain shipments of wine for transportation and delivery. Reversed.

The facts are stated in the opinion.

Messrs. Wilson, Tomerlin & Buckholts, M. F. Highley and Fulton, Shirk & Danner for plaintiff in error.

Messrs. J. R. Cottingham and S. W. Hayes, for defendant in error, and S. P. Freeling, Attorney General, for the State:

That an act will result in an injustice or hardship does not determine the validity

of the act. Courts are not called upon to correct the follies of the lawmaking department, to supervise their mistakes, or to commend them because of their wisdom.

*Delaney v. Plunkett*, — Ga. —, L.R.A. 1917D, 926, 91 S. E. 561; *Com. v. Herr*, 229 Pa. 132, 78 Atl. 68, Ann. Cas. 1912A, 422.

The Constitution of the United States makes no provision for protecting the citizens of the respective states in their religious liberties, nor does it impose any inhibitions in this respect upon the states. This subject is left exclusively to the supervision of the states, by constitutional provisions and statutes enacted in pursuance thereof.

*Permoli v. New Orleans*, 3 How. 589, 11 L. ed. 739; *Brunswick-Balke-Collander Co. v. Evans*, 228 Fed. 991; *Coyle v. Smith*, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688; *Spies v. Illinois*, 123 U. S. 166, 31 L. ed. 86, 8 Sup. Ct. Rep. 21, 22.

In the exercise of the police power, the state may prohibit not only the sale and barter, but the manufacture of intoxicating liquors for general use or personal use and may, without consent of Congress, prohibit the bringing into a state by carriers of intoxicating liquors intended for personal use, and prohibit the receipt and possession of such liquors when so intended.

*Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Clark Distilling Co. v. Western Maryland R. Co.* 242 U. S. 311, 61 L. ed. 326, L.R.A.1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845; *Crane v. Campbell*, 245 U. S. 304, 62 L. ed. 304, 38 Sup. Ct. Rep. 98; *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44; *Delaney v. Plunkett*, — Ga. —, L.R.A.1917D, 926, 91 S. E. 561.

It was unlawful for defendant to transport the wine because all citizens of the state, without regard to their religious belief or mode of religious worship, are prohibited from committing acts which the lawmaking power of the state has deemed essential to suppress the primary evil.

*Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244; *Davis v. Beason*, 133 U. S. 333, 33 L. ed. 637, 10 Sup. Ct. Rep. 299, 8 Am. Crim. Rep. 89; *Com. v. Herr*, 229 Pa. 132, 78 Atl. 68, Ann. Cas. 1912A, 422; *Com. v. Leasher*, 17 Serg. & R. 155; *Stansbury v. Marks*, 2 Dall. 213, 1 L. ed. 353; *State v. Marble*, 72 Ohio St. 21, 70 L.R.A. 835, 106 Am. St. Rep. 570, 73 N. E. 1063, 2 Ann. Cas. 898; *Bloom v. Richards*, 2 Ohio St. 387; *Owens v. State*, 6 Okla. Crim. Rep. 110, 36 L.R.A.(N.S.) 633, 116 Pac. 345, Ann. Cas. 1913B, 1218; *Fealy v. Birmingham*, — Ala. —, 73 So. 296; *Toneray v.*

Budge, 14 Idaho, 621, 95 Pac. 26; Re Frazee, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72; State ex rel. Schwartz v. Powell, 58 Ohio St. 324, 41 L.R.A. 854, 41 N. E. 579; Sweeney v. Webb, 33 Tex. Civ. App. 324, 76 S. W. 766.

Owen, J., delivered the opinion of the court:

This action was brought by plaintiff in error, in the district court of Oklahoma county, for mandamus to compel defendant in error to accept a shipment of wine, tendered by plaintiff in error at Oklahoma City, to be delivered to the Reverend John Van Gastel, a Catholic priest at Guthrie, Oklahoma, and to compel the railway company to accept like shipments, transport and deliver the same, whenever tendered, both intrastate and interstate. The action was brought by plaintiff in error on behalf of all members of the Roman Catholic faith, alleging that he is a Roman Catholic priest, and chancellor to the Catholic diocese of Oklahoma, and secretary to the Right Reverend Theophile Meerschaert, Roman Catholic bishop of Oklahoma. He alleges a part of his duties, under the bishop, to be that of providing to the 105 Catholic priests and their congregations within the state of Oklahoma, sufficient altar wine for conducting the religious services of the Roman Catholic Church, known as the Sacrifice of the Mass.

It appears from the agreed statement of facts that the package tendered was marked, "For Sacramental Purposes," and contained pure, fermented, unadulterated juice of the grape, commonly known as altar wine, manufactured and prepared in the particular manner prescribed by the church, and to be used for the sole purpose of conducting the religious service of that church, known as the Sacrifice of the Mass; and that this wine is capable of being used as a beverage, and can be drunk in sufficient quantities to produce intoxication.

It appears further from the stipulation that the practice of the Sacrifice of the Mass within the territorial limits now comprising the state of Oklahoma, and the use of this fermented altar wine, has been observed by the clergy of the Roman Catholic Church in the celebration of the Sacrifice of this Mass, continuously since the time of Coronado, in the year 1540, and was a practice observed within this territory at the date of the treaty between the United States of America and the Republic of France (Act April 30, 1803, 8 Stat. at L. 200, art. 4), by which the territory of Louisiana was ceded to the United States of America. And it appears that

the diocese of Oklahoma consists of the priesthood of about 105 in number, and in excess of 42,000 members, more than 100 churches, numerous parochial schools, hospitals, convents, seminaries, and various charitable and eleemosynary and educational institutions, owned, controlled, and operated, both for gain and charitable purposes, by the priesthood and sisters of charity, and members of the Roman Catholic Churches. There is observed and conducted within these institutions this religious ceremony and service, known as the Sacrifice of the Mass, and that for such service the especially prepared and fermented altar wine is required as a necessary part of the worship.

It is stipulated to be the faith and belief of all Catholics that the use of the fermented wine is a necessary part of this service in commemoration of the Last Supper, at which time Christ gave wine to the Apostles, saying, "Drink ye of this, for this is my Blood of the New Testament, which shall be shed for many unto the remission of sins." And commanded the Apostles also, "This do for a commemoration of me."

It is also stipulated that this sacrifice, according to the Roman Catholic faith, is not one of praise and prayer merely, but is an external sensible act, signifying the most profound homage to God, and is to all Catholics the supreme act of worship and adoration; of all acts the most acceptable to God; that any law prohibiting the Sacrifice of the Mass does, in effect, prohibit all Catholics within the state of Oklahoma from worshipping God according to their faith and belief.

The shipment was refused by the defendant in error for the reason, as claimed, to do so would be in violation of chapter 186, Sess. Laws 1917, commonly referred to as the "Bone-Dry Law." Section 1 of this act reads: "It shall be unlawful for any person in this state to receive directly or indirectly any liquors, the sale of which are prohibited by the laws of this state, from a common or other carrier."

The question presented is whether the laws of this state, prohibiting the sale of intoxicating liquors, include such altar wine.

The trial court, in refusing plaintiff relief, held the general language found in § 46, art. 25, of the Constitution to include such wine. That section reads: "The manufacture, sale, barter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within the state, or any part thereof, is prohibited for a period of twenty-one years from the date

of the admission of this state into the Union. . . . Any person, individual or corporate, who shall manufacture, sell, barter, give away, or otherwise furnish any intoxicating liquor of any kind, including beer, ale, and wine, contrary to the provisions of this section, . . . or who shall ship or in any way convey such liquors from one place within this state to another place therein, . . . shall be," etc.

Counsel for defendant in error urge with much force that the general terms, "intoxicating liquor of any kind, including beer, ale, and wine," as used in the Constitution, include such wine as may be used for sacramental purposes. To give weight to this argument it is pointed out that, under the provisions of the Constitution and Enabling Act, lawful purchases might be made for medicinal, industrial, and scientific purposes, under certain regulations. It is urged that because sacramental wine was not excepted from the general terms, it must be held to be included, invoking the rule announced in *Lewis's Sutherland, Statutory Construction*, § 705: "Where the legislature has made no exceptions, the courts of justice can make none, as this would be legislative."

The case of *Delaney v. Plunkett*, 146 Ga. 547, L.R.A.1917D, 928, 91 S. E. 561, Ann. Cas. 1917E, 685, is relied upon, where it was held that when the state undertakes to suppress what it is free to regard as a public evil it may adopt such measures having reasonable relation to that end as it may deem necessary, in order to make its action effective. And that a transaction which, separately considered, may be innocuous, may nevertheless be included in a prohibition, the scope of which is regarded as essential to accomplish the purpose of the act. The transaction referred to in that case was having a large quantity of intoxicating liquors for personal use, which was held to be included in the terms and purpose of the Prohibition Statute. We are not unmindful of this rule, but, in our opinion, it has no application here.

The cardinal rule of constitutional and statutory construction is to arrive at the intention of the legislative body. *Ex parte Whitehouse*, 3 Okla. Crim. Rep. 97, 104 Pac. 372. It must be conceded that any fermented and intoxicating wines fall within the general terms of the Constitution. But from the early days of jurisprudence it has been held a thing may be within the letter of the law and yet not within the law, because not within its spirit, nor within the intention of its makers. In the case of *Stradling v. Morgan*, 1 Powd. 205, 75 Eng. Reprint, 315, it was said: "From which

cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions, have always been founded upon the intent of the legislature, which they have collected, sometimes by considering the cause and necessity of making the act. . . . So that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion."

A guide to the meaning of the section of the Constitution is found in the evil which it was designed to remedy; and therefore this court may properly consider the situation as it existed, and as it was pressed upon the attention of the members of the Constitutional Convention. It is a matter of common knowledge that, prior to the passage of the Enabling Act, the use of intoxicating liquors among the Indians was the fruitful source of much crime. The Congress of the United States, recognizing this situation and to suppress this traffic, enacted stringent laws against the sale and importation of intoxicating liquors of every kind in the Indian country (Act Cong. July 23, 1892, chap. 234, 27 Stat. at L. 260, Comp. Stat. 1916, § 4136a; Act Cong. March 1, 1895, chap. 145, 28 Stat. at L. 693; Act Cong. Jan. 30, 1897, chap. 109, 29 Stat. at L. 506, Comp. Stat. 1916, § 4137); and, in order that this traffic might not be resumed on the coming of statehood, the Enabling Act required the inhibition found in § 46, art. 25. That these provisions might extend and be applied throughout the entire state, the section was submitted to the people, and, on its adoption, became a part of our constitutional law. All this legislation had but one purpose, to conserve the morals and guarantee the safety of the public, by suppressing the use and traffic in intoxicating liquors and prevention of kindred and resulting evils. We do not believe that the members of Congress and the Constitutional Convention, in framing this section, had in mind the sacred use of wine in the sacramental service in connection with the suppression of this evil.

General terms of the statutes or the Constitution must be construed in the light

of their common, ordinary usage and meaning. While it appears the altar wine in question is intoxicating, if drunk in sufficient quantities, yet it can hardly be said, it seems to us, that the term "intoxicating liquors," as commonly used in Prohibition Statutes, includes such wine when used in divine worship. The object and purpose of Prohibition Statutes is to prevent the intemperate use of intoxicating liquors, with the attending and consequential evils. The use of wine in this sacred service forms no part of this evil.

We are not without authority in considering these conditions. In the case of *Henry v. Tilson*, 17 Vt. 479, it was said:

"The history of the legislation, in the state, in reference to the subject-matter of a particular statute, may be referred to, as tending to aid in the construction to be given to the statute.

"Where the literal interpretation of a statute would lead to a gross absurdity of restriction, the court will extend its application to cases within the same equity, though at the expense of forcing the construction of the words."

In the case of *Margate Pier Co. v. Han-nam*, 3 Barn. & Ald. 266, 106 Eng. Reprint, 661, Chief Justice Abbott quoted from Lord Coke as follows: "Acts of Parliament are to be so construed as no man that is innocent or free from injury or wrong be, by a literal construction, punished or endangered."

In the case of *State v. Clark*, 29 N. J. L. 96, Clark was indicted under a statute which made it a crime to open or break down any fence in the possession of another. He offered to prove a legal right to enter on the premises, although in the possession of another. The lower court denied him that right, and, in reversing the case, it was held that the purpose of the act was to prevent trespass, and that, while he had violated the letter of the act, he had not violated the spirit. It was said: "If a literal construction of the words of a statute make the act absurd, it must be so construed as to avoid the absurdity. The literal import of the terms and phrases employed will be controlled by the objects which the act was designed to reach."

In the case of *United States v. Kirby*, 7 Wall. 482, 19 L. ed. 278, Kirby and others were indicted, charged with violating the United States statutes against obstructing the passage of the mail, or in any manner retarding the passage of the mail carrier. Farris, a carrier of the mail, was arrested by Kirby and others, on a bench warrant issued out of the circuit court of Kentucky, and taken from a steamboat carrying the United States mail. He pleaded as a de-

fense that he was acting in obedience to the warrant. Upon demurrer to his defense the case was certified to the Supreme Court. The questions presented were: "First. Whether the arrest of the mail carrier, upon the bench warrants from the circuit court of Kentucky, was, under the circumstances, an obstruction of the mail, within the meaning of the act of Congress. Second. Whether the arrest was obstructing or retarding the passage of the carrier of the mail, within the meaning of that act."

In holding the delay and interference incident to the arrest did not fall within the terms of the act, it was said: "When the acts which create the obstruction are within themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object. The statute has no reference to acts lawful in themselves, from the execution of which a temporary delay to the mails unavoidably follows. . . . The public inconvenience which may occasionally follow from the temporary delay in the transmission of the mail, caused by the arrest of its carriers upon such charges, is far less than that which would arise from extending to them the immunity for which the counsel of the government contends. Indeed, it may be doubted whether it is competent for Congress to exempt employees of the United States from arrest on criminal process from the state courts, when the crimes charged against them are not merely mala prohibita, but are mala in se. But whether legislation of that character be constitutional or not, no intention to extend such exemption should be attributed to Congress, unless clearly manifested by its language. All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

In the case of *Reiche v. Smythe*, 13 Wall. 162, 20 L. ed. 566, it was said: "The meaning of general words" in a statute must be restricted "whenever it is found necessary to do so in order to carry out the legislative intention."

In the case of *Ex parte Ellis*, 11 Cal. 222, it was said: "A familiar rule in the construction of statutes is to give effect to the meaning and interpretation of the law-maker. This may be gathered from the reason of the statute; the motives which

led to the making of it, the object in contemplation at the time the act was passed.”

In the case of the Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511, the act of Congress under review made it unlawful to prepay the transportation or in any way assist or encourage the importation or immigration of any alien or foreigner into the United States, under contract or agreement to perform labor or services of any kind in the United States. The plaintiff in error there made a contract with an alien minister, residing in England, by the terms of which he was to remove to the city of New York and enter into its service as rector and pastor. It was claimed this contract was forbidden by the act of Congress. The United States circuit court held that the contract was within the prohibition of the statute, and rendered judgment accordingly. The judgment was reversed by the Supreme Court, holding that, while the contract was within the letter of the statute, it was not within the statute, because not within the spirit nor within the intention of its makers. The intention of the act, it was held, was to prevent importation of cheap, unskilled labor, and to prevent the practice of large capitalists in this country to contract with their agents abroad for the shipment of large numbers of ignorant and servile laborers, under contract by which the employer agreed, upon the one hand, to prepay their passage, while, on the other hand, the laborers agreed to work, after their arrival, for a certain time at low wages. The effect of this was to break down the labor market, and to reduce other laborers engaged in like occupations to the level of the assisted immigrant, and was never intended to include or prevent the employment of a minister to conduct religious services. Mr. Justice Brewer, in delivering the opinion of the court, said: “But beyond all these matters no purpose of action against religion can be imputed to any legislation, state of national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation. The commission to Christopher Columbus, prior to his sail westward, is from ‘Ferdinand and Isabella, by the Grace of God, King and Queen of Castile,’ and recites that ‘it is hoped that by God’s assistance some of the continents and islands in the ocean will be discovered,’” etc.

Coming nearer to the present time, we may call attention to the provisions of section 3 of the Enabling Act, which required our Constitutional Convention to provide in

the Constitution that perfect toleration of religious sentiment shall be secured, and that no inhabitant of this state shall ever be molested, in person or property, on account of his or her mode of religious worship. And this provision appears as § 2, art. 1, of the Constitution. In the constitutions of the various states we find the constant recognition of religious obligations. We find language which, either directly or by clear implication, recognizes a profound reverence for religion, and an assumption that its influence is essential to the well-being of the community. The preamble to our own Constitution is: “Invoking the guidance of Almighty God, in order to secure and perpetuate the blessing of liberty; to secure just and rightful government; to promote our mutual welfare and happiness, we, the people of the state of Oklahoma, do ordain and establish this Constitution.”

The happiness of any people, and the good order and preservation of any government, must essentially depend upon piety, religion, and morality. These cannot be generally diffused throughout a community, except by the institution of the public worship of God and of public instruction in piety and religion. We should not impute to the framers of our Constitution, and to the members of Congress who enacted the Enabling Act, the intention to prevent or interfere with public worship under the general terms to suppress the liquor traffic.

Mr. Justice Brewer, in the Church of the Holy Trinity Case, supra, made use of this illustration: “Suppose in the Congress that passed this act some member had offered a bill which, in terms, declared that, if any Roman Catholic Church in this country should contract with Cardinal Manning to come to this country and enter into its services as pastor and priest; or any Episcopal Church should enter into a like contract with Canon Farrar; or any Baptist Church should make similar arrangements with Rev. Mr. Spurgeon; or any Jewish Synagogue with some eminent rabbi, such contract should be adjudged unlawful and void, and the church making it be subject to prosecution and punishment, can it be believed that it would have received a minute of approving thought or a single vote? Yet it is contended that such was, in effect, the meaning of this statute. This construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the



country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."

Suppose, in our Constitutional Convention, some member had offered a section which, in express terms, declared against the use of wine in sacramental services by any church within this state, and that the transportation and use of such wine, solely for such purpose, would subject the members of that church to prosecution and punishment; can it be believed it would have received a minute of approving thought or a single vote?

We have here a case where there was presented a definite evil, intoxication and intemperance incident to the ordinary use and traffic in intoxicating liquors, in view of which the members of the Constitutional Convention used general terms with the purpose of reaching all phases of that evil. The general language used is broad enough, in its literal interpretation, to cover such fermented wine used for sacramental purposes, which the whole history and life of this nation affirms could not have been intentionally legislated against. In the ordinary transactions of life we find everywhere a clear and positive recognition of the importance and necessity of public worship, and the fostering in every way possible of religious institutions. The custom of opening sessions of deliberate bodies and most conventions with prayer; our laws requiring observance of the Sabbath; the general cessation of all secular business, the closing of courts and legislatures, and other similar public assemblies on the Sabbath; the various churches and church organizations, which abound in every city, town, and community; the multitude of charitable organizations existing all over the country under Christian auspices; the missionary societies and associations which receive general support in aiming to establish the Christian religion in every quarter of the globe—these, and many other matters which might be noticed, are emblems of Christianity, and emphasize that "man's chief and highest end is to glorify God, and fully to enjoy Him forever." That he may do so intelligently, and according to the dictates of his own conscience, is the primary purpose of all Christian civilization. The general terms used in the prohibition section of the Constitution should not be construed to prevent religious worship, and in that manner defeat the very purpose of the act, which was to conserve morality and religion

by preventing intemperance and intoxication.

The well-known rule of contemporaneous construction applies here. The aid of contemporaneous construction may be invoked, when the language of the statute is doubtful and cannot be made plain by the help of any other part of the same statute. Under such circumstances, the court may consider what was the construction put upon the act when it first came into operation. 1 Kent, Com. 445; Lewis's Sutherland Stat. Con. 472. Upon examination of the various acts of the legislature since statehood, we find that sacramental wines were expressly excepted from the provisions of the Act of 1907-1908 (Laws of 1907-1908, chap. 69) and in each succeeding act. From this it appears the legislature construed the provisions of the Constitution not to include wine for sacramental purposes. The exception found in the Act of 1907-8 is: "The provision of this act shall not apply to . . . the use of wine for sacramental purposes in religious bodies."

The language in the Act of 1910-11 (Laws 1910-11, chap. 70) is: "The provisions of this act shall not apply to that (liquors) for sacramental purposes."

In the case of Creek County v. Alexander, — Okla. —, 159 Pac. 311, it was held that when apparent that a strict interpretation of a particular statute, construed alone, would defeat the intention of the legislature, as shown by other legislative enactments which relate to the same subject, and which have been enacted in pursuance of and according to general purposes, in accomplishing a particular result, such construction should not be adopted. The section of the Constitution and acts of the legislature, so far as they deal with the prohibition question, were enacted in pursuance of and according to the general purpose of suppressing the evils incident to the liquor traffic, and to prevent the intemperate use of intoxicating liquors. In the case just referred to, in the opinion by the present chief justice, it was said: "It is a cardinal rule in the construction of statutes that the intention of the legislature, when ascertained, must govern, and that to ascertain the intent all the various provisions of legislative enactments upon the particular subject should be construed together and given effect as a whole. . . . When the language of a statute is dubious, the court, in construing it, will consider the reason and intent of the law to discover its scope and true meaning. . . . Subsequent legislative enactments may be considered as an aid in the interpretation of the prior legislation upon the same subject."

Another rule of construction, under which we arrive at the conclusion that prevention of the use of wine in the sacramental service was not intended, is the construction placed upon a statute by officials charged with the duty of enforcing the statute, either at or near the time of the enactment, and is a just medium for judicial interpretation. This rule was recognized by this court in the case of *Hunter v. State*, 49 Okla. 672, 154 Pac. 545, where Justice Hardy, in delivering the opinion, said: "If there were any doubt of this being the correct construction of these statutes, unless the legislative intent to the contrary were clearly apparent, the fact that in the various counties officials charged with the enforcement thereof, from the date of the statute until the present, in the discharge of their duties under the Revenue Laws of the territory and state, have given such statute the same construction as we give, would be of great weight, and we would not disregard such construction without the most cogent and persuasive reasons."

In the case of *Kelly v. Multnomah County*, 18 Or. 356, 22 Pac. 1110, the supreme court of Oregon said: "It is believed that the construction here given to these provisions is the same they received by those charged with the duty of their execution ever since their enactment, and this, of itself, would be sufficient to turn the scale if the question were doubtful. In all cases where those persons whose duty it is to execute a law have uniformly given it a particular construction, and that construction has been acquiesced in and acted upon for a long time, it is a contemporary exposition of the statutes which always commands the attention of the courts, and will be followed unless it clearly and manifestly appears to be wrong."

In 1892, by an act of Congress (27 Stat. at L. 260, chap. 234, Comp. Stat. 1916, § 4136a, it was made a crime to introduce, under any pretense, any ardent spirits, wine, or intoxicating liquors, of whatso-

ever kind, into the Indian Territory. In 1895, by an act of Congress (28 Stat. at L. 693, chap. 145), it was provided "that any person, whether an Indian or otherwise, who shall, in said territory, manufacture, sell, give away, or in any manner, or by any means furnish to anyone, either for himself or another, any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind whatsoever, whether medicated or not, or who shall carry, or in any manner have carried, into said territory any such liquors or drinks, . . . shall be . . . punished," etc.

It must be admitted the terms of this act are sufficiently comprehensive to include every kind of fermented and intoxicating liquors. In the case of *Ex parte Webb*, 225 U. S. 663, 56 L. ed. 1248, 32 Sup. Ct. Rep. 769, this act was held to be in full force and effect, after statehood, in that portion of the state formerly known as Indian Territory. Large sums of money have been appropriated by Congress, since statehood, for the purpose of enforcing this act in the eastern portion of the state. To that end special prosecutors and enforcement officers were appointed, and many prosecutions had in the United States courts. Yet in no instance, so far as we know, has any officer charged with enforcement of that act undertaken to apply it to the use of wine for sacramental purposes.

We conclude that the use of wine for sacramental purposes in divine worship is no part of the evil of intemperance, the suppression of which is the object and purpose of the Prohibition Law of this state, and therefore, the general term "intoxicating liquors," as used in § 46, art. 25, of the Constitution, does not include wine when used solely for such purpose.

The judgment will be reversed and the case remanded, with directions to grant the relief prayed for.

Sharp, Ch. J., and Turner, Hardy, Brett, Rainey, Miley, and Tisinger, JJ., concurring. Kane, J., not participating.

### Annotation — Applicability to wines intended for sacramental purposes, of regulations in relation to intoxicating liquors.

A search has disclosed no case other than *DE HASQUE v. ATCHISON*, T. & S. F. R. Co. ante, 259, dealing with the applicability of Liquor Laws to wines intended for sacramental purposes. The ordinary form of statute or constitutional provision dealing with intoxicating liquors expressly excepts wine so intended, from the operation of the law. In the absence of such an express pro-

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vision, a question of construction arises. The constitutional prohibition involved in *DE HASQUE v. ATCHISON*, T. & S. F. R. Co. applied to intoxicating liquors generally, and made no exception of wines used for sacramental purposes. The court, by construction, held that such an exception existed. The question as to the power to prohibit the transpor-

tation or possession of wines intended for sacramental purpose did not, therefore, arise. It has been held that a municipality is without power to prohibit or regulate the sale of intoxicating liquor, without excepting sales for me-

dicinal, pharmaceutical, or sacramental purposes, under statutory authority to regulate or prohibit sales of intoxicating liquor except for the above purposes. *Akerman v. Lima* (1898) 8 Ohio S. & C. P. Dec. 430, 7 Ohio N. P. 92. W. A. E.

**WASHINGTON SUPREME COURT.**  
(Department No. 2.)

**AMY L. ASKEY, Resp't.,**  
v.

**NEW YORK LIFE INSURANCE COMPANY, Appt.**

(— Wash. —, 172 Pac. 887.)

**Evidence — death certificate — prior disease.**

1. A death certificate filed by the beneficiary with a life insurance company in proof of loss is not evidence of any disease suffered by insured several years prior to death.

*For other cases, see Evidence, IV. c, in Dig. 1-52 N. S.*

**Same — testimony as to condition of insured.**

2. Nonexpert testimony of relatives of an insured is admissible as to his physical condition and absence of indications of tubercular disease, in an action to recover on the insurance policy.

*For other cases, see Evidence, VII. d, in Dig. 1-52 N. S.*

**Same — want of information from physician.**

3. Upon the question of bad faith in denying existence of tubercular disease in an application for life insurance, evidence of insured's wife that his physician at no time imparted to her information that insured was tubercular is not admissible.

*For other cases, see Evidence, XI. e, in Dig. 1-52 N. S.*

**Same — declarations as to malady.**

4. Upon the question of fraudulent intent in denying a tubercular condition in an application for insurance, evidence of declarations of insured at the time he changed climate for his health, that he had pneumonia, are admissible.

*For other cases, see Evidence, X. d, in Dig. 1-52 N. S.*

**Note.** — As to admissibility of declarations of insured tending to show good faith regarding statements in his application, see annotation following this case, post, 271, and references therein to annotations on related questions.

The relevancy of evidence as to character or reputation, on the issue of fraud or dishonesty in a civil case, is treated in the note to *Great Western L. Ins. Co. v. Sparks*, 49 L.R.A.(N.S.) 724, and see subsequent case of *Rasmusson v. North Coast F. Ins. Co.* L.R.A.1915C, 1179.

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**Same — character for truth.**

5. Evidence of the character of insured as to truth and veracity is admissible, where payment of a life policy is denied because of his alleged fraud in making false representations as to his health.

*For other cases, see Evidence, XI. c, in Dig. 1-52 N. S.*

**Appeal — inadmissible evidence — non-prejudicial error.**

6. The admission of evidence of declarations by a man to his wife, that his physician informed him he had stomach trouble, is nonprejudicial, where there is evidence that about the time in question he did have trouble with his stomach and appendix.

*For other cases, see Appeal and Error, VII. m, 3, a, (3), in Dig. 1-52 N. S.*

(April 30, 1918.)

**A**PPEAL by defendant from a judgment of the Superior Court for King County in favor of plaintiff in an action brought to recover the amount alleged to be due on a life insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. H. T. Granger and James H. McIntosh for appellant.

Messrs. Bausman, Oldham, & Goodale, for respondent:

In order to avoid a life insurance policy on the ground of misrepresentation, the burden is upon the insurance company to prove that a misstatement was made, and that it was knowingly made, with intent to deceive.

*Ley v. Metropolitan L. Ins. Co.* 120 Iowa, 203, 94 N. W. 568; *Quinn v. Mutual L. Ins. Co.* 91 Wash 543, 158 Pac. 82; *Brigham v. Mutual L. Ins. Co.* 95 Wash. 196, 163 Pac. 380; *Goertz v. Continental L. Ins. & Invest. Co.* 95 Wash. 358, 163 Pac. 938.

If a declaration is offered for the purpose of showing intent, knowledge, or state of mind of the declarant, it is relevant, and therefore admissible. If offered as evidence of the ultimate fact, it is not.

*Wigmore, Ev.* §§ 265, 266, 1725; *Klein v. Knights & Ladies of Security*, 87 Wash. 179, L.R.A.1916B, 816, 151 Pac. 241; *Goertz v. Continental L. Ins. & Invest. Co.* 95 Wash. 358, 163 Pac. 938; *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 285, 36 L. ed. 706, 12 Sup. Ct. Rep. 909; *Towne v. Towne*, 191 Ill. 478, 61 N. E. 426; *Rasmusson v. North Coast F. Ins. Co.* 83 Wash. 569, L.R.A.1915C, 1179, 145 Pac. 610.

**Per Curiam:**

The respondent, as beneficiary in a policy of insurance issued by the appellant upon the life of her husband George M. Askey, who died on August 9, 1916, brought suit to recover thereon. The appellant set up as an affirmative defense that the insured made application for insurance on July 30, 1915, and, in response to the question, "Have you ever suffered from any ailment or disease of the heart or lungs?" answered that in 1911 he suffered a severe attack of pneumonia for several weeks, from which he had recovered, the only physician consulted by him being Dr. Klamke, of Port Gamble, Washington. To the questions whether he had ever suffered from "disease of the stomach or intestines, liver, kidneys or bladder," and "Have you consulted a physician for any ailment or disease not included in your above answers?" his response was "No." The answer to the complaint then sets forth that: "The defendant further alleges: That the said statements in said application were false, and were known by the said George M. Askey to be false at the time the said statements were made. That they were material, and that the same were made for the purpose of deceiving and defrauding this defendant in this: That the said Askey stated that he had suffered from the disease of pneumonia in 1911, and that he had not consulted a physician for any ailment or disease not included in said answers, whereas in truth and in fact the said George M. Askey, suffered in 1911 and 1912 from the disease of tuberculosis, and consulted and was treated by one Dr. Klamke for tuberculosis at that time. That had the defendant known that said statements were false it would not have issued the policy sued upon in this cause. That it relied upon said statements, and believed the same to be true, and was induced thereby to execute and deliver the said policy of life insurance."

The cause was tried to a jury, which returned a verdict for the beneficiary for the amount of the policy, upon which judgment was rendered in favor of the respondent. The insurance company appeals, assigning as errors the insufficiency of the evidence and the improper admission of evidence.

Our statute governing contracts of insurance provides that "no oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent its attacking, unless such misrepresentation or warranty is made with

the intent to deceive." Rem. Code, § 6059-34.

In the recent case of *Brigham v. Mutual L. Ins. Co.* 95 Wash. 196, 163 Pac. 380, we held that, under this statute, the falsity of representations in the application for insurance would not defeat the policy, unless it should be further found that they were made with intent to deceive the insurance company. The affirmative defense set up in this case imposed the burden of establishing such fraudulent intent on the appellant. The evidence shows that the insured, in the latter part of the year 1911, while residing at Port Gamble, Washington, was suffering from some ailment, which he represented in his application for insurance as being pneumonia. On the advice of his attending physician, Dr. Klamke, he went to California in January, 1912. He obtained employment there, and remained for about one year and a half returning to Port Gamble, where he intermarried with the respondent in July, 1913. He made application to appellant for insurance on July 30, 1915, being at that date twenty-six years of age. A careful physical examination of him was made by the appellant's medical examiner, who found no indications of tubercular trouble. An analysis of his urine made at the time showed indications of albuminuria, and, on that account, the appellant would not issue a policy unless the applicant agreed that his age for premium purposes be advanced from twenty-six to thirty-nine years, and that he would pay the increased premium exacted for the latter age. The policy, as amended to this effect, was issued on September 27, 1915. The insured began to have trouble with his stomach and intestines in February, 1916, and had difficulty in retaining his food. In the latter part of May, 1916, he was operated on for abscess of the appendix. He never regained his health, and died in less than three months after the operation. Among the proofs of death presented to the appellant was the affidavit of Dr. Klamke, in which he stated that he treated the insured for "tuberculosis of the lungs, first time in 1912 (1911); sent him to California;" that the immediate cause of his death was "general tuberculosis, lungs, larynx, appendix," for which the insured had consulted him "four years ago." This affidavit of Dr. Klamke is the only evidence tending to show that the insured had suffered from pulmonary trouble, other than pneumonia. If, in truth, the insured had tuberculosis, there is no evidence showing that he had knowledge of the fact, other than the natural inference that one really suffering from such a disease would probably know it. Dr. Klamke was not called

as a witness, and there is no proof that he ever informed his patient that he was suffering with tuberculosis.

The death certificate filed by the respondent was not proof of any disease suffered by the insured four or five years prior to death. It constituted an admission by the respondent that the statement in the death certificate was probably true. Such statement constituted *prima facie* evidence, which was subject to refutation; and, even allowing it full force to establish the physical condition of the insured, it was not proof of the insured's intent to deceive the company. The weight of authority is that the proof of death of an insured is conclusive only of the fact of death, and is merely *prima facie* evidence of any statements contained as to the past health of the insured. *Spencer v. Citizen's Mut. L. Ins. Asso.* 3 Misc. 458, 23 N. Y. Supp. 179; *John Hancock Mut. L. Ins. Co. v. Dick*, 117 Mich. 518, 44 L.R.A. 846, 76 N. W. 9; *Fidelity Mut. Life Asso. v. Ficklin*, 74 Md. 172, 21 Atl. 680, 23 Atl. 197; *May, Ins.* 4th ed. §§ 460, 465; *Mutual Ben. L. Ins. Co. v. Newton*, 22 Wall. 32, 22 L. ed. 793; *Mutual Ben. L. Ins. Co. v. Higginbotham*, 95 U. S. 380, 390, 24 L. ed. 499, 503. See also *Boylan v. Prudential Ins. Co.* 18 Misc. 444, 42 N. Y. Supp. 52, where the testimony of the mother of the assured, contradicting the physician's certificate, was held admissible as proof of the veracity of health statements in the application for insurance, and sufficient to raise an issue upon that fact.

In rebuttal of the inference of George M. Askey's knowledge of his condition, raised by the affidavit of Dr. Klamke, there is the testimony of the physician of the insurance company, who made a thorough examination of the insured and found no indications of tubercular trouble. There is also the testimony of the soliciting agent of the insurance company, that the applicant had no appearance of consumptive disease and was regarded by him as a good risk. The wife and mother-in-law of the insured also testified that he had no indications of pulmonary trouble. In view of the evidence, it is apparent that the appellant failed to conclusively establish intent to deceive on the part of the insured. Viewing the evidence in the light most favorable to the appellant, it must be held that it presented such a conflict as to raise a question for the jury.

The appellant contends that it was error on the part of the court to admit the testimony of the wife and mother-in-law of the insured, as to his physical condition and the absence of indications of tubercular disease. Nonexpert opinion evidence of the

physical condition and appearance of an individual is generally held to be admissible. *Horwitz's Jones, Ev.* § 360; *Ferguson v. Davis County*, 57 Iowa, 601, 10 N. W. 906; *Billings v. Metropolitan L. Ins. Co.* 70 Vt. 477, 41 Atl. 516.

We have held such evidence competent upon the issue of intent, in the case of *Goertz v. Continental L. Ins. & Invest. Co.* 95 Wash. 358, 163 Pac. 938, where the testimony of acquaintances and associates, who had adequate opportunity for observation, was admitted for the purpose of rebutting any presumption of knowledge on the part of the insured that he was suffering at the time with the disease from which he afterward died.

Objection is also urged against the admissibility of the testimony by the respondent to the effect that Dr. Klamke, at no time prior to her marriage nor the birth of her children, ever imparted to her information that the insured was tubercular. We think such evidence was inadmissible, but constituted nothing more than harmless error, insufficient, in the light of the other facts in the case, to warrant the granting of a new trial. It was negative evidence of the flimsiest character, neither proving nor disproving any of the issues.

The appellant contends that the court committed prejudicial error in allowing the respondent to testify that the insured told her, just prior to leaving for California on account of his health, that he had pneumonia; that this evidence was clearly hearsay, and lacks the elements of *res gestæ*. The respondent contends that, inasmuch as the insured was charged with making false representations as to his physical condition, the declaration was admissible, in order to show what he thought was the trouble with him, and hence was evidence addressed to the question of his good faith, and tending to show want of knowledge on his part that he was afflicted with any tubercular disease. The authorities are somewhat at variance upon the question of the admissibility of prior declarations of an insured in an action by his beneficiary, and fine distinctions are made in the admission or rejection of such evidence, each case often being governed by its particular facts. In 2 Bacon, *Life & Acci. Ins.* 4th ed. § 636, it is said: "In an action by the assignee or beneficiary of the policy, declarations and admissions of the assured made at a time prior to and remote from the application, and disconnected with any act or fact showing his condition of health, are incompetent for the purpose of contradicting the statements made in the application; but, if it appear otherwise than by

the declarations of assured that such statements were untrue, then his prior declarations are admissible to show knowledge on his part of the falsity of such answers; and statements made by the assured shortly prior to his application concerning his health, in connection with facts exhibiting his then state of health, are probably admissible upon the question of the truthfulness of the answers made by him in such application."

While the last clause of the foregoing statement would seem to sustain the contention of respondent, the authorities cited as supporting it are addressed to declarations in contradiction of statements in the application for insurance. In the present case, we are concerned with declarations of the insured confirming his application, and testified to by the beneficiary as made directly with herself. They were made at a time when the decedent was not contemplating insurance, and when he was suffering from disease. As evidence that the insured at that time was suffering with pneumonia, such testimony should be closely scrutinized, coming as it does from the party in interest. But, bearing in mind that one of the issues is the good faith and lack of intent to deceive on the part of the insured, the question is, Should the evidence be admissible for that purpose? While the general rule is that a statement made by the insured in his application for insurance cannot be impeached by evidence of his prior declarations, it is fairly well settled that, where there is substantive evidence of the falsity of such statement, proof of prior declarations is admissible for the purpose of showing knowledge of such falsity. *Dilleber v. Home L. Ins. Co.* 69 N. Y. 256, 25 Am. Rep. 182; *Rawson v. Milwaukee Mut. L. Ins. Co.* 115 Wis. 641, 92 N. W. 378; *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 36 L.R.A. 271, 64 Am. St. Rep. 715, 26 S. E. 421; *Haughton v. Aetna L. Ins. Co.* 165 Ind. 32, 73 N. E. 592, 74 N. E. 613.

If such declarations are admissible for the purpose of showing deceit, they ought, by parity of reasoning, to be admissible to show good faith. This principle is recognized in a Canadian decision, where an insured's declaration, prior to making an application for insurance, stating his age, was admitted in evidence for the purpose of showing good faith in the misstatement of his age in the application. *Dillon v. Mutual Reserve Fund Life Assn.* 5 Ont. L. Rep. 434.

The question is one of first impression in this court, and seems to have seldom arisen elsewhere. The rule is stated in 4

*Chamberlayne, Ev.* § 2683, as follows: "The nature of the issue in any particular case may render good or bad faith constitutively relevant as component parts of the right or liability asserted in the action. If so, not being subject to direct observation, these phases of the mind must, like other psychological facts, be established circumstantially. Among facts which may properly be employed in such a connection are unsworn statements."

Section 2652 states the rule in other language, as follows: "The existence of good faith or its opposite may be proved, in part at least by extrajudicial statements, whenever this fact is relevant. The only effective limits which can be set to the scope of such declarations are those prescribed by probative or deliberative relevancy."

*Horwitz's Jones, Ev.* after discussing the relevancy of collateral facts to establish bad faith, adds in § 146: "But, of course, on the same principle, facts apparently collateral may be proved, if they show good faith or prudence or the knowledge or information on which a person has acted when such fact is in issue."

See also *Knights of Honor v. Dickson*, 102 Tenn. 255, 52 S. W. 862, where it is said: "Falsehood may be predicated of a misstatement of fact, but not of a mistaken opinion as to whether a man has a disease when it is latent and it can only be a matter of opinion. As to what a person may have died of may be largely, if not altogether, a matter of opinion, about which attending physicians often disagree, and, as to such matters, their statement made can only be treated as representations and not as warranties; and, if made in good faith and on the best information had or obtainable, they will not vitiate a policy, if incorrect, and not willfully untrue."

This rule is in line with that announced in the cases holding evidence of one's intent in doing an act may be shown by his prior declarations. See *Mutual L. Ins. Co. v. Hillmon*, 145 U. S. 285, 36 L. ed. 706, 12 Sup. Ct. Rep. 909. Inasmuch as our statute makes the insured's intent to deceive the controlling question, in avoiding a policy because of false statements as to health made to the insurer, the question of good faith is a very material one, and we must hold that prior declarations of the insured which tend to show good faith are admissible in evidence.

The appellant contends that the court erred in admitting evidence as to the character of the insured as to truth and veracity. One of the issues was that the insured was guilty of fraud upon the

insurance company, in making false representations as to his health. An exception to the general rule against this character of testimony in civil actions is allowed, where fraud is imputed against a man deceased at the time of trial. *Bowerman v. Bowerman*, 76 Hun, 46, 27 N. Y. Supp. 579.

This court has applied the rule, under such circumstances, in the case of *Rasmusson v. North Coast F. Ins. Co.* 83 Wash. 569, L.R.A.1915C, 1179, 145 Pac. 610, declaring such evidence admissible, where the defense was that the insured had sworn falsely in making proofs of loss upon a fire insurance policy, and by reason of his death prior to trial the insured was unable to testify in denial of the charge. We think there was no error in the admission of character evidence under the circumstances of this case.

A further contention is made that the court erred in permitting the respondent to testify that her husband told her in February, 1916, that Dr. Klamke informed him he had stomach trouble. The objection is made that this testimony was incompetent, irrelevant, and immaterial, and

that, under the statute (Rem. Code, § 1214), a wife could not testify to communications made to her by her husband during marriage. Whether or not such testimony was improperly admitted on any ground, its admission was not prejudicial, since there was evidence that the deceased, at the period testified to, did have trouble with his stomach and appendix, undergoing an operation upon the latter organ, and that he continued in a debilitated condition until his death a few months later. The nature of the physical trouble prior to the death of the insured having been proved, any error in the admission of testimony of conversation addressed to that fact was harmless. The effect of this evidence showing death following an operation for appendicitis was to rebut the prima facie evidence contained in the proof of death, and raise a conflict in the evidence for the determination of the jury.

A careful examination of the record leads us to the conclusion that no prejudicial error occurred in the trial.

The judgment is affirmed.

Petition for rehearing denied.

### Annotation — Admissibility of declarations of insured tending to show good faith regarding statements in his application.

The question whether evidence is admissible of declarations of the insured to show that statements in his application for insurance were made in bad faith, is treated in notes to *Taylor v. Grand Lodge*, A. O. U. W. 11 L.R.A.(N.S.) 92, and *Knights of Maccabees v. Shields*, 49 L.R.A.(N.S.) 853, on admissions or statements by the assured outside of his application as evidence against his beneficiary.

Research has disclosed little authority directly on the question indicated in the title to the present note. In *ASKEY v. NEW YORK L. INS. CO.* ante, 267, it seems that a correct result was reached on the question of the admissibility of declarations of the insured, tending to show that the statements in his application for insurance were made in good faith. However, assuming that declarations of the insured tending to show bad faith are admissible, where there is substantive evidence of the falsity of statements in the application, it does not seem necessarily to follow, as the court reasons in that case, that declarations of the insured tending to show good faith are equally admissible. In the former instance, the declaration is against the interest of the one making

it, while in the latter it is in the nature of a self-serving declaration. It will be observed that, in the *ASKEY CASE*, the court states, although not especially emphasizing this fact, that the declarations were made at a time when the decedent was not contemplating insurance, and when he was suffering from disease. And, under the circumstances of the case, it seems that the declarations were properly admitted in evidence to show the good faith of the insured. But their admissibility appears to be because of the exceptional circumstances, and not because of any general rule that, since declarations of the insured are admissible to substantiate a claim of bad faith, they are also admissible to substantiate a claim of good faith.

The decision in the *ASKEY CASE* is supported by *Dillon v. Mutual Reserve Fund Life Asso.* (1903) 5 Ont. L. Rep. 434, which is set out in the former case. There are decisions to the effect that, for the purpose of establishing the good faith of the insured in making the statements in his application, evidence is admissible of information which he had previously received from his physician or others. See, for example, *Murray v. Brotherhood of American Yeomen* (1917)

— Iowa, —, 163 N. W. 421, and Keefe v. Supreme Council, C. M. B. A. (1899) 37 App. Div. 276, 55 N. Y. Supp. 827. And in some cases the language of the court is broad enough to sanction the admission of declarations of the insured in support of the claim of good faith, although it is not clear that the facts required such a holding. For instance, in *Brown v. Greenfield Life Asso.* (1899) 172 Mass. 498, 53 N. E. 129, it is said that evidence as to applications by the insured to other insurers was relevant

and competent on the issue whether his alleged misrepresentations to the defendant were made with actual intent to deceive. But it does not appear whether the evidence was introduced by the insurance company to prove bad faith, or by the beneficiary to show the good faith of the insured.

For effect of honest mistake in answer as to health of insured, warranted by him to be true, see note to *Supreme Lodge, K. L. H. v. Payne*, 15 L.R.A. (N.S.) 1277. R. E. H.

### FLORIDA SUPREME COURT.

STATE OF FLORIDA EX REL. RAIL-  
ROAD COMMISSIONERS

v.

FLORIDA EAST COAST RAILWAY  
COMPANY.

(60 Fla. 480, P.U.R.1915D, 105, 68 So. 729.)

**Carrier — public control — amendment to rule.**

1. Where a railroad company has had ample opportunity to be heard on amendments to a rule, it cannot justly complain that the notice given of the hearing did not strictly comply with the statute.

*For other cases, see Carriers, IV. a, in Dig. 1-52 N. S.*

**Constitutional law — fixing carriers' rates.**

2. In conferring upon the Railroad Commission authority to make reasonable and just rates to be charged by railroad common carriers for intrastate transportation, instead of merely conferring upon the commissioners authority to supervise and regulate such rates as may initially be fixed by the carrier, the legislature does not invade the constitutional right of "acquiring, possessing, and protecting property," nor deprive anyone of "property without due process of law."

*For other cases, see Constitutional Law, II. b, 4, c, in Dig. 1-52 N. S.*

**Same — control of private property.**

3. In making rates the commissioners do not assume the management and control of the property or business of the common carrier, but, by making lawful rates, they supervise and regulate the rendering of the public service, "for the correction of abuses and to prevent unjust discrimination and

excessive charges," as contemplated by the state Constitution.

*For other cases, see Carriers, IV. c, 2, in Dig. 1-52 N. S.*

**Evidence — burden of showing unreasonableness of rule.**

4. Where, under the statute, a rule duly promulgated by the Railroad Commission is prima facie reasonable and just, the burden is upon the carrier to clearly show by convincing evidence that the rule is invalid as applied to it.

*For other cases, see Evidence, II. i, in Dig. 1-52 N. S.*

**Constitutional law — interference with property rights.**

5. Rule 19 of the Railroad Commission rules is a general regulation fixing the relation and apportionment of existing rates for intrastate freight transportation over two or more distinct railroads. The general application of such rule to the respondent's intrastate business is not shown to unlawfully invade the respondent's property rights. If the application of the rule proves unlawful, in whole or in part, a remedy by appropriate procedure exists. It is not shown that such rule will result in unlawful discrimination with reference to or as affected by Federal regulations of interstate commerce.

*For other cases, see Constitutional Law, II. b, 4, c, in Dig. 1-52 N. S.*

(April 20, 1915.)

**P**ETITION by relator for a writ of mandamus to compel respondent to observe rule 19 of the Railroad Commission rules. Writ awarded.

The facts are stated in the opinion.

Mr. F. M. Hudson, for relators:

Rule 19 eliminates discrimination.

Minnesota Rate Cases (*Simpson v. Shepard*) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A. (N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; *Re Walsenburg Coal Field*, 26 Inters. Com. Rep. 85.

Rule 19 promotes freedom of commerce. *Re Walsenburg Coal Field*, supra; *Sea-*

Headnotes by WHITFIELD, J.

Note. — For exercise of rate-making power as illegal interference with corporate management of public utility, see annotation following this case, post, 277.

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board Air Line R. Co. v. Florida, 203 U. S. 281, 51 L. ed. 175, 27 Sup. Ct. Rep. 109.

Rule 19 permits higher interline rates than are allowed by the Interstate Commerce Commission.

Sheridan Chamber of Commerce v. Chicago, B. & Q. R. Co. 26 Inters. Com. Rep. 638; Mississippi River Case, 28 Inters. Com. Rep. 47; Re Rates on Meats, 22 Inters. Com. Rep. 160; Re Rates on Meats, 23 Inters. Com. Rep. 656; Baker Commercial Club v. Oregon-Washington R. & Nav. Co. 25 Inters. Com. Rep. 281; American Nat. Live Stock Assn. v. Southern P. R. Co. 26 Inters. Com. Rep. 37; Washington Mill. Co. v. Norfolk & W. R. Co. 27 Inters. Com. Rep. 546.

General rules of the commissioners should be uniformly applicable and uniformly observed.

State ex rel. Railroad Comrs. v. Southern Teleph. & Constr. Co. 65 Fla. 270, 61 So. 506; State ex rel. Railroad Comrs. v. Seaboard Air Line R. Co. 48 Fla. 129, 37 So. 314; Seaboard Air Line R. Co. v. Florida, *supra*.

State rates will not be accepted as a standard to govern interstate rates.

Re Rates on Meats, 23 Inters. Com. Rep. 656; Re Rates on Meats, 22 Inters. Com. Rep. 160; William v. St. Louis, I. M. & S. R. Co. 22 Inters. Com. Rep. 405; Re Mississippi & M. Rivers, 21 Inters. Com. Rep. 546; Saunders v. Southern Exp. Co. 18 Inters. Com. Rep. 415; Highland Park Mfg. Co. v. Southern R. Co. 26 Inters. Com. Rep. 67.

Mr. Alex. St. Clair Abrams for respondent.

Whitfield, J., delivered the opinion of the court:

Mandamus proceedings were instituted here to enforce observance by the respondent of the following rule of the Railroad Commissioners:

"19. On intrastate shipments of freight, not governed by rule 1, which shall pass over the whole or portions of two or more roads not under the same control, the maximum rate charged shall be, in the case of shipments so passing over two such roads, not greater than the sum of the local rates on such freights, less 10 per cent, for the distance hauled over each road, and, in the case of shipments so passing over three or more such roads, not greater than the sum of the local rates on such freights, less 20 per cent, for the distance hauled over each road. The total rate thus ascertained on such freights from the point of shipment to the point of destination shall be divided in such proportion between the railroads over which such freights pass as to give to

each railroad interested in the shipment its local rate, less 10 per cent, in the case of shipments over two roads, and less 20 per cent in the case of shipments over three or more roads, for the distance such shipment is hauled, conditioned upon the initial line delivering the traffic to the delivering line at its nearest junctional point.

"Nothing in this rule shall be construed to prevent the total of any joint rate made under this rule from being divided in such proportion between the roads interested in the same as they may agree upon, but a failure to so agree between the roads interested shall in no way affect the total joint rate to be charged and collected on, or work delay in the transportation of, such freight, or be a subject of appeal to the Commission by the roads at interest."

The return of the respondent, in effect, avers that the rule operates to discriminate against shippers located on its line, in that shipments from other lines would have a lower rate over respondent's line than shipments from and to points on respondent's line would have; that the enforcement of the rule would be unjust, unreasonable, and oppressive, in that it would greatly reduce the entire receipts of the carrier below the already unremunerative point, particulars being given; that the present rates are reasonable and just to the shippers, but do not, in fact, afford a reasonable compensation for the services rendered, and the enforcement of the rule against respondent will deprive it of just compensation for the services rendered, and violate its property rights under the organic law. A demurrer to the return was overruled. State ex rel. Railroad Comrs. v. Florida East Coast R. Co. 65 Fla. 424, 62 So. 591.

Issue having been joined on the answer to the alternative writ, and the rule being, by statute, deemed to be *prima facie* reasonable and just, the burden is upon the respondent to sustain, by clear and convincing evidence, its averments of facts to show that the application of rule 19 to the business of the respondent will cause unjust discrimination, and will violate property rights protected by the state and Federal Constitutions. See State ex rel. Railroad Comrs. v. Louisville & N. R. Co. 62 Fla. 315, 57 So. 175.

A proffered amendment of the answer or return to the alternative writ sets up that, though notice was given as preliminary to an amendment of rule 19 relating to joint rates, in particulars that are material here, such notice was not in compliance with the mandatory requirements of the statute. The asserted defect in the notice given is

that it did not state the division of the joint rate.

The statute provides that "before applying joint rates to roads not under joint management and control, the commissioners shall give thirty days' notice to the owners, operators or lessees of said road, of the joint rate contemplated, and of its divisions of the same, and give hearings to roads desiring to object to said rates."

The alternative writ alleges that on June 10, 1912, the "railroad commissioners gave due and lawful notice in writing to all railroads and railroad companies doing intrastate business in the state of Florida that they would, on the 17th day of July, 1912, take under consideration the matter of certain proposed amendments to the said rule 19;" that on July 17, 1912, at the hearing in Tallahassee, "upon motion of the Florida East Coast Railway Company and other carriers represented at said hearing, it was ordered that the time for considering and acting upon this matter be extended for thirty days, so as to enable the said Florida East Coast Railroad Company, and the other carriers who might so elect, to prepare and file such further statistical information as they might deem necessary to properly sustain their several defenses."

The return of the respondent "admits that there was a hearing on said proposed amendment to said rule 19 at Tallahassee, Florida, on the 17th day of July, 1912, as set forth in the . . . alternative writ" and "says that it did not put said rule 19 in force because this respondent says that said rule, as amended, was unjust, unreasonable, and beyond the powers of the railroad commissioners of Florida to make, for the . . . reasons" that, in its operation, the rule would compel discriminations and violate property rights secured by the state and Federal Constitutions.

The following provision appears in rule 19 as originally adopted, and also as amended pursuant to the notice referred to: "Nothing in this rule shall be construed to prevent the total of any joint rate made under this rule from being divided in such proportions between the roads interested in the same as they may agree upon, but a failure to so agree between the roads interested shall in no way affect the total joint rate to be charged and collected on or work delay in the transportation of such freight, or be a subject of appeal to the Commission by the roads at interest."

As the amendment considered and adopted pursuant to the notice given makes no change in the rule as to divisions of the

joint rates covered by the rule, and as the respondent had ample opportunity to be heard on the amendments to the rule that were proposed and adopted after full hearing, it cannot now complain that the notice given to it did not state the divisions of the joint rate, merely because the statute requires that feature to be contained in the notice given of a contemplated exercise of the express power "to make reasonable and just joint rates."

The Constitution of Florida ordains that "the legislature is invested with full power to pass laws for the correction of abuses and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature." Const. § 30, art. 16.

In conferring upon the railroad commissioners authority to make reasonable and just rates to be charged by railroad common carriers for intrastate transportation, instead of merely conferring upon the commissioners authority to supervise and regulate such rates as may initially be fixed by the carrier, the legislature does not invade the constitutional right of "acquiring, possessing, and protecting property," nor deprive any one of "property without due process of law." The burden of lawful regulation is assumed by the carrier in engaging in the public service of a common carrier. *State ex rel. Railroad Comrs. v. Florida East Coast R. Co.* 57 Fla. 522, 49 So. 43.

A common carrier corporation devotes its property to the public service, subject to charter and franchise conditions and requirements, and to the obligations growing out of the nature of the business undertaken, including the duty to observe lawful governmental regulations, designed to correct and prevent abuses, unjust discriminations, and excessive charges, and to secure safety, convenience, and fairness to the public to be served. Governmental power to regulate public service does not include the absolute control of property that is incident to ownership. The right and duty of the state to supervise and regulate intrastate common carrier service in the interest of the public do not authorize an invasion of the domain of Federal authority, or arbitrary action that unlawfully impairs contracts rights, or violates the property rights, or supersedes the privileges of ownership of those whose property is used in rendering the public service. *Georgia Railroad & Bkg. Co. v. Smith*, 128 U. S. 174, text 179, 32 L. ed. 377, 380, 9 Sup. Ct. Rep. 47.

In making rates the commissioners do

not assume the management and control of the property or business of the common carrier, but, by making lawful rates, they supervise and regulate the rendering of the public service, "for the correction of abuses and to prevent unjust discrimination and excessive charges," as contemplated by the state Constitution. The statute expressly requires that the rates made by the commissioners shall be reasonable and just, and, if the carriers were permitted to initiate rates, they would likewise have to be reasonable and just; therefore, as only reasonable and just rates may be lawfully prescribed or lawfully charged, even if not prescribed, the carrier cannot justly complain because the rates are initially made by a governmental agency, since no more than just and reasonable rates are lawful under any circumstances, the burden of lawful regulation is assumed by engaging in the public service, and the rates fixed by the governmental agency are subject to judicial review, in so far as they affect rights secured by law. See *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. Rep. 48.

The testimony in the case taken by consent is filed for the consideration of the court, under the issues made by the pleadings. On the pleadings and under the statute making the rule *prima facie* reasonable and just, the burden is upon the respondent carrier to clearly show, by convincing evidence, that the application of rule 19 to its intrastate freight transportation business would result in unlawful discrimination, of which the carrier may complain, or would deprive the respondent of substantial property rights in violation of organic law. At the outset, it may be stated that there is no satisfactory showing that any unjust or unlawful discrimination of which the carrier may complain will inevitably result from the enforcement of the rule against the respondent. See *Interstate Commerce Commission v. Chicago, R. I. & P. R. Co.* 218 U. S. 88, 109, 54 L. ed. 946, 957, 30 Sup. Ct. Rep. 651.

Should the practical operation of the rule cause unlawful discrimination as to localities, or as to commodities, or otherwise, the law affords adequate remedies to those injured thereby. It may be that the absolute and uniform terms of the rule will, because of peculiar conditions, result in unlawful or unjust discriminations in some practical applications, and such instances may be few or many; but the railroad commissioners or the courts may remedy any unlawful operation of the rule where substantial rights are thereby injured. The Constitution expressly provides that unjust discriminations shall be prevented, and

abuses corrected in the rendering of service of a public nature in this state. When duly and fairly tested by experiment and experience, the defects in the rule, if any, may be remedied in due course of law at the instance of anyone having rights in the premises.

Rule 19 is a general regulation, fixing the relation and apportionment of existing rates for intrastate freight transportation over two or more distinct railroads. Its purpose is to give shippers, as near as may be, the benefit of similar rates for intrastate freight transportation between points in the state that are approximately or practically the same distance apart, whether such points are on the same or on different lines of railroad. Every entire transportation requires a haul from point of origin to point of destination, with a terminal service at each end. While a transportation of freight by two or more connecting carriers between the termini requires a transfer to each connecting carrier, it requires only two terminal services, one by the initial carrier, and one by the final carrier.

As the terminal service at each end of a complete transportation is ordinarily a substantial element in the cost of the receipt, transportation, and delivery of freight, the elimination of one terminal service by each carrier, and the substitution of a mere transfer service at the connecting point, should ordinarily reduce the cost of transportation to each carrier, thereby enabling the entire joint transportation service to be performed for, at least, some appreciable amount less than two separate transportations with four terminal services would cost. If a shipment is made to an intermediate point, and then reshipped to destination, two local transportation charges would be exacted; and, as the charge is greater in proportion for a shorter distance than for a longer one, a charge of the local rate for each of the separate hauls between the termini would most probably be greater than for a single haul for the entire distance. While a long haul between termini may be more profitable to one carrier, even with a lesser rate in proportion to the greater distance, yet a carrier may not reach both points, and in order to give approximately similar rates between points on two different lines of railroad as are given between points that are both on one railroad, but practically the same distance apart, each carrier should, in view of the substitution of a mere transfer service for one terminal service, and for the general purpose of equalizing rates between points in the state, the same distance apart, yield something from its local rate, so that the

entire charge will be approximately the same for the same distance in the state, whether the point of origin and the point of destination are on the same line of railroad or not. See *Seaboard Air Line R. Co. v. Florida*, 203 U. S. 261, 51 L. ed. 176, 27 Sup. Ct. Rep. 109. It may be that the difference between the cost of a mere transfer to or from connecting carrier, and the cost of one terminal service, is not so great as the reduction from local rates required by the rule; but, in order to attain a degree of equality in rates to the different sections of the state, each carrier should make a reasonable reduction in its local rate, for a portion of a continuous freight transportation that requires not more than one terminal service on its line. If the uniform reduction of rates required by the rule is unjust and unlawful as an entirety, the carrier has the means of demonstrating it; and, when such demonstration is made, appropriate relief is a matter of right. *Alien v. St. Louis, I. M. & S. R. Co.* 230 U. S. 553, 57 L. ed. 1625, 33 Sup. Ct. Rep. 1030. But no such demonstration appears in this case. *Atlantic Coast Line R. Co. v. Florida*, 203 U. S. 256, 51 L. ed. 174, 27 Sup. Ct. Rep. 108. If the rule operates unjustly in particular instances, owing to peculiar circumstances, there is a remedy afforded by due course of law. It does not appear that, because of rule 19, a joint rate for a given distance over two lines will be less than a single rate for a like distance over one line. Each carrier has a higher mileage rate for its share of the joint haul than it would have for one haul the entire distance.

The burden of the respondent's contention is not that the reduction prescribed by rule 19 is too great, but that no reduction at all should be required of it, upon the theory that, under the peculiar circumstances affecting its business, any reduction of rates whatever, put upon the respondent by the rule, is illegal, because it would unlawfully invade its property rights. The circumstances affecting the respondent's business may be peculiar, and entitled to consideration appropriate thereto. *Florida East Coast R. Co. v. United States*, 234 U. S. 167, 58 L. ed. 1267, 34 Sup. Ct. Rep. 867. But, in view of the purpose of the rule and the duty of the respondent to aid in equalizing rates, it would require a clear and definite showing that the order would inevitably invade respondent's property

rights, in violation of the Constitution, before the courts will relieve it entirely of the duty to observe the rule which, by statute, is deemed to be *prima facie* reasonable and just. No such clear and specific showing has been made in this case. This being the definite conclusion reached, it is not necessary to discuss the character or the probative force and legal effect of the evidence produced in support of the averments of the answer, to the effect that an enforcement of the rule will so deplete respondent's earnings as to unlawfully invade its property rights.

The evidence does not show the costs of the respondent's entire intrastate traffic, to which the rule applies, or the receipts from such traffic, or the cost of and receipts from its entire intrastate business, or the proper apportionment of and the fair value of the property used in rendering its intrastate service. See *Northern P. R. Co. v. North Dakota*, 236 U. S. 585, 59 L. ed. 735, L.R.A.1917F, 1148, P.U.R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1, decided March 8, 1915. See also *Minnesota Rate Cases (Simpson v. Shepard)* 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; *Atlantic Coast Line R. Co. v. Florida*, supra.

Common carrier rate regulations are required to be reasonable with reference to the entire traffic affected by the rates, the carrier being entitled to a fair compensation for services rendered, and the public having a right to reasonably adequate service, without unjust discrimination or excessive charges. General uniformity of existing rates between localities in the state being the purpose of rule 19, if the attainment of such uniformity discloses unreasonableness in the respondent's rates, the remedy by appropriate procedure exists. See *Northern P. R. Co. v. North Dakota*, 216 U. S. 579, 54 L. ed. 624, 30 Sup. Ct. Rep. 423. There is nothing in the evidence to indicate that the operation of rule 19 will result in unlawful discriminations in localities, or otherwise, with reference to or as affected by regulations of interstate commerce.

A peremptory writ will be awarded.

**Taylor, Ch. J., and Shackelford, Cockrell, and Ellis, JJ., concur.**

**Petition for rehearing denied, June 7, 1915.**

**L.R.A.1918F.**

**Annotation — Exercise of rate-making power as illegal interference with corporate management of public utility.**

STATE EX REL. RAILROAD COMRS. v. FLORIDA EAST COAST R. Co. ante, 272, appears to be the only reported case passing upon the question as to whether the exercise of rate-making power is an illegal interference with corporate management of a public utility.

If the contention that the regulation of rates is illegal, as an interference with corporate management, should be upheld, it would revolutionize the present theory of state regulation of utilities, which assumes that the state has full control over the matter of charges for service, provided the utility is permitted to earn a reasonable return, or, in fact, any return above the point of confiscation.

The objection against regulations other than of rates, that they amounted to an illegal interference with the corporate management, has been raised in a variety of cases.

The following are a few of the cases in which this question has been passed upon:

—People ex rel. New York C. & H. R. R. Co. v. Public Service Commission (1915) 215 N. Y. 241, P.U.R.1915D, 423, 109 N. E. 252, holding that a public service commission, in passing upon the reasonableness of commutation rates, should not be influenced by the question whether their adoption would be a wise policy, since the question whether the welfare of the road will be best subserved by one policy or another is one to be decided by the officers and stockholders of the corporation. For annotation on power of public service commission to regulate commutation rates, see note to Pennsylvania R. Co. v. Towers, L.R.A.1918C, 480;

—Pospichal v. Muscoda Mut. Teleph. Co. (1915; Wis.) P.U.R.1915A, 99, holding that the commission has no jurisdiction over the relations between a utility official and the board of directors, unless such relations impair the service or create unreasonable rates;

—Havre De Grace & P. Bridge Co. v. Towers (1918) — Md. —, P.U.R.1918D, 484, 103 Atl. 319, holding that the commission cannot treat a portion of salaries paid to officers of a utility as an improper charge against income, unless there has been a flagrant abuse of the power of the directors of the corporation in fixing such salaries on the ground that it would be an interference with the financial management of the company;

—Sparta v. Monroe County Teleph. Co. (1917; Wis.) P.U.R.1917C, 507, holding that the commission is not concerned with the amount of wages paid employees, except in so far as they may be reflected in unreasonable rates or inadequate service;

—Havre De Grace & P. Bridge Co. v. Towers (Md.) supra, holding that the commission had no power to require a utility to set up and maintain a depreciation reserve account, upon the ground that it amounted to an unwarranted interference with the financial policy of the company;

—People ex rel. Kings County Lighting Co. v. Straus (1917) 178 App. Div. 840, P.U.R.1917F, 672, 166 N. Y. Supp. 196, denying right of commission to require, as a condition to authorizing the issue of bonds, that the utility change its system of accounting, and put its depreciation charge upon some other basis than that adopted by it;

—Re Perry, B. D. Co. (1916; Mass.) P.U.R.1916E, 830, holding that the Massachusetts Public Service Commission has no jurisdiction to compel a common carrier to change its method of disposing of scrap material;

—Towers v. United R. & Electric Co. (1915) 126 Md. 478, P.U.R.1915F, 474, 95 Atl. 170, holding that a public service commission has no power to require that an extension of an electric railway be constructed, operated, and equipped in a specified manner, as the method of construction, operation, and equipment of such an extension is a matter within the honest discretion of the directors;

—Scribner v. Bell Teleph. Co. (1917; Pa.) P.U.R.1917E, 525, holding that the division of territory into local exchanges or zones, for the purpose of furnishing telephone service, should be left primarily to the judgment and experience of the company, to be modified or corrected by the commission only when any division affects disadvantageously and unreasonably the service to the public;

—Phinney Ave. Improv. Club. v. Pacific Teleph. & Teleg. Co. (1915; Wash.) P.U.R.1915A, 98, holding that a public service commission cannot order the discontinuance of the name of a manufacturing city as a telephone prefix, applying to a residential district of a neighboring city, on the theory that the residents thereof are inconvenienced and damaged thereby, since the selection of a tele-

phone prefix is a matter of business judgment, with which the commission has no right to interfere unless the word chosen is offensive;

—*State ex rel. Railroad Comrs. v. Atlantic Coast Line R. Co.* (1911) 60 Fla. 465, 54 So. 394, holding that railroad companies may be required to make written application to the commission for its consent to discontinue operating any regular passenger train, at least ten days before the discontinuance; the court saying that, "while the initial discretion as to the operation of trains is in those charged with the management of the railroad operations, such discretion is subject to lawful governmental regulation. *State ex rel. Railroad Comrs. v. Florida East Coast R. Co.* (1909) 57 Fla. 522, 49 So. 43;"

The New York court of appeals, in referring to the statute authorizing the commission to regulate the issuance of securities, said: "We do not think the legislation alluded to was designed to make the commissioners the financial managers of the corporation, or that it empowered them to substitute their judgment for that of the board of directors or stockholders of the corporation as to the wisdom of a transaction, but that it was designed to make the commissioners the guardians of the public, by enabling them to prevent the

issue of stock and bonds for other than the statutory purposes." The court also said: "While as we have stated, the ownership of property ordinarily carries with it the right of management, the duty devolves upon the owner to so manage as not to have it become a nuisance, or unnecessarily infringe upon the rights of others. It was, therefore, evidently the legislative intent in the enactment of this provision that the commissioners should have supervision over the issuing of long-time bonds to the extent of determining whether they were issued under and in conformity with the provisions of the statute for the purposes mentioned therein, or whether they were issued for the discharge of the actual and not the fictitious debts of the company, or whether they were issued for the refunding of its actual obligations and not for the inflation of its stocks or bonds. Beyond this, it appears to us that the power of the commissioners does not extend, unless it may pertain to the power to determine whether an obligation should be classified as operating expenses, and as to whether such expenses should be paid by obligations running beyond a year." *People ex rel. Delaware & H. Co. v. Stevens* (1909) 197 N. Y. 1, 90 N. E. 60. To the same effect is *People ex rel. Binghamton Light, Heat, & P. Co. v. Stevens* (1911) 203 N. Y. 7, 96 N. E. 114. A. L. R.

#### OKLAHOMA SUPREME COURT.

NATIONAL BANK OF COMMERCE,  
Plff. in Err.,  
v.  
C. O. FISH et al.

(— Okla. —, 169 Pac. 1105.)

#### Appeal — rejection of evidence.

1. Prejudicial error cannot be predicated upon the rejection of immaterial testimony. *For other cases, see Appeal and Error, VII. m, 3, b, in Dig. 1-52 N. S.*

#### Same — ruling affecting codefendant.

2. Where plaintiff in error interposes a demurrer to the evidence in behalf of its codefendants as well as for itself, and the

Headnotes by DAY, C.

Note. — The right of a bank remitting for or paying a forged check as against the depositor or correspondent bank, as affected by the latter's negligence in failing to give notice of the forgery, is treated in the annotation following this case, post, 282, and see references therein to annotations on related questions.

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demurrer is sustained as to its codefendants, it is in no position to complain.

*For other cases, see Appeal and Error, VII. g, 2, in Dig. 1-52 N. S.*

#### Bank — payment on forged indorsement.

3. When a depositor issues his check upon his bank payable to payee or order, it is the duty of the bank to pay same to the person named in said check or upon his genuine indorsement, and a failure so to do is at the peril of the bank.

*For other cases, see Banks, IV. a, 3, b, (3), in Dig. 1-52 N. S.*

#### Same — remedy of bank.

4. Where a bank pays the check of its depositor upon a forged indorsement, it has no right to charge same against the account of the depositor, but must look to its remedy upon the guaranty of the paying bank or other intermediate indorsers, unless the depositor has been guilty of negligence which induced the bank to pay, or having learned of such forgery in time that notice to the bank would have saved it the loss and failed so to notify it, or was guilty of other conduct constituting an estoppel.

*For other cases, see Banks, IV. a, 3, b, (3), in Dig. 1-52 N. S.*

**Evidence — sufficiency.**

5. Evidence examined, and held, insufficient to establish a defense in favor of plaintiff in error.

*For other cases, see Evidence, XII. k, in Dig. 1-52 N. S.*

(May 9, 1916.)

**E**RROR to the Superior Court for Logan County to review a judgment in favor of plaintiff against the Bank of Commerce and sustaining demurrers to the evidence as to the codefendants, in an action brought to recover on certain forged checks. **Affirmed.**

The facts are stated in the Commissioner's opinion.

Messrs. Devereux & Hildreth for plaintiff in error.

Messrs. Tibbetts & Green, for defendants in error:

A bank which pays a check on a forged indorsement cannot charge the depositor's account the amount so paid out.

5 Cyc. 548; Zane, Banks & Bkg. pp. 266, 270; Hatton v. Holmes, 97 Cal. 208, 31 Pac. 1131; Atlanta Nat. Bank v. Burke, 81 Ga. 597, 2 L.R.A. 96, 7 S. E. 738; German Sav. Bank v. Citizens' Nat. Bank, 101 Iowa, 530, 63 Am. St. Rep. 399, 70 N. W. 769, 2 Am. Neg. Rep. 349; First Nat. Bank v. Tappan, 6 Kan. 456, 7 Am. Rep. 568; Jordan Marsh Co. v. National Shawmut Bank, 201 Mass. 397, 22 L.R.A.(N.S.) 250, 87 N. E. 740; Harmon v. Old Detroit Nat. Bank, 153 Mich. 73, 17 L.R.A.(N.S.) 514, 126 Am. St. Rep. 467, 116 N. W. 617; Kaufman v. State Sav. Bank, 151 Mich. 65, 18 L.R.A.(N.S.) 630, 123 Am. St. Rep. 259, 114 N. W. 863; Union Biscuit Co. v. Springfield Grocer Co 143 Mo. 300, 126 S. W. 996; Star F. Ins. Co. v. New Hampshire Nat. Bank, 60 N. H. 442; Shipman v. Bank of State, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; Armstrong v. Pomeroy Nat. Bank, 46 Ohio, St. 512, 6 L.R.A. 625, 15 Am. St. Rep. 655, 22 N. E. 866; Jackson v. National Bank, 92 Tenn. 154, 18 L.R.A. 663, 36 Am. St. Rep. 81, 20 S. W. 802; Brixton v. Deseret Nat. Bank, 5 Utah, 504, 18 Pac. 43; National City Bank v. Third Nat. Bank, 100 C. C. A. 556, 177 Fed. 136; United States v. National Exch. Bank, 214 U. S. 302, 53 L. ed. 1006, 29 Sup. Ct. Rep. 665, 16 Ann. Cas. 1184; Leather Mfrs' Nat. Bank v. Merchants' Nat. Bank, 128 U. S. 26, 32 L. ed. 342, 9 Sup. Ct. Rep. 3; First Nat. Bank v. Whitman, 94 U. S. 346, 24 L. ed. 231.

Day, C., filed the following opinion:

C. O. Fish was engaged in the farm loan business at Guthrie, and was a regular de-

positor of the National Bank of Commerce. It seems that Fish had an arrangement with one J. V. Graham, of Pauls Valley, Oklahoma, whereby Graham would procure applications for farm loans and forward to Fish, and after approving the applications and receiving the notes, mortgages, and abstracts, with a draft of the borrower drawn in favor of Fish, Fish would negotiate the loans, and deposit the draft for collection with the National Bank of Commerce, and thereafter forward to the borrower his individual check drawn on said Bank of Commerce.

Fish received from Graham applications, promissory notes, and mortgages, purported to have been executed by three different husbands and wives, respectively which mortgages purported to bear the file marks of the register of deeds, showing due recordation, and purported to have been acknowledged by each respective husband and wife before said J. V. Graham as notary public, and at the same time received drafts drawn in favor of Fish on his Chicago correspondent, by each borrower, for the amount of his respective loan.

Upon receipt of these loans Fish sold them to his Chicago correspondent, indorsed the drafts, and deposited the proceeds to his credit in the National Bank of Commerce, and thereafter drew his individual checks on said bank, in favor of each borrower, for the amount of his loan, and forwarded the same by mail to the said Graham at Pauls Valley, to be delivered to the respective borrowers who resided in that vicinity. When Graham received the checks, instead of delivering them to the borrowers, he forged the indorsement of the respective payees thereon, and then wrote his indorsement thereunder, and then presented two of these checks to the Pauls Valley National Bank of Pauls Valley, and the other to the First National Bank of Wynnewood, and received the money thereon. Upon cashing these checks, these banks indorsed them and guaranteed all prior indorsements, and in due course they were returned to the National Bank of Commerce at Guthrie through Kansas City, each bank in turn placing its indorsement upon them. The National Bank of Commerce paid the checks and charged same to the account of Fish, and in due time returned same to him as paid checks. Something like two years after the loans were made and the checks cashed, it was discovered that the entire transaction was a forgery; that Graham had forged the names of the purported borrowers to the notes, mortgages, drafts, and checks. Some months before

the discovery of the forgeries, Graham had absconded, leaving no property.

Shortly after these forgeries were discovered Fish instituted suit against the three banks, seeking to hold the National Bank of Commerce and the Pauls Valley National Bank for two of the checks, and the National Bank of Commerce and the First National Bank of Wynnewood for the other.

The cases, by agreement, were consolidated, and upon the trial of the cause, when plaintiff had rested his case, the court sustained a demurrer to the evidence as to the Pauls Valley National Bank and the First National Bank of Wynnewood, and, at the close of all the testimony, instructed the jury to return its verdict in favor of Fish against the National Bank of Commerce for the amount of the three checks, aggregating something over \$3,700, and from such verdict and judgment, the National Bank of Commerce appeals, making C. O. Fish and the other two banks parties defendant in error.

Plaintiff in error directs its complaint chiefly to questions it contends are material error, as follows: The exclusion of testimony, the sustaining of the demurrer to the evidence as to the Pauls Valley National Bank and the First National Bank of Wynnewood, and the directing of the verdict for plaintiff. We shall discuss these questions in the order stated.

Plaintiff in error offered to prove that, at a time subsequent to these forgeries, that officers of the Pauls Valley National Bank wrote to Mr. Fish to the effect that they desired, in the light of recent developments as to the business methods of Graham, to revoke letters of recommendation formerly furnished him by them, and that Mr. Fish replied to this letter, saying that Mr. Graham had been his agent down there for nearly two or three years, that Graham's business had been very profitable to him, and that he was honest and straight, and that the banks did not have any reason to write such a letter, etc. We think this testimony immaterial, for the reason that it was a transaction occurring subsequent to the forgeries, and for the further reason that it does not tend to contradict Fish's testimony that he had confidence in Graham, but tends to corroborate rather than impeach it.

The record discloses that one of the attorneys for plaintiff in error interposed the demurrer to plaintiff's evidence on behalf of the plaintiff in error and Pauls Valley National Bank and the First National Bank of Wynnewood, its codefendants, and this demurrer was sustained by the court as to said codefendants. Since the trial court did the very thing requested

by plaintiff in error, it is in no position to complain.

The relation between bank and depositor is that of debtor and creditor. When a depositor issues his check upon his bank, payable to payee or order, it is the duty of the bank to pay same to the person named in said check or upon his genuine indorsement, and a failure so to do is at the peril of the bank. *Jordan, Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 22 L.R.A.(N.S.) 250, 87 N. E. 740; *Union Biscuit Co. v. Springfield Grocer Co.* 143 Mo. App. 300, 126 S. W. 996; *Jackson v. National Bank*, 92 Tenn. 154, 20 S. W. 802, 36 Am. St. Rep. 81, 18 L.R.A. 663.

The reason for this rule is readily apparent. The depositor cannot know the signatures of the persons to whom he issues checks, and is not called upon nor expected to identify the payee or his signature; while, on the other hand, the bank may decline to pay until sufficient proof of the identification is furnished. It is, of course, impractical for banks at all times to require proof of the genuineness of the payee's indorsement, so a custom has arisen among banks that requires the bank cashing the check in the first instance to indorse same, guaranteeing all prior indorsements, and, relying upon this guaranty, the bank of deposit pays without further question, and, in the event same has been paid upon a forged indorsement, the bank of deposit has no right to charge same against the account of the depositor, but must look to its remedy upon the guaranty of the paying bank or other intermediate indorsers. Unless, of course, the depositor has been guilty of negligence which induced the bank to pay, or having learned of the forgery in time that notice to the bank would have saved it the loss and failed to so notify it, or was guilty of other conduct constituting an estoppel. 5 Cyc. 548; *Zane, Banks & Bkg.* pp. 266-270; *Hatton v. Holmes*, 97 Cal. 208, 31 Pac. 1131; *Atlanta Nat. Bank v. Burke*, 81 Ga. 597, 2 L.R.A. 96, 7 S. E. 738; *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 114 Am. St. Rep. 595, 77 N. E. 693; *Shipman v. Bank of New York*, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; *Armstrong v. Pomeroy Nat. Bank*, 46 Ohio St. 512, 6 L.R.A. 625, 15 Am. St. Rep. 655, 22 N. E. 866; *National City Bank v. Third Nat. Bank*, 100 C. C. A. 556, 177 Fed. 136.

The only allegation and proof of negligence against Fish was the sending of the checks to Graham instead of to the payees, and the failure of Fish to examine the checks when returned to him by the bank. The checks were sent to Graham for delivery to the payees, and Fish had a right to



presume that such would be done, and we can see no negligence in this. Fish was not presumed to know the signatures of the payees, nor did it appear that he, in fact, knew, so that an examination of the checks after their return to him would not have disclosed the forgeries, so we can see no want of care in that regard. *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa, 530, 63 Am. St. Rep. 399, 70 N. W. 769, 2 Am. Neg. Rep. 349; *First Nat. Bank v. Tappan*, 6 Kan 456, 7 Am. Rep. 568; *Brixen v. Deseret Nat. Bank*, 5 Utah, 504, 18 Pac. 43; *Grand Lodge, A. O. U. W. v. State Bank*, 92 Kan. 876, L.R.A.1915B, 815, 142 Pac. 974.

The record further discloses that Fish learned of the forgeries some two or three months prior to his informing plaintiff in error thereof, but prior to his learning of the forgeries Graham had absconded, leaving no property. That being true, notice would have been without avail, and we are unable to see wherein Fish failed in any duty in this.

Plaintiff in error alleges, in its answer, that it paid these checks, relying upon the guaranty of its codefendants, and, if the indorsements of the payees had not been guaranteed by some responsible person, it would not have paid them, and, that being true, its recourse was on said guaranties. *Harmon v. Old Detroit Nat. Bank*, 153 Mich. 73, 17 L.R.A.(N.S.) 514, 126 Am. St. Rep. 467, 116 N. W. 617.

From a careful examination of the evidence, we are convinced that it was insufficient to have supported a verdict for plaintiff in error, and the trial court did not err in directing a verdict for defendant in error.

Finding no error, the judgment of the trial court should be affirmed.

**Per Curiam:**

Adopted in whole.

A petition for rehearing having been filed, Turner, J., on December 11, 1917, handed down the following additional opinion:

For reversal, it is again urged that the court erred in excluding evidence offered by defendants to prove that, by letter dated February 12, 1909, certain parties connected with defendants Pauls Valley National Bank and the First National Bank of Wynnewood had made certain charges (undisclosed by the record) against Graham, and had notified Fish that they desired to withdraw former letters recommending Graham to him, and that Fish replied, in effect, that Graham had been his agent for two or three years; and that his business had been profitable; that he was honest

and straight; that the banks had no reason for writing such a letter; and that, unless they made good their charges, they might get into trouble. There was no error in excluding this evidence, although this was on cross-examination of Fish, who, on direct examination, had testified, over defendant's objection, that he had full confidence in Graham's integrity; this for the reason that the pleadings did not raise the issue of the negligence of Fish in retaining Graham as his agent during the time the forgeries were committed, and hence such evidence was without the issues, and irrelevant and immaterial. We say that such testimony was without the issues; for, turning to the pleadings, they disclose that, to escape liability, it was alleged only that, after the Spain check had been paid by the drawee bank, the same was returned to plaintiff about March 1, 1908, that plaintiff failed to notify said defendant that the indorsement thereon was forged until December, 1909, and that in the meantime Graham had removed himself and his property out of the county, and placed it beyond the reach of said bank. All of which was denied by plaintiff, who alleged that said removal took place long before he discovered the forgery. Such being the state of the pleadings, we fail to see how this letter and the reply thereto, if admitted in evidence, could tend to even put plaintiff on his guard that one or more of his canceled checks contained the forged indorsement of Graham, much less tend to support the allegation that, after he knew it, he failed to notify the payee bank, and thereby deprived it of an opportunity to protect itself.

It is next contended that this court, having all the facts before it, "should render a proper judgment, which should run, first, against the banks which accepted and paid the checks with the forged indorsements, thus making them primarily liable, with a secondary liability upon the National Bank of Commerce." But the state of the record will not permit us to do so, if we were otherwise inclined, which we are not. Pertinent to this, the record discloses that, at the instance of counsel for the National Bank of Commerce, the trial court sustained a demurrer to plaintiff's evidence in favor of the defendant Pauls Valley National Bank and First National Bank of Wynnewood, but overruled it as to the National Bank of Commerce, and rendered judgment, in effect, that plaintiff take nothing as against the former, but have judgment against the latter bank, which alone complains and brings the case here. Now, as to do as requested by counsel would be, in effect,

to hold that the court erred in sustaining counsel's own demurrer, we decline. Besides, as Rev. Laws 1910, § 4118, provides: "As respects one another, indorsers are liable prima facie in the order in which they indorse," which is in keeping with the general rule stated in 4 Am. & Eng. Enc. Law, 2d ed. 483, thus: "In respect to the liability of indorsers inter se, the rule is that they are prima facie liable to each other in the order in which their indorsements successively appear, each indorser being liable to all succeeding indorsers, but not to preceding ones," it would seem that the order of liability should be the other way, and might have

been had the National Bank of Commerce, in a cross action against its codefendants, prayed for alternative relief in that, should plaintiff have judgment against it for the amount of his loss, it have judgment over against them as prior indorsers of the checks for the amount of its loss; but such relief, not having been prayed, and those codefendants thereby given their day in court to defend against an action over against them, we cannot render such judgment against them here.

There is no merit in the remaining contentions.

All the Justices concur.

**Annotation — Right of bank remitting for or paying forged check as against the depositor or correspondent bank, as affected by the latter's negligence in failing to give notice of the forgery.**

This note supplements a note on the same subject appended to *McNeely Co. v. Bank of North America*, 20 L.R.A. (N.S.) 79.

As to the liability of a bank for paying an altered check, where alteration was facilitated by form in which it was drawn, see note in L.R.A.1918B, 327.

As to the duty of a depositor having a checking account with a bank, to examine pass book and vouchers upon return from the bank, see note in L.R.A. 1915D, 741.

As pointed out in the note first referred to, in considering the question raised, the negligence of the depositor or the correspondent bank is assumed to exist, the question being, in effect, as to whether or not such negligence, in and of itself, is a sufficient ground for avoidance by a bank remitting for or paying a forged check to sustain it in charging the check to the depositor or correspondent bank. It is also stated, in the note referred to, that by the weight of authority a bank cannot charge the amount paid on a forged check against the account of a depositor or correspondent bank, unless it shows that the former have been guilty of negligence in discovering or giving notice of the forgery, and such negligence has misled it to its injury. This is also the doctrine of the cases decided subsequently to this note: *Scala v. Miners' & M. Bank* (1918) — *Colo.* —, 171 Pac. 752 (bank must be misled by act of negligence on the part of the depositor); *Commercial Bank v. Arden* (1917) 177 Ky. 520, L.R.A.1918B, 320, 197 S. W. 951 (no ground of estoppel exists against

depositor, unless he did or said something which induced or caused the bank to pay the forged check drawn against his account, when it would not otherwise have done so); *Morgan v. United States Mort. & T. Co.* (1913) 208 N. Y. 218, L.R.A.1915D, 741, 101 N. E. 871, Ann. Cas. 1914D, 462 (bank may escape liability for repayment of amount of forged check charged to the depositor's account, by showing that the latter has been guilty of negligence which contributed to such payments, and that it has been free from any negligence); *North British & M. Ins. Co. v. Merchants' Nat. Bank* (1914) 161 App. Div. 341, 146 N. Y. Supp. 720 (same as preceding case); *Metallurgical Securities Co. v. Mechanics & M. Nat. Bank* (1916) 171 App. Div. 321, 157 N. Y. Supp. 321 (a depositor cannot be charged with failure to inform a bank of forgery of the indorser's signature to checks signed by him, unless the bank has been actually damaged by such failure); *Figuers v. Fly* (1916) 137 Tenn. 358, 193 S. W. 117 (where forgery is that of signature of payee, the bank is liable to repay the amount of check charged to the depositor's account, unless it shows that the latter has been guilty of some negligence or fault which misled it); *First Nat. Bank v. Farmers' & M. State Bank* (1912) — *Tex. Civ. App.* —, 146 S. W. 1034 (where the negligence of the remitting bank in not ascertaining the forgery of a check did not naturally and proximately result in injury to the receiving bank, the latter is liable for the amount remitted).

It has also been held that, where a

bank is guilty of negligence in paying a forged check, the drawer is estopped from claiming against it, only where his own negligence is directly connected with the forgery. *New York Produce Exch. Bank v. Houston* (1909) 95 C. C. A. 251, 169 Fed. 785.

It has been held, however, that, where a depositor fails to inform his bank of forgeries as soon as he discovers them, he loses his right of action against the bank. *Findlay v. Corn Exch. Nat. Bank* (1911) 166 Ill. App. 57. And in Pennsylvania the rule obtains that, where a depositor fails promptly to inform the bank of the forgery of his name to a check, he must be regarded as having withheld from it a substantial right, without regard to what might or might not have resulted from the prompt exercise of that right; for it is sufficient to know that such delay on the part of the depositor might well prejudice the bank, and it is not necessary for the latter to prove that it, in fact, did work material harm to it. *Marks v. Anchor Sav. Bank* (1916) 252 Pa. 304, L.R.A.1916E, 906, 97 Atl. 399 14 N. C. C. A. 812, following, in this regard, *McNeely Co. v. Bank of North America* (1908) 221 Pa. 588, 20 L.R.A.(N.S.) 79, 70 Atl. 891. And, under this rule, it has been held that a delay of a week or two weeks by a depositor, before informing a bank of the forgery of his name to a check, is fatal to his right to hold the bank for the amount of the check charged to his ac-

count. *Murray v. Real Estate Title Ins. & T. Co.* (1909) 39 Pa. Super. Ct. 438.

In *Hair v. Winnsboro Bank* (1916) 103 S. O. 343, 88 S. E. 26, a charge to the jury was sustained, which, in effect, instructed the jurors that the defendant bank was liable to repay to a depositor the amount paid by it on a series of forged checks charged to the depositor's account, unless the latter was guilty of negligence, either in discovering the forgery or failing to inform the bank within a reasonable time after discovering it.

In *Israel v. State Nat. Bank* (1909) 124 La. 835, 50 So. 783, it is held that, where a depositor did not inform a bank that certain checks returned to him were forgeries, although he was put upon notice in this regard, he was nevertheless entitled to recover the amount of the forged checks which the bank had charged to his account up to the time he had notice of the forgery; but he could not recover the amount of the forged checks paid by the bank and charged to his account after he had such notice.

In this regard it is to be noted, that the Negotiable Instruments Law provides, in effect, that where delay in giving notice to a bank of the forgery of a check exceeds a year from the time a depositor receives his pass book and canceled vouchers, including the forged checks, the depositor cannot assert any claim against the bank in regard thereto. *Shattuck v. Guardian Trust Co.* (1912) 204 N. Y. 200, 97 N. E. 517. A. G. S.

# OKLAHOMA SUPREME COURT.

WORLD PUBLISHING COMPANY et al.,  
Plffs. in Err.,  
v.

MARY MINAHAN et al.

(— Okla. —, 173 Pac. 815.)

## Libel — managing editor — liability.

Where the managing editor of a newspaper is one of the officers of the corporation and has active charge and control of the management, conduct, and policy thereof, he is equally liable with the owner for the publication of a libelous article, and this is true, even though he did not know of the publication, for it is his duty to know, and it is his duty to control the contents of said

Headnote by HOOKER, C.

Note. — As to liability of editor or manager of newspaper for libel published without his knowledge, see annotation following this case, post, 287.

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publication, and he cannot avoid responsibility by abandoning the same in the hands of his employees, and escape responsibility upon the theory that his employees acted without his knowledge or consent. For other cases, see *Libel and Slander, I. in Dig. 1-52 N. S.*

(May 28, 1918.)

**E**RROR to the District Court for Tulsa County to review a judgment in plaintiff's favor in an action brought to recover damages for the alleged publication of a libel. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Gregg & Martin, for plaintiffs in error:

There is no reason upon which an editor, any more than any other individual, can be held responsible for such a tort, when it appears that he was actually innocent of all complicity in it.

*Folwell v. Miller*, 10 L.R.A.(N.S.) 332,

75 C. C. A. 489, 145 Fed. 495, 7 Ann. Cas. 455; German-American Ins. Co. v. Huntley, — Okla. —, 161 Pac. 815.

Messrs. John Y. Murry and Davidson & Williams, for defendants in error:

Lorton was personally liable, coextensively with the World Publishing Company.

Folwell v. Miller, 10 L.R.A.(N.S.) 332, 75 C. C. A. 489, 145 Fed. 495, 7 Ann. Cas. 455.

The managing editor is personally liable for libelous publications in his paper, whether or not he knew or had any part therein or connection therewith, and regardless of his presence or absence, and this without reference to his executive authority and absolute control of subordinates.

25 Cyc. 429; 17 R. C. L. § 138; Danville Press Co. v. Harrison, 99 Ill. App. 244; Nevlin v. Spieckemann, 1 Sadler (Pa.) 400, 4 Atl. 497; Smith v. Utley, 92 Wis. 133, 35 L.R.A. 621, 65 N. W. 744; Belo v. Fuller, 84 Tex. 450, 31 St. Rep. 75, 19 S. W. 616.

Hooker, C., filed the following opinion:

In the petition filed in this cause in the lower court Mary Minahan alleged that at all times mentioned therein she was the proprietress and manager of a rooming house, located in the city of Tulsa, and at the same time the World Publishing Company, a corporation, was the owner and the publisher of two certain newspapers to wit, the Tulsa Daily World, a morning publication, and the Tulsa Evening Sun, an afternoon publication, both of which papers were in general circulation in the city and county of Tulsa; that Eugene Lorton was the managing editor of both of said papers, and as such, among other things, it was his duty to supervise the matters printed and published in each and all of said papers, and to exercise reasonable diligence in ascertaining the truthfulness of the articles so published, and that his duties to the World Publishing Company required him to ascertain and know the truthfulness of all articles published in said papers; that at all times the said Mary Minahan, plaintiff below, was a good and worthy citizen of the city of Tulsa, and that she conducted a clean, law-abiding rooming house, and in all ways behaved and conducted herself as a good woman should; that the rooming house conducted by her enjoyed a good reputation as a moral and law-abiding place; and that neither she nor her place had ever had any suspicion cast upon them, until after the publication of the articles complained of here.

It is further alleged that said defendants wrongfully maliciously, and wantonly, and with a desire and intention to injure her, the said Mary Minahan, and her good name,

and to bring her into public disgrace among her neighbors and her friends, did, on the 11th day of July, 1914, in the various editions of its papers, falsely, wrongfully, and maliciously, and in total disregard of her rights, publish of and concerning her and her place of business the following libelous and defamatory matter:

Police to Delve into Mysterious Case at Resort.

Landlady Still Refuses Information—Police Active, Foul Play Is Feared—Is Bad Result.

The deepest, darkest mystery still surrounds the sudden illness of Mrs. Frank Fleek, who came to Tulsa yesterday afternoon in company with her husband and registered at the Minahan rooms. Death was only cheated of a victim by the municipal pulmotor, operated by Jack Breen of the Central Fire Station, after the woman's lungs had been refreshed by artificial air pumped from the life-saving service.

From what the woman was afflicted with could not be learned this morning. The Fleeks, who came by automobile from Kansas City and registered at the Minahan rooms without the knowledge of the character of the place it is, are said to be wealthy. Newspaper reporters again this morning were refused admittance to the rooming house, while the landlady of the place reluctantly gave up information to the police.

Detectives Busy.

The police still cling to the theory that there is something back of the case that has not yet been given out. Detectives and plain clothes officers were this morning detailed on the case. If the landlady continues her obstinate and defiant manner towards the police, arrests may quickly follow.

A House of Ill Repute.

The reputation of the house was unknown to the Fleeks when they registered there yesterday afternoon. Police officers this morning gave out the information that it is one of the most notorious houses of ill repute in Tulsa, operating under the guise of a "rooming house." Although a definite foundation so far is lacking, the police are working on the theory that the woman's sudden illness was caused by foul means employed by those in charge of the place.

Last night, when newspaper reporters called at the place, they were met by the landlady, Mrs. Minahan, who abruptly ordered them from the house and threatened bodily injury when they at first refused to comply with her demands. The

reporters were forced from the place when several burly men attendants were summoned by Mrs. Minahan.

Reports from there this morning girls wearing even less clothing were conspicuous in the resort last night, while an effort was being made to resuscitate the woman.

Reports from there this morning indicate that the woman will recover if she is given the necessary protection.

The petition here stated a cause of action, and sought to recover damages in the sum of \$10,000 for damages to her reputation.

To this petition the World Publishing Company filed an answer, in which it admitted that it was the owner and publisher of the aforesaid newspapers, and that the articles published in them were printed by it in good faith, upon reliable information furnished it through its reporters, and were published by it upon the belief that the same were true, and that the matters and things stated therein were in fact true, and especially denied that said articles, or any part thereof, were and are libelous against the plaintiff, that said articles were published as items of general news, in good faith, without any malice to the plaintiff or any intention on its part to injure or damage plaintiff in her reputation, credit, or business, and especially denied plaintiff had been injured or damaged in any way by reason of said publications, and said answer also contained a general denial.

The defendant below, Eugene Lorton, filed a separate answer, in which he admitted that he was the managing editor in the employ of the World Publishing Company, and that said corporation printed and published the aforesaid newspaper in the city of Tulsa at the time involved here, and denied the allegations contained in the plaintiff's petition, and especially denied that said articles were printed or published for the purpose of injuring plaintiff in her reputation, and denied that the same had hurt her in any way whatsoever.

The articles published were libelous per se, and the evidence in this case was altogether unwarranted and unjustified, without any foundation to support it.

The evidence for plaintiff below establishes that Eugene Lorton was, at the time of this publication, the managing editor of the Tulsa Daily World, and the Tulsa Evening Sun. He was also the vice president of the World Publishing Company, and one of the business managers connected with the institution, and had the authority to hire and fire its employees, and the general policy of the papers, together with their entire business affairs, were conducted and operated by him, either personally or

by those who were in his employ, and under his supervision.

This case was tried to a jury, and, after hearing the entire evidence, a verdict was returned in favor of the defendant in error against the World Publishing Company and Eugene Lorton for the sum of \$500; and to reverse this judgment the World Publishing Company and Eugene Lorton have appealed to this court, and have assigned several reasons why the judgment should be reversed.

It is urged that, in view of the fact that the petition filed herein, and on which this cause went to trial, sought to recover damages caused only to the reputation of plaintiff below, certain parts of the evidence which defendant in error was permitted to give as to the effect that said publications had upon her health were prejudicial to the rights of the plaintiffs in error. This contention is not well taken. The court in its instructions specifically limited the right of recovery to injuries caused to the reputation of plaintiff below, and, during the progress of the trial, the statement was many times made to the jury by plaintiff below that she sought no recovery for damages to her health or business, but merely to her reputation. We do not believe that the plaintiffs in error were in any way prejudiced by the introduction of this evidence, and this view is strengthened by the size of the verdict and the entire absence of any justification for the publication.

It is next urged that the admission of the evidence of one Kersey, who was the desk sergeant at the police station upon the night these transactions took place concerning which this publication was made, was error. The purpose of this testimony was to show the conduct and demeanor of the reporters in the employ of the World Publishing Company, whose ill-advised acts caused this publication. The reporters were agents of the World Publishing Company, and, while in the employ of the World Publishing Company as a corporation, were, in a sense, under the supervision and management and control of the plaintiff in error Eugene Lorton, who had charge of the operation of these papers. This testimony was competent, and neither the rights of the company nor of Eugene Lorton were in any way prejudiced by its introduction.

As to the World Publishing Company, there is no merit whatever in its appeal. The judgment here against it is ridiculously small for the injury inflicted, and we unhesitatingly affirm the judgment of the lower court as to it.

It is contended by Eugene Lorton that

the trial court committed an error in refusing to permit him to establish that he was not in the city at the time of the publication of the articles complained of here, but that, as a matter of fact, he was away on his vacation, and had been for some days prior thereto, and did not know of the publication until after the expiration of several days, and it is further asserted that the trial court committed an error prejudicial to him in giving instruction No. 10, which was as follows, to wit: "The court instructs the jury that, if they believe from the evidence in this case the defendant Lorton had, either directly or indirectly, under his control a general supervision and management of the editorial policy and news columns of the Tulsa Daily World, then, in that event, in law he would be equally liable with the World Publishing Company for any and all injury done or damage incurred by reason of the publication therein of any libelous article. This would be true regardless of whether or not he wrote or knew of the article before it was published."

These two questions can be considered upon one proposition, as to whether one who occupied the position similar to that of Eugene Lorton here is responsible for the publication made in his absence. We think this evidence establishes the fact that Lorton was the representative of the World Publishing Company, and in fact, so far as the entire management of the Tulsa Daily World was concerned, he was the World Publishing Company, that is, he conducted the policy of the paper, supervised it, managed it in all of its details, employed or assisted in employing those who operated it, and that his functions and his duties as well as his power, as testified to by himself, clothed him with more authority than that of the managing editor.

In 17 R. C. L. p. 385, it is said: "It has been held that the managing editor of a newspaper is equally liable with the proprietor and publisher in a civil action for the publication of a libelous article, whether he knows of the publication or not, as it is his business to know; and the fact that he is only editor in a particular department, and has no control over the department in which the article complained of appears, has been said to be immaterial."

In 25 Cyc. 429, the rule is stated thus: "The managing editor of a newspaper is equally liable with the proprietor for the publication of a libelous article, and this whether he knows of the publication or not, as it is his duty to know the contents of all articles published."

In *Danville Press Co. v. Harrison*, 99 Ill. App. 244, it is said: "Where a newspaper

is published and controlled by a corporation, one who is merely an officer of the corporation is not responsible individually for libelous publications made without his knowledge or consent, but it is otherwise where such officer is the general manager of the paper and authorized by the directors of the corporation to control its policy."

And it is further held that "where the general manager of a corporation engaged in the publication of a newspaper neglects to control his employees in respect to what shall appear in the paper, and a libel is published, such neglect is equivalent to a reckless disregard of the rights of others, equal to a wilful or intentional wrong, and renders both the manager and the corporation liable to be mulcted in exemplary damages."

In the body of the opinion, it is said: "The evidence shows, however, that Beard was the general manager of the publication and was authorized by the directors to control the policy of the paper. He had also assumed to do this, and had employed Robinson, the editor who published the libel. We think Beard as much responsible for the publication as if he knew the libel was about to be published and did not prevent it. In other words, a person cannot avoid liability by putting instruments of harm, which he is authorized and it is his duty to control, into the hands of others, and then by abandoning the same in the hands of his agent, be heard to say that the agent acted without his knowledge or consent, after the harm has been accomplished."

In *Smith v. Utley*, 92 Wis. 138, 35 L.R.A. 622, 65 N. W. 746, the supreme court of Wisconsin said: "The law is well settled that the managing editor of a newspaper is equally liable with the proprietor and publisher for the consequences, in a civil action, for the publication of a libelous article; and this is so, whether he knows of the publication or not, for it is his business to know, and mere want of knowledge constitutes no defense."

In *Newell on Slander and Libel*, § 480, it is said:

"The proprietor of a newspaper is responsible for a libel appearing in its columns, although the publication may be made in his absence and without his knowledge. But the mere fact that one is president of and a stockholder in a corporation publishing a newspaper does not render him liable for a libel therein."

"As to the liability of a managing editor or editor in chief of a newspaper, the American cases are not in harmony. In *Smith v. Utley*, 92 Wis. 133, 35 L.R.A. 620, 65 N. W. 744, it was held that the managing editor of a newspaper is equally liable

with the proprietor and publisher for the consequences, in a civil action, for the publication of a libelous article; and this is so, whether he knows of the publication or not, for it is his business to know, and mere want of knowledge constitutes no defense.' A similar holding was made in *Hunt v. Bennett*, 19 N. Y. 173.

"On the other hand, the United States court of appeals held, in *Folwell v. Miller*, 10 L.R.A.(N.S.) 332, 75 C. C. A. 489, 145 Fed. 495, 7 Ann. Cas. 455: . . . A person who is general manager of a newspaper owned by a corporation and is authorized by the directors to control the policy of the paper, and assumes to do so, and employs an editor who publishes a libel, is liable

therefor, though he knew nothing of the libel before its publication, and had not authorized it to be published."

See also *Belo v. Fuller*, 84 Tex. 450, 31 Am. St. Rep. 75, 19 S. W. 616; *Nevin v. Spieckermann*, 1 Sadler (Pa.) 400, 4 Atl. 497.

The case of *Folwell v. Miller*, supra, is relied upon by the plaintiff in error as authority for nonliability. A careful consideration of the facts in this case, in our judgment, removes the same from the doctrine laid down in *Folwell v. Miller*.

For the reasons above indicated, the judgment of the lower court is affirmed.

Per Curiam:

Adopted in whole.

### Annotation — Liability of editor or manager of newspaper for libel published without his knowledge.

The present note is supplementary to note to *Folwell v. Miller*, 10 L.R.A.(N.S.) 332, which case is discussed and distinguished in *WORLD PUB. CO. v. MINAHAN*, ante, 283.

The different results reached in the cases seem to depend upon the relation deemed to exist between editor and proprietor.

As stated in *Folwell v. Miller* (Fed.) supra, if the liability of the editor is coextensive with that of the proprietor, it is not affected or qualified by the circumstance that the publication was made without any personal participation on his part. The *Folwell* Case, in holding an editor not liable for the publication of a libel without his knowledge, at a time when he is absent from the office, considers that the responsibility of the editor is not commensurate with that of the proprietor, but that the relation is that of principal and agent.

As supporting the view that an editor's liability is coextensive with that of the proprietor, the *Folwell* Case discusses *Smith v. Utley* (1896) 92 Wis. 133, 35 L.R.A. 620, 65 N. W. 744; *Watts v. Fraser* (1837) 7 Ad. & El. 223, 112 Eng. Reprint, 455, 2 Nev. & P. 157, W. W. & D. 451, 6 L. J. K. B. N. S. 226, 1 Jur. 671; *Nevin v. Spieckermann* (1886) 1 Sadler (Pa.) 400, 4 Atl. 497 and *Hunt v. Bennett* (1859) 19 N. Y. 173. See also other cases in note in 10 L.R.A.(N.S.) 332.

In *Leuch v. Berger* (1915) 161 Wis. 564, 155 N. W. 148, the court observed that it would not be inclined to extend the rule of liability regardless of knowledge, as announced in *Smith v. Utley*.

(1896) 92 Wis. 133, 35 L.R.A. 620, 65 N. W. 744, to a case of merely nominal editorship,—one where a person held the title, but did not exercise the functions appertaining to the position; and the liability of an editor was said to be a question for the jury in the *Leuch* Case, where it was admitted that the editor and his associate published the newspaper, and that the editor had immediate charge and control of the paper and active control of all publications of it, but testified that he knew nothing about the article until after it was published.

In *Wahlheimer v. Hardenbergh* (1916) 217 N. Y. 264, 111 N. E. 826, reversing (1914) 160 App. Div. 190, 145 N. Y. Supp. 161, the general manager and secretary of an unincorporated association organized to gather and distribute news was held not liable for libel published by such association. If he was the principal, observed the court, "if the business, regardless of the name under which it was conducted, was in fact his, then of course the reporters were his servants, and he was responsible for the libel. But we find no evidence that he ever was the principal. He was not even a member of the association. He was employed by the executive committee; he was paid a salary for his services; and he held his position at the pleasure and subject to the direction of his employers. Undoubtedly he had large duties of supervision and large powers of control. But the business was not his; the reporters were not his servants; he was not the principal, but the manager." The court further stated that the defendant, if he was not the principal, could not be held

on the theory of respondeat superior. The reporters were not engaged in his business; they were in the service of the association. He was not even an editor. "It was not his duty to edit or to approve or even to read the work of the reporters. He could not be held as a joint tort-feasor. If he had anything to do with the publication, the case would be different. But he had nothing to do with it. He did not procure it or participate in it or know anything about it. Yet he has been held liable for damages, and the jury were even told that the damages might be punitive. We think there is no sufficient basis on which such a verdict may stand." In connection with this case, observe also the reasoning of *Folwell v. Miller*, supra.

On the other hand, in *WORLD PUB. CO.*

*v. MINAHAN*, ante, 283, the managing editor of a newspaper is held equally liable with the owner for the publication of a libelous article, even though he did not know of the publication, the court stating that he could not avoid responsibility by abandoning the same in the hands of his employees, and escape responsibility upon the theory that his employees acted without his knowledge or consent. See also cases in note in 10 L.R.A.(N.S.) 332.

The decision of *Colburn v. Patmore* (1834) 4 Tyrw. 677, 1 Crompt. M. & R. 73, 149 Eng. Reprint, 999, 3 L. J. Exch. N. S. 317, held that the proprietor of a newspaper in which, without his knowledge or consent, a libel was inserted by his editor, could not recover against the editor the damages sustained by his own conviction as proprietor. J. D. C.

#### NEW MEXICO SUPREME COURT.

BERNARD BOES

v.

DAVID HOWELL, Appt.

(— N. M. —, 173 Pac. 966.)

##### Pleading — admission.

1. Matters properly pleaded which are not denied stand admitted.

For other cases, see *Pleading*, I. m, in *Dig.* 1-52 N. S.

##### Automobile — liability of owner.

2. One who keeps an automobile for the pleasure and convenience of himself and his family is liable for injuries caused by the negligent operation of the machine while it is being used for the pleasure or convenience of a member of his family.

For other cases, see *Automobiles*, II. a, in *Dig.* 1-52 N. S.

(Roberts, J., dissents.)

(May 28, 1918.)

**A**PPEAL by defendant from a judgment of the District Court for Chaves County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by the negligent operation of defendant's automobile. Affirmed.

Mr. O. O. Askren for appellant.

Messrs. J. D. Mell and R. C. Reid, for appellee:

Headnotes by HANNA, Ch. J.

Note. — As to liability where automobile is being used by a member of owner's family, see note to *King v. Smythe*, post, 297.

L.R.A.1918F.

Matters properly pleaded which are not denied are admitted.

31 Cyc. 207, and the authorities cited thereunder; *Harden v. Atchison & N. R. Co.* 4 Neb. 521; *Finklestein v. Barnett*, 16 Misc. 488, 38 N. Y. Supp. 961; *Wall v. Livezey*, 6 Colo. 465.

Defendant was liable for the injuries caused by the negligent operation of his automobile.

*Birch v. Abercrombie*, 74 Wash. 486, 50 L.R.A. 59, 133 Pac. 1020; *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761; *Parker v. Wilson*, 179 Ala. 361, 43 L.R.A.(N.S.) 87, 60 So. 150; *Hiroux v. Baum*, 137 Wis. 197, 19 L.R.A.(N.S.) 332, 118 N. W. 533; *Guignon v. Campbell*, 80 Wash. 543, 141 Pac. 1031; *Berry, Automobiles*, 2d ed. § 653.

Statement by HANNA, Ch. J.:

By the complaint filed in this case, which was instituted in the district court of Chaves county, it was alleged by Bernard Boes, against defendant, David Howell, that defendant was the owner of an automobile, which he permitted his sons, Guy Howell and John Howell, to drive and operate for their pleasure and for the pleasure of defendant's family and for his business; that on the 23d day of November, 1915, while running and operating defendant's automobile, the two sons of defendant passed a wagon wherein plaintiff was driving, coming up from behind the plaintiff and passing the plaintiff in a careless and reckless manner at a high rate of speed and giving no warning of their approach, causing the team which plaintiff was driving to run away, with the result that the plaintiff was injured. By his answer defendant admitted



that he is the owner of an automobile, but denied that on the occasion of the alleged accident he permitted or authorized Guy Howell or John Howell to use or drive said car. All of the other material allegations of the complaint were traversed. By further defense in the way of new matter the defendant pleaded contributory negligence. The facts as disclosed by the evidence at the trial, briefly stated; are as follows: On November 23, 1915, plaintiff and his son were driving toward the city of Roswell, and while about 2 miles east of that point, the sons of defendant, in the car in question, accompanied by several passengers, passed them on the left side of the road at a speed of 15 miles or more per hour, without giving any warning, which frightened the team of plaintiff, resulting in the neck yoke breaking, which let the wagon tongue down, and the team swerved to the left into a bank at the side of the road, upsetting the wagon and injuring the plaintiff.

Hanna, Ch. J., delivered the opinion of the court:

At the conclusion of plaintiff's case, the defendant moved the court to instruct the jury to return a verdict in favor of the defendant for the following reasons: First, that there had been no proof that the person driving the car was the agent of the defendant; second, if such proof existed there was nothing to show that the driver of the car was the agent of the defendant acting within the scope of his employment. A further ground pertaining to the alleged failure to prove damages was interposed, but for the purposes of this case does not require our consideration. In this connection appellant contends that at the conclusion of the plaintiff's case, when this motion was interposed, the plaintiff had proved, in regard to liability, only that the car which was driven at the time of the accident was owned by the defendant; and that his son, Guy Howell, was driving the same.

By plaintiff's complaint it was alleged that the defendant is the owner of an automobile which he permits his sons, Guy Howell and John Howell, to drive and operate for their pleasure and for the pleasure of the defendant's family and for his business. Defendant's answer in this connection was as follows: "Defendant admits that he is the owner of the automobile, but denies that on the occasion of the alleged accident that he permitted or authorized Guy Howell to use or drive said car."

It does not appear that he forbade him to drive the car on the occasion of the accident or on any other occasion. There is no denial of the allegations of the complaint

that the defendant permitted his sons to drive and operate for their pleasure and for the pleasure of defendant's family the defendant's car. The fact that he denied that on the occasion of the accident he permitted or authorized his sons to drive the car is not a sufficient denial of the allegation of the complaint. It is fundamental that matters properly pleaded which are not denied stand admitted. 31 Cyc. 207. We therefore have established by the pleadings that the defendant was the owner of the automobile in question, which he permitted his sons to drive and operate for their pleasure and for the pleasure of the defendant's family. A question is raised as to whether or not there is sufficient proof to show that the son driving the car at the time in question was a minor, but we believe that this is sufficiently established by the testimony of a witness, who, when testifying as to the ages of the boys in the car, said that they ranged from sixteen to nineteen years. It therefore appears that a minor son of the defendant was driving the car at the time of the accident, and that this was by the permission of the defendant. Turning to *Berry on Automobiles*, 2d ed. § 653, we quote from the text as follows: "The rule is followed, in most of the states in which the question has been decided, that one who keeps an automobile for the pleasure and convenience of himself and his family is liable for injuries caused by the negligent operation of the machine while it is being used for the pleasure or convenience of a member of his family."

See also *The Law Applied to Motor Vehicles*, §§ 902, 903. An examination of the numerous authorities upon the question of liability in these cases discloses that the mere existence of the relation of parent and child is not sufficient to raise the relation of master and servant, or create agency upon the part of the child so as to render the parent liable for the child's negligence in operating the former's automobile. In a case note found in 50 L.R.A. (N.S.) 59, following the case of *Birch v. Abercrombie*, a very comprehensive editorial note, supported by authority, points out that "the owner of an automobile who maintains it for the general use of his family should be held liable for its negligent operation by one of his children, whom he designates or permits to run it, where the car is occupied and being used at the time of the injury for the pleasure of other members of the owner's family than the child driving it. Under such circumstances the latter is unquestionably acting as the agent or servant of the owner in carrying out the purposes for which the car was bought, as much as

if the owner had hired a person outside of the family to act as chauffeur."

In the case of *Birch v. Abercrombie*, referred to, which is also reported in 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020, the court expressly held that "the burden is upon a parent whose child causes an injury while driving the parent's automobile, to overcome the presumption that the child was driving the vehicle for the owner."

The Washington supreme court further said in the same opinion: "A daughter, in using her father's automobile for her own pleasure, is his servant in doing so, if he purchased and kept the automobile for the use of his family."

The facts in the case referred to are closely analogous to the facts of the instant case. See also *Kayser v. Van Nest*, 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 N. W. 1091; *Griffin v. Russell*, 144 Ga. 275, L.R.A. 1916F, 216, 87 S. E. 10, Ann. Cas. 1917D, 994.

Following the last-mentioned case in L.R.A. there is another extensive note, collecting later authorities and supplementing the note in 50 L.R.A.(N.S.) 60. In this note, and in a number of authorities which we have examined, it is pointed out that a somewhat different question arises where an injury is inflicted by the negligent operation of an automobile purchased for the general use of the owner's family by his child, while the latter, with the express or implied permission of the father, is using it for his own pleasure alone. As pointed out in the last-mentioned note, the parent's liability for the injury caused by the negligent operation of the car by one of his children, whom he designates or permits to run it, is clearer in a case where the child was at the time driving with other members of the family than where driving alone, since the presence of other members of the family tends to show that the car was being used for the purpose for which it was intended, and that the operator was acting as the parent's servant. We do not believe that this suggested difficulty has application to the present case. Two members of the defendant's family were in the car, and, so far as the record discloses, the car was not being used for the pleasure of one member of the family alone. We might add numerous authorities to this opinion, but we agree with the view expressed by the Washington court in the case of *Birch v. Abercrombie*, *supra*, which we will quote as follows: "It seems too plain for cavil that a father, who furnishes a vehicle for the customary conveyance of the members of his family, makes their conveyance by that

vehicle his affair,—that is, his business,—and anyone driving the vehicle for that purpose with his consent, express or implied, whether a member of his family or another, is his agent."

There are other assignments of error in appellant's brief, but they are primarily, if not entirely, disposed of by the conclusion at which we have arrived in this opinion.

Finding no error, therefore, in the record, the judgment of the trial court is affirmed; and it is so ordered.

**Parker, J., concurs.**

**Roberts, J., dissenting:**

The majority opinion follows the rule announced in the case of *Birch v. Abercrombie*, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020; and, if the doctrine announced by the Washington court in that case is correct, conceded the present case should be affirmed.

While it is stated in the majority opinion that, upon the occasion of the accident, two sons of appellant were in the machine, one driving and the other a passenger, I do not understand the majority to hold that the son who was driving the machine was the agent of the father because he was carrying another member of the father's family in the machine. Some courts hold that while a father provides an automobile for the pleasure and convenience of the members of his family, and a member of the family acts as chauffeur, and at the request of the father or with his consent uses the machine to carry the members of the family on business or pleasure, the son is acting as chauffeur and is the agent or servant of the father. The facts in this case, however, in my judgment, should not bring it within such a rule. From all that appears from the record the son who was driving the machine was about his own individual business, and was not operating the machine at the request or for the convenience of his brother. In this respect the case is identical with that of *Cohen v. Meador*, 119 Va. 429, 89 S. E. 876, Ann. Cas. 1917D, 375. Eliminating this incident from the case and stating the law as set forth in the majority opinion, we have the doctrine announced that "one who keeps an automobile for the pleasure and convenience of himself and his family is liable for injuries caused by the negligent operation of the machine while it is being used for the pleasure or convenience of a member of his family,"—which, restated baldly, holds that, where a father purchases an automobile for the convenience or pleasure of his family, he is liable for all injuries occasioned by the negligent opera-

tion of the same by any member of the family, although such member at the time of the injury was pursuing his own business or pleasure. Liability is put on the ground that the child, or member of the family, is the servant of the father, notwithstanding that, at the time the injury is inflicted, the child, or member of the family, is pursuing his own ends or purposes, whether of business or pleasure. I cannot give my assent to this doctrine, which, if followed to its logical conclusion, would render the parent liable in all cases for injuries resulting from the negligent use by members of his family of instrumentalities which he had provided for their pleasure and amusement. If, perchance, a parent should purchase a bicycle for the pleasure and amusement of his son, which, by reason of the negligence of the child, should occasion injury to another, the parent would be liable. The same thing would apply to a golf ball, base ball, roller skates, and a hundred and one other things which devoted parents are beguiled into supplying for the amusement and entertainment of their progeny.

It has never been the law in this country or in England that the father is liable for the torts of his children, either minors or adults, simply because of the relationship of parent and child, and the majority opinion in this case and the authorities supporting it do not place the liability upon the ground of relationship, but attempt to sustain it upon the theory of the doctrine of master and servant.

Until the cases followed by the opinion in this case announced the novel doctrine applicable to injuries occasioned by automobiles driven by a member of the family, it has always been accepted, without question, that a master was not responsible for any act or omission of his servant which was not connected with the business in which he served him, and in determining whether a particular act is done in the course of the servant's employment it is proper to inquire whether the servant was at the time engaged in serving the master. If the act was done while the servant was at liberty from his services, pursuing his own ends exclusively, there was no question but that the master was not responsible, even though the injuries complained of could not have been committed without the facilities afforded by the servant's relation to his master. *Garretzen v. Duenckel*, 50 Mo. 104, 11 Am. Rep. 405.

An automobile is not per se a dangerous agency. *McNeal v. McKain*, 33 Okla. 449, 41 L.R.A.(N.S.) 775, 126 Pac. 742; *Lewis v. Amoroux*, 3 Ga. App. 50, 59 S. E. 338; *Shinkle v. McCullough*, 116 Ky. 960, 105

Am. St. Rep. 249, 77 S. W. 196, 15 Am. Neg. Rep. 63; *Christy v. Elliott*, 216 Ill. 31, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 74 N. E. 1035, 3 Ann. Cas. 487; *Chicago v. Banker*, 112 Ill. App. 94; *McIntyre v. Orner*, 166 Ind. 57, 4 L.R.A.(N.S.) 1130, 117 Am. St. Rep. 359, 76 N. E. 750, 8 Ann. Cas. 1087; *Indiana Springs Co. v. Brown*, 165 Ind. 465, 1 L.R.A.(N.S.) 238, 74 N. E. 615, 6 Ann. Cas. 656, 18 Am. Neg. Rep. 392; *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761; *Hartley v. Miller*, 165 Mich. 115, 33 L.R.A.(N.S.) 81, 130 N. W. 336, 1 N. C. C. A. 126; *Slater v. Advance Thresher Co.* 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133; *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 355; *Hall v. Compton*, 130 Mo. App. 675, 108 S. W. 1122; *Danforth v. Fisher*, 75 N. H. 111, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670, 71 Atl. 535; *Vincent v. Crandall & G. Co.* 131 App. Div. 200, 115 N. Y. Supp. 600; *Knight v. Lanier*, 69 App. Div. 454, 74 N. Y. Supp. 999, 12 Am. Neg. Rep. 157; *Steffen v. McNaughton*, 142 Wis. 49, 26 L.R.A.(N.S.) 382, 124 N. W. 1016, 19 Ann. Cas. 1227; *Jones v. Hoge*, 47 Wash. 663, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915, 92 Pac. 433. This being true, an automobile would be in the same class as a horse and buggy, a bicycle, or other similar agency provided for the comfort, convenience, or amusement of the members of the family.

The following cases are cited in the notes referred to in the majority opinion as supporting, directly and indirectly, the position taken: *Denison v. McNorton*, 142 C. C. A. 631, 228 Fed. 401; *Stowe v. Morris*, 147 Ky. 386, 39 L.R.A.(N.S.) 224, 144 S. W. 52; *McNeal v. McKain*, 33 Okla. 449, 41 L.R.A.(N.S.) 775, 126 Pac. 742; *Campbell v. Arnold*, 219 Mass. 160, 106 N. E. 599; *Bourne v. Whitman*, 209 Mass. 155, 35 L.R.A.(N.S.) 701, 95 N. E. 404, 2 N. C. C. A. 318; *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761; *Kayser v. Van Nest*, 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 N. W. 1091; *Ploetz v. Holt* (1913) 124 Minn. 169, 144 N. W. 745; *Guignon v. Campbell*, 80 Wash. 543, 141 Pac. 1031; *Switzer v. Sherwood*, 80 Wash. 19, 141 Pac. 181, Ann. Cas. 1917A, 216; *Birch v. Abercrombie*, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020; *Allen v. Bland* (1914) — Tex. Civ. App. —, 168 S. W. 35; *Hazzard v. Carstairs*, 244 Pa. 122, 90 Atl. 556; *Moon v. Matthews*, 227 Pa. 488, 29 L.R.A.(N.S.) 856, 136 Am. St. Rep. 902, 76 Atl. 219; *Cowell v. Saperston*, 149 App. Div. 373, 134 N. Y. Supp. 284, also 208 N. Y. 619, 102 N. E. 1100; *Davis v. Littlefield*, 97 S. C. 171, 81 S. E. 487; *Winn v. Haliday* (1915) 109 Miss. 691, 69 So. 685; *McHarg v. Adt* (1914) 163 App. Div. 782,

149 N. Y. Supp. 244; *Carrier v. Donovan*, 88 Conn. 37, 89 Atl. 894; *Hiroux v. Baum*, 137 Wis. 197, 19 L.R.A.(N.S.) 332, 118 N. W. 533; *Lashbrook v. Patten*, 1 Duv. 317; *Winfrey v. Lazarus*, 148 Mo. App. 388, 128 S. W. 276; *Daily v. Maxwell*, 152 Mo. App. loc. cit. 422, 133 S. W. 351; *Marshall v. Taylor*, 168 Mo. App. 240, 153 S. W. 527, 6 N. C. C. A. 313; *Hays v. Hogan*, 180 Mo. App. 237, 165 S. W. 1125; *McWhirter v. Fuller*, — Cal. —, 170 Pac. 417. The case of *Hutchins v. Haffner*, — Colo. —, L.R.A. 1918A, 1008, 187 Pac. 966, should also be added, as should *Lewis v. Steele*, 52 Mont. 300, 157 Pac. 575. A reading of the last expression of the supreme court of Massachusetts in the case of *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761, will show that it does not go to the extent claimed for it, but is really the other way; nor do the other two cases cited support appellee's contention. The Texas case (*Allen v. Bland* (1914) — Tex. Civ. App. —, 168 S. W. 35, is not in point. There, the father permitted his eleven-year-old son to drive the automobile, and the case turned on the point that the father was liable because he permitted an inexperienced and incompetent boy to operate the automobile. In the Kentucky case (*Stowe v. Morris*, 147 Ky. 386, 39 L.R.A.(N.S.) 224, 144 S. W. 52) the son was not operating the car for his own purpose, but was driving at the request and for the business of his sister; it being his duty, under instruction, to drive the same at the request of other members of the family. Nor are the Pennsylvania cases, for in each of the cases cited the machine was operated by a hired chauffeur on family business. *Carrier v. Donovan*, 88 Conn. 37, 89 Atl. 894, the Connecticut case, is not in point, nor is the Wisconsin case of *Hiroux v. Baum*, 137 Wis. 197, 19 L.R.A.(N.S.) 332, 118 N. W. 533. The Mississippi case is also distinguishable, as shown by the later case of *Woods v. Clements*, 113 Miss. 720, L.R.A.1917E, 357, 74 So. 422. The New York cases were all decided by inferior courts, and the later expression by the court of appeals is the other way. The same is true of the Missouri cases. The Oklahoma case is not in point because the son, who was acting as chauffeur, did so at the request of his sister, taking the sister and her friend for a pleasure ride. Eliminating these, we have fairly supporting the majority opinion the courts of Minnesota, Washington, South Carolina, Colorado, and Montana.

On the contrary, my position is supported by the following well-considered cases and authorities: *Parker v. Wilson*, 179 Ala. 361, 43 L.R.A.(N.S.) 87, 60 So. 150; *Riley*

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*v. Roach*, 168 Mich. 294, 37 L.R.A.(N.S.) 884, 134 N. W. 14; *Danforth v. Fisher*, 75 N. H. 111, 21 L.R.A.(N.S.) 93, 139 Am. St. Rep. 670, 71 Atl. 535; *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1057; *Lots v. Hanlon*, 217 Pa. 339, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 525, 10 Ann. Cas. 731; *Cohen v. Borgenecht*, 83 Misc. 28, 143 N. Y. Supp. 399; *Maher v. Benedict*, 124 App. Div. 579, 108 N. Y. Supp. 228; *Patterson v. Kates* (C. C.) 152 Fed. 481; *Slater v. Advance Thresher Co.* 97 Minn. 305, 5 L.R.A.(N.S.) 598, 107 N. W. 133; *Stewart v. Baruch*, 103 App. Div. 577, 93 N. Y. Supp. 161; *Reynolds v. Buck*, 127 Iowa, 601, 103 N. W. 946, 18 Am. Neg. Rep. 412; *Doran v. Thomsen*, 76 N. J. L. 754, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296; *Garretzen v. Duenckel*, 50 Mo. 104, 11 Am. Rep. 405; *Evans v. A. L. Duke Automobile Supply Co.* 121 Mo. App. 266, 101 S. W. 1132; *Maddox v. Brown*, 71 Me. 432, 36 Am. Rep. 336; *Broadstreet v. Hall*, 10 L.R.A.(N.S.) 933, and notes, 168 Ind. 192, 120 Am. St. Rep. 356, 80 N. E. 145; *Howe v. Leighton*, 75 N. H. 601, 75 Atl. 102; *Spelman v. Delano*, 177 Mo. App. 28, 163 S. W. 300; *Linville v. Nissen*, 162 N. C. 95, 77 S. E. 1096; *Tanzer v. Read*, 160 App. Div. 584, 145 N. Y. Supp. 708; *McFarlane v. Winters*, 47 Utah, 598, L.R.A.1916D, 618, 155 Pac. 437; *Heissenbuttel v. Meagher*, 162 App. Div. 752, 147 N. Y. Supp. 1087; *B. & R. Co. v. McLeod*, — Alberta, —, 7 D. L. R. 579; *Farthing v. Strouse*, 172 App. Div. 523, 158 N. Y. Supp. 841; *Loehr v. Abell*, 174 Mich. 590, 140 N. W. 926; *Armstrong v. Sellers*, 182 Ala. 582, 62 So. 28; *Schumer v. Register*, 12 Ga. App. 743, 78 S. E. 731; *Roberts v. Schanz*, 83 Misc. 139, 144 N. Y. Supp. 824; *University of Missouri Bulletin, Law Series 5* (Dec. 1914) p. 30; *Case & Comment* (Aug. 1915) p. 220; 28 *Harvard Law Rev.* (Nov. 1914) p. 91.

Among the cases relied upon to support the liability of the father is that of *Hays v. Hogan*, 180 Mo. App. 237, 165 S. W. 1125. This case, however, went to the supreme court of Missouri, and that court repudiated the doctrine contended for and held, quoting from the syllabus: "A father is not liable for the negligence of a minor son in driving an automobile purchased for the use of the family, solely in furtherance of the child's own business or pleasure, and permission of the father is immaterial." 273 Mo. 1, L.R.A.1918C, 715, 200 S. W. 286.

The court of appeals of New York, in the case of *Van Blaricom v. Dodgson*, 220 N. Y. 111, L.R.A.1917F, 363, 115 N. E. 443, after stating the rule as announced by the supreme court of Washington, says: "This,

is an advanced proposition in the law of principal and agent, and the question which it presents really resolves itself into the one, whether, as a matter of common sense and practical experience, we ought to say that a parent who maintains some article for family use, and occasionally permits a capable son to use it for his individual convenience, ought to be regarded as having undertaken the occupation of entertaining the latter, and to have made him his agent in this business, although the act being done is solely for the benefit of the son. That really is about all there is to the question. Not much can be profitably said by way of amplification or in debate of the query whether such a liability would rest upon reasonable principles, or whether it would present a case of such theoretical and attenuating agency, if any, as would be beyond the recognition of sound principles of law as they are ordinarily applied to that relationship. The question largely carries on its face the answer, whichever way to be made. . . . But it seems to us that such a theory is more illusory than substantial, and that it would be far-fetched to hold that a father should become liable as principal every time he permitted a capable child to use for his personal convenience some article primarily kept for family use. That certainly would introduce into the family relationship a new rule of conduct which, so far as we are aware, has never been applied to other articles than an automobile. We have never heard it argued that a man who kept for family use a horse or wagon or boat or set of golf sticks had so embarked upon the occupation and business of furnishing pleasure to the members of his family that, if some time he permitted one of them to use one of those articles for his personal enjoyment, the latter was engaged in carrying out, not his own purposes, but, as agent, the business of his father. It seems to us that the present theory is largely due to the thought that because an automobile may be more dangerous when carelessly used than any of the other articles mentioned, there ought to be a larger liability upon the part of the owner, and, to this end, an extension of the doctrine of principal and agent in order properly to safeguard its use. . . . And in the present case it is in effect argued that because the use of an automobile upon a highway may be dangerous, and therefore is a privilege subject to license by the state, the courts can apply a different rule of agency to its use than would or could be applied to the case of the other articles which have been mentioned. This kind of argument, as it appears to us, discloses the novelty and

weakness of the proposition which is being urged upon us. It seems to disclose the idea, as an essential part of the argument, that because an automobile is different than a horse or boat, some advanced rules ought to be applied to its use. But the rules of principal and agent are not thus to be formulated. They are believed to be constant, and not variable in response to the supposed exigencies of some particular situation. The question whether one person is the agent of another in respect of some transaction is to be determined by the fact that he represents and is acting for him, rather than by the consideration that it will be inconvenient or unjust if he is not held to be his agent. If, contrary to ordinary rules, the owner of a car ought to be responsible for the carelessness of everyone whom he permits to use it in the latter's own business, that liability ought to be sought by legislation as a condition of issuing a license rather than by some new and anomalous slant applied by the courts to the principles of agency."

This opinion says about all that can be said upon the subject. If the lawmaking power of the state deems it necessary that the owner of an automobile should be made liable for injuries occasioned by its negligent operation by members of the family, it can pass appropriate legislation to accomplish such end. A court, however, is not a legislative branch of the government, and should not assume powers not vested in it by the Constitution.

For the foregoing reasons, I dissent.

#### TENNESSEE SUPREME COURT.

SHERMAN G. KING, Plff. in Certiorari,  
v.

F. D. SMYTHE.

(— Tenn. —, 204 S. W. 296.)

Master and servant—liability of parent for act of child—use of automobile.

A man who maintains an automobile for the pleasure of his family is liable for injury inflicted by its negligent use by an adult son, who is a member of his family, and who is using the car for his own pleasure under the general permission of the father.

For other cases, see *Parent and Child*, I. in *Dig. 1-52 N. 8.*

(June 17, 1918.)

Note.—As to liability where automobile is being used by a member of owner's family, see annotation following this case, post, 297, and references therein to annotations on related questions.

**C**ERTIORARI to the Court of Civil Appeals to review a judgment reversing a judgment of the Circuit Court for Shelby County in plaintiff's favor, in an action brought to recover damages for injuries caused by an automobile operated by defendant's son. Reversed.

The facts are stated in the opinion.

Mr. Thomas M. Scruggs for plaintiff in certiorari.

Messrs. J. T. Settle, John E. Bell, and W. H. Bentley, for defendant in certiorari:

When the head of a family purchases an automobile, intending it to be used, among other things, for the pleasure of the members of his family, and a member of his family, with his consent, is using it for pleasure, the automobile is being used for the purpose for which it was bought, and the driver is, in that sense, the agent of the owner.

*Lynde v. Browning*, 2 Tenn. C. C. A. 262; *Goodman v. Wilson*, 129 Tenn. 464, 51 L.R.A.(N.S.) 1116, 166 S. W. 752; *Birch v. Abercrombie*, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020; *Lashbrook v. Patten*, 1 Dew. 316; *Denison v. McNorton*, 142 C. C. A. 631, 228 Fed. 401; *Allen v. Bland*, — Tex. Civ. App. —, 168 S. W. 35; *Kayser v. Van Nest*, 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 N. W. 1091; *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761; *Marshall v. Taylor*, 168 Mo. App. 240, 153 S. W. 527, 6 N. C. C. A. 313; *Davis v. Littlefield*, 97 S. C. 171, 81 S. E. 487; *McNeal v. McKain*, 33 Okla. 449, 41 L.R.A.(N.S.) 775, 126 Pac. 742; *Moon v. Matthews*, 227 Pa. 488, 29 L.R.A.(N.S.) 856, 136 Am. St. Rep. 902, 76 Atl. 219.

Lansden, J., delivered the opinion of the court:

King brought this suit in the circuit court of Shelby county to recover damages for injuries to an automobile, occasioned by a collision between it and an automobile owned by the defendant, being driven by his son. The defendant is a physician and surgeon in the city of Memphis, and his practice is confined to surgery and teaching surgery. His statement of the relationship of the son to himself and the automobile was accepted by plaintiff below, and is as follows: "I was not in my car at the time of this accident, and no member of my family was in the car at the time, except my son Frank W. Smythe. At the time this accident occurred, Frank, my son, was not on any of my business nor engaged in the performance of any service for me. Frank is now in his twenty-fifth year, and at that time was a year younger than he is now. My son is in the senior class at the Tennes-

see University Medical College, and at the time of the accident he was a medical student, and residing at my home, where he is still living. He is not employed by me—I am just simply taking care of him and trying to educate him. I do not know how he happened to have the car out on that night or that particular occasion. He frequently drives out in the evenings alone or with his friends when I am not using the car. He is at liberty to use my car, and he don't have to ask me for permission on a specific occasion. If he had any duty to perform for me, I would direct him to do it, but, generally speaking, my chauffeur drives me and my family when we are using the car. When he (Frank) is using the car he is using it on his own business, his own pleasure, and not mine. My son lives with me as a part of my family, has always done so, and has never had any home except my home. At the time of this accident he was and has always been a member of my family, and has been a student at the university. I have supported him and maintained him, as he had no chance to make a living himself. I own and maintain this car for my professional purposes and for the pleasure of any members of my family; if I am not using the car, of course it is at their disposal. Generally speaking, my son has my permission to use my car if it is not likely to be summoned, and he understands when he is out visiting I have to keep in touch with him so as to be able to get my car. I would not deny him the use of the car if he wanted to go out to the park, or some place, if I was not using it, and it was the same with any other member of my family—if I was not using the car, they didn't have to have my consent for a specific occasion, for they understand it is subject to their use, if I am not using it. He was not using my car wrongfully on the occasion this accident happened; that is, he had a right to use it, and I would not object to his using it."

The statement of Dr. Smythe contains some conclusions of law made by him, but it fairly establishes that his son was a member of his family, was provided for in every particular as other members of the family, and that the son had the permission of the father to use the automobile upon the occasion of the accident. It can make no difference that the permission given the son by the father was general, and not particular. He expressly says that the son did not need to ask him for the car if he was not using it himself, and admittedly he was not using it, or wanting to use it, at this particular time. He also states that the son was not upon his business or on any service for him, but

was on his own business. This is a conclusion of law. The son was on his own pleasure. We also think that it can make no difference, so far as liability is concerned, that the son was the only member of the family in the car at the time of the collision. The car was bought and maintained for the professional purposes of the defendant, and for the pleasure of his family. This can only mean that when the car is not in use by the defendant for his professional purposes, and is in use by any member of his family for pleasure, it is being used for one of the purposes for which it was bought and maintained.

Hence, the question for decision is, Whether defendant is liable for accidents occurring by reason of the admitted negligence of his son while driving defendant's automobile, bought for the purposes stated, by defendant's permission, and for the son's pleasure.

Under well-settled principles, the defendant's liability must depend upon whether the son operating the automobile was his servant and engaged upon his business at the time the negligence occurred. *Goodman v. Wilson*, 129 Tenn. 464, 51 L.R.A.(N.S.) 1116, 166 S. W. 752; *Kayser v. Van Nest*, 125 Minn. 277, 51 L.R.A.(N.S.) 970, 146 N. W. 1091; *Hartley v. Miller*, 165 Mich. 115, 33 L.R.A.(N.S.) 81, 130 N. W. 336, 1 N. C. C. A. 126; *McNeal v. McKain*, 33 Okla. 449, 41 L.R.A.(N.S.) 775, 126 Pac. 742; *Birch v. Abercrombie*, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020; *Griffin v. Russell*, 144 Ga. 275, L.R.A.1916F, 216, 87 S. E. 10, Ann. Cas. 1917D, 994; *Van Blaricom v. Dodgson*, 220 N. Y. 111, L.R.A. 1917F, 363, 115 N. E. 443. The selected cases cited are elaborated, annotated, and show that all the courts apply this rule.

The rule, as stated, excludes the idea that defendant could be liable for the torts of his son because of the relationship existing between them. *Mirick v. Suchy*, 74 Kan. 715, 87 Pac. 1141, 11 Ann. Cas. 366; *Chastain v. Johns*, 120 Ga. 977, 66 L.R.A. 958, 48 S. E. 343.

It is also well established that an automobile is not a dangerous agency, so that its owner is liable for injuries to travelers on the highways inflicted while being driven by another, irrespective of the relationship of master and servant, or principal and agent. *Jones v. Hoge*, 47 Wash. 663, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915, 92 Pac. 433; *Goodman v. Wilson*, supra.

The court of appeals was of opinion that the facts stated did not create a prima facie case of liability, which would authorize a submission of the question of defendant's liability to a jury, and, for that reason

alone, dismissed the suit. The question of the parent's liability for damages occasioned by his automobile when driven by a member of his family, with his permission, and which he bought for the use and pleasure of his family, has not, so far, been decided in this state. The authorities cited above all discuss the question, and the annotator's notes to the cases, as well as the cases themselves, show that the numerical weight of authority is in favor of the parent's liability. In a recent case by the court of appeals of New York, the theory of liability is vigorously combated in an opinion prepared by Chief Justice Hiscock. The courts of last resort, in many states, sustain liability upon the theory that the member of the family is upon the defendant's business, and is his agent for the purpose, when driving for pleasure in a car furnished by the father for the pleasure and entertainment of his family. It is said, substantially, that the father has made it his business to entertain the members of his family, when he purchases an automobile for that purpose and delivers it to them for such use. In many cases, it is said that no difference can be perceived between such a case and a case where a man buys a business truck and employs a chauffeur to drive it in the prosecution of his business. This idea is combated by the court of appeals of New York, in *Van Blaricom v. Dodgson*, 220 N. Y. 111, L.R.A.1917F, 363, 115 N. E. 443. This case admits that the numerical weight of authority is, perhaps, against the opinion, but says the views therein expressed find support directly and indirectly in several cases cited. We have not examined all of those cases, but we have examined some of them, and they do not directly support the opinion. They do support the idea expressed in the opinion concerning the rule of agency, but they do not discuss or apply the rule in the case of an automobile driven by the son of defendant, under conditions stated in the cases which the opinion combats. The gist of the reasoning of this authority is contained in the following excerpt: "The proposition of liability urged in this case, however, goes further. It asserts that the father is liable for negligence in the management of his automobile by an adult son, when the latter is pursuing his own exclusive ends, absolutely detached from accommodation of the family or any other member thereof. On its face a proposition seems to be self-contradictory which asserts that a person who is wholly and exclusively engaged in the prosecution of his own concerns is nevertheless engaged as agent in doing something for someone else. It has always been supposed that a person who

was permitted to use a car for his own accommodation was not acting as agent for the accommodation of the owner of the car. *Reilly v. Connable*, 214 N. Y. 586, L.R.A. 1916A, 954, 108 N. E. 853, Ann. Cas. 1916A, 656. The attempt is made, however, to reconcile these apparently contradictory features of this proposition by the assertion that the father had made it his business to furnish entertainment for the members of his family, and that, therefore, when he permitted one of them to use the car, even for the latter's personal and sole pleasure, such one was really carrying out the business of the parent, and the latter thus became a principal, and liable for misconduct. This is an advanced proposition in the law of principal and agent, and the question which it presents really resolves itself into the one whether, as a matter of common sense and practical experience, we ought to say that a parent who maintains some article for family use, and occasionally permits a capable son to use it for his individual convenience, ought to be regarded as having undertaken the occupation of entertaining the latter, and to have made him his agent in this business, although the act being done is solely for the benefit of the son. That really is about all there is to the question."

It seems to us that the foregoing reasoning is more concerned with what the learned court considered pure logic than with the practical administration of the law. If a father purchases an automobile for the pleasure and entertainment of his family, and, as Dr. Smythe did, gives his adult son, who is a member of his family, permission to use it for pleasure, except when needed by the father, it would seem perfectly clear that the son is in the furtherance of this purpose of the father while driving the car for his own pleasure. It is immaterial whether this purpose of the father be called his business or not. The law of agency is not confined to business transactions. It is true that an automobile is not a dangerous instrumentality, so as to make the owner liable, as in the case of a wild animal loose on the streets; but, as a matter of practical justice to those who are injured, we cannot close our eyes to the fact that an automobile possesses excessive weight, that it is capable of running at a rapid rate of speed, and, when moving rapidly upon the streets of a populous city, it is dangerous to life and limb and must be operated with care. If an instrumentality of this kind is placed in the hands of his family by a father, for the family's pleasure, comfort, and entertainment, the dictates of natural justice should require that the owner should be re-

sponsible for its negligent operation, because only by doing so, as a general rule, can substantial justice be attained. A judgment for damages against an infant daughter or an infant son, or a son without support and without property, who is living as a member of the family, would be an empty form. The father, as owner of the automobile and as head of the family, can prescribe the conditions upon which it may be run upon the roads and streets, or he can forbid its use altogether. He must know the nature of the instrument, and the probability that its negligent operation will produce injury and damage to others. We think the practical administration of justice between the parties is more the duty of the court than the preservation of some esoteric theory concerning the law of principal and agent. If owners of automobiles are made to understand that they will be held liable for injury to person and property occasioned by their negligent operation by infants or others who are financially irresponsible, they will doubtless exercise a greater degree of care in selecting those who are permitted to go upon the public streets with such dangerous instrumentalities. An automobile cannot be compared with golf sticks and other small articles bought for the pleasure of the family. They are not used on public highways, and are not of the same nature of automobiles.

The court of appeals held that there was no evidence to support the verdict. We think this was error. The ownership of the automobile by defendant Smythe, and the fact that it was being driven by a member of his family with his permission, coupled with the further fact that the automobile was purchased and maintained for this purpose, among others, made a *prima facie* case of liability. Many cases hold that the ownership of the automobile merely makes a *prima facie* case that it was then in the possession of the owner, and whoever was driving it was doing so for the owner. *Birch v. Abercrombie*, 74 Wash. 496, 50 L.R.A. (N.S.) 59, 133 Pac. 1020. But this case is not left to such presumption. It is further proven that the automobile was being driven by defendant's son, with defendant's permission, for the son's pleasure, and that defendant bought the automobile partly for such purpose.

The negligence of defendant's son and the amount of damages inflicted are not in dispute. The only question made here is the liability of defendant for the injuries sustained. Accordingly, the judgment of the Court of Civil Appeals is reversed, and that of the Circuit Court is affirmed.



## Annotation — Liability where automobile is being used by a member of owner's family.

This annotation supplements that to *McNeal v. McKain*, 41 L.R.A.(N.S.) 775; *Birch v. Abercrombie*, 50 L.R.A.(N.S.) 59; *Griffin v. Russell*, L.R.A.1916F, 223, and *Van Blaricom v. Dodgson*, L.R.A.1917F, 365.

As stated in the prior notes, the annotation is confined to cases in which the parent's liability is discussed or decided with reference to the principle of agency or respondeat superior.

As to liability of owner upon the ground of dangerous agency, or of negligence in intrusting car to incompetent or negligent person, for injury inflicted while latter is operating car for his own purposes, see annotation to *Neubrand v. Kraft*, L.R.A.1915D, 691; *Walker v. Klopp*, L.R.A.1916E, 1295, and *Gardiner v. Solomon*, L.R.A.1917F, 384; and see the later case of *Halverson v. Blosser*, L.R.A.1918B, 498.

As to liability of owner for injuries by automobile while being used by a servant or third person for his own business or pleasure, see annotation to *Reilly v. Connable*, L.R.A.1916A, 957.

On making prima facie case of responsibility for negligence of driver of automobile by proof of defendant's ownership of car or employment of driver, see notes to *White Oak Coal Co. v. Rivoux*, 46 L.R.A.(N.S.) 1091, and *West v. Kern*, L.R.A.1918D, 924.

As to validity of statute making owner liable for injuries by automobile being used by another, see notes to *Daugherty v. Thomas*, 45 L.R.A.(N.S.) 699, and *Stapleton v. Independent Brewing Co.* L.R.A.1918A, 918.

### Where parent's automobile is being driven by child — generally.

Supplementing annotations in 41 L.R.A.(N.S.) 775; 50 L.R.A.(N.S.) 59; L.R.A.1916F, 223, and L.R.A.1917F, 366.

As indicated in the prior annotation, the relation of parent and child will not, of itself, render the parent liable for the child's negligent operation of the parent's car; but the child may become the parent's servant or agent in operating the car, and thus render the parent liable for the child's negligent driving.

It will be noted that it was held in *KING v. SMYTHE*, ante, 293, that the liability of a parent for damage caused by his automobile, while being driven by his son, depended upon whether the son was

the parent's servant and engaged in his business at the time of the accident.

In a late case, it was held that no presumption arose from the fact that, at the time of an accident, a son was driving his father's automobile that the son was acting within the scope of his authority, which cast upon the father the burden of showing the contrary. *Hays v. Hogan* (1917) — Mo. —, L.R.A.1918C, 715, 200 S. W. 286.

Following *Griffin v. Russell* (1915) 144 Ga. 275, L.R.A.1916F, 216, 87 S. E. 10, Ann. Cas. 1917D, 994, the court, in *Dougherty v. Woodward* (1917) — Ga. App. —, 94 S. E. 636, held that a father is not liable for the negligent driving of his car by his minor son, unless the son was acting as his father's servant; and where the evidence showed that the defendant's son, at the time of the injury for which recovery was sought, was using the car for his own purposes, in inspecting property which he contemplated buying, it was held that a verdict for the father was proper, although it also appeared that the defendant's wife was accompanying the son, at the latter's request.

And it was also held that the father's expressions of sympathy to the parents of the person injured, and his statements that he would do the right thing and his Christian duty in the matter, did not amount to a ratification of the tort or an acknowledgment of his liability therefor.

And in *Knight v. Cossitt* (1918) 102 Kan. 764, 172 Pac. 533, the evidence was held insufficient to establish the relation of master and servant between a father and son, and insufficient to support a verdict against the former, where the testimony showed that the father and his adult son, who lived with him, together owned the automobile which caused the injury for which a recovery was sought, and that when used for family purposes it was usually driven by the father, but sometimes by the son; that the latter drove it when using it in his business; that on the day of the accident the father was away, and the son took the car to go down town on his business; that his mother got into the car to ride down with him; and that on the way the accident occurred. The court stated that the only evidence to show that the relation of master and servant existed was that the mother got

into the car to ride, and that this was insufficient.

In *Clark v. Sweaney* (1918) — N. O. —, 95 S. E. 568, where recovery was sought for an injury inflicted by the defendant's automobile, the evidence was held sufficient to demand a submission to the jury of the question whether the defendant's son was acting as his father's agent, or servant, there being testimony that the defendant owned the automobile, that it was being driven by his son, whose mother was in the car, and that defendant came up after the accident and ordered the son to carry his mother home.

In *Wilson v. Polk* (1918) — N. O. —, 95 S. E. 849, in an action to recover for an injury inflicted by an automobile owned by a mother and driven by her son, accompanied by his father, an instruction was upheld which, in effect, stated that if the son and his father were the mother's agents, acting in her employment, and she had sent them to look after her business and they were guilty of negligence, she would be liable; but that if they were not acting as her agents, and she had not sent them on her business, and she was not with them and did not know where they had gone, but knew that they had taken the machine and gone off with it, but not to attend to her business, their negligence could not be imputed to her. It was also held that, although the evidence as recited in the statement of the case was not very full as to the mission the father and son were on, it could not be presumed that the jury found that they were on the mother's business, without evidence.

The court, in this case, stated that from the argument there seemed to be some misapprehension as to the ruling in *Linville v. Missen* (1913) 162 N. O. 101, 77 S. E. 1096 (set out in note in 50 L.R.A.(N.S.) 59), and said: "The court held, in that case, that such evidence was rebuttable, as, in that instance, by the fact that the son had been forbidden to use the machine, and had taken it out and was using it contrary to his father's wishes and without his knowledge, and that the mere ownership of the automobile, of itself, would not make the owner liable for personal injuries; that a parent was not ordinarily liable for such tort of his minor son (subject to exception, where the father permitted a child of tender years to run his automobile), nor would the owner be liable for the negligence of his son or any other chauffeur running an automo-

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bile, unless at the time driving the machine in the scope of his employment or implied authority."

In *Farnham v. Clifford* (1917) 116 Me. 299, 101 Atl. 468, where recovery was sought for an injury caused by the negligent operation of the defendant's automobile by his adult son, the court found it unnecessary to consider the contention that there was no evidence showing that the car was being used in the father's business at the time of the accident, it being held that the jury were justified in finding the defendant liable because of his admission of liability to the husband of the plaintiff, which he did not explain or modify while testifying as a witness in his own behalf.

**Where a car is purchased or kept for use of family.**

Supplementing annotations in 50 L.R.A.(N.S.) 60; L.R.A.1916F, 225, and L.R.A.1917F, 366.

As shown by the prior annotation, where a child acts as chauffeur for the family, of a car kept for family purposes, the owner is generally held liable for injuries resulting from the negligent operation of the car by the child, while he is driving it for other members of the owner's family who have permission to use it.

Where, however, a child, or a member of the owner's family, is driving a car kept for family use, for his own purposes and pleasure, unaccompanied by other members of the family, there has been a conflict of authority as to the owner's liability. Some of the courts hold that the owner cannot be held liable under such circumstances, since the driver was not acting as his servant or agent, while others hold the parent liable on what may, for convenience, be termed "the family purpose" doctrine, that is, on the theory that the car was being used for the purpose for which it was kept. As shown by the following cases, the conflict of authority still exists.

The latter view was adopted in *KING v. SMYTHE*, ante, 293, where the court reached the conclusion that, where a father purchases an automobile for the pleasure and entertainment of his family, and gives his adult son, who is a member of his family, permission to use it for pleasure, the son, in so using it, is acting in furtherance of the purpose for which the father kept the car, and that the latter would be liable for an injury caused by the son's negligent operation.

And the rule holding an owner of an

automobile, kept for family purposes, liable for an injury resulting while the car was being used by a member of the family, was adopted in *Boss v. Howell* (1918) — N. M. —, ante, 288, 173 Pac. 966, where the owner of an automobile maintained for family use, was held liable for an injury caused by it, while being used by his two sons.

And in *Crittenden v. Murphy* (1918) — Cal. App. —, 173 Pac. 595, a complaint was held to state a cause of action against a mother and father, where it alleged that the defendants were the owners of the automobile which injured the plaintiff; that it was purchased for the pleasure and comfort of the defendants and their minor son, and not for business purposes; that the son was authorized and permitted to drive the car for himself and defendants; and that, at and immediately prior to the time of the accident, the son was driving the automobile with the consent, knowledge, and permission of defendants, and was acting in furtherance of and not apart from the service and control of the defendants, and within purposes for which the car was purchased.

The court stated that the cases are divided as to the parent's liability, where a son was alone in a machine kept for family use, and not engaged in performing some act expressly for the parent at the time an injury resulted from the operation of the car, and, after quoting from *Birch v. Abercrombie* (1913) 74 Wash. 486, 50 L.R.A. (N.S.) 59, 133 Pac. 1020, where the rule was adopted, holding the parent liable in such cases, on the theory that the car was being used for the purpose for which the parent kept it, and in furtherance of the very purpose of its ownership, and that the child, in using it, was using it in the parent's business, as his agent, the court said: "We are satisfied that the rule thus laid down is the correct one, not only because of the fact that the use of the machine by the son for his own pleasure was contemplated when it was purchased, but also because of the very nature of the automobile itself. While it is true that the automobile is not, in itself, a dangerous instrument, nevertheless, it demands a very high degree of care and skill in its management upon the highway; and it must be recognized that, in the hands of an incompetent or reckless youth, it has immense potentiality for harm to others. Therefore, the owner owes the duty to the traveling public to see to it that his car,

when driven on the streets with his permission and for the purposes for which the car was purchased, should be driven carefully and with due consideration to their rights; and the owner should not, in good conscience, be allowed to disclaim his responsibility on the ground that the use thus contemplated and authorized by him is permissive only. When, as is alleged in the complaint in the case at bar, the son, with his parents' permission, takes the car out and drives it so recklessly as to cause it to run off the highway and to strike plaintiff, standing on the sidewalk, it is, in effect, the negligence of the parents in permitting the reckless son to drive that is the real cause of the injury. And we find this principle recognized in the statutes of California, for § 19 of the Motor Vehicle Act of 1915 (Stat. 1915, p. 406), which was in effect at the time of the accident, provides as follows: 'No person shall allow a motor vehicle owned by him or under his control to be operated by any person who has no legal right to do so, or in violation of the provisions of this act.' The complaint in the case at bar certainly shows an utter disregard by defendant's son, of the rules of the road laid down in the act in question. And in 1917 the legislature went a step further, in an amendment to § 24 of the Motor Vehicle Act (Stat. 1917, p. 407, § 18), where it is provided that no minor shall, in any event, operate an automobile without a license, and that, as a prerequisite to obtaining such license, the parent or guardian of such minor must join in the application therefor; and it is there further provided 'that any negligence of a minor, so licensed, in operating or driving a motor vehicle upon the public highway, whether as chauffeur or operator, shall be imputed to the person or persons who shall have signed the application of such minor for said license, which person or persons shall be jointly and severally liable with such minor,' for any damages caused by such negligence. It may be noted that the provision just quoted makes the parent liable, even though he neither owns nor controls the machine driven by the minor, and to that extent it creates a new liability; but, for the reasons above set forth, we are satisfied that, under the law as it stood at the time of the accident in the case at bar, the complaint herein stated a good cause of action against the defendants."

In *Blair v. Broadwater* (1917) — Va. —, L.R.A. 1918A, 1011, 93 S. E. 632, how-

ever, it was held that a parent was not liable for an injury done by an automobile in the possession of his minor daughter, because he purchased the machine for the use and pleasure of his family, and the child was at the time using it for her own pleasure, on the theory that the latter was engaged in the parent's business.

And in *Hays v. Hogan* (1917) — **Mo.** —, L.R.A.1918C, 715, 200 S. W. 286, it was held that the owner of an automobile, maintained for the use and pleasure of his family, is not liable for injuries caused by the negligence of his son in driving it, if the son, who is a member of his family and permitted at times to use the car, has it out, against orders, for his own pleasure at the time of the accident, as he is not the servant or agent of the owner.

And, following the decision in *Hays v. Hogan* (**Mo.**) *supra*, it was held in *Bolman v. Bullene* (1918) — **Mo.** —, 200 S. W. 1068, that the owner of an automobile, kept for his family's use, was not liable, on the theory of master and servant, for an injury inflicted by the negligent operation of the car by his son-in-law, who was using the car for his own purposes, although he lived in the defendant's family, and used it sometimes with and sometimes without the defendant's permission.

And, in this case, where it appeared that the defendant, on the particular occasion, allowed his son-in-law to use the car to go to a certain place to assist a friend, it was held that it could not be said that he was engaged in the defendant's business.

And it was also held that, even if the son-in-law was acting under the defendant's instructions in going to his friend's assistance, he could not be held liable for the injury in question, which was not inflicted while he was performing that errand, but while he was using the machine to go on another errand of his own.

In *Wilde v. Pearson* (1918) — **Minn.** —, 168 N. W. 382, where the owner of a car, kept for family use, when she went away, had it set up on blocks in the garage for the winter and forbade her daughter using it, and in her absence the daughter, with a friend, reassembled the machine, and the friend took it to meet guests for a party arranged by the daughter, and, after having made one trip, returned for other guests, and, while on his way and driving at an unlawful speed, collided with a pole, wrecked the

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machine and killed one of the occupants, who was not an invited guest to the party, but who, at the request of one of those invited, was permitted by the driver to go with them, it was held that the owner of the car was not liable for the death of such person, as the car was being used without her knowledge or permission, not for the purpose for which it was kept, and not in her service.

In *Uphoff v. McCormick* (1918) — **Minn.** —, 166 N. W. 788, the evidence was held to sustain a finding that the defendant's automobile, at the time an injury resulted from its operation, was being used with his authority and for family purposes, for which it was kept, there being testimony that at the time of the accident his son was returning from a dance, that his sister was with him, that the defendant knew that they were going, and that the machine was, from time to time, used for family purposes.

**Where car is being driven by owner's spouse, or relative other than child.**

Supplementing annotation in L.R.A. 1916F, 227.

As appears from the prior annotation, where one owns and keeps a car for family use, and an injury results from its negligent operation while it is being used by the owner's spouse, the owner has been held liable, under the "family purpose" doctrine, the theory of which is equally as applicable where a spouse is driving alone for pleasure as where a child is doing so.

And in *Hutchins v. Haffner* (1917) — **Colo.** —, L.R.A.1918A, 1008, 167 Pac. 966, it was held that one who maintained an automobile for the pleasure of himself and wife, who had general permission to use it as she desired, was liable for an injury negligently inflicted by the car while she was driving for her own pleasure, since she was his agent in carrying out the purpose for which the car was purchased.

In *McWhirter v. Fuller* (1918) — **Cal.** —, 170 Pac. 417, it was held that proof that the car which inflicted an injury was owned by the defendant, and was being operated by his wife at the time of the accident, with his express consent and permission, established a *prima facie* case authorizing an inference, in the absence of substantial proof to the contrary, that the wife was using the car as the agent of her husband.

But in *Mast v. Hirsh* (1918) — **Mo.** App. —, 202 S. W. 275, a husband was held not liable for an injury inflicted by the negligent operation of his automobile,

where it appeared that he kept the car for the use of himself and wife, and that at the time of the accident she was driving the machine for the pleasure of herself and her relatives, with the husband's knowledge, but not at his direction. The court called attention to the fact that the supreme court of Missouri, in *Hays v. Hagan* (Mo.) supra, had disapproved *Daily v. Maxwell* (1911) 152 Mo. App. 415, 133 S. W. 351 (set out in the earlier annotation), and with reference to the argument that the relatives accompanying the wife were visiting her, and that it was the husband's business to provide entertainment and pleasure for them, the court said that this was stretching the string whereby it was sought to tie the case to the doctrine of master and servant to the breaking point; that, whatever social duty a husband may owe to his wife's relatives, the defendant was not performing them at the time the injury occurred.

The court further said: "If the member of the family (competent to run a car and to exercise the care required by statute) who takes the car out, though with the consent of the husband or father, is on his own business, or pleasure, the husband or father is not liable for his negligence; but if such member, under the direction of the husband or father, express or implied, is performing a duty which the latter owes, a liability arises for negligence. It should, however, be borne in mind that a member of the family cannot force his or her service on the husband or father against his will, and, however conducive to the health or pleasure of the member of the family taking out the car, or to the health or pleasure of other members of the family whom he may take with him, there must appear authority from the father, express or implied, before the former may be called his servant, engaged in his business.

In *Brenner v. Goldstein* (1918) — App. Div. —, 171 N. Y. Supp. 579, it was held that a wife was not liable for an injury inflicted by her machine while it was being driven by her husband alone for his own purposes, the only evidence upon which her liability could be predicated being her ownership of the car.

**Presence of member of family in car loaned to third person.**

Supplementing annotation in L.R.A. 1916F, 228.

A reference to the prior annotation shows that courts have refused to hold the owner of an automobile liable for an

injury inflicted by the negligent operation of the machine, while it was being used by one to whom it had been loaned, although a member of the owner's family was in the car at the time.

And in *Halverson v. Blosser* (1917) 101 Kan. 683, L.R.A.1918B, 498, 168 Pac. 863, it was held that the owner of an automobile was not liable for an injury caused by it, where he loaned it to another, and the owner's son, on his own initiative and the borrower's invitation, accompanied the latter, and was operating the car when the injury occurred, as the machine was engaged in the borrower's business.

**Where automobile is being driven by chauffeur under orders of member of family.**

Supplementing annotations in 41 L.R.A. (N.S.) 778; 50 L.R.A. (N.S.) 63; L.R.A. 1916F, 228, and L.R.A.1917F, 367.

As appears from the earlier notes, where the owner of a car, kept for family use, furnishes a chauffeur other than a member of his family, he is ordinarily liable for an injury occurring while the chauffeur is driving under orders from a member of the family.

In *Houseman v. Karicofe* (1918) — Mich. —, 167 N. W. 964, where recovery was sought against a father and mother who owned an automobile, which had inflicted an injury while their son, an invalid, was using it with his friends, one of whom was driving, it was held that there was testimony from which the jury could have found that the parents planned the trip, for which the car was being used, for the pleasure of their son and his guests, and arranged with the one who was driving to operate the car, and that, if this testimony was accepted as true, they would be liable on the theory of master and servant.

The evidence in *Potts v. Pardee* (1917) 220 N. Y. 431, 116 N. E. 78, was held not to justify holding the owner of an automobile liable for an injury inflicted by it, where it appeared that she was a married woman, but that, although she was in the car with her husband and child at the time of the accident, it was being driven by a chauffeur, who received his orders from her husband and was hired and paid by the latter.

The evidence in *Penticost v. Massey* (1918) — Ala. —, 77 S. W. 675, was held sufficient to authorize the jury in finding that the chauffeur, who was driving the automobile which killed the plaintiff's child, was in the employ of the defendant in the operation of the car in

question, and an instruction to find for the defendant was held erroneous. The court stated that if it was conceded, as contended by the defendant, that the legal title to the car was in his wife, this would have no material bearing on the result, as there was evidence authorizing a finding that the car was in the defendant's possession, and was used and controlled by him for the pleasure of himself and family, and that full dominion and control of it were in him, and there was also evidence that the chauffeur was subject to the defendant's orders, and that the latter had been seen to pay him, and the defendant testified that, while his wife paid the chauffeur, it was out of money furnished by him as an allowance for such purposes.

The evidence in the case was also sufficient to take the question to the jury as to whether the chauffeur was, at the time of the accident, acting within the scope of his employment.

**Where child's car is being used by member of family.**

Where a child owns a car and keeps it for the use of the family, it appears that the owner may be held liable for an injury caused by the car while it is being used by another member of the family.

Thus, it has been held that a daughter who kept an automobile for the use of her mother was liable for an injury caused by the negligent operation of the car while it was being driven, under the mother's orders, by a chauffeur furnished by the garage belonging to the company of which the daughter's husband was president. *Crouse v. Lubin* (1918) 260 Pa. 329, 103 Atl. 725, the

court holding that the daughter made it an element of her business to provide recreation for her mother, and that the latter, in employing the chauffeur, was acting within the scope of her authority, and that the daughter was responsible for his acts.

In *De Smet v. Niles* (1916) 176 App. Div. 822, 161 N. Y. Supp. 566, it was held that the owner of an automobile, a young man twenty-two years of age, who lived with his parents, was not liable for an injury resulting from its negligent operation while being driven by his brother at the request of their mother, to take her and a friend for a ride, although the owner had told his brother that any time his mother wanted him to take her out he could take her in the car, the court holding that the machine was not being used in the defendant's business, but solely for the purposes and pleasure of his mother, and that the authority given his brother did not render the defendant liable.

And in *Quinn v. Neal* (1917) 19 Ga. App. 484, 91 S. E. 786, a nonsuit was held properly awarded in an action to recover for an injury caused by an automobile, there being nothing to show that the machine, which was driven by the minor daughter of one of the defendants, and sister of the other, who owned the car, was being operated with the consent of either defendant, or that the car was in fact being used in carrying on or aiding the business of either or both of the defendants, although there was testimony by the father that his daughter had been in the habit of driving to his office at lunch time, and taking him home in the car. J. T. W.

**COLORADO SUPREME COURT.**

AMERICAN SMELTING & REFINING COMPANY, Impleaded, etc., Plff. in Err.,  
v.

FREDERICK C. HICKS et al.

(— Colo. —, 172 Pac. 1055.)

**Parties — action for conversion of stolen ore.**

1. The one who stole and sold the ore is not a necessary party to an action by the true owner against a refining company which bought and converted to its own use

the stolen ore, for the proceeds of the sale which remain in its possession.

For other cases, see *Parties*, II. a, 1, in *Dig.* 1-52 N. S.

**Trover — stolen property — defense.**

2. That one who stole ore and sold it to a refining company, which converted it to its own use, is making claim for the proceeds in another state, is no defense to an action for such proceeds by the true owner against the refining company.

For other cases, see *Trover*, II. in *Dig.* 1-52 N. S.

(May 6, 1918.)

Note. — As to joinder of original converter of property with subsequent purchaser in an action for conversion, see annotation following this case, post, 305.

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**ERROR** to the District Court for Summit County to review a judgment in favor of plaintiffs in an action brought to recover for the conversion of stolen ore. Affirmed.

The facts are stated in the opinion.

Messrs. Henry A. Dubbs and Henry O. Vidal, for plaintiff in error:

The Wrights are indispensable parties to this action.

*Tabor v. Bank of Leadville*, 35 Colo. 1, 83 Pac. 1060; *Rumsey v. New York L. Ins. Co.* 59 Colo. 71, 147 Pac. 337; *McDougald v. New Richmond Roller Mills Co.* 125 Wis. 121, 103 N. W. 244.

The Wrights, though nominally parties, were not served with process.

*Watkins v. Perry*, 25 Colo. App. 425, 139 Pac. 551; *Tomboy Gold Mines Co. v. Green*, 11 Colo. App. 447, 53 Pac. 845; *Mahr v. Norwich Union F. Ins. Soc.* 127 N. Y. 452, 28 N. E. 391; *Cadle v. McLimans*, 23 Wyo. 515, 153 Pac. 901; *Archuleta v. Archuleta*, 52 Colo. 601, 123 Pac. 821; *Colorado State Bank v. Davidson*, 7 Colo. App. 91, 42 Pac. 687; *Denison v. Jerome*, 43 Colo. 456, 96 Pac. 166; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.

The summons published does not justify the judgment entered, and the judgment is consequently void for that reason.

*Black*, Judgm. 2d ed. § 223; *Peabody v. Phelps*, 9 Cal. 213; *Netzorg v. Green*, 26 Tex. Civ. App. 119, 62 S. W. 789; *Stewart v. Anderson*, 70 Tex. 588, 8 S. W. 295.

Messrs. Hogan & Bonner, for defendants in error:

The legislature may, in its discretion, provide for substituted service in case of necessity, or where personal notice is for any reason impracticable, in an action where the controversy relates to property which is within the jurisdiction of the court, and with a reasonable exercise of such legislative discretion the courts will not assume to interfere.

*Shepherd v. Ware*, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773; *McClymond v. Noble*, 84 Minn. 329, 87 Am. St. Rep. 354, 87 N. W. 838; *State ex rel. Douglas v. Westfall*, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175; *Gassert v. Strong*, 38 Mont. 18, 98 Pac. 497; *Ampero Min. Co. v. Fidelity Trust Co.* 74 N. J. Eq. 197, 71 Atl. 605.

The appearance of the Wrights was general.

*Everett v. Wilson*, 34 Colo. 476, 83 Pac. 211; *Balfe v. Rumsey & S. Co.* 55 Colo. 97, 133 Pac. 417, Ann. Cas. 1914C, 692; *Mahr v. Union P. R. Co.* 140 Fed. 921; *Montague v. Marunda*, 71 Neb. 805, 99 N. W. 653.

The Wrights were not indispensable parties.

*O'Neil v. Wolcott Min. Co.* 27 L.R.A. (N.S.) 200, 98 C. C. A. 309, 174 Fed. 527.

HILL, Ch. J., delivered the opinion of the court:

L.R.A.1918F.

This action was instituted by the defendants in error, hereafter called the plaintiffs, against S. B. and M. A. Wright and the American Smelting & Refining Company. The complaint alleges that the defendants Wright, by means of underground workings, etc., entered upon plaintiffs' property, and mined and carried away certain ore; that it was shipped to the defendant the American Smelting & Refining Company, and that the proceeds of such ore were then in the hands of said company; that plaintiffs had served the company with notice that the ore was the property of plaintiffs; that defendants Wright are claiming the proceeds of said ore; and that the defendant Refining Company threatens to make settlement with the Wrights for it, etc., unless restrained, etc. The prayer is for judgment against the Wrights for \$100,000 damages, and that they be restrained from further trespass on plaintiffs' property; that the defendant the American Smelting & Refining Company be restrained from making settlement with the Wrights for the ore taken; that it be declared to hold the proceeds of said ore as trustee for the use of plaintiffs, and to pay such proceeds to them, etc. That portion of the findings and judgment necessary to review is against the American Smelting & Refining Company, wherein it is held that ore of the value of \$449.45 was, by the defendants Wright, unlawfully taken from the property of plaintiffs and shipped to the Refining Company, and at the time of the commencement of this action was in its possession, had been converted to its use, and that the plaintiffs are entitled to the proceeds in the sum of \$449.45.

The refining company bring the case here for review, and contends that the court erred in its findings: (a) That service of summons was legally made upon the Wrights by publication; (b) that the proceeding was in rem; (c) that it had jurisdiction over the refining company as to the \$449.45 in its hands, and in entering the default of the Wrights, and in finding that these ores shipped to the Refining Company, amounting to \$449.45, were the property of the plaintiffs, and that they are entitled to said moneys; and (d) in finding that plaintiffs were entitled to judgment against the Wrights for this property in the hands of the refining company; and (e) in not holding that there was no service of summons upon the Wrights; and (f) that they were indispensable parties, and that the court was without jurisdiction to enter judgment against the refining company for the reason that no legal service was made upon the Wrights, etc.

The plaintiffs maintain that the Wrights

entered a general appearance which gave the court jurisdiction over them; that if this position is not sound, that they were regularly served by publication; that the action is in rem, and, for this reason, that the court had jurisdiction to proceed in so far as the ore and the proceeds derived therefrom by the refining company are concerned; and that the Wrights were not indispensable parties, as between the plaintiffs and the refining company, to this action for possession of the ores belonging to the plaintiffs, or their value, when it is alleged and was established by proof that they were wrongfully and unlawfully taken from plaintiffs' mine by the Wrights, and wrongfully and unlawfully delivered to the refining company. If the latter of these contentions is sound, the others need not be considered.

As between the plaintiffs and the defendant refining company, the pleadings allege and the proofs establish that certain persons (in this case, the Wrights) wrongfully and unlawfully took from plaintiffs' mine certain ores, and delivered them to the defendant refining company, which converted them to its own use; that it has paid no one for them; and that their value is \$449.45. In such circumstances, we cannot agree that the Wrights are indispensable parties to the action between plaintiffs and the defendant refining company in order for plaintiffs to recover the value of their ores. *Tabor v. Bank of Leadville*, 35 Colo. 1, 83 Pac. 1060, involved the validity of a garnishee summons, issued by purported authority of a void judgment; it has no application to a case of this kind. The judgment here for review is the one against the refining company for its conversion of the plaintiffs' property. The fact that others assisted in the commission of the tort is no defense to its liability. The fact that the Wrights lay claim to the proceeds is no defense to the refining company for the conversion of plaintiffs' property. The contention that, without the presence of the Wrights as parties, there can be no inquiry concerning plaintiffs' rights against the defendant refining company for the conversion of their property, is not well taken. We might as well say that A, the owner of a cow which had been stolen by B, who sells it to C, who converts it into beef, can have no adjudication of his claim against C for its conversion, without finding and making B, the thief, a party to the action. To bring it nearer to this case, suppose B sells a stolen horse to C, to be paid for later, and A, the owner, brings suit against C for possession or its value, C admits having received the horse from B, and that he agreed to pay B,

the thief, for it, but says to A that, notwithstanding you allege and have proven that the horse was stolen, that it is yours, and that you are entitled to it or its value, nevertheless the thief, B, from somewhere out of this state, claims this money; hence I cannot be made to pay you until you get the thief into court and have his rights determined against me, pertaining to my liability to him for selling the horse to me. This, in substance, is the position of the defendant refining company. It admits the receipt of the ore, its conversion by it, but says that the Wrights are in California, and make claim there against it for these proceeds, that, as it does business in California, they may sue it there, and unless the Wrights' claim against them is determined in this litigation, it may be compelled to pay them for this ore, although it is now compelled to pay plaintiffs for it; for this reason, as the Wrights cannot be reached here, that the plaintiffs, in order to have their claim adjudicated against the refining company, must go where the Wrights are, and make them parties to the action. If such were the rule, it would, in many cases, work a denial of justice. All persons, in some degree, must be held responsible for the result of their actions in dealing with others. Think of the result that might follow should the rule contended for be applied to transactions in the buying and selling of live stock at the large centers of trade.

The act complained of against the defendant refining company is *ex delicto*. In such case, the liability for conversion is joint and several. *Carper v. Risdon*, 19 Colo. App. 530, 76 Pac. 744; *Denver Omnibus & Cab Co. v. Gast*, 54 Colo. 17, 129 Pac. 233. In the former of these cases, 19 Colo. App. at page 536, it is said: "The point is made that, after the court had ordered the dismissal as to Lindemann, it could not lawfully render judgment against Carper, because the complaint charged a joint conversion. For a joint trespass, the liability of the trespassers is joint and several. This action might have been brought in the first instance against Carper alone; or, having been brought against both, there might, at any time before judgment, have been a dismissal by the plaintiff as to Lindemann, leaving the action to proceed against the other defendant; and, on principle, we confess ourselves unable to see why the court might not do what could have been done by the plaintiff, or why it is not competent to either court or jury, in an action for a trespass, to find one defendant guilty and another not guilty."



We think this declaration somewhat applicable to the facts here.

Section 84, Revised Code 1903, provides that "the court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

As heretofore stated, the complaint states a cause of action in favor of the plaintiffs against the refining company; there is no contention that it was not tried, or that the testimony did not sustain it. A judgment was rendered thereon. In such circumstances, under the provision of the Code last cited, it should not be reversed, unless it works prejudicial error against the substantial rights of the refining company; and, inasmuch as the Wrights were not indispensable parties to this contention, all portions of the case concerning them can be eliminated without doing an injustice to the refining company, pertaining to the issue presented against them and tried. Hence, it is unnecessary to determine whether there was service of summons upon the Wrights, whether the court had jurisdiction over them, or whether any judgment rendered against them is valid or otherwise. The fact that they threaten the refining company with suit in another jurisdiction to recover the value of this ore is no defense to its paying the plaintiffs for it, if the allegations of plaintiffs' complaint are true; if they are, that fact would be a defense in favor of the refining company against the Wrights in any jurisdiction. The contention of the refining company that this will not relieve it from being harassed with litigation concerning it may be true. One answer to this is that the refining company, and not the plaintiffs, brought about the condition whereby it may be liable to such an attack, by purchasing something from the Wrights which they did not own, and which in fact belonged to the plaintiffs, and which they did not give the Wrights or the refining company permission to take.

Had the pleadings disclosed that the action involved contractual relation between the plaintiffs and the Wrights concerning this property, it might present a different question, in which case *Rumsey v. New York L. Ins. Co.* 59 Colo. 71, 147 Pac. 337, might be applicable. In that case the record discloses that Rumsey, then of Honolulu, secured from the insurance company a \$5,000 policy upon his life, wherein Benson, Smith, & Company, also of Honolulu, were designated as the beneficiary; that, after Rumsey's death, his wife brought suit in Colorado to be subsestituted as the beneficiary and to recover the value of the policy, seeking to invoke the equitable rule of substitution. She admitted that she had never been designated, in the manner provided in the policy, as the beneficiary, and that such an indorsement had never been made on the policy, or on the books of the company, and also that at the time of her husband's death Benson, Smith, & Company were in possession of the policy, were the designated beneficiaries in it, and that the records of the company thus showed. She contended that upon account of certain acts of the insurance company, and also certain alleged wrongful acts of Benson, Smith, & Company in refusing to surrender the policy, etc., that under the equitable rule of substitution she should be treated as having been substituted during the life of her husband as the beneficiary, instead of Benson, Smith, & Company, and was entitled to recover the amount called for in the policy as such substituted beneficiary without making Benson, Smith, & Company a party to the suit, or securing from them the surrender of the policy. We held, under such circumstances, that their equities and rights as a beneficiary could not be determined under the equitable rule of substitution, in an action to which they were not a party. Such an issue is foreign to the case under consideration.

The judgment is affirmed.

Garrigues and Scott, JJ., concur.

### **Annotation — Joinder of original converter of property with subsequent purchaser in an action for conversion.**

It is settled law that a subsequent purchaser of property from someone other than the true owner is liable for the conversion of the property if he refuses to return it to the true owner on demand. The question here raised is based on this assumption as to the law. It is clear that it is not necessary to join the original converter of the property with a subsequent purchaser, in an action

against the latter for the wrongful conversion of the property. *AMERICAN SMELTING & REF. Co. v. HICKS*, ante, 302; *Harrison v. Hawley* (1894) 7 Tex. Civ. App. 308, 26 S. W. 765. And it has been held that these parties cannot be joined in a trover action, where the subsequent purchaser purchased bona fide, and without knowledge that the seller was not the owner of the property. *Larkins v. Eck-*

wurzel (1868) 42 Ala. 322, 94 Am. Dec. 654.

If, however, the subsequent purchaser of property had knowledge of the lack of title in the seller, there is a joint wrongful act upon the part of these parties at the time of the sale, and they may be joined as parties defendant in a trover action. *Ess v. Griffith* (1895) 128 Mo. 50, 30 S. W. 343.

And see, upon this point, *Smith v. Briggs* (1885) 64 Wis. 497, 25 N. W. 558, and *Smith v. Morgan* (1887) 68 Wis. 358, 32 N. W. 135, holding that, in an action to recover damages for the wrongful cutting and converting of timber, it is proper to join the original wrongdoer and the purchaser from him, where the latter was alleged to have purchased with knowledge of the wrongful cutting.  
A. G. S.

#### CONNECTICUT SUPREME COURT OF ERRORS.

JANE NEARY, Appt.,

v.

METROPOLITAN LIFE INSURANCE COMPANY et al.

(92 Conn. 488, 103 Atl. 661.)

**Insurance — right of beneficiary — power of insurer to change.**

A beneficiary with an insurable interest who joins in the application for a life insurance policy, takes the policy into his possession, and pays the premiums, has an interest which can be defeated by change of beneficiary only in the manner prescribed by the policy, even though the insurer claims such provision is solely for its benefit and attempts to waive it.

*For other cases, see Insurance, IV. b, in Dig. 1-52 N. S.*

(Wheeler, J., dissents.)

(April 30, 1918.)

**A** PPEAL by plaintiff from a judgment of the Superior Court for New Haven County in favor of defendant Neary in an action brought to recover the amount alleged to be due in a life insurance policy. Affirmed.

Statement by Beach, J.:

The action is by one of two alleged beneficiaries to recover on a policy of life insurance. An order of interpleader was entered, and upon an agreed statement of facts judgment was rendered in favor of Catherine Neary.

In 1913, John Neary and Catherine his wife joined in an application to the Metropolitan Life Insurance Company for insurance upon the life of John. The policy in

**Note.**—As to right of original beneficiary in ordinary life policy to insist upon compliance with provisions governing change of beneficiary, see annotation following this case, post, 311, and references therein to annotations on related questions.

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question was issued on that application, naming Catherine as the beneficiary. All premiums on the policy were duly paid by Catherine, the last payment on August 2, 1915, and the policy itself has at all times been in the possession of Catherine. The policy provided for a change of beneficiary, and that the insured might designate a new beneficiary by a notice in writing filed at the home office of the company and accompanied by the policy itself, the change to take effect upon the indorsement of the same by the company on the policy.

On July 28, 1915, John Neary signed and delivered to the agent at New Haven, for transmission to the home office of the company, an application for a change of beneficiary from his wife Catherine to his mother Jane Neary. The application was forwarded to and received by the home office at some date not otherwise shown than by the following indorsement thereon: "Recorded in policy register. J. F. B. 9/8/15. J. F. B." It was not accompanied by the policy, and no indorsement of any change of beneficiary was ever made on the policy. On September 2, 1915, John and Jane joined in an application for a loan upon the policy, which was made by the company's check to the joint order of John and Jane Neary. John died September 12, 1916, and the amount of the policy, less the loan, is admittedly due and payable to the rightful beneficiary.

Messrs. Charles F. Roberts and George E. Beers, for appellant:

As between the plaintiff Jane Neary, and the defendant Catherine E. Neary, the change of beneficiary was so made that the fund can be awarded to the plaintiff.

*Freund v. Freund*, 218 Ill. 189, 109 Am. St. Rep. 283, 75 N. E. 925; *Bispham, Eq.* § 168, 7th ed. p. 261; *Joyce, Ins.* 2d ed. 1917, § 754; *Holden v. Modern Brotherhood*, 151 Iowa, 673, 132 N. W. 329; *Ladies of Modern Maccabees v. Daley*, 166 Mich. 542, 181 N. W. 1127; *Ross v. Rogers*, 96 Ark. 154, 131 S. W. 336; *Almy v. Commercial*

Travelers Asso. 59 Ind. App. 249, 106 N. E. 893.

The court is not bound to award the property to one who has the legal title, but may so shape its judgment and distribute the fund, as to do complete equity between the parties.

MacLennan, Interpleader, p. 273.

Mr. George E. Hall for appellee Neary.

Beach, J., delivered the opinion of the court:

It is not claimed that the attempted change of beneficiary was completed in the manner provided for in the policy by surrender of the policy, and indorsement of the change thereon by the company. On the contrary, the finding is that the policy remained continuously in the possession of the original beneficiary, Catherine, who paid all the premiums thereon and was never asked to give it up. She had no knowledge of any desire or attempt to change the beneficiary until she went to the company's office to prepare the proofs of death. The plaintiff's claim is that the formalities prescribed in the policy for carrying out the reserved right of changing the beneficiary were solely for the benefit of the insurance company, and that it might and did waive their performance by treating Jane as the substituted beneficiary in making the loan of September 2, 1915.

This claim is based on the supposition that Catherine had no legal interest in the fruits of the policy, but merely an expectancy, of which she could be deprived without notice. It is true that a beneficiary named in a death benefit certificate issued by a fraternal benefit association, and providing for a change of beneficiary, takes nothing more than a mere expectancy. *Supreme Colony U. O. P. F. v. Towne*, 87 Conn. 644, 648, 89 Atl. 264, Ann. Cas. 1916B, 181; *Order of Scottish Clans v. Reich*, 90 Conn. 511, 514, 97 Atl. 863.

But that is not necessarily true of beneficiaries named in an ordinary life insurance policy, although the right to change the beneficiary in a prescribed manner is reserved. "In case of an ordinary policy [of insurance], the right of the person for whose benefit a policy is issued cannot be defeated by the separate or joint acts of the assured and the company, without the assent of the beneficiary." *Masonic Mut. Ben. Asso. v. Tolles*, 70 Conn. 537, 544, 40 Atl. 450. It seems logically to follow that the insertion in such a policy of a provision for changing the beneficiary in a prescribed manner ought not to extinguish the interest of the beneficiary, but to qualify it. The later decisions so hold. *Indiana Nat.*

*L. Ins. Co. v. McGinnis*, 180, Ind. 9, 45 L.R.A.(N.S.) 192, 101 N. E. 289; *Filley v. Illinois L. Ins. Co.* 144 Pac. 257, 93 Kan. 193, L.R.A.1916D, 134; *Christman v. Christman*, 163 Wis. 433, 157 N. W. 1099. Moreover, companies authorized to carry on a general life insurance business may contract directly with a beneficiary who has an insurable interest in the life of the assured; and there seems to be no reason why the interest of such a beneficiary may not be absolute or qualified, according to the terms of the policy.

In this case the wife, having an insurable interest in the life of her husband, joined in the application for a policy which, on its face, provided for the presentation of the policy to the company for indorsement, before any change of beneficiary should become effective. She took the policy into her own possession, apparently relying on that provision for her protection, and paid all the premiums. Under these circumstances, she had an interest in the policy of which she could not be deprived, except in the manner prescribed therein.

Assuming, without deciding, that she was bound to deliver up the policy to the assured on demand, the finding is that no such demand was made. Whether she had a lien upon the policy for premiums advanced, at least to the extent of its cash surrender value, need not be determined. She had a legal interest, as distinguished from a mere expectancy, of which she could not be deprived, except in the manner prescribed in the policy, and therefore the provisions as to the mode of changing the beneficiary were not solely for the benefit of the insurance company. Even if they were so intended by the company, they hold out, on their face, an inducement for the payment of premiums by a beneficiary to whom the policy is delivered. In the long run the payment of premiums inures to the benefit of the company, and, if a beneficiary pays premiums on the faith of an apparent protection afforded by the terms of the policy, he ought, equitably, to be protected as far as the terms of the contract will protect him.

It does not appear from the finding whether the company knew that the premiums were being paid by the beneficiary. It did know that she joined in the application; that she had an insurable interest in the life of the assured; and that the policy contained provisions, on the faith of which she might suppose herself to be protected in paying premiums. Under such circumstances it is not asking too much of insurance companies to see that the terms of the policy are complied with before assenting to a change of beneficiary. This conclusion

makes it unnecessary to pass on the somewhat doubtful question whether the company did, in this case, assent to an informal change of beneficiary.

There is no error.

In this opinion Prentice, Ch. J., and Roraback and Shumway, JJ., concur.

Wheeler, J., dissenting:

The Metropolitan Life Insurance Company issued its policy of ordinary life insurance upon the life of one John H. Neary, upon an application signed January 17, 1913, by him and his wife Catherine E. Neary. The application expressly provided that "the right to change the beneficiary hereby designated without the consent of said beneficiary is reserved." The policy provided that the insured reserved "the right of revocation of the beneficiary named, and the right to designate a new beneficiary." The assured could exercise this right by filing written notice of such change in the home office of the company, together with the policy itself. The change became effective upon the company indorsing such change of beneficiary upon the policy.

On July 28, 1915, the assured signed and delivered to the agent of the insurance company in New Haven an application for a change of beneficiary from his wife to his mother, Jane Neary. Upon the policy register of the company at its main office is indorsed: "Recorded in policy register. J. F. B. 9/8/15. J. F. B."

On September 2, 1915, John H. Neary made written application, signed by the plaintiff, Jane Neary, for a loan of \$82 upon this policy, and this loan was duly made and a check given for the same, payable to John H. and Jane Neary. It was the practice of the company to make loans to the insured, and not to the beneficiary, in the application for which, in some cases, the beneficiary joined. The court reached the conclusion that the loan was insufficient to prove a waiver by the company, because it was not proved that the company knew of the attempted change of beneficiary when it was made.

The application fee for said insurance and all premiums thereon were paid by the defendant Catherine E. Neary, and she always had possession of the policy and had no knowledge of an attempt to change the beneficiary, or of the making of said loan, until after the death of her husband.

The member of a mutual benefit society may change, at will, the beneficiary named in his certificate of insurance. In the ordinary life insurance policy, the assured may not change the beneficiary without his con-

sent. The reason for this distinction is found in the fact that in the ordinary life policy the beneficiary has a vested right in the benefits of the policy, while in the benefit certificate the beneficiary has no vested right in the proceeds, merely the expectancy of an interest in case the assured die without having changed the beneficiary. *Masonic Mut. Ben. Asso. v. Tolles*, 70 Conn. 537, 544, 40 Atl. 448; *C. E. Shepard & Co. v. New York L. Ins. Co.* 87 Conn. 500, 504, 89 Atl. 186. But the ordinary life policy may contain a provision reserving the right to change the beneficiary, and, when the policy so provides, the assured may exercise his right to change the beneficiary at will, since the beneficiary has no vested interest in the policy. *Townsend v. Fidelity & C. Co.* 163 Iowa, 718, 721, L.R.A.1915A, 109, 144 N.W. 574; *Waring v. Wilcox*, 8 Cal. App. 317, 96 Pac. 910; 21 Cyc. 893; 4 Cooley, Briefs on Ins. p. 2762; 14 R. C. L. § 554.

In *Denver L. Ins. Co. v. Crane*, 19 Colo. App. 191, 73 Pac. 878, the court said of an ordinary life policy: "The policy provided, in explicit language, that the insured might, without the plaintiff's consent, diminish the amount of the insurance or appoint another beneficiary in her place. She, therefore, had no vested interest, but only an expectancy, which might at any time be defeated by the act of her husband."

May on Insurance, § 399M, thus states the rule: "In those companies, however, that expressly permit a change of beneficiary without consent of the former appointee, the person first designated acquires no vested interest during the life of the insured, but only an expectancy."

Concerning such a provision in a life policy, the court said, in *Hopkins v. Northwestern Life Assur. Co.* 40 C. C. A. 4, 99 Fed. 202: "The right of the beneficiary is inchoate, and a mere expectancy, during such lifetime, and does not become vested until the death of the insured happens with the policy unchanged."

In *Hopkins v. Hopkins*, 92 Ky. 324, 17 S. W. 864, the court says: "This [rule of the straight life policy] does not hold true, however, where the contract of insurance provides that the insured may change the beneficiary. In such a case, it vests conditionally only. The right of the one named in the policy is then subject to be defeated by the terms of the very contract naming him as the beneficiary. It is a condition of the contract, and his right is therefore subject to it."

Since a policy of this character is wholly the property of the assured, it can be taken by his creditors as one of his assets. The court so holds in *Re Orear*, 102 C. C. A. 78,

81. 30 L.R.A.(N.S.) 990, 178 Fed. 635: "Under this provision the insured was unequivocally given the right and power to change the beneficiary in each policy, without the concurrence of the beneficiary named in the policy and even against the will of such beneficiary. Not only so, but this power was one which he could exercise for his own benefit. To illustrate: He could have borrowed money and have changed the beneficiary so that the lender would have held the policy as security for the repayment of his money. . . . He further could have exercised this power so as to have made the policy payable to his own estate. He still further could have exercised this power by naming as the beneficiary some trustee for all his creditors. . . . This being so, the policies were property which, under section 70, subdivision 5, above mentioned, passed to the trustee upon the adjudication of Derr as a bankrupt." *Re Derr* (D. C.) 182 Fed. 715.

The policy in suit was an ordinary life policy, which reserved to the insured the right of changing the named beneficiary. It also gave the assured a right to secure a loan upon the policy and the right to secure its surrender value. Not only did the policy reserve the right to change the beneficiary, but the application for the policy expressly reserved in the assured this right, and the beneficiary named in the policy, Catherine E. Neary, who is a defendant in this action, joined in signing this application.

After the issuance of this policy there was no moment when the assured could not have designated a new beneficiary by complying with the conditions of the policy and filing notice of such change at the home office, accompanied by the policy itself for indorsement thereon. The beneficiary could not stop the change. The ownership of the policy was in the assured, and it could have been taken by his creditors. The interest of the first-named beneficiary was a contingent or conditional interest, effective upon the death of the assured without having made such change. Her interest was hence a mere expectancy in the lifetime of the assured.

The payment of premiums by the beneficiary did not affect the contract of insurance entered into between the assured and the insurance company. It did not deprive the assured of the ownership of the policy, or take away from his creditors their right to appropriate its benefits to their debt. It did not vest in the beneficiary an interest in the policy. The payment of the premiums gave the beneficiary the right to have the proceeds of the policy applied to the payment of the premiums, with interest, before the proceeds could be diverted elsewhere.

That is the only protection either law or equity will give to the first-named beneficiary. She will be made whole. She cannot secure a profit on her investment, if any there be.

Under the terms of the policy, the assured could exercise his right to designate a new beneficiary by filing written notice of such change in the home office of the company, together with the policy, and the change became effective upon the company indorsing such change of beneficiary upon the policy. Since the beneficiary had no vested interest in the policy, it did not concern her whether the policy was filed with the company and the change indorsed thereon. Until the death of the assured a valid change might be made, and her interest did not begin until the death of the insured without having made a change of beneficiary.

Provisions in a policy prescribing the method for changing the beneficiary do not affect the contract of insurance between the assured and the insurance company. Some of the decisions hold that provisions of this character qualify the right of the assured to make the change only in the prescribed way, and that the beneficiary has an interest in the policy, subject to be defeated by the change of beneficiary. This is a misconstruction of the contract of insurance. The beneficiary takes no interest until the death of the assured.

The provisions requiring the filing of the policy and the indorsement thereon of a change of beneficiary were not inserted for the benefit of the assured, but for the insurer. Where these provisions are not followed, the insurance company is not required to recognize the attempted change. But, since these provisions are for its benefit, it may waive them.

When the life policy permits a change of beneficiary without the consent of the beneficiary and upon the sole application of the assured, we see no reason, any more than did the court in *Townsend v. Fidelity & Casualty Co.* supra, why the construction obtaining as to similar provisions in beneficial certificates should not be given to the similar provision in the life policy. The provisions in the benefit certificates are for the benefit of the insurer, and so are those in the life policy. The one may be waived, and a like privilege must be accorded to the other.

Cooley, *Briefs on Insurance*, vol. 4, p. 3772, states the rule of law concerning benefit certificates: "The rule requiring the surrender of the old certificates, and, indeed, most of the procedure in effecting a change of beneficiaries, are intended only for the bene-

fit of the association, and may therefore be waived by it."

In *French v. Provident Sav. Life Assur. Soc.* 205 Mass. 424, 91 N. E. 577, the court held that the provisions of the policy as to a change of beneficiary had not been complied with. In the course of his discussion, Chief Justice Rugg was careful to point out that the question of whether the company had waived these provisions was not involved: "Moreover, the defendant did not waive the provisions of the policy and accept the new designation as valid. Apparently, its responsible officers had no notice or knowledge of it until after the decease of the insured. These circumstances, if present, would make a different case from that before us, where other considerations would need to be discussed."

In *Freund v. Freund*, 218 Ill. 189, 109 Am. St. Rep. 283, 75 N. E. 925, the court said: "It is said by counsel for appellee that the provisions in regard to consent and indorsement, and in regard to . . . changing the name of the beneficiary, were solely for the protection of the company, and, therefore, could be waived by the company. This is true, provided the acts alleged to amount to a waiver were performed during the lifetime of the assured."

The trial court reached the conclusions to which I have come:

(1) "The first beneficiary . . . acquired no vested interest in the policy or its proceeds by being made beneficiary."

(2) The assured "could not change the beneficiary without doing so in the way provided by the insurance contract, that is, the policy."

(3) "But the company or society may waive the requirements of its contract or of its laws as to the change of beneficiary."

"The question in the case," said the trial court, "is, therefore, whether the company's action in loaning waived the surrender of the policy."

And whether the company waived these requirements of the policy is the remaining question which we are called upon to decide.

The application for a change of beneficiary was in approved form and produced from the custody of the company. It was delivered by the assured to the local agent of the insurer in New Haven. No evidence other than the following was introduced to show that the company received the application prior to the decease of the assured: Exhibit A, which is a part of the finding, bears upon its face, in print, "Recorded in policy register," and immediately following it, upon the same line, in writing: "J. F. B. 9/8/16. J. F. B." This indorsement means

that this application was recorded in the policy register on September 8, 1916, a date prior to the decease of the assured. The application was therefore in the possession of the company at its home office before the decease of the assured. The fact that the company accepted the application without the policy is persuasive evidence that it waived the provision requiring the filing of the policy.

It also appears in the finding that the assured, subsequent to the filing of his application for a change of beneficiary, joined with the new beneficiary in an application for a loan upon the policy, which the company made by check to the order of the assured and the new beneficiary. The policy provided that "the company will loan on the sole security thereof up to the limit secured by the cash surrender value, on proper and lawful assignment and delivery of this policy." It further provided that the assignment of the policy must be executed upon the blanks of the company and filed at its home office.

To make the loan, an assignment and delivery of the policy was essential. No assignment of the policy was made, nor was there any delivery of the policy to the company. Since the loan was made, the company must have waived this provision, for the policy was never surrendered to the company. Unless Jane Neary had been accepted as a beneficiary by the company, there was no reason for having her a party to the loan. The company treated her as a beneficiary, and thereby waived the requirement that the policy should be presented with the application and the change indorsed thereon. It might have insisted upon these requirements in which case the loan could not have been made. The company's waiver is the only logical conclusion to draw from these facts.

The trial court was in error in holding that the loan was the only evidence of waiver. The indorsement upon the application was strong evidence of this fact. It was also in error in holding that it had not been proved that the company knew of the attempt to change the beneficiary when the loan was made. The loan was made to the assured and the new beneficiary. The new beneficiary would not have been included in the loan had the company not known of the change of beneficiary. No other conclusion is logically permissible.

In its answer, the company admits that the insured had exercised his right to designate a new beneficiary, under the policy, upon forms furnished by the company, and that the company had accepted the said change of beneficiary. Since compliance

with these formalities of the policy was for the benefit of the company, it had the right to admit compliance, and its admission is conclusive upon this point against the defendant Catherine Neary.

The conclusion of the trial court that the waiver of the company had not been established is contrary to the proven facts.

In my opinion, there is error, and the judgment should be set aside.

### **Annotation — Right of original beneficiary in ordinary life policy to insist upon compliance with provisions governing change of beneficiary.**

For some cases falling within the scope of this note reference is made to the note appended to *Johnson v. New York L. Ins. Co.* L.R.A.1916A, 877, on right of one to whom policy of life or benefit insurance has been assigned by insured to proceeds, where provisions as to change of beneficiary were not complied with.

As to surrender of policy of ordinary life insurance without consent of beneficiary, see note to *Ferguson v. Phoenix Mut. L. Ins. Co.* 35 L.R.A.(N.S.) 844. And later case, *Indiana Nat. L. Ins. Co. v. McGinnis*, 45 L.R.A.(N.S.) 192.

As to effect of consideration moving from beneficiary originally named in certificate issued by mutual benefit association upon the right of a member to change beneficiaries, see the notes to *Stronge v. Supreme Lodge, K. P.* 12 L.R.A.(N.S.) 1207; *Savage v. Modern Woodmen*, 33 L.R.A.(N.S.) 773, and *Sipe v. Sipe*, L.R.A.1918E, 1029.

For beneficiary's consent to surrender of policy, or designation of new beneficiary, as affecting his right to question validity thereof, see note to *Hicks v. Northwestern Mut. L. Ins. Co.* L.R.A. 1915A, 872.

Although the beneficiary in an ordinary life policy, according to the great weight of authority, takes a vested interest which cannot be defeated where there is no right reserved by the insured to change the beneficiary, yet, where the latter makes such a reservation, it is held that the beneficiary merely takes a qualified vested interest, which is subject to be defeated by an exercise by the insured, during his lifetime, of the right reserved. The view has been taken in some cases that provisions governing the right to change the beneficiary are for the benefit of the insurer alone, and that they may be waived by it, but it is generally held that no waiver of a failure to comply with such provisions, at least, where the act required is judicial and not merely ministerial, can be made by the insurer after the insured's death, since, upon that event, the beneficiary's right becomes absolutely vested.

It will be noted that the conclusion was reached in *NEARY v. METROPOLITAN L. Ins. Co.* ante, 306, that a beneficiary with an insurable interest, who joined in an application for insurance, took the policy into his possession, and paid the premium, had an interest which could be defeated by a change of beneficiary only in the manner prescribed by the policy, even though the insurer claimed that the provision as to change of beneficiary was solely for its benefit, and attempted to waive it.

In accord with this conclusion, there are dicta in the following cases that, where the right to change the beneficiary in an ordinary life policy is reserved, the beneficiary named acquires a qualified vested interest, subject to be defeated by a change during the insured's lifetime, in the manner provided in the contract; *Arnold v. Empire Mut. Annuity L. Ins. Co.* (1907) 3 Ga. App. 685, 60 S. E. 470; *Indiana Nat. L. Ins. Co. v. McGinnis* (1913) 180 Ind. 9, 45 L.R.A.(N.S.) 192, 101 N. E. 289, former appeal (1912) — Ind. App. —, 99 N. E. 751.

And in *Provident Sav. Life Assur. Co. v. Dees* (1905) 120 Ky. 285, 86 S. W. 522, it was held that, where an application naming one as beneficiary was accepted by the insurer, and a policy issued naming such person sole beneficiary, his rights became fixed, so that neither the insured nor the insurer could affect them, except as provided in the policy, and that, as the policy provided for a change of beneficiary only with the consent of the insurer, the insured could not, after the delivery of the policy, affect the rights of the beneficiary by writing an additional name in the policy as a joint beneficiary, there being no provision for a change in this way.

And in *Christman v. Christman* (1916) 163 Wis. 433, 157 N. W. 1099, it was held that, under § 2347, Stat. 1915, where the insured made his wife beneficiary, she took a vested interest which could be defeated only in the manner reserved in the policy, and that, the only method reserved being a change by written notice to the insurer during the continuance of

the policy, a change was not effected by the insured's attempt to divert the wife's interest in his will.

And in *Metropolitan Ins. Co. v. Clanton* (1909) 76 N. J. Eq. 4, 73 Atl. 1052, where the court stated that the industrial life policy involved was a pure life policy, and that, under such policies, the interest of the person designated as beneficiary was a vested property right, subject to the terms of the policy, it was held that a change of beneficiary was not effected, it appearing that the provision for changing the beneficiary by forwarding the policy to the home office of the insurer and indorsing the transfer on it had not been complied with.

And it was held, in *Begley v. Miller* (1907) 137 Ill. App. 278, that the right to change the beneficiary of the ordinary life policy involved was limited by the terms governing the right to change, and, where these had not been complied with by the insured in an attempted change, the original beneficiary was held entitled to the benefit, although the insurer made no contest, and was willing to pay to whichever of the claimants was entitled to the money. And to the same effect, in *Chance v. Simpkins* (1916) 146 Ga. 519, 91 S. E. 773.

In *Freund v. Freund* (1905) 218 Ill. 189, 109 Am. St. Rep. 283, 75 N. E. 925, where the insurer filed a bill of interpleader, it was held that, although the beneficiary named might not have had a vested right in the fund provided for in the policy during the lifetime of the insured, yet, when the latter died, the beneficiary acquired rights which could not be cut off, except as prescribed in the contract, and that the right of the beneficiary who was properly named was not defeated, where the insured, two days before his death, left his policy and a request for a change of beneficiary at a branch office of the insurer, receiving a receipt, and the policy and the request for a change of beneficiary were forwarded to the home office after the insured's death, but the insurer never consented to the change, or made a written indorsement in accordance with the provisions of the contract, governing the right to change the beneficiary. The court, in this case, stated that the provisions as to consent and indorsement were for the protection of the insurer, and could be waived by it if the acts alleged to amount to a waiver were performed during the insured's lifetime, but that it could not, as against the beneficiary, perform any acts which would

amount to a waiver, after his rights had become vested by the death of the insured.

And in *Tillman v. John Hancock Mut. L. Ins. Co.* (1898) 27 App. Div. 392, 50 N. Y. Supp. 470, there was held to be no change of beneficiary, where, at the time of the insured's death, the authorized officers of the insurer had not consented to a request for change of beneficiary as required by the policy, the court stating that the insurer could not, after the insured's death, waive the requirement and deprive the original beneficiary of the money.

And in *Sangunitto v. Goldey* (1903) 88 App. Div. 78, 84 N. Y. Supp. 989, it was held that a change of beneficiary could be made only by written notice to the insurer, accompanied by the policy, and an indorsement of the change on the policy as provided thereby, and that no change was effected, where the policy was forwarded to the insurer with a request for a change of beneficiary and, although the insurer received the policy before the insured's death, no indorsement of a change was made thereon before that event.

And in *Berg v. Damkoehler* (1902) 112 Wis. 587, 88 N. W. 606, the court stated that the beneficiary had an actual subsisting interest in the policy, subject to the right of the insured to vest it elsewhere, and where the insured had not, before his death, complied with the provision giving him the right to change the beneficiary, by filing with the insurer a written request, duly acknowledged, the original beneficiary was held entitled to the insurance money, although the insured had forwarded a request for a change of beneficiary, which was not properly executed, and the fact that the insurer had paid the money into court was held not to change the rights of the parties.

But, in *John Hancock Mut. L. Ins. Co. v. White* (1898) 20 R. I. 457, 40 Atl. 5, a provision requiring the consent of the company to a change of beneficiary was held to be solely for the protection of the insurer, and therefore one on which it alone could insist, and, where the insurer had filed a bill interpleading the two claimants of the benefit, a failure to comply with the requirement was held waived, and the new beneficiary was held entitled to the benefit, although the insurer had not consented to the change prior to the insured's death. And the view that provisions requiring the delivery of the policy, and an indorsement of



a change of beneficiary thereon, were for the benefit of the insurer alone, was adopted in *State Mut. Life Assur. Co. v. Bessett* (1918) — R. I. —, L.R.A.1918C, 961, 102 Atl. 727, and effect was given to an attempted change of beneficiaries, although certain requirements as to change, which were regarded as ministerial acts, had not been complied with by the insurer prior to the insured's death, where the insurer had waived compliance therewith.

In another Rhode Island case, where the beneficiary had wrongfully refused to deliver up the policy, and had prevented the insured from presenting it to the insurer for indorsement of a change of beneficiary, as provided by the policy, and the insurer filed a bill of interpleader, and made no objection to the validity of the attempted change of beneficiary, effect was given to the change. *John Hancock Mut. L. Ins. Co. v. Bedford* (1914) 36 R. I. 116, 89 Atl. 154.

J. T. W.

# NEBRASKA SUPREME COURT.

MARION LEON

v.

CHICAGO, BURLINGTON, & QUINCY  
RAILROAD COMPANY, Appt.

(— Neb. —, 167 N. W. 787.)

**Trial — negligence — question for jury.**

1. Where different minds may reasonably arrive at different conclusions from the same state of facts, as to whether the facts proven establish negligence, the question of negligence in such case is for the jury and not for the court.

For other cases, see *Trial*, II. c, 8, a, in *Dig.* 1-52 N. S.

**Carrier — accompanying passenger — duty.**

2. Where a person, with the permission of an employee of a railroad company, enters a passenger coach with a departing guest, who is a passenger, to see such passenger off, it is the duty of the company to exercise ordinary care to prevent injuring such person while entering and while within and while alighting from the coach.

For other cases, see *Carriers*, II. k, 1, in *Dig.* 1-52 N. S.

**Same — negligence — liability.**

3. In such case, the company is liable for negligently injuring a person who so accompanies a guest into one of its coaches.

For other cases, see *Carriers*, II. k, 1, in *Dig.* 1-52 N. S.

**Appeal — absence of error.**

4. The record examined, and held, the petition states a cause of action and the verdict is supported by the testimony.

For other cases, see *Evidence*, XII. d; *Pleading*, II. j, in *Dig.* 1-52 N. S.

(Sedgwick, Rose, and Cornish, JJ., dissent.)

(May 17, 1918.)

Headnotes by DEAN, J.

**Note.** — The duty of a carrier to one who goes upon a train to assist a passenger is considered in the annotation following this case, post, 317, and see references therein to annotations on related questions.

L.R.A.1918F.

**A** PPEAL by defendant from a judgment of the District Court for Douglas County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Byron Clark, Jesse L. Root, and J. W. Weingarten, for appellant:

A person permitted to enter a railroad company's passenger car, not for the purpose of becoming a passenger or to render some actual assistance to an arriving or departing passenger, is a mere licensee, to whom the carrier owes no duty other than not to wantonly or purposely injure her.

*Chealey v. Rocheford*, 4 Neb. (Unof.) 768, 96 N. W. 241, 14 Am. Neg. Rep. 596; *Whaley v. Louisville & N. R. Co.* 186 Ala. 72, 52 L.R.A. (N.S.) 179, 65 So. 140; *McElvane v. Central of Georgia R. Co.* 170 Ala. 525, 34 L.R.A. (N.S.) 715, 54 So. 489, 3 N. C. C. A. 340; *Arkansas & L. R. Co. v. Sain*, 90 Ark. 278, 22 L.R.A. (N.S.) 910, 119 S. W. 659.

The mere fact that a car is moved so abruptly that a licensee just stepping from a car loses her balance and is thrown to the ground, without proof that the carrier or its agents knew she was in that position when the car was moved, and without proof that the movement was extraordinarily violent and out of the ordinary, does not justify a recovery against the carrier.

*St. Louis & S. F. R. Co. v. Goenell*, 23 Okla. 588, 22 L.R.A. (N.S.) 892, 101 Pac. 1126; *Jelinek v. Omaha & O. B. Street R. Co.* 98 Neb. 751, 154 N. W. 545; *Louisville R. Co. v. Osborne*, 171 Ky. 348, 188 S. W. 419; *Raeuber v. Public Service R. Co.* 89 N. J. L. 366, 98 Atl. 192; *Farmer v. St. Louis, I. M. & S. R. Co.* 178 Mo. App. 579, 161 S. W. 327; *Tuder v. Oregon Short Line R. Co.* 135 Minn. 294, L.R.A.1917C, 86, 160 N. W. 785, 14 N. C. C. A. 716.

Messrs. Lambert, Shotwell, & Shotwell and Edward Simon for appellee.

Dean, J., delivered the opinion of the court:

Mrs. Marion Leon, plaintiff and appellee, aged twenty-two, sued defendant for personal injuries alleged to have been sustained by her in being thrown from the lower step of one of defendant's coaches, that was "negligently and carelessly moved, jerked, and suddenly started," as alleged, at its Omaha depot, as she was about to alight therefrom after accompanying into the coach one of defendant's outgoing passengers who was her guest and about to leave the city. She recovered a judgment for \$1,350, and defendant appealed. This case is before us on rehearing. The former hearing was before the commission, and on their recommendation we reversed the judgment of the district court.

Plaintiff's petition alleges in substance that she was permitted by the employees of defendant to pass through the depot gate and to board a coach in defendant's train, that an employee negligently and carelessly represented to her "would remain stationary for a period of four to five minutes from the time she boarded it; that, relying and depending upon said permission, advice, and representation, plaintiff boarded said car and remained there for . . . not more than two minutes; that she then immediately left said car, and that while she was in the act of stepping therefrom . . . defendant, acting by and through its agents, negligently and carelessly moved, jerked, and suddenly started said car without giving plaintiff any notice or warning whatever that said car was about to be moved, thereby throwing plaintiff violently to the ground and upon said brick pavement; . . . that, as a direct, immediate, and proximate result of the negligence and carelessness of defendant," she received the injuries complained of.

Defendant's answer denied generally the averments of the petition and alleged that "None of its servants . . . had authority to represent to the plaintiff . . . that its trains would remain stationary for any period whatsoever; . . . that any injury or inconvenience plaintiff may have suffered as the result of the movement of any of defendant's trains, same resulted from plaintiff's carelessness and negligence, and by reason of risks which she assumed in going upon defendant's premises and into its cars, and did not result from any negligence or carelessness on the defendant's part."

Plaintiff's reply was a general denial.

Miss Grojinsky had been plaintiff's guest at her home in Omaha for about two weeks. She was a stranger there, and, being unacquainted with the streets and car service,

plaintiff accompanied her to the depot at about 3 o'clock in the afternoon of August 3, 1914. Together they were permitted to proceed through the station gate to the train, upon Miss Grojinsky showing her ticket to the gatekeeper.

Miss Grojinsky testified that when they arrived at the coach this conversation took place between her and defendant's brakeman, who was standing at the steps:

I showed him my ticket and said, "Red Oak?" He said, "Yes, ma'am. This is the train." I said, "How many minutes before my train leaves?" He said, "Ten minutes." I said, "Then my friend will have time to go on the train a minute to say goodbye?" "Yes, lady; plenty of time;" and he ushered us on.

She said that, at the time, she told the brakeman that Mrs. Leon was there merely to see her off. She added that plaintiff was in the coach with her not to exceed two minutes and that a few seconds after Mrs. Leon left her seated in the coach "there was a sudden lurch of the car. . . . I was jarred, kind of thrown forward in my seat. . . ."

Q. What did you observe when you looked out of the window?

A. Marion Leon had fallen from the car. A gentleman was assisting her. . . .

Q. Where was she when you looked out of the car?

A. Lying on the brick—

Q. Brick pavement?

A. Or the ground.

The witness said the coach, at the time, moved several feet forward, and that no signal was given that the train was about to be moved. On cross-examination she testified:

Q. How far did the train move after this jerk that you spoke of before the train came to rest?

A. Several feet. . . . About 7 or 8 feet. . . .

Q. How long after it came to rest, after this jolt, before it departed?

A. About four or five minutes.

Plaintiff testified that she left her guest seated in the coach about two minutes after her entrance, and that as she was descending the steps, and just at the moment when her left foot was on the lower step and her right foot was in position to step down on the pavement, and while she was holding to the handrail of the car, "this train gave a sudden jerk, and I was thrown . . . to the pavement." She added that she was not warned and did not know the train was about to be moved, and that, as a result of

its sudden movement, she fell violently to the pavement on her right side, thereby incurring the injuries complained of. Her testimony was substantially to the same effect as that of Miss Grojinsky, respecting the conversation with the brakeman at the car steps. She testified that no box step was in sight, nor was any employee of defendant to be seen when she came out of the coach, and that when she fell she was assisted to her feet by a young man of about eighteen, a stranger, who partly supported and partly carried her through the depot gate and up the steps into the main waiting room, and that after a brief period of rest, though in great pain, she boarded a street car that carried her to the store of her husband, and that he at once called a physician, who came and administered first aid, and that she was again examined by the physician the same evening after being taken by her husband in a taxi to her home. She testified that, as a result of the fall, her entire right side was bruised and her arm was bleeding and her right foot was sprained, and that she was in bed for ten days immediately after the accident, the doctor attending her "about twice a day," and that she was "up and down for about six weeks," suffering greatly all of the time. Plaintiff's testimony was corroborated by her husband and by a nurse who attended her a few days, and who saw her often afterwards, respecting the bruised condition of her body and the length of time that she suffered. They also testified that before the accident plaintiff was strong and free from bodily ills and able to do ordinary housework, but that she was afterwards subject to nervous attacks and was able to do but little of such work.

The attending physician testified that he examined plaintiff two times on the afternoon and evening of August 3d. He said that, on arriving at the store of plaintiff's husband, "Mrs. Leon was sitting on a box at the rear end of the store, . . . suffering quite a bit of pain, and pretty sick, and I simply bandaged up her leg. It was badly swollen; and I ordered her to be taken home at once, and I saw her late in the afternoon again."

He testified that plaintiff was in the third or fourth month of pregnancy, and that she bled internally, and that her injuries threatened to result in a miscarriage, and that because of the pain she suffered he administered morphine hypodermics for about two days. He also said that plaintiff was "flat on her back . . . from seven to ten days, and she was under observation for about four or five or six weeks after that." He was acquainted with her for about a year

before he attended her, and said that her health was good before the injury.

Defendant does not complain of the amount of the recovery, but, in view of its contention that the accident complained of by plaintiff was not sustained by her upon the premises of the railroad, we have discussed the pleading and the testimony at unusual length. In its brief, defendant argues that the testimony adduced in support of plaintiff's petition, "viewed in the light of the uncontradicted and unimpeachable evidence adduced by appellant, is as extravagant as a tale in the 'Arabian Nights.' Nothing but the gullibility of twelve mere men in passing upon the claim of an attractive woman can account for the verdict in this case." On the main points in dispute respecting the occurrence of the accident, defendant's testimony was confined to that of several of its employees who worked at the Omaha depot, and trainmen who were in charge of the train on the day of the accident, but they were apparently unable to recall the circumstances testified to by plaintiff and Miss Grojinsky.

The following facts seem to have been established to the satisfaction of the jury: That appellee was permitted by the carrier's agents to enter the railroad yards and the coach with her guest, and that they were informed by an employee at the car entrance that the train would not leave for ten minutes, and that she, in reliance thereon, remained in the coach about two minutes, when the train was negligently "jolted" or "jerked" forward several feet without warning to her, and that, as a direct result of such negligent movement of the train, as she was about to step from the coach, she was thrown violently to the brick platform, and thereby seriously injured. We conclude that the trial court properly refused to sustain appellant's motion for a directed verdict, either on the ground of insufficiency of the petition or of the testimony. When different minds may reasonably arrive at different conclusions from the same state of facts, as to whether the facts proven establish negligence, the question of negligence in such case is for the jury. Appellant assigns numerous errors respecting the giving and refusing of instructions, and also on the admission of testimony. We have examined the assignments and find that no reversible error was committed in the respects noted.

On the question of the liability of a common carrier for negligence in this class of cases, the weight of authority seems to be in accord with the conclusion we have adopted. Plaintiff was not a trespasser. She was more than a bare licensee. She en-

tered defendant's coach on the implied invitation of defendant, and though she was not a passenger, yet the relation that she sustained to defendant in the premises that we have discussed was such that the carrier was bound to use such reasonable and ordinary care in the handling of its train as would permit her to alight, without the infliction of serious injury to her person through the negligence of its employees. Failing in this, the company is liable to respondent in damages. 4 R. C. L. p. 1053, § 503; 6 Cyc. 615; *Doss v. Missouri, K. & T. R. Co.* 59 Mo. 27, 21 Am. Rep. 371, 4 Am. Neg. Cas. 49; *Cherokee Packet Co. v. Hilson*, 95 Tenn. 1, 31 S. W. 737, 10 Am. Neg. Cas. 247; *Whitely v. Southern R. Co.* 122 N. C. 987, 29 S. E. 783; *Missouri, K. & T. R. Co. v. Hibbitts*, 49 Tex. Civ. App. 419, 109 S. W. 228; *Cooper v. Atlantic Coast Line R. Co.* 78 S. C. 562, 59 S. E. 704; *McElvane v. Central of Georgia R. Co.* 170 Ala. 525, 34 L.R.A.(N.S.) 715, 54 So. 489, 3 N. C. C. A. 340; *St. Louis Southwestern R. Co. v. Cunningham*, 48 Tex. Civ. App. 1, 106 S. W. 407; *Morrow v. Atlanta & C. Air Line R. Co.* 134 N. C. 92, 46 S. E. 12; *Missouri, K. & T. R. Co. v. Miller*, 15 Tex. Civ. App. 428, 39 S. W. 583, 2 Am. Neg. Rep. 258.

The authorities hold, generally, that the carrier is not liable where a person who is not a passenger, but who accompanies a passenger into a coach, is injured in alighting therefrom after the train has begun its journey on schedule time, unless the injured person had previously notified someone in charge of the train of his purpose to alight. But that such is not the present case is obvious from a review of the record. Plaintiff entered defendant's coach by permission, and it is sufficiently pleaded, and to the jury's satisfaction proven, that those in charge of its train, with knowledge of defendant's entrance and before its scheduled time of departure and without warning, negligently "jerked and suddenly started" the coach from which she fell, and that such negligence was the immediate cause of her injury. *Johnson v. Southern R. Co.* 53 S. C. 203, 69 Am. St. Rep. 840, 31 S. E. 212. In the present case, defendant's witnesses denied any knowledge of the happening of the accident complained of by plaintiff. Some of the depot officers and trainmen testified that if such an occurrence had taken place at the time and under the circumstances that were related to the jury by plaintiff and Miss Grojinsky they would have known about it. But the jury were not only the triers of fact, they were as well the judges of the credibility of the witnesses, and they adopted the plaintiff's version of the acci-

dent, and we are not inclined to disturb their finding.

In boarding the coach of a common carrier, a person is bound to anticipate such movements of the coaches as are usual and ordinary in making up its trains, such as the attaching of the engine or additional coaches or the like. But the duty devolves upon the carrier to use ordinary care under such circumstances. The carrier should anticipate that persons who have a right to be upon its coaches at its stations may be in the act of boarding or alighting therefrom, and it should therefore, at such times, use ordinary care to avoid violent and abrupt movements of its trains without warning. We would be loath to hold that a person, with the knowledge and under the implied invitation of the carrier, could not enter one of its coaches with a passenger to speed a parting guest who had been an inmate of the home and practically a member of the family, without assuming the risk of injury from the negligence of its employees.

Defendant charges that plaintiff's petition does not allege that she entered the coach for the purpose of bidding her guest farewell, nor to render to her any necessary assistance. No motion to make plaintiff's petition more definite and certain in the particulars complained of appears in the record, nor was the objection that is now made to the pleading brought to the attention of the trial court in the motion for a new trial. In such case the practice is well settled that the case may be disposed of as if such issue had been pleaded, or amendments may be allowed at any time to conform to the proof. In the present case, we find the petition was sufficient, and no amendment was required.

Our former judgment is vacated, and, finding no reversible error in the record, the judgment of the district court is affirmed.

**Rose and Cornish, JJ., dissent.**

**Sedgwick, J., dissenting:**

There is no doubt that anyone has a right to go upon a passenger train of a common carrier to accompany a departing guest, or for any lawful purpose, and "in boarding the coach of a common carrier a person is bound to anticipate such movements of the coaches as are usual and ordinary in making up its trains, such as the attaching of the engine or additional coaches or the like. But the duty devolves upon the carrier to use ordinary care under such circumstances. The carrier should anticipate that persons who have a right to be upon its coaches at its stations may be in the act of boarding or alighting therefrom, and it should therefore,

at such times, use ordinary care to avoid violent and abrupt movements of its trains without warning." (Majority opinion.) The cars did not leave the station within the time that the trainmen informed the plaintiff they would remain there, and if the starting of the car was an ordinary matter, such as passengers and others might expect at any time when a passenger train is standing, then passengers and others getting on and off of the train should have that in mind, and should not put themselves in a position where they would be thrown down by such a movement of the car. The question as to just how much the record shows that the car was jarred or moved is a very important question. The fact that the plaintiff fell and was severely hurt does not prove that there was any extraordinary movement of the car. It does not prove negligence on the part of the defendant. Her fall is equally consistent with a failure on her own part to use due care under the circumstances.

The plaintiff testified that there was a "jerk or jolt," and she fell. Cars are seldom coupled without a "jerk or jolt." Plaintiff's friend testified, "there was a sudden lurch

of the car. . . . I was jarred, kind of thrown forward in my seat." She was not moved in her seat so that she could say, without qualification, that she was "thrown forward." She was "kind of thrown forward." That amounts to saying that it made some noticeable impression upon her. Any, even the slightest, movement might have had as much effect. This evidence fails to sustain the burden of proof which is upon the plaintiff to prove negligence of the defendant which was the proximate cause of her injury. If there is such extraordinary impact or concussion as to necessarily throw persons down who are carefully entering or alighting from the train, there would ordinarily be plenty of witnesses by whom such fact could be proved. No one testified to any such fact except plaintiff and her friend, and their testimony fails to establish anything serious or unusual. If there had been any such extraordinary circumstance, the trainmen would have known it. If their testimony is to be believed, we have affirmative proof that there was no negligence of defendant, and no proof of such an occurrence as would amount to negligence on the part of defendant.

### Annotation — Duty of carrier to one who goes upon a train to assist a passenger.

The earlier cases dealing with this question are treated in the notes in 3 L.R.A.(N.S.) 432; 22 L.R.A.(N.S.) 910; 28 L.R.A.(N.S.) 773, and 46 L.R.A.(N.S.) 357.

As to duty and liability of carrier to one who accompanies a passenger not for the purpose of assisting him, see annotation to *Whaley v. Louisville & N. R. Co.* 52 L.R.A.(N.S.) 179.

The general rule that where a person, with notice to or within the knowledge of the servants of a railroad company, enters a train to assist a passenger, but himself not intending to take passage, the company owes such person the duty of exercising ordinary and reasonable care not to injure him, finds support in the following recent cases: *Whaley v. Louisville & N. R. Co.* (1914) 180 Ala. 72, 52 L.R.A.(N.S.) 179, 65 So. 140; *Cannon v. Atchison, T. & S. F. R. Co.* (1917) 101 Kan. 363, L.R.A.1918A, 559, 167 Pac. 1050; *LEON v. CHICAGO, B. & Q. R. Co.* ante, 313; *St. Louis & S. F. R. Co. v. Isenberg* (1915) 48 Okla. 51, 150 Pac. 123; *St. Louis Southwestern R. Co. v. Little* (1913) — Tex. Civ. App. —, 157 S. W. 1185; *F. Worth & D. C. R. Co. v. Allen* (1915) — Tex. Civ. App. —, 179

S. W. 62. And that this duty includes the obligation to allow the assistant a reasonable opportunity safely to alight, if his intention to do so is known, see *Whaley v. Louisville & N. R. Co.* (1914) 186 Ala. 72, 52 L.R.A.(N.S.) 179, 65 So. 140; *Cannon v. Atchison, T. & S. F. R. Co.* (1917) 101 Kan. 363, L.R.A.1918A, 559, 167 Pac. 1050; *Chesapeake & O. R. Co. v. Dean* (1914) 160 Ky. 757, 170 S. W. 167; *St. Louis & S. F. R. Co. v. Isenberg* (1915) 48 Okla. 51, 150 Pac. 123; *St. Louis Southwestern R. Co. v. Little* (1913) — Tex. Civ. App. —, 157 S. W. 1185; *Missouri, K. & T. R. Co. v. Churchill* (1914) — Tex. Civ. App. —, 171 S. W. 517, and *Ft. Worth & D. C. R. Co. v. Allen* (1915) — Tex. Civ. App. —, 179 S. W. 62.

And it is not necessary, in order to entail this duty upon the carrier, that permission to enter the train should first be obtained of the conductor, where notice of the intention of entering and immediately leaving was given to another train employee, and there was no regulation prohibiting persons from getting upon trains to render necessary assistance to passengers. *St. Louis & S. F.*

R. Co. v. Isenberg (1915) 48 Okla. 51, 150 Pac. 123.

These rules are based upon the theory that, in the absence of any regulation forbidding persons to enter trains to assist passengers, one who, with knowledge of the company, goes upon a train for that purpose, has an implied permission or license to do so. See *Cannon v. Atchison, T. & S. F. R. Co.* (1917) 101 Kan. 363, L.R.A.1918A, 559, 167 Pac. 1050; *Leon v. Chicago, B. & Q. R. Co.*; *St. Louis & S. F. R. Co. v. Isenberg* (Okla.) supra; *Ft. Worth & D. C. R. Co. v. Allen* (1915) — Tex. Civ. App. —, 179 S. W. 62.

But that in the absence of any notice, either actual or constructive, of the purpose of the attendant, the carrier owes no duty to such person, except not to injure him wilfully or wantonly, see *Cannon v. Atchison, T. & S. F. R. Co.* (Kan.) supra; *Leon v. Chicago, B. & Q. R. Co.*; and *Ft. Worth & D. C. R. Co. v. Allen* (Tex.) supra. And a railroad company, which has no notice of the presence on its train of one who has entered merely for the purpose of assisting a passenger, owes him no common-law duty to hold the train either a sufficient or reasonable time to enable him to alight safely. *Street v. Chicago, M. & St. P. R. Co.* (1914) 124 Minn. 517, 145 N. W. 746, 8 N. C. C. A. 630. However, such a person is within the protection of a statute, requiring passenger trains to stop "a sufficient time, not less than one minute, safely to discharge and receive passengers." Ibid. And in Texas it has been held that proof of a general long-contin-

ued custom to delay trains at a certain point to permit persons to assist passengers, or to hold such trains for a definite period, supplies notice to the company of an intention to enter a train in compliance with the custom, and that it is "wholly immaterial" that the operatives of the particular train were without notice of plaintiff's intention to assist a passenger, and then alight. *Ft. Worth & D. C. R. Co. v. Abbott* (1914) — Tex. Civ. App. —, 170 S. W. 117; *Ft. Worth & D. C. R. Co. v. Allen* (1915) — Tex. Civ. App. —, 179 S. W. 62.

And where one goes upon a train, at the request of a conductor, to accompany and care for injured persons who are being rushed to a hospital, it has been held that the emergency is such that, independently of authority or lack of authority of such official under the ordinary conditions of operation, and for the purpose of the trip, the relation of carrier and passenger exists, obligating the carrier to exercise the highest practical care and diligence in the operation of the train. *Vandalia R. Co. v. Darby* (1915) 60 Ind. App. 294, 108 N. E. 778.

Of course, under some circumstances, the carrier may be relieved of liability for failure to exercise the proper degree of care. For instance, in *Cannon v. Atchison, T. & S. F. R. Co.* (1917) 101 Kan. 363, L.R.A.1918A, 559, 167 Pac. 1050, where the carrier owed one who entered a train to assist a passenger the duty of exercising ordinary and reasonable care, and failed to fulfil same, it was held that recovery was barred by the contributory negligence of the plaintiff.

G. J. C.

#### KANSAS SUPREME COURT.

JOHN A. CARLSON

v.

MID-CONTINENT DEVELOPMENT COMPANY, Appt.

(103 Kan. 464, 173 Pac. 910.)

**Receiver — nuisance — restoration of property — liability.**

1. A gas company built its pipe line in a highway more than 12 inches above the ground in such a way as to constitute a nuisance, and by reason of the defective construction a horse driven by the plaintiff

Headnotes by JOHNSTON, Ch. J.

**Note.** — As to the liability of a corporation on a cause of action for tort arising while the corporation was in the hands of a receiver, see annotation following this

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caught his feet under the pipe, and in struggling to extricate himself overturned the buggy, throwing the plaintiff out and injuring him. The pipe line and other property of the defendant passed into the hands of a receiver after the line was built, and was in his possession when the injury was sustained by plaintiff, but had been restored to the company before the trial of the action begun by plaintiff against the company to recover damages for the injury. Held, that, the company having negligently created the nuisance which caused the injury, it is liable, although the pipe line was in the control of the receiver when plaintiff suffered the injury.

For other cases, see *Highways*, IV. b, 1, in Dig. 1-52 N. S.

**Appeal — error — right to complain.**

2. The building of such a structure was not only negligence, but it was a wrong which rendered the party creating it liable

without proof of negligence, and the fact that the court in its instructions placed the burden upon the plaintiff of proving negligence did not materially prejudice the defendant.

*For other cases, see Appeal and Error, VII. m, 4, a, (5), in Dig. 1-52 N. S.*

Same — erroneous evidence — non-prejudice.

3. The admission of testimony that the receiver moved and buried the pipe line after the accident did not, under the circumstances, constitute prejudicial error.

*For other cases, see Appeal and Error, VII. m, 3, a, in Dig. 1-52 N. S.*

Same — refusal to strike evidence.

4. The refusal of the court to strike out the testimony of a witness upon the alleged grounds that it was contrary to all of the evidence on the question, and untrue, is not error.

*For other cases, see Trial, I. c, in Dig. 1-52 N. S.*

(July 6, 1918.)

**A**PPEAL by defendant from a judgment of the District Court for Wyandotte County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. William G. Holt and J. K. Cubbison for appellant.

Messrs. Thompson, McCaries, & Gorsuch for appellee.

Johnston, Ch. J., delivered the opinion of the court:

In an action to recover for personal injuries, the plaintiff obtained a judgment against the defendant for \$3,000, on account of negligence in constructing and maintaining defendant's gas pipe upon a public highway. It was alleged that the defendant, which owned and operated a pipe line for conducting gas from its wells to consumers, constructed and maintained a pipe line on and along a public highway about 2 feet above the ground and in such a way as to constitute a nuisance, and that while plaintiff was driving along the highway, observing due care, his horse's feet were caught under the pipe, throwing down the horse, upsetting the buggy, and throwing plaintiff against a barbed wire fence, seriously injuring him. Defendant answered with a denial, a charge of contributory negligence, and an averment that the property, assets, and control of the business of the defendant

were in the hands of a receiver when the accident occurred, and that therefore it was not liable for the injury. It was shown in the evidence that the road along which the pipe was laid was partly surfaced with macadam, and at the place where plaintiff was injured it was slanting and slippery by reason of a recent rain. The gas pipe mentioned was near the edge of the macadam surface, and from a foot to 16 inches above the ground. Just as the plaintiff drove past a steam roller, which was standing on the other side of the road and partly upon the macadam portion, the horse slipped, his feet going under the gas pipe, and in a plunging effort to extricate himself and get on his feet the buggy was overturned, throwing plaintiff against the barbed wire fence and causing the injury for which the recovery was sought. There was a conflict in the evidence as to how the horse and buggy came to slide down to the pipe, and as to whether the horse first became frightened at the steam roller near by; but it is reasonably clear that the horse slipped under the gas pipe, with the result that plaintiff was thrown out and injured.

One of the contentions on this appeal is that the defendant cannot be held responsible for the injury, because the pipe line was under the control of a receiver when the accident occurred. After the pipe line was constructed, and on August 15, 1911, the property of the company passed into the hands of a receiver, and was in his possession on May 20, 1915, when the accident occurred. It appears that on April 24, 1915, about two years before the trial herein, an order was made, discharging the receiver and providing that the possession of the property should be restored to the company within five days after the order was made. Although no direct evidence of the surrender of possession to the company is found, the presumption is that the receiver performed his duty and restored the possession to the defendant as directed. As the company negligently created a nuisance on the highway which caused the injury of the plaintiff, while the line and business of the company were in the control of the defendant, it is liable for the injury to the plaintiff, regardless of the liability of the receiver for wrongfully maintaining the line in that condition. The company cannot escape liability for its wrong because the receiver may be liable, or because he happened to be in control of the pipe line when the injury was sustained. 29 Cyc. 1201.

Defendant says the case was tried on the theory of negligence, and not that the wrong constituted a nuisance. It was alleged in plaintiff's petition that the defendant negli-

case, post, 320, and references therein to annotations on related questions.

Upon the question whether a corporation is liable to a criminal prosecution for acts or omissions while in the hands of a receiver, see note in 26 L.R.A.(N.S.) 710.

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gently created a nuisance. The testimony showed that the structure built by the defendant was a nuisance, and the court in its instructions recited the facts upon which the plaintiff relied for a recovery, and these facts amounted to a nuisance. The court did define the rules of negligence, and there was negligence in the act of the defendant. The building of such a structure was not only negligence, but it was a wrong, which rendered the one creating it liable without proof of negligence. 20 R. C. L. 381; 29 Cyc. 1201. The requirement that plaintiff should prove negligence placed an unwarranted burden upon him, but it is not one which prejudiced the defendant. This is sufficient to sustain the ruling of which complaint is made, but it may be added that it has been held that a railway company is liable for an injury that occurs while the property is in the hands of a receiver or trustee. *Kansas P. R. Co. v. Wood*, 24 Kan. 619; *Union Trust Co. v. Cuppy*, 26 Kan. 754.

Objection was made to testimony that the pipe line was moved and buried after the accident. As the precaution for safety was

taken by the receiver, and not by the company, it may well be doubted whether the testimony was admissible. However, the defect in the construction of the line was so obvious, and the responsibility of the defendant so clearly shown, that no prejudice could have resulted from the admission of the testimony.

Nor was there any error in the ruling refusing to strike out the testimony of Dr. Gordon. His description of the place where the accident occurred conflicted with that of other witnesses, so that defendant insists that he must have been speaking of another place than the one where the accident occurred. While that may have impaired the credibility of the witness and the weight of his testimony, it did not affect its competency. Although questioned, the testimony tended to show that the exposed pipe was the proximate cause of the injury. We cannot uphold the contention that the amount of the verdict indicates prejudice and passion on the part of the jury.

The judgment is affirmed.

### Annotation — Liability of corporation on cause of action for tort arising while the corporation was in the hands of a receiver.

As a general rule, a corporation, while its property is in the hands of a receiver, has no control over either the receiver or his servants, and therefore, in the absence of any liability imposed by statute,

or of an agreement to assume liability, is not personally responsible for the negligence or wilful torts of the employees of the receiver;<sup>1</sup> although, as will presently be explained, its property may be

<sup>1</sup> Although the character of the cause of action to which this rule has been applied is immaterial, it is indicated, in connection with the cases below cited, for the purpose of negating the existence of a possible distinction. Cases arising out of

—injuries to passengers are: *Davis v. Duncan* (1884) 19 Fed. 477; *Chamberlain v. New York, L. E. & W. R. Co.* (1895) 71 Fed. 636; *Memphis & L. R. Co. v. Stringfellow* (1884) 44 Ark. 322, 51 Am. Rep. 598, 2 Am. Neg. Cas. 115; *Eckels v. Farley* (1907) 131 Ill. App. 557; *Vandalia R. Co. v. Keys* (1910) 46 Ind. App. 353, 91 N. E. 173; *Metz v. Buffalo, C. & P. R. Co.* (1874) 58 N. Y. 61, 17 Am. Rep. 201; *Hicks v. International & G. N. R. Co.* (1884) 62 Tex. 38; *Ryan v. Hays* (1884) 62 Tex. 42.

—out of injuries at railroad crossings, are: *Gableman v. Peoria, D. & E. R. Co.* (1897) 82 Fed. 790, reversed on other grounds in (1900) 41 C. C. A. 160, 101 Fed. 1; *Atlanta, B. & A. R. Co. v. McGill* (1915) 194 Ala. 186, 69 So. 874; *McNulta v. Lockridge* (1891) 137 Ill. 270, 31 Am. St. Rep. 362, 27 N. E. 452, affirmed in (1891) 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. Rep. 11; *Ohio & M. R. Co. v. Davis* (1884) 23 Ind. 553, 85 Am. Dec. 477, 11 Am.

Neg. Cas. 453; *Bell v. Indianapolis, C. & L. R. Co.* (1876) 53 Ind. 57; *Turner v. Hannibal & St. J. R. Co.* (1881) 74 Mo. 602; *Howard v. Philadelphia & R. R. Co.* (1888) 6 Pa. Co. Ct. 589.

—out of injuries to employees are: *Memphis & C. R. Co. v. Hoechner* (1895) 14 C. C. A. 469, 31 U. S. App. 644, 67 Fed. 456; *Baltimore & O. R. Co. v. Burris* (1901) 50 C. C. A. 48, 111 Fed. 882; *Bartlett v. Cicero Light, Heat & P. Co.* (1898) 177 Ill. 68, 42 L.R.A. 715, 69 Am. St. Rep. 206, 52 N. E. 339; *Ohio & M. R. Co. v. Anderson* (1882) 10 Ill. App. 313; *St. Louis & S. F. R. Co. v. Bricker* (1902) 65 Kan. 321, 69 Pac. 328, 12 Am. Neg. Rep. 438; *Louisville Southern R. Co. v. Tucker* (1899) 105 Ky. 492, 49 S. W. 314; *Archambeau v. New York & N. E. R. Co.* (1898) 170 Mass. 272, 49 N. E. 435; *Texas P. R. Co. v. Johnson* (1890) 76 Tex. 421, 18 Am. St. Rep. 60, 13 S. W. 463; *Texas & P. R. Co. v. Huffman* (1892) 83 Tex. 286, 18 S. W. 741.

—out of negligence in handling a car of explosives, resulting in injury to a volunteer fireman: *Willson v. Colorado & S. R. Co.* (1914) 57 Colo. 303, 142 Pac. 174.

—out of the negligent frightening of a



chargeable with the amount of the damages thereby occasioned.

The same is true in the case of a nuisance arising from the acts of the re-

horse: *Union P. R. Co. v. Smith* (1898) 59 Kan. 80, 52 Pac. 102.

—out of negligence in uncrating a vicious dog: *Holt v. Leslie* (1915) 116 Ark. 433, 173 S. W. 191.

—other personal injury actions: *Farmers' Loan & T. Co. v. Central R. Co.* (1880) 2 McCrary, 181, 7 Fed. 538; *Texas & P. R. Co. v. Bledsoe* (1893) 2 Tex. Civ. App. 88, 20 S. W. 1135; *Missouri, K. & T. R. Co. v. Wood* (1899) — Tex. Civ. App. —, 52 S. W. 93.

—killing of stock: *Schurr v. Omaha & St. L. R. Co.* (1896) 98 Iowa, 418, 67 N. W. 280; *Heath v. Missouri, K. & T. R. Co.* (1884) 83 Mo. 617.

—the setting of a fire: *Stevens v. Atchison, T. & S. F. R. Co.* (1900) 87 Mo. App. 26.

—wrongful ejection of a passenger: *Godfrey v. Ohio & M. R. Co.* (1888) 116 Ind. 30, 18 N. E. 61; *Dillingham v. Anello* (1895) — Tex. Civ. App. —, 29 S. W. 1103.

—slander by a conductor: *Beaumont, St. L. & W. R. Co. v. Daniel* (1916) — Tex. Civ. App. —, 186 S. W. 383.

—loss of or injury to goods or live stock carried: *Ocean S. S. Co. v. Wilder* (1890) 107 Ga. 220, 33 S. E. 179; *Texas & P. R. Co. v. Donovan* (1894) 86 Tex. 378, 25 S. W. 10; *Holman v. Galveston, H. & S. A. R. Co.* (1896) 14 Tex. Civ. App. 499, 37 S. W. 464; *Ft. Worth & R. G. R. Co. v. Ballou* (1915) — Tex. Civ. App. —, 174 S. W. 337; *International & G. N. R. Co. v. Perkins* (1916) — Tex. Civ. App. —, 185 S. W. 657; *Andrews v. Roberts* (1917) — Tex. Civ. App. —, 192 S. W. 569; *Ft. Worth & R. G. R. Co. v. Zidell* (1918) — Tex. Civ. App. —, 202 S. W. 351.

—character of cause of action not stated: *Tallulah Falls R. Co. v. Ramey* (1911) 137 Ga. 568, 73 S. E. 838.

In *Memphis & C. R. Co. v. Hoechner* (1895) 14 C. C. A. 469, 31 U. S. App. 644, 67 Fed. 456, it was said by Lurton, J.: "A receiver appointed by a court of equity to hold, manage, and operate an insolvent railroad is not the agent of the insolvent railroad corporation, and is not a substitute for the board of directors. He is but the hand of the court appointing him, and holds, manages, and operates the property under the orders and directions of the court, as its custodian, and not for or under the control of the directors or shareholders of the corporation. His management is for the benefit of those ultimately entitled under decree of the court. His acts are not the acts of the corporation and his servants are not the agents or servants of the corporation."

See also, as to the nonexistence of the relationship of principal and agent between a corporation and its receiver, *Farmers' Loan & T. Co. v. Central R. Co.* (1880) 2 McCrary, 181, 7 Fed. 537.

But in *Ryan v. Hays* (1884) 62 Tex. 42,

the court, in discussing the theory upon which a corporation is exonerated from liability for torts of a receiver or his agents while in possession of its property, said: "It has been held in many cases that the relation of master and servant does not exist in such case between a railway company and the receiver, and that, when the receiver has the exclusive control of the operation of a railway placed in his hands, the company to which it belongs is not liable for injuries resulting from the negligence of the receiver or his employees. . . . That this is technically true cannot be controverted; but the fact remains that the company is indirectly, through the liability of its property or the profits or income thereof while in the hands of a receiver, made responsible for the satisfaction of claims for injuries resulting from the negligence of a receiver or his employees, and it is exceedingly difficult to see upon what ground this can be accomplished in ordinary receiverships, if we entirely exclude the idea that the receiver is, in some sense, the servant of the company whose property he holds and operates and whose franchise he exercises. It may be true, when a railway company, charged by law with a public duty voluntarily assumed through the agencies which the act creating it permits it to select, fails to perform that duty and to comply with its obligations to others, that such person as a court of competent jurisdiction may appoint to take charge of its property, and therewith discharge its obligations to the public and to others at the same time, should be considered its servant in some cases. The law, ordinarily, through its charter, provides for the management of a railway by a directory, to be selected by the stockholders; but it might provide for the doing of this in some other way, as by the appointment of the directory, in whole or in part, by a named department of the government. If so provided, and such a charter was voluntarily accepted and acted on, would not the directory so appointed be essentially the servants of the railway company, and employees under them also the servants of the company? In such case might not the stockholders, if they operated under a charter so providing, be held to consent to receive as their servants the persons so selected, and might not their acts bind them as fully as though they were selected in the usual manner? If so, does not every railway company accept its charter with the knowledge that, in a given condition of business mismanagement, the control of its business and property, charged with a duty to the public, will be taken from the hands of its directory elected by its stockholders, and placed in the hands of a receiver appointed by a court? In such case, would not a corporation, by accepting its charter with a knowledge of the law, consent in

ceiver or his employees.<sup>2</sup> But where the cause of action arises out of a nuisance created by the corporation prior to the receivership, the corporation may be held liable on the same grounds which make the creator of a nuisance liable for its continuance, after parting with the title.<sup>3</sup> See, in this connection, the annotation in 25 L.R.A.(N.S.) 731, on "Liability of one erecting or creating a nuisance upon his land for continuance of same after he has parted with the title," and the annotation in 46 L.R.A.(N.S.) 1187, on "Joint liability of successive owners of property for nuisance maintained thereon." The converse question of the liability of a receiver for the continuance of a nuisance created before his appointment is covered by a note to *Lamb v. Roberts*, L.R.A.1916F, 1018;

effect to such appointment, and the receiver, in an essential sense, thereby become the servant of the company."

In *Texas P. R. Co. v. Johnson* (1890) 76 Tex. 421, 18 Am. St. Rep. 60, 13 S. W. 463, and *Stewart v. Baltimore & O. R. Co.* (1901) 11 Ohio S. & C. P. Dec. 232, 8 Ohio N. P. 179, the opinion was expressed that although a receiver, appointed on the application of creditors to take charge of property in the interest of creditors, is not a servant or agent of the company so as to render the company liable for the negligence of the receiver or his employees, the case would be otherwise, where the receiver was appointed by the procurement of the corporation itself, for the purpose of temporarily placing its property beyond the reach of its creditors on execution, and of enabling it to relieve itself from temporary financial embarrassment; and that, in such case, it might with some propriety be held that the receiver was but the servant or agent of the company, for whose acts it would be as fully responsible as though he was appointed by its stockholders or directors; but in both cases the court preferred to rest its decision on another ground.

\* In *St. Louis, B. & M. R. Co. v. Green* (1916) — Tex. Civ. App. —, 183 S. W. 829, an action for depreciation in value of real estate by reason of the construction of a switch track along a street, by which the use of such street was destroyed, the elevation of its tracks so as to obstruct the drainage of water, and the use of the sidetrack as a place to park locomotives at night, creating offensive smells and odors, it was held that no recovery could be had against the railroad company for damages suffered by the plaintiff after its property passed into the hands and control of a receiver.

\* In *Union Trust Co. v. Cuppy* (1882) 26 Kan. 754, it was held that a railway company, creating a nuisance consisting of an insufficient culvert, was liable for injury

and see also the subsequently decided case of *Bush v. Stephens*, L.R.A.1918A, 1131.

Inasmuch as damages for injuries to persons or property during the receivership, caused by the torts of the receiver's agents and employees, are classed as a part of the operating expenses of the corporation, and, as such, are payable out of the net income, the corporation is, on equitable grounds, liable, where a portion of the income derived from the business during the receivership is diverted from the payment of operating expenses, and applied to the permanent improvement of the property, which is returned, without sale, to the corporation, or where the funds so arising are turned over to the corporation.<sup>4</sup>

The plaintiff is not bound, however,

resulting therefrom while its property was in the hands of a receiver.

Under a statute requiring railroad companies to fence their rights of way or be liable for stock killed by their trains, passed years before any receiver was appointed, the railroad company may be held liable, after the restoration to it of its property, for stock killed while its road was being operated by the receiver. *Kansas P. R. Co. v. Wood* (1890) 24 Kan. 619.

A corporation may be joined with the receivers of its property as defendants in an action for maintaining a continuing public nuisance, consisting of an embankment causing the flooding of plaintiff's land and crops. *St. Louis, A. & T. R. Co. v. Trigg* (1897) 63 Ark. 536, 40 S. W. 579.

See also, in this connection, *CARLSON v. MID-CONTINENT DEVELOPMENT CO.* ante. 318.

<sup>4</sup> *Texas & P. R. Co. v. Bloom* (Texas & P. R. Co. v. Manton) (1897) 164 U. S. 636, 41 L. ed. 580, 17 Sup. Ct. Rep. 216, 1 Am. Neg. Rep. 545, affirming (1894) 9 C. C. A. 300, 23 U. S. App. 143, 60 Fed. 979; *Bartlett v. Cicero Light, Heat & P. Co.* (1898) 177 Ill. 68, 42 L.R.A. 715, 69 Am. St. Rep. 206, 52 N. E. 339 (death of employee); *Litchfield Min. & P. Co. v. Beanblossom* (1907) 138 Ill. App. 122 (is liable in action for wrongful death, where property has been returned after paying improvements and betterments); *Mobile & O. R. Co. v. Davis* (1884) 62 Miss. 271 (if no third party's rights have intervened); *Texas & P. R. Co. v. Johnson* (1890) 76 Tex. 421, 18 Am. St. Rep. 60, 13 S. W. 463 (injury to employee); *Texas P. R. Co. v. Overheiser* (1870) 76 Tex. 437, 13 S. W. 468; *Texas P. R. Co. v. Griffin* (1890) 76 Tex. 441, 13 S. W. 471; *Texas & P. R. Co. v. Geiger* (1870) 79 Tex. 13, 15 S. W. 214; *Texas & P. R. Co. v. Miller* (1890) 79 Tex. 78, 11 L.R.A. 395, 23 Am. St. Rep. 308, 15 S. W. 264, 6 Am. Neg. Cas. 592; *Boggs v. Brown* (1891) 82 Tex. 41, 17 S. W. 830 (delay in transportation and delivery of cattle);

to proceed against the corporation in equity. The conduct of the latter in procuring or in acquiescing in the withdrawal of the receivership and in the discharge of the receiver, and the cancellation of his bond, and in accepting the restoration of its property, largely increased in value by the betterments, affords ground to charge an assumpsit of such valid claims against the receiver as were not satisfied by him or by the court which discharged him.<sup>6</sup>

Although it has been intimated in some cases that the corporation is chargeable only to the extent of the funds expended in betterments or turned over to it,<sup>6</sup> the point has never been directly decided; and, on principle, it would seem that if the damages recoverable would have been a charge on the corpus in the hands of a receiver, in case of a deficiency in the net income, they would likewise be a charge on the corpus of the property returned to the corporation.<sup>7</sup>

It is immaterial that suit has not been brought against the receiver, but is brought in the first instance against the company to which the trust fund or property was restored after the discharge of the receiver.<sup>8</sup> And an action

brought against the receiver and the corporation, and pending after the restoration of the property to it by the receiver, is not cut off by the failure to present and prosecute the claim by intervention in the receivership case, under an order requiring such claims to be presented and prosecuted by a certain date or be barred.<sup>9</sup>

A corporation, to which its property has been restored, without sale, with extensive improvements made from the revenues of the receivership, can, by reason of such betterments, be held liable for a judgment against the receivers, although it was a party to the original suit against the receivers, and had then been held not liable.<sup>10</sup>

In such an action a corporation is not ordinarily liable, unless the receiver was primarily liable.<sup>11</sup> But, assuming that it would be a defense to the receiver that the injury for which the action is brought resulted from a defect existing at the time he took over the property, which he had not had a reasonable time to remedy, such defense is not available to the corporation on account of whose negligence the defect may have existed, even though the injury occurred while the road was

Texas P. R. Co. v. White (1891) 82 Tex. 543, 18 S. W. 478; Texas & P. R. Co. v. Bailey (1892) 83 Tex. 19, 18 S. W. 481; Texas & P. R. Co. v. Huffman (1892) 83 Tex. 286, 18 S. W. 741; Texas & P. R. Co. v. Brick (1892) 83 Tex. 526, 29 Am. St. Rep. 675, 18 S. W. 947 (injury to employee); Texas & P. R. Co. v. Comstock (1892) 83 Tex. 537, 18 S. W. 948, 10 Am. Neg. Cas. 260; Texas & P. R. Co. v. Bloom (1892) 85 Tex. 279, 20 S. W. 133; Texas & P. R. Co. v. Donovan (1894) 86 Tex. 378, 25 S. W. 10; Texas & P. R. Co. v. Rose-dale Street R. Co. (1890) 4 Tex. App. Civ. Cas. (Willson) 266, 15 S. W. 120; Garrison v. Texas & P. R. Co. (1895) 10 Tex. Civ. App. 136, 30 S. W. 725; Missouri, K. & T. R. Co. v. Lacy (1896) 13 Tex. Civ. App. 391, 35 S. W. 505; Texas & P. R. Co. v. Gaal (1896) 14 Tex. Civ. App. 459, 37 S. W. 462 (ignition of wood near track); Holman v. Galveston, H. & S. A. R. Co. (1896) 14 Tex. Civ. App. 499, 37 S. W. 464; Kansas City, M. & O. R. Co. v. Russell (1916) — Tex. Civ. App. —, 184 S. W. 299.

<sup>6</sup> Texas & P. R. Co. v. Bloom (Texas & P. R. Co. v. Manton) (1897) 164 U. S. 636, 41 L. ed. 580, 17 Sup. Ct. Rep. 216, 1 Am. Neg. Rep. 545, affirming (1894) 9 C. C. A. 300, 23 U. S. App. 143, 60 Fed. 979.

<sup>7</sup> See, as apparently restricting the liability of the corporation to the amount of the betterments, Texas & P. R. Co. v. Bloom (Texas & P. R. Co. v. Manton) (1897) 164 U. S. 636, 41 L. ed. 580, 17 Sup. Ct.

Rep. 216, 1 Am. Neg. Rep. 545; Texas & P. R. Co. v. Geiger (1890) 79 Tex. 13, 15 S. W. 214; Texas & P. R. Co. v. Bailey (1892) 83 Tex. 19, 18 S. W. 481; Missouri, K. & T. R. Co. v. Lacy (1896) 13 Tex. Civ. App. 391, 35 S. W. 505; Holman v. Galveston, H. & S. A. R. Co. (1896) 14 Tex. Civ. App. 499, 37 S. W. 464; International & G. N. R. Co. v. Perkins (1916) — Tex. Civ. App. —, 185 S. W. 657.

<sup>9</sup> In Bartlett v. Cicero Light, Heat & P. Co. (1898) 177 Ill. 68, 42 L.R.A. 715, 69 Am. St. Rep. 206, 52 N. E. 339, it is said that damages for injuries to persons or property during the receivership, caused by the torts of the receiver's agents and employees, are accorded the same priority of payment as belongs to other necessary expenses of the receiver, and will be paid out of the net income, if that is sufficient, and, in the event of a deficiency, out of the corpus.

<sup>8</sup> Bartlett v. Cicero Light, Heat & P. Co. (Ill.) supra.

<sup>9</sup> Texas & P. R. Co. v. Bloom (Texas & P. R. Co. v. Manton) (1897) 164 U. S. 636, 41 L. ed. 580, 17 Sup. Ct. Rep. 216, 1 Am. Neg. Rep. 545, affirming (1894) 9 C. C. A. 300, 23 U. S. App. 143, 60 Fed. 979.

<sup>10</sup> Missouri, K. & T. R. Co. v. Lacy (1896) 13 Tex. Civ. App. 391, 35 S. W. 505.

<sup>11</sup> So, where the common-law rule that no action will lie for wrongful death has not been abrogated by statute, so far as receivers are concerned, the corporation is not liable. Texas & P. R. Co. v. Collins (1892).

in the hands of a receiver, and the company is liable only on account of betterments.<sup>12</sup>

Where there has been a sale of the property, the corporation cannot be held liable for damages occurring while its property was in the hands of a receiver, unless it is alleged and proved that earnings during the receivership were invested in improvements.<sup>13</sup> A subsequent purchase of the corporate property by the company from one who bought it at a sale made by the receiver, under a proper order of the court (there being no collusion in the sales), does not render the company liable in damages for torts of the receiver and his servants in the course of the receivership;<sup>14</sup> but the corporation is liable only to the extent

to which earnings between the date of the sale and the transfer of the property by the receiver to his vendee have been invested in betterments.<sup>15</sup>

A corporation may incur personal liability on a cause of action in tort arising during the receivership, where it has agreed to assume the debts and liabilities of the receiver.<sup>16</sup>

In Texas, a statute has been enacted, declaring, without reference to the question of betterments, that where the property has been returned to the corporation without sale, it shall be responsible for a debt or liability incurred during the receivership; and this statute has been held not to be unconstitutional as depriving a corporation of its property without due process of law.<sup>17</sup>

84 Tex. 121, 19 S. W. 365; Texas & P. R. Co. v. Bledsoe (1893) 2 Tex. Civ. App. 88, 20 S. W. 1135.

<sup>12</sup> Texas & P. R. Co. v. Geiger (1890) 79 Tex. 13, 15 S. W. 214.

<sup>13</sup> Ray v. Dillingham (1897) — Tex. Civ. App. —, 41 S. W. 188.

<sup>14</sup> Hicks v. International & G. N. R. Co. (1884) 62 Tex. 38; Ryan v. Hays (1884) 62 Tex. 42; International & G. N. R. Co. v. Perkins (1916) — Tex. Civ. App. —, 185 S. W. 657.

<sup>15</sup> Holman v. Galveston, H. & S. A. R. Co. (1896) 14 Tex. Civ. App. 499, 37 S. W. 464.

<sup>16</sup> A corporation may be liable where, by the order under which it has been allowed to resume possession of its property, it was charged with, and, by its acceptance of the privilege given it by the court, has assumed and agreed to satisfy, all the obligations of the receivers. Baltimore & O. R. Co. v. Burris (1901) 50 C. C. A. 48, 111 Fed. 882.

A corporation is liable upon a cause of action in tort arising while it was in the hands of a receiver, where the order of the court discharging the receiver provides that the company shall "assume and fully pay all the lawful liabilities and obligations of said receiver." Vandalia R. Co. v. Keys (1910) 46 Ind. App. 353, 91 N. E. 173.

A corporation which, for the purpose of terminating a receivership, agrees to assume the debts and liabilities against the receiver, is liable for a tort committed by his agents. Ryan v. Hays (1884) 62 Tex. 42.

A corporation accepting the return of its property under a decree, to the terms of which it agreed, whereby it took the property "subject to all claims, damages, and liabilities now existing, or which may thereafter be made against the receivers," is liable for a tort committed by the receiver's servants. Missouri, K. & T. R. Co. v. Chilton (1894) 7 Tex. Civ. App. 183, 27 S. W. 272.

In order to show liability on the part of a corporation, it is necessary to allege and prove that the receiver has been duly ap

pointed and discharged, and the property delivered to the corporation, and either that such property was equal in value to the amount of plaintiff's claim, or that plaintiff's claim has been made a condition of such delivery of the property, by a decree of the court terminating the receivership. Kansas City, M. & O. R. Co. v. Russell (1916) — Tex. Civ. App. —, 184 S. W. 299.

<sup>17</sup> In Missouri, K. & T. R. Co. v. Chilton (Tex.) supra, the court said: "It is sufficient for the determination of this case to suggest that appellant has not been deprived of any right or property without due process of law, because, by its own agreement, it undertook to become responsible for the claims of appellee, in order to get possession of the property. But considering the question under the act alone, we are unable to perceive in what respect appellant has been deprived of its property without due process of law. Such an act is really beneficial to the railway company, to the extent that it provides a method whereby it may be relieved of the expense of a receivership, without waiting for the long and tedious course of final settlement. When it takes advantage of this benefit by accepting the property under the law, is it not reasonable and just that it should take it cum onere? The receivers, under the well-recognized equity rule, might hold the property and operate it until all liabilities incurred pending the receivership were fully paid. Is it depriving the company of a substantial right to allow it to accept the property from the hands of the receivers, charged with these liabilities? We have not been referred to any case going so far, and have not been able to find one."

Under this statute, it is not necessary to allege or prove the investment of funds by the receivers in betterments. Yoakum v. Kroeger (1894) — Tex. Civ. App. —, 27 S. W. 953; International & G. N. R. Co. v. Cook (1897) 16 Tex. Civ. App. 386, 41 S. W. 665.

Other decisions arising under this statute are Kansas City, M. & O. R. Co. v. Latham

And under statutes imposing a liability of a penal character for breach of an absolute duty thereby created, a corporation may be answerable for a liability

incurred while the property was in the hands of a receiver;<sup>18</sup> and such liability is sometimes declared by the statute itself.<sup>19</sup>

(1916) — *Tex. Civ. App.* —, 182 S. W. 717, and *Kansas City, M. & O. R. Co. v. Weaver* (1917) — *Tex. Civ. App.* —, 191 S. W. 591.

<sup>18</sup> The statutory right to recover for stock killed by cars of a railroad company, the road not being fenced, is not based on the ground of negligence in killing the stock, and it is, therefore, immaterial that the stock was killed while the road was being operated by a receiver. *McKinney v. Ohio & M. R. Co.* (1864) 22 Ind. 99.

<sup>19</sup> Under a statute imposing upon railway companies a liability to the owners of animals killed or injured by its cars or locomotives, whether operated by the company or a receiver thereof, the corporation is liable for stock killed while the railroad was being operated by a receiver. *Ohio & M. R. Co. v. Fitch* (1863) 20 Ind. 498; In-

*dianapolis, C. & L. R. Co. v. Ray* (1878) 51 Ind. 269; *Louisville, N. A. & C. R. Co. v. Caubbe* (1874) 46 Ind. 277.

In an action under a statute which provides that, where a railroad company neglects or refuses to fence its right of way after notice by the owner of adjoining land, the owner or occupant of such adjoining land may build the fence and bring his action to recover double the value thereof against either the corporation or the party in possession of and operating the road; it is no defense that, at and before the time of building the fence in question, the railroad and all the property of the defendant was in the hands of a receiver. *Ohio & M. R. Co. v. Russell* (1885) 115 Ill. 52, 3 N. E. 561. E. S. O.

## MISSOURI SUPREME COURT.

(Division No. 1.)

JOHN C. CARTER, Admr., etc., of Delmar Ridgeway, Deceased, Resp.,  
v.

METROPOLITAN LIFE INSURANCE COMPANY, Appt.

(— Mo. —, 204 S. W. 399.)

**Insurance — substitution of stranger for examination.**

1. Securing a policy of life insurance through the substitution for physical examination of a stranger in place of applicant is not within a statutory provision that no misrepresentation made in obtaining a policy shall be deemed material or render the policy void unless the matter misrepresented shall have actually contrib-

uted to the contingency or event on which the policy is to become due.

*For other cases, see Insurance, III. c, 2, a, in Dig. 1-52 N. S.*

**Pleading — general denial — fraud.**

2. The defense that a policy of life insurance was secured by substituting a stranger for applicant for the purpose of physical examination cannot be raised by general denial.

*For other cases, see Pleading, III. b, in Dig. 1-52 N. S.*

**Trial — question for court — cancellation of policy.**

3. A special answer and cross bill in an action on a policy of life insurance, seeking its cancellation for fraud, changes the action into one in equity which should be heard by the court.

*For other cases, see Jury, I. b, 1, b, in Dig. 1-52 N. S.*

(June 13, 1918.)

**Note.** — The question of consent of the person whose life is insured as a condition of insurance thereon is covered in the notes to *Martin v. McAllister*, 56 L.R.A. 585, and *Acme Mfg. Co. v. McCormick*, post, —.

As to right to avoid contract because of mistake as to identity of other party thereto, see note to *School Sisters v. Kuanitt*, L.R.A. 1916D, 792.

For power of equity to take jurisdiction of suit to cancel insurance policy for fraud, and to enjoin action at law on the policy, see notes to *Woelffe v. The Sailors*, 12 L.R.A. (N.S.) 881, and *Bankers Reserve Life Co. v. Omberson*, 48 L.R.A. (N.S.) 265.

As to right of insurer to cancellation of the policy in equity before loss, upon the ground that it was obtained by fraud, see note to *Pacific Mut. L. Ins. Co. v. Glaser*, 45 L.R.A. (N.S.) 222.

L.R.A.1918F.

**A**PPEAL by defendant from a judgment of the Circuit Court of the city of St. Louis in favor of plaintiff in an action brought to recover the amount alleged to be due on a life insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. Fordyce, Holliday, & White and William J. Tully, for appellant:

No valid contract of insurance had ever been entered into, and the policy on which plaintiff was suing should be canceled.

*Barrington v. Ryan*, 88 Mo. App. 85; *Whitmore v. Supreme Lodge, K. L. H. 100 Mo. 36*, 13 S. W. 495; *Pacific Mut. L. Ins. Co. v. Glaser*, 245 Mo. 377, 45 L.R.A. (N.S.) 222, 150 S. W. 549; *Gardner v. North State*

Mut. L. Ins. Co. 163 N. C. 367, 48 L.R.A. (N.S.) 714, 79 S. E. 806, Ann. Cas. 1915B, 652; Southern States Mut. L. Ins. Co. v. Herlihy, 138 Ky. 359, 128 S. W. 91; Mutual L. Ins. Co. v. Pearson, 114 Fed. 395; Bacon, Life & Acci. Ins. 4th ed. § 194; 1 Joyce, Ins. 2d ed. §§ 43-45, 99; Schuermann v. Union Cent. L. Ins. Co. 165 Mo. 641, 65 S. W. 723; Keller v. Home L. Ins. Co. 198 Mo. 440, 95 S. W. 903; 9 Cyc. 401.

Defendant was entitled to introduce evidence to prove that no contract of insurance was ever entered into between Delmar Ridgeway and it.

Greenway v. James, 24 Mo. 326; Cavender v. Waddingham, 2 Mo. App. 551; Wilkerson v. Farnham, 82 Mo. 672; Clemens v. Knox, 31 Mo. App. 185; White v. Middlesworth, 42 Mo. App. 368; Chapman v. Currie, 51 Mo. App. 40; Hellmuth v. Benoist, 144 Mo. App. 695, 129 S. W. 257; Southern States Mut. L. Ins. Co. v. Herlihy, 138 Ky. 359, 128 S. W. 91; Johnson v. Reliance Ins. Co. 181 Mo. App. 443, 168 S. W. 914; Young v. Glascock, 79 Mo. 574; Sprague v. Rooney, 104 Mo. 349, 16 S. W. 505.

Defendant had a right to have the jury's verdict on whether or not the person insured was dead.

Milliken v. Thyson Commission Co. 202 Mo. 637, 100 S. W. 604; Johnson v. Grayson, 230 Mo. 380, 130 S. W. 673; Printz v. Miller, 233 Mo. 47, 135 S. W. 19.

Mr. Frederick H. Bacon, for respondent:

Before a loss, but not afterwards, an insurance company can bring an action in equity to cancel a policy alleged to have been obtained by fraud. After the death, however, no such right exists because the fraud, if any, can be pleaded as a defense, provided the facts bring it within the provisions of our statute as to misrepresentations made in obtaining a policy of life insurance.

Schuermann v. Union Cent. L. Ins. Co. 165 Mo. 641, 65 S. W. 723; Kern v. Supreme Council A. L. H. 167 Mo. 471, 67 S. W. 252; Pacific Mut. L. Ins. Co. v. Glaser, 245 Mo. 377, 45 L.R.A. (N.S.) 222, 150 S. W. 549; Insurance Co. v. Cullen, 237 Mo. 557, 141 S. W. 626; Keller v. Home L. Ins. Co. 198 Mo. 440, 95 S. W. 903; Lynch v. Prudential Ins. Co. 150 Mo. App. 461, 131 S. W. 145; Cable v. United States L. Ins. Co. 191 U. S. 288, 48 L. ed. 188, 24 Sup. Ct. Rep. 74; Riggs v. Union L. Ins. Co. 63 C. C. A. 365, 129 Fed. 207; Griesa v. Mutual L. Ins. Co. 94 C. C. A. 635, 169 Fed. 509.

If the defendant claimed that the issuance of the policy was obtained by fraud, the facts must be specially pleaded.

Kern v. Supreme Council, A. L. H. 167

M. 471, 67 S. W. 252; Welsh v. Metropolitan Ins. L. Co. 165 Mo. App. 233, 147 S. W. 147; Aloe v. Fidelity Mut. Life Asso. 164 Mo. 675, 55 S. W. 993; Jenkins v. Covenant Mut. L. Ins. Co. 171 Mo. 383, 71 S. W. 688; Keller v. Home L. Ins. Co. 198 Mo. 440, 95 S. W. 903; State ex rel. Gordon v. Kennedy, 163 Mo. 510, 63 S. W. 678; 2 Cooley, Briefs on Ins. 1176; Hilburn v. Phoenix Ins. Co. 140 Mo. App. 355, 124 S. W. 63; Burgess v. Mercantile Town Mut. Ins. Co. 114 Mo. App. 189, 89 S. W. 568; Hester v. Fidelity & C. Co. 69 Mo. App. 186; Johnson v. Sovereign Camp, W. W. 119 Mo. App. 98, 95 S. W. 951; Gruwell v. National Council, K. L. S. 126 Mo. App. 496, 104 S. W. 884; Harris v. Knights & Ladies of Honor, 129 Mo. App. 163, 108 S. W. 130; Keeton v. National Union, 178 Mo. App. 301, 165 S. W. 1107; Coscarella v. Metropolitan L. Ins. Co. 175 Mo. App. 138, 157 S. W. 873; People's Bank v. Stewart, 136 Mo. App. 24, 117 S. W. 99; Ritchey v. Home Ins. Co. 98 Mo. App. 113, 72 S. W. 44; B. Roth Tool Co. v. Champ Spring Co. 122 Mo. App. 603, 99 S. W. 827; Flint-Walling Mfg. Co. v. Ball, 43 Mo. App. 504; Merrill v. Central Trust Co. 46 Mo. App. 236.

Walker, J., delivered the opinion of the court:

This is an action brought by plaintiff as administrator on a life insurance policy, alleged to have been issued by defendant to one Delmar Ridgeway. Upon the sustaining of a demurrer to defendant's answer, except as to its general denial, and its refusal to plead further, the plaintiff made formal proof, and the court directed a verdict in his favor in the amount of the policy. From this judgment the defendant appeals.

The petition contains all the formal averments necessary to a pleading of this character. The answer consists: First, of a general denial; second, a special defense, and cross bill; that the policy was caused to be issued on the application of a person who falsely represented himself to be Delmar Ridgeway, and that defendant issued said policy, relying upon such false and fraudulent representation; that the person who represented himself to be Delmar Ridgeway, and who signed the application for the policy was not in fact Delmar Ridgeway, but fraudulently imposed upon the defendant in thus falsely representing himself in the procurement of said policy; that the plaintiff, with intent to defraud the defendant, caused the alleged Delmar Ridgeway to apply for the policy and to undergo the required medical examination therefor, and furnished the money to pay the premium on the policy; that plaintiff fraudulently

caused the alleged Delmar Ridgeway to execute a will purporting to be the will of Delmar Ridgeway, bequeathing the policy to the plaintiff; that five months after the issuance of the policy, Delmar Ridgeway died, and plaintiff made application for and was appointed administrator with the will annexed of the estate of the deceased. For a further special defense and cross bill, after pleading the foregoing affirmative defenses, defendant alleges that the application for insurance herein was not made in good faith by the alleged Delmar Ridgeway, for the beneficiary named in the policy, but was made at the instigation and request of the plaintiff for his own use and benefit; that plaintiff paid the first semiannual premium on the policy, and caused the alleged Delmar Ridgeway to execute a will bequeathing the policy to the plaintiff; that the policy never was delivered to the alleged Delmar Ridgeway, but possession of same was fraudulently kept and maintained by the plaintiff, and the plaintiff had no insurable interest in the life of the insured. This is followed by a prayer for specific relief, in that the policy be canceled, and for naught held, and that defendant be hence dismissed with its costs, and for such other and further relief as to the court may seem proper. Plaintiff's demurrer to the first and second counts of the answer, stated separately, was that neither constituted a defense to the petition, and, if the facts stated therein were true, they showed that defendant had a full and complete remedy at law. The case coming on for hearing, after the sustaining of the demurrer, as aforesaid, the plaintiff made formal proof of the issuance of the policy, the payment of the premium, the death of deceased, the probating of the will of the latter, and the appointment of plaintiff as administrator. The defendant offered proof to sustain its general denial, and in support of its several special defenses, all of which testimony was excluded.

The matter having been heard before a jury, the court, at the instance of the plaintiff, gave the following peremptory instruction: "The court instructs the jury that under the pleadings and evidence in this case the plaintiff is entitled to recover on the policy sued on in the sum of \$500, less an unpaid semiannual premium of \$10.91, with interest on the balance from the time of the filing this suit, at the rate of 6 per cent."

Defendant asked the following instructions, which were refused:

"The court instructs the jury that if you believe and find from the evidence that the application for the policy in this suit was not signed by Delmar Ridgeway, but, on the

contrary, was signed by some other person, falsely and fraudulently representing himself to be Delmar Ridgeway, and that this fact was not known to the defendant, then your verdict must be in favor of the defendant.

"The court instructs the jury that if you believe and find from the evidence that the plaintiff John C. Carter caused an application to be made for a policy of insurance purporting to be upon the life of one Delmar Ridgeway, and that the plaintiff caused and alleged Delmar Ridgeway to execute a last will and testament, leaving the proceeds of said policy to the plaintiff, and that the plaintiff was not a relative of said Delmar Ridgeway, or dependent upon said Delmar Ridgeway, or a creditor of said Delmar Ridgeway, and had no insurable interests in the life of said Delmar Ridgeway, then your verdict must be in favor of defendant."

The jury found in favor of the plaintiff, as directed by the court. From this verdict, after the overruling of its motion for a new trial, defendant appealed.

I. Primarily, the determination of the issue involved is dependent upon the construction of § 6037, Rev. Stat. 1909, which provides: "No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons, citizens of this state, shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case shall be a question for the jury."

Plaintiff contends, and the trial court so held, that this section applies not only to policies procured through misrepresentations made by the applicant for insurance, but as well to those procured by one simulating the applicant. This is a rather startling proposition, and, if the statute be so construed, its effect will be to render an insurance contract immune from a plea of invalidity for fraud, although obtained through false pretenses made by another than the insured, and without his knowledge. No amplification of words is necessary to the conclusion that such a construction, instead of lessening the possibility of fraud, as was evidently intended by the enactment of the section, will tend rather to promote the same. Aside, however, from this general conclusion, amply sustained by the rules of interpretation, a consideration of the nature of life insurance contracts and the conditions under which they are uniformly executed will aid in determining the meaning, purpose, and consequent limitation of the section.

An examination of the applicant is a condition precedent to the issuance of a life insurance policy. From its terms, it is evident that this section was intended to be limited to the facts elicited in this examination in its providing that the misrepresentations referred to shall be those "made in obtaining or securing" the policy. The limitation is express, and under the rule embodied in the maxim of *expressio unius, etc.*, other misrepresentations, outside of or independent of such examination, and which may affect the validity of the policy, are excluded.

Viewed from another vantage the propriety of the restricted application of the section becomes apparent. It is in the nature of a limitation. As such, it can have no operative force unless there exists a policy otherwise valid upon which it can operate. An invalid policy has no legal existence and can form no basis for the operation of a limitation. As applied to the case at bar, it follows that before the section can be invoked to limit the effect of whatever misrepresentations may be pleaded as a defense to an action on the policy, the latter must be conceded to be otherwise valid. The result of this concession leaves nothing which can appropriately be interposed by the plaintiff in invoking the section, except such misrepresentations as may be charged to have been made by the insured in obtaining the policy. These, as we have shown, must be such as were made by him in his examination for the same.

Furthermore, the words employed in defining the materiality of the misrepresentations referred to in the section are, in themselves, sufficiently definite to enable the character of such misrepresentations to be determined. The section prescribes that only such misrepresentations are material as contribute to the death of the insured, one which so contributes must be such an one, which, if it had not been made, the policy would not have been issued. To illustrate, the applicant answers falsely in regard to never having had a certain disease, and that he is then in sound health. He dies soon thereafter of this disease. If he had answered truly, the issuance of the policy would have been precluded. False answers to any other material inquiries would have had a like effect, in that they would have rendered the applicant an uninsurable risk. This but tends to emphasize the fact that the right of the insured to the policy is determined by his examination, and to such misrepresentations, therefore, as are made therein, the section must necessarily have reference. What is meant by the section, in other words, is that no false state-

ment made in the application for the policy shall avoid the same, unless such statement concealed a condition which contributed to the death of the insured.

Otherwise construed, the validity of the policy in other respects is left out of consideration. No limit, except as indicated in defining their materiality, is to be placed upon any representations made in securing the policy; and, although they may involve the grossest and most despicable fraud, viz., the impersonation of another for the purpose of profiting by his death, and be independent and outside of the purported examination of the insured, the insurer is to be precluded from interposing them in defense to an action on the policy, unless it be alleged that they contributed to the death of the insured. Such a construction is not in accord with a reasonable interpretation of the words employed. Its effect in the administration of the law of insurance under our statute would be to foster fraud. It outrages a righteous sense of justice, and is therefore foreign to the intention of the legislature in the enactment of the section. Given the restricted construction we have indicated, however, it serves a useful and practical purpose in placing a reasonable limit upon the effect of misrepresentations, the interposition of which has been deferred until the insured is dead.

The construction of the section under the facts in issue is one of first impression in this state. Our reports are replete with cases discussing and determining the effect of various forms of misrepresentations in obtaining policies, but these are found to be limited to misrepresentations made by the applicants themselves and not by others.

The supreme court of Kentucky, in ruling upon a case (*Southern States Mut. L. Ins. Co. v. Herlihy*, 138 Ky. 359, 128 S. W. 91), involving the defense made here of false personation of the insured in procuring the policy, says in effect that, "although the company could not defeat a recovery upon the ground that the insured in the applications made false and material answers, this . . . did not deprive it of the right to make the defense that the insured was not in truth the person who made application for the insurance, and who was, in fact examined, or the defense that the insurance was procured as a part of a conspiracy entered into between the insured and others who had no insurable interest in her life, for the purpose of practising a fraud upon the company. These defenses were based upon facts existing independent of the matter contained in the application. The failure to comply with the statute [in pleading the application] denied the company the right



to resist the payment of the policies upon defenses arising out of the application. It did not prevent it from showing that in other respects outside of the matter contained in the application the policies had been avoided. If a person other than the insured made the application and was examined, there was, of course, no contract at all between the company and the insured. And so, if the insurance was obtained as a part of a conspiracy entered into by persons having no insurable interest in the life of the insured, the contract was illegal, against public policy, and nonenforceable. These two defenses the company made, and the lower court properly permitted wide latitude in the examination of witnesses whose evidence tended to support them."

This case is apposite here because the rule announced therein, expressed in general terms, is exceedingly elementary and applicable alike to all obligations. It is that a contract conceived in fraud has no legal existence, and that this fact may be shown to defeat an action brought thereon. *Pacific Mut. L. Ins. Co. v. Glaser*, 245 Mo. loc. cit. 390, 45 L.R.A.(N.S.) 222, 150 S. W. 540. Thus it appears, aside from the inapplicability of § 6937, supra, that the defense sought to be made by the defendant in its special answer and cross bill, that no contract had ever been made between it and the insured should have been permitted. The trial court therefore erred in sustaining the plaintiff's demurrer.

II. The defense was based upon the theory that the contract was illegal, in that no real agreement had ever been entered into by the parties. If this fact be established, then the contention of the defendant may be sustained upon a broader principle than the determination of its rights, viz., that of public policy. But is this defense available under a general denial? Under our system of pleading a general denial raises an issue as to each of the material allegations of the petition. *Sells v. Atchison, T. & S. F. R. Co.* 266 Mo. loc. cit. 177, 181 S. W. 106; *Kelerher v. Henderson*, 203 Mo. loc. cit. 511, 101 S. W. 1083. In a certain class of cases, and which do not distinguish between general denial and the general issue usually involving the right to the possession of property, it is held that the defendant may prove any fact which goes to show that the plaintiff never had any cause of action. A compilation of this class of cases is to be found in *Patton v. Fox*, 160 Mo. loc. cit. 106, 69 S. W. 287.

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It was held in *Sprague v. Rooney*, 104 Mo. 360, 16 S. W. 505, that the effect of a general denial is to deny the legality of a contract sought to be enforced, and to authorize the admission of evidence to show that the same, although on its face valid, was intended to accomplish an illegal object. This case was expressly overruled in *McDermott v. Sedgwick*, 140 Mo. loc. cit. 182, 39 S. W. 776, in which the following ruling was announced: Where there is nothing on the face of the petition to indicate other than a valid contract, if it is to be invalidated by some extrinsic matter, such matter must be pleaded. This ruling is in harmony with the current of authority, not only in the earlier but the later cases as well. *School Dist. v. Sheidley* (*School Dist. v. Stocking*) 138 Mo. loc. cit. 690, 37 L.R.A. 406, 60 Am. St. Rep. 576, 40 S. W. 656; *Bell v. Peper Tobacco Warehouse Co.* 205 Mo. loc. cit. 493, 103 S. W. 1014; *Shonhoney v. Quincy, O. & K. C. R. Co.* 231 Mo. loc. cit. 147, 132 S. W. 1059, *Ann. Cas.* 1912A, 1143.

Nothing appearing on the face of the petition to disclose the fraud on which the contract was founded, and the same being susceptible of formal proof without a showing as to its legality, the defense of its legal nonexistence was not available under a general denial.

III. The joinder of the general denial, separately stated, with that of the special answer and cross bill is expressly authorized by statute (Rev. Stat. 1909, § 1807); *State ex rel. Davis v. Rogers*, 79 Mo. 283; *Cohn v. Lehman*, 93 Mo. 574, 6 S. W. 267.

The special answer and cross bill alleged with sufficient certainty the grounds of the defense and the reasons for the affirmative relief prayed for. The latter consisted in a prayer for a decree canceling the policy. This changed the action at law into one in equity, and the case should have been heard by the court and not by a jury. *Myers v. Schuchmann*, 182 Mo. 159, 81 S. W. 618; *Wendover v. Baker*, 121 Mo. 273, 25 S. W. 918.

For the reasons stated, this case should be reversed and remanded, to be proceeded with as herein indicated. It is so ordered.

All concur, except Blair, J., not sitting.

Petition for rehearing denied, June 23, 1918.

## KENTUCKY COURT OF APPEALS.

T. T. FORMAN et al., Appts.,  
v.

MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK.

(173 Ky. 547, 191 S. W. 279.)

**Insurance—illustration—part of policy.**

1. An illustration exhibited to one solicited for life insurance, approved in writing by a general officer of the company, and attached to the policy, with the understanding on the part of the insured that at the termination of the accumulation period he should select one of the options set out in the illustration, becomes a part of the contract and the insurer must settle according to the figures therein set out, whether the policy is actually entitled to the amount specified or not.

*For other cases, see Contracts, I. f, in Dig. 1-52 N. S.*

**Same—construction of policy—effect of figures.**

2. A statement in an illustration attached to a life insurance policy that insured would have a right, at the termination of the accumulation period, to draw a specified amount of surplus, controls provisions in the application that insured agrees to accept the insurer's apportionment of surplus, and in the policy that the policy will be credited with its distributive share of surplus, and in the illustration that the surplus will necessarily depend upon subsequent experience and that the figures are correct as based upon experience of the company.

*For other cases, see Insurance, VI. c, 2, in Dig. 1-52 N. S.*

(January 30, 1917.)

**A** PPEAL by plaintiffs from a judgment of the Circuit Court for Fayette County in defendant's favor in an action brought to recover the amount alleged to be due on a life insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. M. Don Forman, Judge Matthew Walton, and John Shannon, for appellants:

Appellants were entitled to a judgment for the amount sued for upon a construction of the policy as modified by the illustration.

*Equitable Life Assur. Soc. v. Winn*, 137 Ky. 646, 28 L.R.A.(N.S.) 558, 126 S. W. 153; *Pierce v. Equitable Life Assur. Soc.* 145 Mass. 56, 1 Am. St. Rep. 433, 12 N. E. 858; *Fuller v. Knapp*, 24 Fed. 100, 37 Fed. 163; *Equitable Life Assur. Soc. v. Hardin*,

**Note.**—For representation or estimate as to accumulations, dividends, surplus, etc., of insurance policy, see annotation following *Luellen v. New York L. Ins. Co.* post, 343.

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166 Ky. 51, 178 S. W. 1155; *White v. Provident Life & T. Co.* 237 Pa. 375, 85 Atl. 463; *Grange v. Penn. Mut. L. Ins. Co.* 235 Pa. 320, 84 Atl. 392.

The illustration is a part of the contract of insurance.

*O'Neill v. Caledonian Ins. Co.* 166 Cal. 310, 135 Pac. 1121; *New York & P. R. S. S. Co. v. Aetna Ins. Co.* 192 Fed. 212; *Frankfort Marine Acci. & Plate Glass Ins. Co. v. California Artistic Metal & Wire Co.* 23 Cal. App. 74, 151 Pac. 176; *Equitable Life Assur. Soc. v. Meuth*, 145 Ky. 160, 140 S. W. 157, Ann. Cas. 1913B, 661; *Timlin v. Equitable Life Assur. Soc.* 141 Wis. 276, 124 N. W. 253; 1 Elliott, Contr. § 71; *Southern Mut. L. Ins. Co. v. Montague*, 84 Ky. 653, 4 Am. St. Rep. 218, 2 S. W. 443; *Southern Ins. Co. v. Milligan*, 154 Ky. 216, 167 S. W. 37; *Ligon v. Minton*, — Ky. —, 125 S. W. 304; *Drake v. Holbrook*, 28 Ky. L. Rep. 1319, 92 S. W. 297; *Prewitt v. Trimble*, 92 Ky. 176, 36 Am. St. Rep. 596, 17 S. W. 356; *Long v. Douthitt*, 142 Ky. 427, 134 S. W. 453.

The issue and delivery of the illustration was binding on appellee.

*Mississippi Valley Ins. Co. v. Neyland*, 9 Bush, 430; *Powell v. Continental Ins. Co.* 97 S. C. 375, 81 S. E. 654; *Independent Order of Foresters v. Cunningham*, 127 Tenn. 521, 156 S. W. 192; *National Live Stock Ins. Co. v. Jackson*, 160 Ky. 228, 169 S. W. 695; *Queen of Arkansas Ins. Co. v. Molone*, 111 Ark. 229, 163 S. W. 772; *Schuler v. Metropolitan L. Ins. Co.* 191 Mo. 52, 176 S. W. 275; *Godfray v. Atlantic Horse Ins. Co.* 160 N. C. 238, 84 S. E. 339; *Wright v. Northwestern Mut. L. Ins. Co.* 91 Ky. 206, 15 S. W. 242; *Phoenix Ins. Co. v. Spiers*, 87 Ky. 85, 8 S. W. 453; *Hartford Life & Annuity Ins. Co. v. Haydon*, 90 Ky. 39, 13 S. W. 585; *Washington L. Ins. Co. v. Menefee*, 107 Ky. 249, 53 S. W. 260; *Pelican Assur. Co. v. Schildknecht*, 128 Ky. 351, 106 S. W. 312; *Connecticut Indemnity Assn. v. Crogan*, 21 Ky. L. Rep. 717, 52 S. W. 959.

The application is not a part of the contract.

*Keller v. Equitable F. Ins. Co.* 28 Ind. 170; *Breaden v. Western & Southern L. Ins. Co.* 148 Ky. 488, 146 S. W. 1104; *Western & S. L. Ins. Co. v. Galvin*, 24 Ky. L. Rep. 444, 68 S. W. 655; *Manhattan L. Ins. Co. v. Myers*, 109 Ky. 378, 59 S. W. 30; *Provident Sav. Life Assur. Soc. v. Puryear*, 109 Ky. 381, 59 S. W. 15.

Messrs. *Hobson & Hobson* also for appellants.

Messrs. *Frederick L. Allen*, *George R. Hunt*, *Grubbs & Grubbs*, and *Bruce & Bullitt*, for appellee:

The illustration is not a guaranty as to

the surplus, but a mere representation of what the results would be if the company's past experience was reproduced in the future.

*Provident Sav. Life Assur. Soc. v. Withers*, 132 Ky. 541, 116 S. W. 350; *Langdon v. Northwestern Mut. L. Ins. Co.* 199 N. Y. 188, 92 N. E. 440; *Untermyer v. Mutual L. Ins. Co.* 128 App. Div. 615, 113 N. Y. Supp. 221; *Grange v. Penn Mut. L. Ins. Co.* 235 Pa. 320, 84 Atl. 396.

The illustration forms no part of the policy of insurance.

*Provident Sav. Life Assur. Soc. v. Withers*, *supra*; *Williams v. New York L. Ins. Co.* 122 Md. 141, 89 Atl. 97; *Cooley, Briefs on Ins. p. 663*; *Ruse v. Mutual Ben. L. Ins. Co.* 23 N. Y. 516; *Germania L. Ins. Co. v. Bouldin*, 100 Miss. 660, 56 So. 609; *MacIntyre v. Cotton States L. Ins. Co.* 82 Ga. 478, 9 S. E. 1124; *Odell v. Manhattan L. Ins. Co.* 15 Ohio L. J. 197; *Mansfield v. Cincinnati Ice Co.* 11 Ohio Dec. Reprint, 617; *Union Cent. L. Ins. Co. v. Hook*, 62 Ohio St. 256, 56 N. E. 906; *Knickerbocker L. Ins. Co. v. Heidel*, 8 Lea, 438; *Townsend v. Equitable L. Assur. Soc.* 263 Ill. 432, 105 N. E. 324.

There is no ground for the charge that the illustration quoted was a false representation, known to be such and made to procure the insurance by deceit.

*Provident Sav. Life Assur. Soc. v. Withers*, 132 Ky. 546, 116 S. W. 350; *Langdon v. Northwestern Mut. L. Ins. Co.* 199 N. Y. 188, 92 N. E. 440; *O'Brien v. Equitable Life Assur. Soc.* 173 Mich. 432, 138 N. W. 1086; *New York L. Ins. Co. v. McMaster*, 30 C. C. A. 532, 57 U. S. App. 638, 87 Fed. 63; *Tourtellotte v. New York L. Ins. Co.* 155 Wis. 455, 144 N. W. 1117; *Keithley v. Mutual L. Ins. Co.* 271 Ill. 584, 111 N. E. 503.

In the absence of fraud or mistake the appellants are bound by the principles and methods adopted by the Mutual Life in determining and apportioning surplus.

*Greeff v. Equitable Life Assur. Soc.* 160 N. Y. 19, 46 L.R.A. 288, 73 Am. St. Rep. 659, 54 N. E. 712; *Gadd v. Equitable Life Assur. Soc. v. Brown*, 213 U. S. 25, 53 L. ed. 682, 29 Sup. Ct. Rep. 404; *Fuller v. Knapp*, 24 Fed. 100; *New York, L. E. & W. R. Co. v. Nickals*, 119 U. S. 296, 30 L. ed. 363, 7 Sup. Ct. Rep. 209; *Peters v. Equitable Life Assur. Soc.* 200 Mass. 579, 86 N. E. 885; *Equitable Life Assur. Soc. v. Weil*, 103 Miss. 186, 60 So. 133, Am. Cas. 1915B, 636.

Oral statements and representations of soliciting agents are not binding upon the company, and cannot vary the written policy.

*Jefferson v. New York L. Ins. Co.* 151 Ky. 609, 152 S. W. 780; *Travelers' Ins. Co. v.*

*Myers*, 62 Ohio St. 529, 49 L.R.A. 760, 57 N. E. 458; *Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 218; *Mutual L. Ins. Co. v. Hilton-Green*, 241 U. S. 613, 60 L. ed. 1202, 36 Sup. Ct. Rep. 676; *Douglas v. Knickerbocker L. Ins. Co.* 83 N. Y. 492; *Donoho v. Equitable Life Assur. Soc.* 22 Tex. Civ. App. 192, 54 S. W. 645; *Fowler v. Metropolitan L. Ins. Co.* 116 N. Y. 389, 5 L.R.A. 805, 22 N. E. 576.

By Ky. Stat. § 656, no paper can be part of a contract of insurance unless it is physically attached thereto.

*Snedeker v. Metropolitan L. Ins. Co.* 160 Ky. 119, 169 S. W. 570; *Rice v. Rice*, 23 Ky. L. Rep. 635, 63 S. W. 586; *Provident Sav. Life Assur. Soc. v. Elliott*, 29 Ky. L. Rep. 552, 93 S. W. 659; *Southern States Mut. Life Ins. Co. v. Herlihy*, 138 Ky. 359, 128 S. W. 91; *Ferlage v. Supreme Tribe B. H.* 153 Ky. 645, 156 S. W. 139; *American Guild v. Wyatt*, 125 Ky. 44, 100 S. W. 266; *Provident Sav. Life Assur. Soc. v. Puryear*, 109 Ky. 381, 59 S. W. 15; *Provident Sav. Life Assur. Soc. v. Withers*, 132 Ky. 541, 116 S. W. 350.

The illustration was a mere estimate based on previous experience, and it did not guarantee that the surplus on the policy would in twenty years amount to \$996.08.

*Truly v. Mutual L. Ins. Co.* 108 Miss. 453, 66 So. 970; *Tourtellotte v. New York L. Ins. Co.* 155 Wis. 455, 144 N. W. 1117; *O'Brien v. Equitable Life Assur. Soc.* 173 Mich. 432, 138 N. W. 1086; *Williams v. New York L. Ins. Co.* 122 Md. 141, 89 Atl. 97.

*Carroll, J.*, delivered the opinion of the court:

On April 16, 1892, the Mutual Life Insurance Company, by its policy of that date, insured the life of the appellant T. T. Forman, for \$2,000, the policy being payable to his wife. The policy contained this clause: "This policy is issued on the twenty-year distribution plan. It will be credited with its distributive share of surplus apportioned at the expiration of twenty years from date of issue. Only twenty-year distribution policies in force at the end of such term and entitled thereto by year of issue shall share in such distribution of the surplus; and no other distribution to such policies shall be made at any previous time. All surplus so apportioned may be applied at the end of such period to purchase an annuity or may then be drawn in cash."

Forman kept the policy in force until April 16, 1912, twenty years after the date of its issue, at which time he was notified that the surplus dividend on his policy was \$518.28, and that he could either draw this amount in cash or could select any one of

the several other equivalent options provided in the policy. Forman elected to receive the surplus dividend in cash, and accordingly the sum of \$518.28 was paid to him, with the stipulation that it should not prejudice his right to recover from the company the difference between the amount received and \$996.08, the amount he claimed. The company declining to pay the amount claimed by Forman as cash surplus, viz., \$996.08, he brought this suit to recover the difference between \$518.28 and \$996.08, and, the lower court having dismissed his petition, he prosecutes this appeal.

Forman insists that he is entitled to the difference between the amount paid and the amount claimed, upon the ground that the company, at the time the policy was delivered to and accepted by him, guaranteed that the surplus dividend at the expiration of twenty years would be \$996.08, and upon the further ground that, on a fair accounting of the surplus to which his policy was entitled, he would receive the sum claimed by him.

As we have reached the conclusion that Forman is entitled to the relief sought, upon the ground that the company guaranteed, as a part of the contract of insurance, that it would pay to him as surplus earned by his policy, at the end of twenty years, \$996.08, we do not find it necessary to enter into a consideration of the question whether a fair accounting would show him entitled to \$996.08 or any larger sum than the company paid.

Forman in his deposition says that Dr. H. D. Rodman, who was then an agent for the company, solicited him to take out a policy in the company, and, as an evidence of the inviting qualities of the policy, submitted to him an "illustration." This "illustration" consisted of two pages; on one was some illustrated matter and the signature in writing of F. Schroider, assistant secretary, attested by the seal of the com-

pany, and on the other was the following printed and written matter:

Age 39 Please indorse as correct Prem. \$62.20.

Illustration  
T. T. Forman No. 496,382  
Income Life Policy  
Par Value, \$2,000.  
Reserve, \$681.14.

This form of contract is new and original in its essential features. Under it the policyholder has several options of settlement, or continuances, as below stated. The cash and equivalent values include the legal reserve, the amount of which is specifically guaranteed, and the surplus. What this surplus will be in future settlements will necessarily depend upon subsequent experience. The surplus incorporated with the cash value or equivalent options in this example is to be understood as an adopted illustration based upon actual experience in policy settlements of recent date.

Option at the End of Twenty Years.

3 A	\$1,677.14 In Cash	To draw in cash the entire reserve with the accumulated surplus.
12 B	\$58.70 Annual Income and \$1,677.14 At Death.	Or "B" To draw as annual income for life, and continue the sum of the reserve and accumulated surplus as paid-up insurance, participating in future dividends, and payable at death.
C5	\$3,554 At Death	Or "C" To add the insurance value of accumulated surplus to the amount of the original insurance and continue the combined amounts, as participating insurance, by payment of the original premium only.
2 D7	\$996.08 Cash Surplus or \$100 Equivalent Life Income and \$2,000 At Death.	Or "D" To draw accumulated surplus in cash, or as an equivalent life income, and continue original insurance, participating in dividends, by payment of original premium.
6 E 9	\$168.38 income after one year or \$445.96 Income after ten years.	Or "E" To buy a one-year deferred, or a ten-year deferred, income with the total cash value.

\* The page referred to was as follows:

Income Life Policy  
issued by  
the Mutual Life Insurance Company  
of New York  
Richard A. McCurdy, President.

\$451,000,000

And upwards paid to Policyholders and held for future payments.

Correct JW  
The Mutual  
Life Ins. Co.

Wm. P. Stewart  
Instructor  
of Agents

The accompanying figures are correct as an illustration based upon the actual experience of the company.  
F. Schroider, Asst. Secy.

Apr. 16, 1892

For use with "Illustrations, 1891."

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He further testifies that he was attracted by the options set out in the illustration and said to Dr. Rodman, that this illustration appeals to me, and after conference with him the result of it was that I informed him that, if he would have the illustration which he presented to me approved by some general officer of the company, I would take out the policy. He agreed to this, and while perhaps there was nothing said in the application with reference to the illustration being made a part of the policy, I had Dr. Rodman's agreement that it should be so approved and attached to the policy, and he made his word good. At the head of the illustration in pencil memorandum, which I believe to be

in the handwriting of Dr. Rodman, are these words, now quite indistinct with age, as follows: "Please indorse as correct." I believe that to be the identical paper which was filled in by Dr. Rodman as the defendant's agent, and believe that it is the identical paper sent by Dr. Rodman, as agent, to the defendant, along with the application which I made for insurance in defendant company. When the policy was returned to me that illustration was dated, as I read it, the same date with the policy, and it was physically attached to the policy when the same was delivered to me by Dr. Rodman as the contract of insurance with the company. It was attached by mucilage or paste to the policy. I desire to call attention to the fact that the illustration is signed "F. Schroider, Assistant Secretary," whose name is signed to my policy contract, and his signature to the policy appears to be in the same handwriting as the signature of F. Schroider, assistant secretary, on the illustration. Therefore I believed at the time, and believe now, that I was getting the approval of the illustration by a general officer, or two general officers, or three general officers of the defendant company. I say three because there are some cabalistic signs, "Correct, J. W.," on the back of the illustration that I have never been able to figure out, but it looks like somebody who had authority to handle such papers had indorsed it correct besides Stewart and Schroider. It is perhaps needless for me to say, but I do state it, and it is a fact, that the representations made to me by Dr. Rodman and approved by these officers of the company, and the contents of the illustration, induced me to take out this contract of insurance.

On cross-examination he was asked, and said:

Q. Subsequent to the application being made by you the policy came back from New York and was delivered to you by Dr. Rodman?

A. I think that is right. I am sure it is.

Q. You have testified to the fact that the paper called "an illustration" in your suit and in this action was fastened to the policy by mucilage?

A. I have.

Q. You don't know when that was done, do you?

A. I do not.

Q. In other words, you are not advised as to whether that illustration was pasted on the policy at the home office or at the office in Lexington?

A. I only know that it was physically attached to the policy when it was delivered to me by Dr. Rodman in Lexington, Ken-

tucky. I never saw the policy until it was so delivered.

On further examination in chief he was asked, and said:

Q. I will ask you if the illustration blank which you testified was attached to the policy at the time of its delivery to you was not exhibited to you by the agent of the company who solicited the insurance, prior to the time that you signed the application?

A. I have so testified, and believe that those figures are Dr. Rodman's figures filling in the blanks, and that it was sent on and, I believe, stamped in New York, and was undoubtedly attached to the policy, and delivered to me on or about the middle of April, 1892.

Q. I will ask you whether or not you requested Dr. Rodman, as agent of the company, before you accepted the policy which was issued upon the application, to forward the figures which he had made and which appear upon the illustration, to the company for its approval.

A. I did, and, as I recall, it was made a condition precedent to my taking the insurance.

Q. Do you recall any conversation with Dr. Rodman at or about the time of the delivery of the policy, or previous thereto, in which he said to you, in substance, that he had submitted the illustration to the company and it had been approved?

A. I don't remember that, because the illustration came back along with the policy.

Q. With the marks and notations which now appear upon it?

A. That paper is absolutely unaltered, except as it may have become obscure by age from the time it was attached to that policy until the present day.

Dr. H. D. Rodman testified, but there is no conflict between his evidence and that of Mr. Forman as to what transpired when the policy was being solicited, or afterwards, or in regard to the circumstances related by Mr. Forman in respect to the paper called "illustration." Dr. Rodman further said that, in soliciting, insurance agents of the company at that time did use such papers as this "illustration," but he also expressed the opinion that they were not a part of the contract of insurance.

In order that the issue upon which we propose to rest our decision may be clearly understood, it may be well to briefly restate the evidence on the subject of this "illustration," and the contentions of the respective parties to this litigation. We think the evidence shows in a very satisfactory way that Mr. Forman was induced to take

the policy of insurance upon the faith of the representations as to what options he would have the benefit of at the expiration of twenty years, as they were stated in the paper that will be called "illustration," and, furthermore, that [he declined to take out a policy until this "illustration" was approved by a general officer of the company at the home office in New York, and physically attached to the policy. He was not willing to accept the representations of the soliciting agent as to the correctness of the statements set forth in this "illustration," nor was he willing to consent that this soliciting agent might attempt to make this "illustration" a part of the policy contract. He wanted to be sure that this "illustration" was approved by some authorized officer of the company and made a part of the policy contract under the direction of some authorized officer, and so the "illustration" was sent by the soliciting agent to the home office of the company in the city of New York, and its authenticity was vouched for by the signature in writing of the assistant secretary of the company at the home office, the same person whose signature, in the same handwriting, appears on the policy contract, with the seal of the company attached to it.]

It is also a fair assumption that at the home office of the company the "illustration" was physically attached to the policy contract, at the time its verity was attested by the assistant secretary. After this was done, and when the policy contract with the "illustration" physically attached to it, subscribed to and attested in the manner indicated, was presented to Mr. Forman, he accepted the policy.

Upon this state of facts it is insisted in behalf of Forman that this "illustration" became and continued to be a part of the policy contract, as much so as if what it contains had been incorporated in the policy contract itself; or, in other words, that the "illustration" and what may be called the policy contract proper are to be treated as one contract, and the rights of the parties determined from a consideration of these two papers, looking at them as one contract and the only contract between the parties.

On the other hand the argument for the company is that the "illustration" is not, and never was, a part of the contract of insurance; that it was only an advertising illustration of what the company believed the options would amount to at the end of twenty years. It is a further argument that, even though the "illustration" should be treated as a part of the contract of insurance, it does not constitute a guaranty or promise that the amounts mentioned

therein would be paid to the policyholder at the end of twenty years.

In considering first the question whether this paper designated as "illustration" is to be treated as a part of the contract of insurance, we have been furnished with much authority in support of their respective contentions by opposing counsel, but none of the cases relied on develop states of fact like those appearing in this record as we have set them out.

The case of *Southern Mut. L. Ins. Co. v. Montague*, 84 Ky. 653, 4 Am. St. Rep. 218, 2 S. W. 443, was a suit by Montague, a policyholder, to compel the insurance company to issue to him a paid-up policy. The company resisted this suit upon the ground that the policy contract did not obligate it to issue such a policy. In avoidance of this defense, Montague relied upon a pamphlet issued by the company setting forth what it would do, including the issue of the character of policy demanded by him. In considering the effect of this pamphlet which was held by the court to be binding on the company, the court said:

"At the time the general agent of the company solicited the insurance from the appellee, . . . he presented and delivered to him a pamphlet issued by the company, with the names of its officers and executive committee indorsed upon it, setting forth the nature and advantage of life insurance, and particularly in the Southern Mutual Life Insurance Company. . . . This pamphlet reads: ' . . . Those desiring to discontinue payments of the annual premiums may, after the payment of *four annual premiums* on the life plan, or two on the ten-year or endowment plans, dispose of their policies to the company, in which case they will receive the equitable value, either in cash or a policy of insurance will be issued for a fixed sum, payable at death.'

"This plan of insurance the company, through its chief officers, presented to the people of the state, by its authorized agents, with insurance policies drafted in the manner and form as the one delivered to the appellee. It is not pretended that any part of this pamphlet was embodied in the insurance policy, but it is alleged by the appellee that it was represented by the agent of the company that the stipulations in said pamphlet formed a part of the contract, and that after the payment of the premiums, four in number, the policy could not be forfeited to the extent of the payments made. The appellee paid nine premiums and failed to pay the tenth, and it is now claimed that he is not entitled to a paid-up policy because the verbiage of the pamphlet was not

embodied in the policy. The fact of the exhibition of the pamphlet, and the representations made by the company's agent, which are admitted by the appellant, and established by the testimony of the agent whose duty it was to solicit subscriptions upon the representations contained in it, made that a part of the agreement. . . . The printed pamphlet was not only the inducement, but formed a part of the consideration for which the premium notes were executed and the contract entered into by the assured. The rights of the assured under it was the prime cause for his accepting the policy, and gave the appellant as an insurance company, as it maintained, the preference over all others, and to hold that it was not intended as a part of the contract would be sustaining a fraud that no court of conscience could sanction."

In *Equitable Life Assur. Soc. v. Meuth*, 145 Ky. 160, 140 S. W. 157; Ann. Cas. 1913B, 661, privileges indorsed on the back of the policy in pencil writing, which were testified by the insured to have been on the policy when he received it, were held to be a part of the policy contract, although there was no reference in the printed or written parts of the policy contract to these figures; and the court said: "When the president signed his name on the face of the policy, with his name printed under what was on the back of the policy, he made the whole policy the contract of the company."

In *Timlin v. Equitable Life Assur. Soc.* 141 Wis. 276, 124 N. W. 253, the facts were these: Timlin took out a policy of insurance in the Equitable Society for \$1,000 on the twenty-year plan. There were certain options allowed the insured in the body of the policy, and there was attached to the policy by a pin a small sheet on which there was certain printed and written matter. This paper was very much like the "illustration" in this case, and set out the amounts that the insured would get, at the expiration of twenty years, in selecting one of the options described in the policy. At the expiration of twenty years the insured elected to accept the benefits of one of the options mentioned in the policy, and the Equitable Society offered to pay him the amount of the option, according to its method of calculating the amount due. The insured refused to accept the proposition, and insisted that he was entitled to the amount stipulated for in the paper pinned to the policy. In the opinion the policy proper was described as "A," and the paper attached was described as "B," and the question for decision in the case was whether the paper B was a part of the policy contract A. In disposing of the case

the court, in the course of the opinion holding that the paper B was a part of the contract, said:

"In the light of the facts and circumstances shown, plaintiff's possession and production of pages A and B sufficiently establish that they were transmitted to him by the defendant, in carrying out the negotiations for the contemplated life insurance policy. It is, however, averred that the fact of such delivery of page B is no proof that the statements therein are a part of the insurance contract made by the parties. True, such delivery in itself is not proof conclusive that the writing on this page embraces a part of the contract, but such fact, in connection with the other facts of the transaction, has a material and significant bearing, and tends to show that the contents of this page embody a part of the negotiations had between the parties and that they are expressed in the writing.

"It is argued that the provisions contained in page A show that it was understood and stipulated that this sheet embraced the whole contract, and therefore the page B is excluded therefrom. Stress is placed on the provision that 'the contract between the parties hereto is completely set forth in this policy, and the application therefor, taken together, and none of its terms can be modified, . . . except by an agreement in writing,' signed by one of the authorized officers. There is nothing in this provision excluding page B from being a part of the policy; for the question remains: What, under this provision, constitutes the policy? Plaintiff asserts that it consists of the agreement set forth on pages A and B, while the defendant claims that page A alone covers it. We do not consider that the words 'this policy,' as used in this provision, restrict it to page A. The term, as here used, is applied to the contract made by the parties, and in this connection embraces the agreements of the parties, whether embodied in page A or in both pages A and B. . . .

"Viewing the pages A and B in the light of their contents, we find that they obviously treat of the same subject-matter, and that the various provisions are in accord and are harmonious and mutually complementary. It is manifest that the agreements of page B make definite and certain what was left indefinite in the fifth paragraph of 'Provisions and Requirements' of page A. This seems a most natural and reasonable thing for a person to do in negotiating for life insurance. The all-important questions for the applicant are the amount of the premiums and the financial

value of the contract at its maturity. And so here it is evident that the plaintiff sought to purchase insurance that would yield him definite financial returns, and that the defendant company stipulated that the contract would yield the amounts specified in page B if it should be in force at the end of the tontine period."

In *Tourtellotte v. New York L. Ins. Co.* 155 Wis. 455, 144 N. W. 1117, the question was whether a paper not attached to the policy, but delivered with it in the mail, should be treated as a part of the contract as it was set forth in the policy. This statement, which was delivered to the insured with the policy, made definite and certain the amount that the insured would receive upon his election to accept the benefit of options described in the policy, and is very much the same character of paper as the "illustration" in this case. In holding that the paper accompanying the policy did not guarantee the payment of the amount specified therein, the court said: "The statement purports to do nothing but illustrate or explain the contract. It contains no words of promise or guaranty."

It then proceeded to distinguish this case, on the facts, from the *Timlin Case* by saying that in the *Timlin Case* "it was held to contain words of promise as to the amount to be paid, while here we have language which purports only to illustrate the policy, and which states the source of the figures upon which the illustration is based."

And it further said that *Tourtellotte* understood, when he accepted the contract, that he would only get, at the end of the option period, his equitable share in the surplus, and not the sum set forth in the paper. The essential difference between that case and the one we have consists in the fact that here the "illustration" was attached to and made a part of the contract, and Forman, when accepting the policy, understood that when the option period arrived he would have the right to select one of the amounts specified in the "illustration." A further material difference grows out of the fact, which we will presently endeavor to establish, that the "illustration" was a guaranty to Forman that he would receive the amounts therein specified.

In *Untermeyer v. Mutual L. Ins. Co.* 128 App. Div. 615, 113 N. Y. Supp. 221, a controversy arose between the insured and the company as to whether a paper delivered with the policy by the soliciting agent of the company should be treated as a part of the contract of insurance, and the court, in holding that it should not, said:

"The policy, bearing the signature of the officers of the company and its promise to

pay, contained no promise as to this future speculative result, but did bear in emphatic terms a notice to the holder that no agent had power on behalf of the company to make or modify this or any contract of insurance to extend the time for paying a premium, to bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy.

"The whole claim of the plaintiff is based upon the contemporaneous writing signed by the soliciting agent and called an illustration, her contention being that that paper, signed by the agent, because it was upon a blank furnished by the company and was delivered to the insured at the same time with the delivery of the policy, was, in spite of and in the face of the warning and notice contained in the policy itself, nevertheless the act of the company and binding upon it as its direct promise.

"We hold upon this statement of facts that this paper was a mere presentation by the soliciting agent of the hoped-for results based upon the past experience of the company, that he had no power to make it as a binding contract of the company, and that the company is not affected by it."

It will be observed in that case that the decision was put upon the ground that the paper relied on by the insured was a mere presentation by a soliciting agent, who had no power to make it a binding contract on the company, and so the difference between that case and the one before us is obvious.

In *MacIntyre v. Cotton States L. Ins. Co.* 82 Ga. 478, 9 S. E. 1124, the question was whether a prospectus issued by the company and used by its agents in procuring insurance should be treated as a part of the contract and binding on the company, and the court held that it should not.

In *Grange v. Penn Mut. L. Ins. Co.* 235 Pa. 320, 84 Atl. 392, the insured relied on a statement of estimates given to him by an officer of the company, pending the negotiations for the policy, claiming that the "estimates" of the options that he had the privilege of electing to have at the end of a certain period set forth in this estimate induced him to take the policy, and therefore the company was obliged to give him the benefit of the options set forth in the estimates; but, in holding that the insured could not have the relief sought on this ground, the court said: "Counsel for appellant contends that these statements of the assistant secretary of the company were misrepresentations of material facts, and that the company should be held responsible to him in damages for the deceit which he alleges was practised. But with respect



to this matter the trial judge found that the evidence of misrepresentation was not sufficiently clear, precise, and indubitable to demand a reformation of the policy, and that the misrepresentations were concerned with matters which were the subject of estimate merely, and not of concrete fact, and therefore they do not support the appellant's allegation of fraud in the making of the contract. He further held that it was not within the power of the assistant secretary to bind the defendant company by any representation, in such a manner as to give to the plaintiff any advantage over other policyholders in the company. The court also found that the representation made by the assistant secretary that the estimate was based on the past experience of the company did not constitute such deceit as would justify a recovery of damages by appellant, or would entitle him to an accounting by the company. These conclusions seem to us to reasonably follow from the evidence concerning the matter in question."

It will thus be seen that in that case the insured sought relief upon the ground of fraud and deceit practised on him in the procurement of the policy, and the relief was denied because the evidence was not sufficient to support it.

In *Williams v. New York L. Ins. Co.* 122 Md. 141, 89 Atl. 97, there was pasted on the policy a typewritten statement setting forth the amount that would be paid the insured on the expiration of the accumulation period; and the question in this case was whether the company was bound by the figures contained in this slip. In considering the effect of this slip and in holding that the company was not bound by its contents, the court said that this question depended upon "whether or not the slip pasted on it, already quoted, was a part of the contract between the parties, and if it was, what effect, if any, did it have upon the policy itself? It is to be noted at the outset that the slip is neither signed nor initialed, nor is there anything upon it to indicate that it was, or was intended to be, any part of the contract. Where or how it originated is not shown by the evidence. Dr. Williams testifies that the only time he ever saw the policy was when Mr. Howland delivered it to him, and that at that time it had the typewritten slip pasted on the third page; but he further testifies that that is what he relied on in taking out the policy—those figures. This is a manifest impossibility. The insurance was taken out in July, and the policy was not made out until October. He could not then have relied, in taking out this insurance, upon something which had no existence until three months later. But

he further says, and this is probably what he means, that the agent who solicited the insurance made him certain representations as to figures, and that this slip corresponded with the representations made to him. Whatever the representations may have been, they were merged in the contract. . . . The mere fact of the fastening of the slip to the policy could not make it a part of the contract, where there was no reference on either policy or slip of the one to the other."

It will be noticed that the court put its decision upon the point that the slip was neither signed nor initialed, nor was there anything to indicate that it was intended to be a part of the contract, thus plainly distinguishing it from the case we have.

In *Provident Sav. Life Assur. Soc. v. Withers*, 132 Ky. 541, 116 S. W. 350, in a litigation with the assurance society as to the meaning and effect of the contract of insurance, the insured relied upon a paper styled an "illustration," and claimed that the assurance society, by fraud or mistake, had not delivered to him a contract that contained the stipulations set forth in the "illustration," upon which stipulations he relied. It appears from the opinion that the soliciting agent, at the time he delivered the policy, gave to the insured the "illustration," which was signed by the agent. In holding that the "illustration" was not binding on the company, the court said: "Withers accepted his policies when the company sent them to him. He could have told by the simplest inspection whether they conformed to the contract Johnson had made with him. He kept the policies until he brought this suit on October 17, 1906, or about seven years after the policies were delivered to him. He cannot now say that he has not accepted the policies; for he kept the policies and regularly paid the premiums. By the statute the policy is the sole measure of the company's liability. We have held in several cases that nothing outside of the policy, such as the application or other prior contract, can be pleaded by the company to modify its liability under the contract. The statute is for the protection of both the company and the policyholder. Preliminary contracts previous to the issue of the policy can be shown by neither to defeat its operation. . . . The plaintiff cannot have relief under the special contract relied on, because that was merged in the policies, and he cannot now have the policies corrected for fraud or mistake, because the action is not brought within five years after the perpetration of the fraud or the making of the mistake, and after he knew or by ordinary diligence should have known it. He had the policies. He could

have looked at them at any time. He cannot accept them, and, after keeping them for seven years, and after the time has expired within which he might have had the policies corrected for fraud or mistake, have relief in equity. To do this would be to encourage or reward supineness, and it would be to establish a rule that would destroy the value of written contracts."

Another illustrative case is *Langdon v. Northwestern Mut. L. Ins. Co.* 199 N. Y. 188, 92 N. E. 440, in which a divided court held that the insured was not entitled to a reformation of his policy to conform to the stipulations in a paper entitled "a special contract," putting its decision upon the ground that the special contract was understood to be no more than a prospectus, and upon the further ground that the insured, by his laches, had deprived himself of the right to ask a reformation.

A discussion of the question before us may also be found in *Bliss on Life Insurance*, p. 612, and *Cooley's Briefs on Insurance*, vol. 1, p. 662.

Many other cases have been examined, but it would extend this already lengthy opinion beyond reasonable bounds to give extracts from the numerous cases on the subject. It is sufficient to say that no one that we have cited or examined presents as strong reasons for holding the illustration to be a part of the policy contract as do the facts in the case we have. In the cases holding that slips, prospectuses, illustrations, and other like papers sought to be made a part of the policy could not be so treated, it will be generally found that this conclusion was reached because the paper relied on was either signed by some unauthorized agent of the company, or was not attached to the policy, or was understood not to be a part of the contract, or was not relied on by the insured. But in this case the "illustration" was signed by one of the chief officers of the company; it was physically attached to the policy; it was the inducement offered by the company to Forman why he should accept the policy, and set forth the reasons that caused him to accept it, and he understood that this "illustration" was a part of the contract. No person of ordinary intelligence, receiving a policy under the circumstances Mr. Forman accepted this one, would have any reasonable doubt that the "illustration" was intended to be and was a part of the contract. Nor can there be any reasonable doubt that the company intended he should so believe.

Another question is: Does it contain express or implied stipulations binding, or that should be construed to bind, the company to pay the cash surplus of \$996.08

mentioned in the "illustration?" Counsel for the company say it does not; that, even if it should be treated as a part of the contract, it was no more than an agreement that the company would set apart to this policy such an amount of surplus as the policy was entitled to; or, in other words, the "illustration" and the policy, when read together or separately, mean in respect to this matter the same thing, and neither contains a promise or guaranty that the company will pay any certain sum.

Let us see now by comparison of the application, the policy, and the "illustration," if the "illustration" promised to do no more than the policy, or should be so construed. The application signed by Forman recites that "I further agree that in any distribution of surplus the principles and methods which may be adopted by the company for such distribution and its determination of the amount apportioned to such policy shall be and are hereby ratified and accepted by me."

And the policy stipulated: "It will be credited with its distributive share of surplus apportioned at the expiration of twenty years from the date of issue."

So that neither in the application nor in the policy is there any statement as to the amount of surplus that would be apportioned to the policy. The matter of distribution and apportionment was left, by the terms of these papers, to the good faith and honesty of the company. But when we turn to the "illustration," we find, in option "D," under the head of "Options at the End of Twenty Years," that he should have the right "to draw accumulated surplus in cash, . . . \$996.08 cash surplus."

It is very true that this "illustration" also recites that "what this surplus will be in future settlements will necessarily depend upon subsequent experience."

And it further states that "the accompanying figures are correct, as an illustration based upon the experience of the company."

But if the company did not intend to practise a fraud on Forman or to deceive him—and it is urgently insisted that the company did not intend to do either—what was the purpose in making a part of the contract this "illustration," and specifying in it that he should have the option at the end of twenty years "to draw accumulated surplus in cash, . . . \$996.08?" The policy contract provided that he should have the surplus apportioned to his policy at the end of twenty years, but did not specify what the amount of the surplus would be, and this is what Forman wanted to know. This is why he demanded the "illustration,"

plainly setting forth the amount he could draw, and manifestly the company should not be permitted to say that the figures \$996.08 are meaningless, or that they are a mere estimate, because to allow it to escape liability on this ground would be to assume that it did endeavor to deceive and defraud Forman. Any reasonable man of average intelligence would understand from reading the "illustration" that at the end of twenty years he would get \$996.08. This is the only fair construction of which the "illustration" and the policy, when read together, are susceptible. And this is manifestly the construction the company intended Forman should put on the illustration, when read with his policy. It was the belief that he would get \$996.08 that induced him to accept the contract, and the company attached the "illustration" to the policy to satisfy Forman on this vital point. It knew as well as he did that the policy did not give him the definite assurance that he wanted, and so, to make certain this indefinite condition in the policy, it made the "illustration" a part of the contract, for the sole purpose of guaranteeing to Forman that at the end of twenty years he could get \$996.08. This is the only fair and honest theory upon which the conduct of the company in attaching the "illustration" to the policy can be explained.

We prefer to adopt this view rather than assume that the company was attempting to practise a fraud on or deceive Forman by inducing him to accept the policy on the faith of the assurance that at the end of twenty years he could draw \$996.08 in surplus, when it did not intend to pay him this amount, because it is perfectly plain that the company, by this "illustration," either intended to pay Forman at the end of twenty years \$996.08, or it intended to deceive him.

The two papers, therefore, should be read as if the company had agreed that, at the expiration of twenty years, the distributive share of surplus to which the policy would be entitled would be \$996.08. This was the construction of the contract by Forman at the time it was made, this was the construction that the company intended should be placed on it by him, and this is the construction that we put on it.

When an insurance company puts out papers like this "illustration," and makes them a part of its policy contract, as it did in this case, it should be required to perform the stipulations of the contract, including those contained in the papers that are made a part of it, according to their reasonable interpretation and according to the interpretation the company intended the insured should place on them, and that he

did place on them. Insurance companies, dealing as they do with all classes of people, should not be allowed to purposely mislead or deceive their patrons by preparing for their information and guidance statements, and, after securing contracts on the faith of these statements, repudiate them, and escape liability on the pretense that the papers or statements were merely allowable advertising schemes or expressions of an opinion as to what the company hoped it might be able to do. This should be so because the great majority of persons who take out life insurance have no acquaintance with the business of insurance or the manner in which it is conducted, and hence are obliged to depend for information on the assurances and representations made by the company as to what it will do.

We may pass with short comment the argument that the company could not know what the amount of surplus to which the policy would be entitled at the end of twenty years would be, and therefore it could not reasonably have specified the sum of \$996.08. This was a matter for the company to determine for itself, and as it voluntarily elected to set down the precise sum that its surplus would amount to, it must stand by its act.

To sum up our conclusions, we think: (1) That when an authorized agent of an insurance company attached to the policy, or, without physical annexation, by his representations or assurances makes, a paper, by whatever name called, a part of the policy contract, and on the faith of the statements in this paper the insured is induced to accept the contract, the paper becomes a part of the contract, and the company is bound by its stipulations; (2) that if there is reasonable doubt as to the meaning of the contract, that construction should be adopted that will carry out the understanding of the insured as to the meaning of the contract at the time he accepted it, if it is fairly made to appear that his understanding of its meaning was produced by and based on representations and assurances in writing made to him by the company before or at the time the contract was executed, and these representations and assurances were of such a nature as to reasonably induce the insured to believe that his understanding and construction of the contract would be carried out.

Wherefore the appeal prayed for is granted, and the judgment reversed, with directions to enter a judgment for Forman in conformity with the prayer of his petition.

Petition for modification of opinion overruled.

## MICHIGAN SUPREME COURT.

FANNIE LUELLEN et al.

v.

NEW YORK LIFE INSURANCE COMPANY, Plff. in Err.

(— Mich. —, 167 N. W. 950.)

**Insurance—representations as to value of policy—effect.**

A statement in a letter by an insurance agent when delivering a policy tontine in character, which states the value of the respective options at the termination of the accumulation period, is, so far as the estimate of surplus is concerned, a mere estimate and not binding on the company, where the policy itself guarantees a cash value at the end of the accumulation period and provides that no agent has power to bind the company, by any promise, representation or information.

For other cases, see *Insurance*, VI. c, 2, in Dig. 1-52 N. S.

(June 3, 1918.)

**ERROR** to the Circuit Court for Washtenaw County to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on a life insurance policy. Reversed.

**Statement by Fellows, J.:**

On May 11, 1897, defendant, a mutual life insurance company, executed at its New York office a policy of insurance upon the life of Albert G. Denmark, on the twenty-payment life, twenty-year accumulation plan, to which policy was attached the application therefor. It was one of sixteen policies issued by defendant during that year on the same plan to men of the same age as Mr. Denmark. The application contained, among others, the following clause: "That in any distribution of surplus or apportionment of dividend, the principles and methods which may be adopted by the company for such distribution or apportionment, and its determination of the amount equitably belonging to any policy which may be issued under this application, shall be and are hereby ratified and accepted."

The policy itself contained the following: "No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying any premium, to waive any forfeiture, or to bind the company by making any promise or making or receiving any representation or information. These powers can be exer-

cised only by the president, vice president, second vice president, actuary or secretary of the company, and will not be delegated. . . . The company guarantees that the entire cash value of this policy at the end of the accumulation period shall be \$1,320, and, in addition, the cash dividend then apportioned by the company. At the end of the accumulation period, the company will send the insured a written statement, setting forth the results under each of the above accumulation benefits."

The policy also contained an option to the insured to select and receive one of six accumulation benefits, the fifth of which was to receive the cash value and discontinue the policy. Mr. Denmark was then living at Big Springs, Texas, and the insurance was solicited by and procured through one E. J. Hadlock, an agent of defendant. While Mr. Denmark only knew what Hadlock told him as to his agency, the defendant admitted that he was its agent, and produced the contract of agency. This contract contained the following provision: "It is agreed that said party of the second part shall have no authority on behalf of said party of the first part to make, alter or discharge any contract, to waive forfeitures, to extend the time of payment of any premium, or to waive payment in cash, or to receive any money due or to become due to said party of the first part, except on application obtained by or through him in exchange for conditional receipts to be furnished by said party of the first part, or on policies or renewal receipts (signed by the president, vice president or actuary) sent to him for collection."

The agent sent to Mr. Denmark the policy of insurance, accompanied by the following letter:

No. 2,521. C. F. Morehead, President. Joseph Magoff, Vice President. K. C. Lackland, Cashier. State National Bank. United States Depository.

El Paso, Texas, May 20, 1897.

Mr. A. G. Denmark,

Dear Sir:—

Inclosed please find your policy, the best policy that is written, just as I explained to you. Now if you die within twenty years your estate will receive all back that you have paid on the policy and \$2,000 added to it; if you live to the end of twenty years, you will receive your choice of six benefits:

The first, \$2,000 paid-up insurance and \$110 annual income.

The second, paid-up insurance, \$3,478.

The third, \$2,000 paid-up insurance and dividend in cash, \$1,314.

The fourth, \$1,320 paid-up insurance and \$1,314 dividend in cash, and \$39.60 a year.

Note. — For representation or estimate as to accumulations, dividends, surplus, etc., of insurance policy, see annotation following this case, post, 343.

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The fifth, cash value, \$1,320, and dividend in cash, \$1,314; \$2,634.

The sixth, annual income for life of \$260.  
I am your, E. J. Hadlock.

Thereafter, during the twenty-year period Mr. Denmark paid the annual premiums as they fell due. He had borrowed money from the company, so that the amount due on these loans equaled the amount of the reserve guaranteed in said policy. Shortly before the policy matured defendant caused a calculation to be made of the profits and surplus equitably belonging to said policy in accordance with the principles and methods adopted by it for that purpose, and the amount so found was the sum of \$746.66. There is no claim of fraud in this calculation, or that it does not correctly state the amount of surplus and profits apportionable to this policy under such principles and methods.

Plaintiffs are the daughters and assignees of Mr. Denmark. Proceeding upon the theory that the letter of Mr. Hallock was a part of the contract of insurance, they elected to accept the fifth option of cash value, and asked payment of the sum of \$1,314. Defendant tendered the sum of \$746.66, which was declined. This suit was thereupon instituted, and the said sum of \$746.66 was tendered into court. The facts not being in dispute both parties moved for a directed verdict, plaintiff for the sum of \$1,314, with interest, defendant for a verdict for plaintiff for the amount of the tender. Plaintiff's motion was granted, and defendant sued out this writ of error.

Messrs. Thomas A. E. Weadock and James H. McIntosh, for appellant:

The conversations with the agent had no power to change the contract.

Warren v. Federal L. Ins. Co. — Mich. —, 164 N. W. 449; Fisk v. Liverpool & L. & G. Ins. Co. — Mich. —, 164 N. W. 523; Quinlan v. Providence Washington Ins. Co. 133 N. Y. 356, 28 Am. St. Rep. 645, 31 N. E. 31; Williams v. New York L. Ins. Co. 122 Md. 141, 89 Atl. 97; Hill v. Travelers' Ins. Co. 146 Iowa, 133, 28 L.R.A. (N.S.) 743, 124 N. W. 898; Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 53 L. ed. 682, 29 Sup. Ct. Rep. 404; Uhlman v. New York L. Ins. Co. 109 N. Y. 421, 4 Am. St. Rep. 482, 17 N. E. 363; Langdon v. Northwestern Mut. L. Ins. Co. 116 App. Div. 558, 101 N. Y. Supp. 914, 199 N. Y. 188, 92 N. E. 440; Keithley v. Mutual L. Ins. Co. 271 Ill. 584, 111 N. E. 503; Truly v. Mutual L. Ins. Co. 108 Miss. 453, 66 So. 970; Kaley v. Northwestern, — Neb. —, 166 N. W. 256; Tourtellotte v. New York L. Ins. Co. 155 Wis. 455, 144 N. W. 1117.

Mr. John P. Kirk, for appellees:

The promise given to Mr. Denmark at the time of the delivery of the policy is a part of the insurance contract.

16 Am. & Eng. Enc. Law, 864, 865; Equitable Life Assur. Soc. v. Meuth, 145 Ky. 160, 140 S. W. 157, Ann. Cas. 1913B, 661; John Hancock Mut. L. Ins. Co. v. Schlink, 175 Ill. 284, 51 N. E. 795; Bush v. Missouri Town Mut. Ins. Co. 85 Mo. App. 155; German-American Ins. Co. v. Yeagley, 163 Ind. 651, 71 N. E. 897, 2 Ann. Cas. 275.

If an agent by his agreement or conduct misleads the assured, and thereby induces him to accept the policy under the belief that there has been a waiver of all conditions precedent, and delivers the policy, the company is estopped thereby.

Young v. Hartford F. Ins. Co. 45 Iowa, 377, 24 Am. Rep. 784; Nixon v. German Ins. Co. 69 Mo. App. 351; State Ins. Co. v. Hale, 1 Neb. (Unof.) 191, 95 N. W. 473; Wood v. American F. Ins. Co. 149 N. Y. 382, 52 Am. St. Rep. 733, 44 N. E. 80.

Fellows, J., delivered the opinion of the court:

This record disclosed and it should be obvious that while an insurance company may calculate its reserve with certainty, its prospective surplus or profits over a future period of years would be contingent upon the happening of so many uncertain events that its amount would be highly problematical. The amount apportionable to a policy of any class would be so dependent upon the number of lapses, the rate of interest its investments would earn, its expenses of doing business, its losses, taxes, adverse or favorable legislation, its volume of business, and so many other contingencies as to take any approximation of such profits into the realm of conjecture, based to a certain extent upon past experience, but always with the uncertainty of the future. Courts have quite uniformly had this situation in mind in considering tontine insurance, or insurance partaking of a tontine character, and have realized and understood that what the future earnings of a company will be is a matter of estimate, rather than mathematical calculation, and that figures of future earnings will generally be treated as estimates rather than specific sums agreed upon in this class of insurance. Thus it was said in *Untermeyer v. Mutual L. Ins. Co.* 128 App. Div. 615, 113 N. Y. Supp. 221, a case not unlike the present one: "The whole scheme was essentially speculative and problematical. The amount to be apportioned depended upon the number of survivors, for only those who survived were to participate in the distribution; it depended upon the cost of administration of the business of the

company properly apportioned to the policy during the period in which it ran; it depended upon the interest which could be earned on the investment of the premiums paid during that period. Upon such factors there could be no more than a guess, based upon previous experience, as to the result at the end of the period. The company could promise, as it did promise, to pay a fixed and definite sum upon the death of the insured, because experience had shown the average rate of life of a person at the age of the insured, experience had shown the rate of premium which would protect the company and insure the payment of the amount agreed upon. But when, attached to the definite promise of insurance in a definite sum, was given the speculative hope of a participation in problematic savings and earnings to the problematic survivors of a given year of insurers, the proposition, upon its face, became incapable of accurate solution."

In this case there was given the insured by the agent of the company, upon a blank furnished by the company, an illustration said to be based upon the past experience of the company as to the cash value of the policy at maturity. The figures were held to be an estimate, and not a binding agreement to pay that sum.

In *Langdon v. Northwestern Mut. L. Ins. Co.* 199 N. Y. 188, 92 N. E. 440, the separate paper was headed, "Special Contract." Like the *Untermeyer Case*, it stated the amount of the prospective surplus; but the court declined to permit recovery on it, holding that the policy controlled; Mr. Justice Hiscock, speaking for the majority of the court, saying: "Therefore it seems to me that on this proposition the appellant did not establish his case; that the contract did not on its face purport, by guaranteeing a fixed amount of surplus, to overthrow the very fundamental principle of tontine insurance that a policyholder at the end of his period should get a cash payment, dependent on what had happened during that period to and concerning other associated policyholders, but rather expressed his share to be estimated and dependent on such contingencies, and, therefore, there was no variance between it and the policy in this respect."

In *Keithley v. Mutual L. Ins. Co.* 271 Ill. 584, 111 N. E. 503, it was sought to recover in an action for fraud and deceit, upon the representations that the surplus on the policy, together with the legal reserve, would amount at the end of the period to \$6,000. The plaintiff was denied recovery, the court saying: "The statement that the defendant would pay \$6,000 at the end of twenty years was no more than a promise. The statement that the surplus of the pol-

icy, added to the reserve, would amount to \$6,000, was no more than a prophecy—the expression of an expectation. The statement of a thing in the future, to be a fraudulent misrepresentation, must amount to the statement of a fact. The statement that a particular article will bear a certain strain or sustain a certain weight; that a machine will do certain work; that land will produce certain crops, or the like, although future in form, refers to the suitability or capacity of the article or machine for the proposed purpose, or the character or fertility of the soil or the possession of the attributes which will produce the stated results, and amounts to a statement of an existing fact. The statement here complained of is not of that character."

This court, in the case of *O'Brien v. Equitable Life Assur. Soc.* 173 Mich. 432, 138 N. W. 1086, had before it a policy of insurance, tontine in character, to which was attached a separate piece of paper upon which recovery was sought. It was held that the figures in the separate paper constituted an estimate as to the amount of the surplus, and not an agreement to pay the amount therein stated. In that case Mr. Justice Stone, who wrote for the court, pointed out that the cases of *Timlin v. Equitable Life Assur. Soc.* 141 Wis. 276, 124 N. W. 253, and *Equitable Life Assur. Soc. v. Meuth*, 145 Ky. 160, 140 S. W. 157, Ann. Cas. 1913B, 661, which are relied upon in the instant case, were clearly distinguishable from the case before the court. In one particular the *O'Brien Case* differs from the present case, in that the separate paper was there admittedly issued with authority of the company, while here the company not only denies the authority of the agent to so bind it, but also disclaims all knowledge of the paper until it was called to its attention just prior to the institution of suit. The doctrine of the cases discussed is supported in the following cases, which are quite like them on the facts: *Williams v. New York L. Ins. Co.* 122 Md. 141, 89 Atl. 97; *Tourtellotte v. New York L. Ins. Co.* 155 Wis. 455, 144 N. W. 1117; *Truly v. Mutual L. Ins. Co.* 108 Miss. 453, 66 So. 970; *Kaley v. Northwestern Mut. L. Ins. Co.* — Neb. —, 166 N. W. 256; *Warren v. Federal L. Ins. Co.* — Mich. —, 164 N. W. 449.

The tendency of these cases is to the effect that when the policy of insurance is tontine, semitontine, or tontine in its character, statements as to the prospective surplus or profits will be regarded as estimates, rather than definite promises to pay a fixed amount. This does not prevent insurer and insured from contracting for insurance in a definite amount, but does prevent the turn-

ing of a tontine policy into one for a fixed sum in case the surplus does not reach expectations.

But the record discloses not only a want of any testimony showing or tending to show any authority upon the part of the agent Hadlock to change the contract of insurance by the letter he wrote, but it also affirmatively shows that he had no such authority. In *Fisk v. Liverpool & L. & G. Ins. Co.* — Mich. —, 164 N. W. 522, this court, speaking through Mr. Justice Brooke, said: "It is elementary that the powers possessed by agents of insurance companies, like those of agents of any other corporations, are not governed by any individual principle, but are to be interpreted in accordance with the general law of agency. A different view may not be applied to a contract of insurance than is applied to other contracts."

In *Quinlan v. Providence Washington Ins. Co.* 133 N. Y. 356, 28 Am. St. Rep. 645, 31 N. E. 31, it was said: "But where the restrictions upon an agent's authority appear

in the policy, and there is no evidence tending to show that his powers have been enlarged, there seems to be no good reason why the authority expressed should not be regarded as the measure of his power."

See also *Barry & F. Lumber Co. v. Citizens' Ins. Co.* 136 Mich. 42, 98 N. W. 761; *Porter v. Home Friendly Soc.* 114 Ga. 937, 41 S. E. 45; *Travelers' Ins. Co. v. Myers*, 62 Ohio St. 529, 49 L.R.A. 760, 57 N. E. 458.

In the instant case the agent Hadlock was not clothed with either the express or apparent authority to change the policy of insurance issued by the company, or to enlarge the liability of the defendant. That liability was fixed by the contract between the parties, not by the letter written by Mr. Hadlock.

It follows that the judgment must be reversed. The case will be remanded to the Circuit Court for the county of Washtenaw, with instructions to render judgment for the amount of the tender. The defendant will recover costs of both courts.

### Annotation — Insurance; representation or estimate as to accumulations, dividends, surplus, etc.

#### Actions on policy.

In most cases statements or representations as to accumulations, dividends, and surplus which will accrue on tontine and similar policies are held to be merely estimates, and not guaranties of the amounts, since the accumulation of these funds is purely speculative, and depends upon numerous future uncertain elements.

It will be noted that in *LUELLEN v. NEW YORK L. INS. CO.* ante, 340, it was held that, where a policy is tontine, or tontine in its character, statements as to the prospective surplus or profits will be regarded as estimates, rather than definite promises to pay a fixed amount, and that, in view of the provision of the application and policy involved that no agent had power to modify the contract, the testimony showed no authority by the agent who solicited the policy to bind the insurer by statements as to profits payable at the end of the tontine period.

And in *Untermeyer v. Mutual L. Ins. Co.* (1908) 128 App. Div. 615, 113 N. Y. Supp. 221, a blank, executed by the insurer's agent concurrently with the issuance of a tontine policy, stating several options available at the expiration of the accumulative period,—one a cash value "consisting of reserve and esti-

mated surplus;" a paid-up participating policy for a stated sum; and an "estimated surplus payable in cash," with a continuance of the original policy,—was held a mere presentation of the hoped-for results, based upon past experience, and not a part of the policy, which provided that no agent had power, on behalf of the company, to make or modify the contract by any promise or representation not contained in the application; and the insured was held not entitled to a paid-up policy for the amount stated in the blank executed by the agent.

And in *Kaley v. Northwestern Mut. L. Ins. Co.* (1918) — Neb. —, 166 N. W. 256, where an agent, when soliciting a policy, made out and signed a printed blank form that he had had prepared, which was headed, "Conservative Estimate of a Semitontine Policy," and stated that at the expiration of twenty years the insured could choose from the following options: "First, a surrender of the policy and take your entire share of its earnings, guaranteed reserve \$1,377.90, and surplus \$1,766.17," and before delivering the policy to the insured pasted upon it a like blank signed by him, it was held that the insurer was not bound by the terms of the blank attached, as to the amount of the surplus, in view of the provisions of the policy

that agents should have no power to make or alter the contract, and of the application that no statements or representations made by any person should be binding on the insurer unless they were reduced to writing and presented at the home office in the application.

And in the following cases the particular statements and representations were held to be merely estimates, and not guaranties entitling the insured to the specific amounts named: *Truly v. Mutual L. Ins. Co.* (1914) 108 *Miss.* 453, 66 *So.* 970, where a statement sent by a general agent to the insured when he was contemplating taking a policy was headed "Illustration," and stated that the cash and surrender values included the reserve, which was guaranteed, and the surplus, the amount of which in the future settlements necessarily depended upon subsequent experience; that the surplus incorporated with the cash value in the examples was to be understood as an approximate illustration based upon recent settlements; and then gave as one of the options open at the end of twenty years the right to a paid-up policy for a stated amount; and subsequently, under a heading, "Guaranteed," gave a list of amounts payable to the beneficiary in case of death before the expiration of twenty years.

—*O'Brien v. Equitable Life Assur. Soc.* (1912) 173 *Mich.* 432, 138 *S. W.* 1086, where a slip furnished to the agent for use in soliciting, and pinned to a tontine policy, stated, on one side, certain amounts as the reserve, and the surplus, constituting the cash value at the end of the tontine period, and on the other side set forth that the reserve was a fixed quantity which could be stated in advance, but that the surplus was a varying quantity, depending on future experience; that a surplus was guaranteed, but that its amount could not be determined in advance; that, while the results of the future must depend on the experience of the future, figures based on past experience furnished the best data upon which to judge the value of the policies offered.

—*MacIntyre v. Cotton States L. Ins. Co.* (1889) 82 *Ga.* 478, 9 *S. E.* 1124, where there was a statement in a prospectus, used by the agent in soliciting the policy, that the insurer required interest on one loan paid annually in advance, that all other interest would be paid by dividends, it being unsuccessfully claimed that this amounted to a warranty that the insured's share of

dividends should be sufficient to keep down unpaid interest on his loans.

And in *Donoho v. Equitable Life Assur. Soc.* (1899) 22 *Tex. Civ. App.* 192, 54 *S. W.* 645, it was held that the evidence showed no fraud, and that the insured had no right to regard an illustration shown him by the soliciting agent in any other light than the opinion of the insurer as to the future results of a tontine policy such as he contemplated taking, it appearing that, at the time, such policies were new and untried, that the paper in question stated that the advantages of a tontine policy were shown by illustrations based on the actual results of such policies which had already matured, and that the figures given in illustrations of options were so based, and that they would, of course, be modified by the future experience of the society, although it appeared that the estimates given were based on policies held in a section in which, at the time the policy in question was issued, policyholders received from 30 to 50 per cent larger dividends than did those in the section in which the insured lived, it further appearing that such classification was subsequently abandoned.

And in *Provident Sav. Life Assur. Soc. v. Withers* (1909) 132 *Ky.* 541, 116 *S. W.* 350, where it appeared that the agent, when he solicited the policy, delivered a signed writing to the insured which, in the first part, gave the loan values, the amounts payable in case of death, and the period of extended insurance, followed by the words: "The above values are guaranteed in the policy," and subsequently set forth certain options, giving amounts as to paid-up policies, and cash values, the court observed that the amounts following the words above quoted were not guaranteed; but in any event, it appearing that the insured had retained a policy which did not conform to the written agreement for about seven years, and paid the premium, it was held that he could not be allowed to say that he had not accepted the policy; that, by statute, the policy was the sole measure of the insurer's liability, and could not be modified by anything outside of it.

And in *Tourtellotte v. New York L. Ins. Co.* (1914) 155 *Wis.* 455, 144 *N. W.* 1117, a paper delivered with a policy, but not attached to it, although found by the jury to have been intended by the parties as a part of the contract, was held not to change the contract so as to make it guarantee a cash value of a stated sum at maturity, it being headed, "State-



ment," and setting forth that the three principal options given by the policy were illustrated below, and that the figures given were based on the results realized on tontine policies which had matured during the current year. The court here distinguished the case of *Timlin v. Equitable Life Assur. Soc. (Wis.)* *infra*, on the ground that the attached paper there involved contained words of promise as to the amount to be paid, while in the case under consideration the paper only purported to illustrate the policy.

And in *Williams v. New York L. Ins. Co.* (1913) 122 Md. 141, 89 Atl. 97, where the insured applied for a twenty-year accumulation policy, and such a policy was delivered, to which was attached a typewritten slip, containing a "statement" of the surplus in cash payable at the end of twenty years, it was held that whatever representations the soliciting agent made as to the amount of surplus payable were merged in the policy, and that the slip attached to the policy was not a part of the contract, there being no reference, in either policy or slip, from the one to the other; and that the amount mentioned in the slip as payable at the end of twenty years was not a guaranty of the payment of that sum, but merely an estimate of what the amount would be.

And in *Knickerbocker L. Ins. Co. v. Heidel* (1881) 8 Lea (Tenn.) 488, it was held that statements as to the amount of paid-up policies, contained in a prospectus, could only be looked to on the question of fraud which would avoid the contract, and were not a part of the contract, notwithstanding a reference on the back of the policy, stating that a prospectus of the company might be had gratis upon application.

And in *Odell v. Manhattan L. Ins. Co.* (1886) 15 Ohio L. J. 197, where recovery was sought on a policy for a certain amount, in fulfillment of representations of the soliciting agent, it was held that the policy was the real contract, and that, in the absence of fraud, mistake, or ambiguity, the statements of the agent prior to the making of the policy, and the statements contained in any circular or prospectus issued by the company and not made a part of the policy, were inadmissible to vary its terms.

In some cases, however, statements and representations contained in certain instruments as to accumulation, surplus, etc., have been held a part of the con-

tract of insurance and a guaranty of the amounts set forth.

Some of these may be harmonized, in part at least, with preceding cases, by reason of the difference in the facts, which show that the statements were specially authorized by the officers of the insurer.

Thus, in *Forman v. Mutual L. Ins. Co.* (1917) 173 Ky. 547, L.R.A.1918, 23, 191 S. W. 279, where the evidence showed that the insured was induced to take a twenty-payment policy upon the faith of representations as to amounts payable under certain options contained in an illustration blank, and that he refused to take a policy until this illustration was approved by a general officer of the insurer, and physically attached to the policy, and it appeared that the secretary of the company approved it, and that it was attached to the policy, it was held that its provisions became a part of the contract, and that the contract, by virtue of the "illustration," which provided under the head of "options," that the insured should have the right at the end of twenty years, to draw "accumulated surplus in cash, . . . \$996.08, cash surplus," guaranteed the payment of that sum, notwithstanding that the "illustration" recited that what the surplus would be, in future settlements was dependent upon subsequent experience, and that the accompanying figures were correct as an illustration based upon the experience of the company.

And in *Southern Mut. L. Ins. Co. v. Montague* (1887) 84 Ky. 653, 4 Am. St. Rep. 218, 2 S. W. 443, where the insurer's general agent, who solicited the policy, presented and delivered to the insured a pamphlet issued by the company, with the names of its officers and executive committee indorsed upon it, setting forth the benefits of a policy that would always be of value for surrender when the insured was not able to pay the premiums, and stating that, after a certain number of premiums had been paid, the policy might be disposed of to the company for its equitable value, either in cash, or a paid-up policy, it was held that the exhibition of the pamphlet and the agent's representation that it formed a part of the contract made it a part of the agreement; that it was not the representation of the agent, but the statement of the principal; and that, although the policy issued made no provision for a paid-up policy, the insured was entitled to one.

In *Timlin v. Equitable Life Assur.*

Soc. (1910) 141 Wis. 276, 124 N. W. 253, a blank, partly written and partly printed, containing the usual form of tontine insurance, but leaving the amount of options indefinite, was held not to represent the entire agreement of the parties, but the contract was held to include a smaller sheet, attached to the other by a pin, which was partly written and partly printed, and stated, in part: "These estimates are the authorized figures of the society," and, among the options provided, "guaranteed legal reserve in policy is \$514.31, guaranteed surplus is estimated at \$591.69," and further provided for a life annuity for a stated sum; and it was held that the amounts stated were not mere estimates, but were guaranteed. The court said: "Much stress is placed on the use of the word 'estimate,' on page B, as indicating that this page is merely a statement to show plaintiff the hoped-for results of a contract such as is embodied in page A. We must look to the connection in which the word is employed. It is shown to refer to a future condition, namely, the financial value of the contract, judging from the present knowledge, which is derived from the experience of the company in carrying this class of contracts. Manifestly, such knowledge did not furnish an absolutely definite basis for determining the financial value of the contract at maturity. It is, however, well known that persons are constantly undertaking definite financial obligations regarding affairs wherein the financial results are as uncertain as they were in this transaction. While this element was present, it was one which the parties might well agree to fix definitely by an estimate based on the results theretofore ascertained from the experience of the company in this class of business, under like conditions. We find nothing in the use of this word in the first option, pertaining to the 'guaranteed surplus,' which necessarily implies or signifies that it referred to a problematical result. Its use, with the words 'guaranteed surplus,' naturally signifies that the parties fixed the surplus that was to be apportioned to this contract at maturity out of the surplus earnings. This meaning is corroborated by the other options, which are couched in words of clear meaning and definite promises. The option selected by the plaintiff contains a promise of a life annuity, beginning with \$53.47 and increasing annually, and also a promise to carry the policy for \$1,000 free of cost until death.

This, in itself, is an unambiguous promise and an assumption of an obligation by the defendant. It covers the liability of the company under the contract to administer the interests of a large number of persons to a fund held by the company for their benefit. In considering this phase of the case, it should be borne in mind that the nature of the obligation of an insurance company to a policyholder under the tontine dividend periods, as specified in this contract, is that of a debtor and creditor under the stipulations of the agreement.

Viewing the pages A and B in the light of their contents, we find that they obviously treat of the same subject-matter, and that the various provisions are in accord and are harmonious and mutually complementary. It is manifest that the agreements of page B make definite and certain what was left indefinite in the fifth paragraph of 'provisions and requirements' of page A. This seems a most natural and reasonable thing for a person to do in negotiating for life insurance. The all-important questions for the applicant are the amount of the premiums and the financial value of the contract at its maturity. And so, here, it is evident that the plaintiff sought to purchase insurance that would yield him definite financial returns, and that the defendant company stipulated that the contract would yield the amounts specified in page B, if it should be in force at the end of the tontine period. The argument of the defendant that the company did not so contract because the company was unable to make that certain, which in its very nature is uncertain, is fully met by the fact that they may and probably did have sufficient information on the subject to warrant them in undertaking this obligation. This is sustained by the statement on page B that 'these estimates are the authorized figures of the society.' It is evident that the parties agreed upon the amount to be apportioned to this policy under its provisions as a tontine dividend policy, a matter which is usually left unascertained. Provision is made that the company shall apportion it when the contract matures."

And in *Equitable Life Assur. Soc. v. Meuth* (1911) 145 Ky. 160, 140 S. W. 157, Ann. Cas. 1913B, 661, modified on other grounds in (1911) 145 Ky. 746, 141 S. W. 37, Ann. Cas. 1913B, 663, where a tontine policy provided in writing on the back that, at the end of the tontine period, the insured should be en-

titled to paid-up insurance for a stated sum, and a surplus of a stated amount, it was held that the insured was entitled to the amount stated, and that the insurer could not avoid liability for that amount by showing that a surplus for a smaller amount had been apportioned.

In *Germania L. Ins. Co. v. Bouldin* (1911) 100 Miss. 660, 58 So. 609, where an agent to whom the insurer had forwarded a policy for delivery, without the knowledge of the company, pasted a rider on the back of the policy, and the insured accepted the policy under the belief that the company had attached the rider, it was held to be a part of the contract of insurance, and the insured was held entitled to the amount of paid-up insurance stated therein as one of the options available. The court said that there was nothing in the rider showing that the amount of paid-up insurance was merely an estimate, and that it was, on the other hand, an unqualified guaranty, it appearing that the rider stated that the insured could select any of the options, and provided: "Reserve guaranteed and amount stated in policy; surplus guaranteed, but amount estimated based on past experience."

In *Dakan v. Union Mut. L. Ins. Co.* (1907) 125 Mo. App. 451, 102 S. W. 634, the court said that a table printed on the back of the policy, which was not referred to in the policy, giving the number of years and days insurance was secured under the nonforfeiture policy upon payment of premiums for a stated number of years, could not be regarded as a part of the contract, if it were to be construed as contended by the plaintiff, since it would be in conflict with the specific provisions of the policy, but that, even if it were to be considered as a part of the policy, plaintiff's interpretation of it could not be accepted.

In *Fuller v. Metropolitan L. Ins. Co.* (1889) 37 Fed. 163, it was held that in determining the meaning of the words in a policy, "reserve dividend plan," and "reserve dividend fund," recourse could be had to a volume on reserve dividend insurance, it appearing that this volume was the only one giving information as to such insurance at the time the policy in question was issued, and that the insurer employed the author of that volume to instruct its agents as to that form of insurance, and the company's agent used the volume to explain the plan when soliciting the policy.

#### Reformation of policy.

In several cases reformation of policies to conform to representations as to surplus, etc., has been refused, such statements being regarded merely as estimates of the amounts probably payable at the expiration of the accumulative periods.

Thus, in *Grange v. Penn Mut. L. Ins. Co.* (1912) 235 Pa. 320, 84 Atl. 392, where the plaintiff alleged that he was induced to take a policy by statements of the insurer's assistant secretary that, at the expiration of the accumulation period, the insured would receive a paid-up policy for a certain sum, and an estimated sum of \$7,800 in cash, that, while the insurer always used the word "estimated," the applicant was told that he could rely upon getting the amount stated, as it was a rule of the company to be always on the safe side and never to put out an inflated estimate, it was held, although it appeared that the actual surplus at the end of the accumulation period was only about half the estimated sum, that the misrepresentations were concerned with matters which were the subject of estimate only; that the representations made were based on the past experience of the company and were not inconsistent with good faith, and that the insured was not entitled to a reformation of policy or to a recovery of the amount estimated by the agent.

And in *Grieb v. Equitable Life Assur. Soc.* (1911) 189 Fed. 498, 114 C. C. A. 658, 194 Fed. 1021, reformation was refused to a tontine policy, providing, among other things, for the payment of \$10,000 in cash at the expiration of the tontine period, together with a further sum, denominated dividend or surplus, equivalent to the full proportionate share of the profits of the company's business earned by the policy, the court holding that there was no mutual mistake shown, but that the policy was in accordance with statements by the soliciting agent, contained in an illustration blank, that at the end of the tontine period the insured would have the advantage of three options, one of which was a cash value, consisting of matured endowments and surplus amounting to \$17,570, but stating that the results of policies issued thereafter would, of course, depend upon the future experience of the insurer. And a like conclusion was reached in *Avery v. Equitable*

Life Assur. Soc. (1889) 117 N. Y. 451, 23 N. E. 3.

In *Langdon v. Northwestern Mut. L. Ins. Co.* (1910) 199 N. Y. 188, 92 N. E. 440, it was held that if a blank, stating the amount of surplus payable, was viewed as providing for a fixed share of the surplus, the applicant had the right to waive or eliminate this provision, and that he had done so, where, after this preliminary paper was delivered to him, he made a written application for a ton-tine policy, the principles of which he fully understood, and agreed in the application that no statements, representations, or information made or given by the person soliciting the insurance should be binding on the insurer unless they were reduced to writing and presented to the home office in the application, which was not done, and it further appeared that the insured, although he knew for some years before that the terms of the policy issued to him did not guarantee the amount of the surplus, did not attempt to have the policy reformed until the end of the accumulative period.

#### **Actions for fraud.**

Several cases have considered the question whether representations of the kind under consideration will support an action for fraud.

Thus, in *Keithley v. Mutual L. Ins. Co.* (1916) 271 Ill. 584, 111 N. E. 503, a representation by an insurer, in soliciting a policy, that the surplus, plus the legal reserve, would amount to a certain sum

at the end of twenty years, was held to constitute no ground for an action of fraud against the insurer, the court saying that, in order to constitute fraud, the representation must be an affirmation of fact, and that the representations in question were merely a promise and expression of an opinion or expectation.

And in *Warren v. Federal L. Ins. Co.* (1917) — Mich. —, 164 N. W. 449, statements in a letter written to a policyholder by an officer of an old line company, which had reinsured the policies of an assessment company, to the effect that dividends ought to operate to reduce very materially the charges against his policy, even though they did not entirely offset them, was held not a misrepresentation of any fact, but the mere expression of an opinion, and did not constitute a basis for an action for fraud.

But where an insurance company published advertisements stating that insurance could be had in such company for half the money it could be obtained for in other companies, explaining that this was accomplished by paying one half the premiums in cash, and the other half in premium notes, which would never have to be paid, as the dividends of the company always had and would pay such notes, which was false, to the knowledge of the company's officers, it was held that there was an actionable fraud, rendering the company liable to one who had acted upon these statements. *Rohrschneider v. Knickerbocker L. Ins. Co.* (1879) 76 N. Y. 216, 32 Am. Rep. 290. J. T. W.

#### **NEW MEXICO SUPREME COURT.**

VOLLIE C. MUSGRAVE, Appt.,  
v.

JOHN B. McMANUS, Superintendent of the  
Penitentiary of the State.

(— N. M. —, 173 Pac. 196.)

#### **Limitation of actions—person under disability.**

1. The provisions of § 3350, Code 1915, requiring an action for personal injury to be brought within three years, is not tolled by § 3353, excepting from the operation of the statute persons under legal disability. *For other cases, see Limitation of Actions, II. m, in Dig. 1-52 N. S.*

Headnotes by HANNA, Ch. J.

**Note.** — For imprisonment as a disability within saving clause of Statute of Limitations, see annotation following this case, post, 352.

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#### **Same—person serving sentence.**

2. In the case of a convict serving a term in the penitentiary at the time of the alleged personal injury, who does not bring the suit within three years thereafter, the exceptions contained in the statute, § 3353, Code 1915, as to persons under legal disability, not including persons imprisoned, such persons are not under legal disability within the meaning of the statute.

*For other cases, see Limitation of Actions, II. m, in Dig. 1-52 N. S.*

(Roberts, J., dissents.)

(May 7, 1918.)

**A** PPEAL by plaintiff from a judgment of the District Court for Santa Fe County sustaining a demurrer to the complaint and dismissing a suit brought to recover damages for personal injuries alleged to have been sustained from a beating administered to plaintiff while confined in the state penitentiary. Affirmed.

Statement by Hanna, Ch. J.:

The appellant, plaintiff below, brought suit against John B. McManus, superintendent of the state penitentiary, to recover damages for alleged injuries sustained by him from a beating administered to him while he was confined as a convict. The complaint alleges that the beating occurred on the 19th day of May, 1912; that the plaintiff was continuously confined as a convict in the penitentiary from December 20, 1910, until October 26, 1915. The complaint was filed December 20, 1915. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, in that the alleged injuries were inflicted more than three years before the beginning of the action, and that therefore the right of action was barred by the Statute of Limitations. This demurrer was sustained by the trial court, and the cause dismissed; from which judgment the plaintiff has appealed.

Messrs. McFie, Edwards, & McFie for appellant:

A person in prison is under disability within the meaning of the statute.

Angell, Limitations, p. 203; Browning v. Browning, 3 N. M. 659, 9 Pac. 677; 1 Chitty, Crim. Law, 723; 2 Co. Litt. § 199, note; New v. Smith, 86 Kan. 1, 119 Pac. 386; Dade Coal Co. v. Haslett, 83 Ga. 549, 10 S. E. 435; Rosa v. Prather, 103 Ind. 191, 2 N. E. 575; State v. Calhoun, 50 Min. 523, 18 L.R.A. 838, 34 Am. St. Rep. 141, 32 Pac. 40; Meeks v. Vassault, 3 Sawy. 206, Fed. Cas. No. 9393; Wescott v. Upham, 127 Wis. 590, 107 N. W. 2.

Mr. Frank J. Lavan, Special Counsel, with Messrs. Frank W. Clamoy, Attorney General, and Catron & Catron, for appellee:

There are radical differences between our statute and the English statute.

2 Wood, Limitations, 4th ed. p. 1077.

The enumeration by the legislature of specific exceptions to a Statute of Limitations excludes all others.

Atchison, T. & S. F. R. Co. v. Atchison Grain Co. 68 Kan. 585, 75 Pac. 1051, 1 Ann. Cas. 639; Hooster v. Sammelmann, 101 Mo. 619, 14 S. W. 728; Lawson v. Tripp, 34 Utah, 28, 95 Pac. 520; Black, Interpretation of Laws, p. 522; M'Iver v. Ragan, 2 Wheat. 25, 4 L. ed. 175; 85 Cyc. 990; Lewis v. Lewis, 7 How. 776, 12 L. ed. 909; McGraw v. Rohrbough, 74 W. Va. 285, 82 S. E. 217; Jones v. Lemon, 26 W. Va. 620.

Imprisonment, if not an exception in the statute, cannot affect the running of limitations.

25 Cyc. 1264; Bledsoe v. Stokes, 1 Baxt. 312; Tallman v. Mutual F. Ins. Co. 27 U.

C. Q. B. 100; Breinen Min. Co. v. Bremen, 13 N. M. 111, 79 Pac. 806; Romero v. Atchison, T. & S. F. R. Co. 11 N. M. 679, 72 Pac. 37; DeBaca v. Wilcox, 11 N. M. 346, 68 Pac. 922; Lutz v. Atlantic & P. R. Co. 6 N. M. 496, 16 L.R.A. 819, 30 Pac. 912; Perea v. Colorado Nat. Bank, 6 N. M. 1, 27 Pac. 322.

Hanna, Ch. J., delivered the opinion of the court:

The several assignments of error raise but one question, to wit, is the statute requiring an action for damages for injury to the person to be brought within three years of the date of the injury tolled by the section of the statute excepting persons under any legal disability. By § 3350, Code 1915, it is provided that an action for an injury to the person or reputation of any person must be brought within three years. By § 3353 it is provided as follows: "The times limited for the bringing of actions by the preceding provisions of this chapter shall, in favor of minors and persons insane or under any legal disability, be extended so that they shall have one year from and after the termination of such disability within which to commence said actions."

It is contended by appellant that, by virtue of our statutory provision, § 1354, Code 1915, the common law, as recognized in the United States of America, shall be the rule of practice and decision. Therefore, where there is no statute law abrogating it, the common law is in force, and, it appearing that we have no statutory definition of "legal disability," it becomes the duty of the court to look to the common law for a definition of this term as applied to our statute. The seventh section of the Statute of James (the English Statute of Limitations) provided that if any person entitled to bring any of the personal actions mentioned therein should be, at the time the cause of action accrued, under the age of twenty-one years, feme covert, non compos mentis, imprisoned, or beyond the seas, such person shall be at liberty to bring the same action within the times limited by the statute, after his disability has terminated. In Browning v. Browning, 3 N. M. 659, 9 Pac. 677, it was held that the Statute of Limitations of 21 James I. became the Law of Limitations of the territory in 1876. By chapter 5 of the Laws of 1880 the legislature adopted the Statute of Limitations as to civil actions; § 3353, quoted supra, appearing as § 10 of that act. Section 3350, referred to supra, was adopted by the same act of the legislature of 1880 as § 5, but was subsequently amended by chapter 60 of the Laws of 1909, extend-

ing the period from two to three years within which the action could be brought.

It is argued by appellant that, while by the adoption of our present Statute of Limitations we repealed the common-law statute, yet it is evident that the legislature in the passage of § 3353 had in mind the common-law disabilities, and that it is therefore proper to look to the English statute for a definition of what were the legal disabilities under the common law. Under the ancient common law it is true that there were three principal incidents consequent upon a conviction for felony; forfeiture of a state, corruption of the blood, and the extinction of civil rights, more or less complete, which is denominated civil death. At the common law it was also true that a felon could be sued, but could not sue. The felon's disability to appear as plaintiff was due to the forfeiture of his estate, resulting in the lack of remedial interest in the cause of action. 30 Cyc. 22. As pointed out in the same text at page 23, this doctrine of the common law, that a convict had no standing as party plaintiff, has been generally rejected by American courts as a rule of our common law, though it has had a partial survival in American statute law. See also 9 Cyc. 872. Under the English Statute of Limitations the following persons were excluded from the restrictions of the act: Those within the age of twenty-one years; feme covert; non compos mentis; imprisoned; beyond the seas. By our Statute of 1880, the following persons were excluded from the restrictions of the act: Minors; insane persons; persons under any legal disability.

A comparison of our statute on the subject of limitation of civil actions with the statute of Missouri (Rev. Stat. 1909, §§ 1879 et seq.) would lead one to believe that our legislature closely followed the Missouri statute. While not identical, they are very similar. This conclusion was evidently reached by our territorial supreme court in considering another section of the same statute in the case of *Lindauer Mercantile Co. v. Boyd*, 11 N. M. 464, 70 Pac. 568. It therefore becomes pertinent to compare the provision in the Missouri statute with regard to exceptions made, with a similar provision in the statute of New Mexico. The first and second provisions of the two statutes are substantially the same. The third provision of the Missouri statute excepts those imprisoned on any criminal charge for any time less than life. The fourth provision of the Missouri statute excepts married women. The New Mexico statute excepts those under any legal disability, and makes no refer-

ence to married women. It might be urged that our legislature, in adopting our statute without specifically excepting those imprisoned, disclosed an intention to depart from the common-law rule, which had been, in a modified form, adopted in the Missouri statute, and this view would be borne out by the fact that no reference is made to married women, who have been given definite rights under other New Mexico statutes. In endeavoring to arrive at the intention of the legislature, in this connection it is well to note that both in England and in this country the courts have considered Statutes of Limitation more favorably than formerly, and that, while the statute itself is to be construed liberally, it follows necessarily that the exceptions which it makes in favor of particular persons or classes are to be construed with strictness, and that implied and equitable exceptions are not to be grafted upon the Statute of Limitations, where the legislature has not made the exception in express words in the statute. See *Black, Interpretation of Laws*, 332; 25 Cyc. 990; 17 R. C. L. Limitations of Actions, §§ 33, 189, 190. See also *Buss v. Kemp Lumber Co.* 23 N. M. —, L.R.A.1918C, 1015, 170 Pac. 54. In 25 Cyc. at 1264, it is said: "Imprisonment, if not an exception in the statute, cannot affect the running of limitations."

The only case which we have examined in support of this rule, that of *Bledsoe v. Stokes*, 1 Baxt. 312, is not quite satisfactory, and the opinion is not comprehensive enough to throw any great light upon the question. The court said however, that, "when the legislature in a Statute of Limitations has created no exceptions, the court can make none, is too plain a point to require the citation of authority."

The court apparently held that because the disability of imprisonment was not retained and brought forward from a former Statute of Limitation into the present Code, imprisonment did not constitute a statutory bar. The same argument might be held to apply to the present case, in view of the fact that by the adoption of the New Mexico statute without including the use of the term "imprisonment," as it appears in the Missouri statute, this bar to the operation of the statute has not been carried forward into our New Mexico law.

In *Wood on Limitations*, vol. 2, § 237, an interesting discussion of the saving clauses in Statutes of Limitations is found, from which it is to be observed that, in many of the states, persons imprisoned are excepted from the operation of the statute, or, to be more exact, the operation of the Statute of Limitations is tolled in their favor for a definite time after the removal of this dis-

ability, if it be such. The author points out that, in Connecticut, the saving clause exists in favor of persons legally incapable of suing, and that this applies only in favor of infants, females covert, and such persons as, by the common or statute law, are incapable of bringing an action at law, and does not embrace persons imprisoned or beyond the seas. The same author, at § 241, further discusses the question of imprisonment, and points out that in Connecticut, New Hampshire, Iowa, Kansas, New Jersey, Kentucky, Mississippi, Tennessee, Delaware, Virginia, West Virginia, and New Mexico, imprisonment is not recognized as constituting a disability, and no saving clause exists in favor of persons restrained of their liberty. While no authority is cited by the author in support of this conclusion, at least so far as New Mexico is concerned, the conclusion arrived at is undoubtedly based upon the principle that "persons imprisoned" must be expressly mentioned in the statute, in order that they have the benefit of the saving clause. This principle finds support in the case of *Bledsoe v. Stokes*, cited *supra*, and in the case of *Lawson v. Tripp*, 34 Utah, 28, 95 Pac. 520, in which case the Utah court said that, while the rule is that Statutes of Limitation are generally to be liberally construed, it is also a well-recognized doctrine that, when such statutes contain provisions excepting certain persons or classes from the operation of the statutes, those exceptions are to be strictly construed, and courts will not, by construction, extend such an exception to include persons not expressly mentioned therein. We have cited *Black on Interpretation of Laws*, *supra*, in support of this principle, and numerous other authorities might be added, with which, however, we will not cumber this opinion. "Legal disability," which is the term used in our statute, is defined by *Bouvier* to be a "want of legal capacity to do a thing." As applied to the Statute of Limitations in civil actions, it would unquestionably mean legal capacity to bring the action, and, as we have pointed out, at common law a convict was without power to bring a civil action, and, as also pointed out, this rule has been changed in American jurisdictions, save in a few which have preserved the common-law rule by statutory enactment. In New Mexico, there is no disability in a convict to institute a civil action, the only results of conviction of crime being as set forth in our statute. § 1450, Code 1915, and the provisions of § 1, art. 7 of the Constitution, the constitutional provision having to do with the convict's

loss of the right of suffrage, and the statutory provision setting forth the effects of conviction for crime, but not including forfeiture, corruption of blood, or loss of civil rights. In Missouri, it is provided by statute that convicts for life are civilly dead, and as to their estates, an imprisonment for life shall result in the administration and disposition of the estate as if he were naturally dead. Mo. Rev. Stat. 1909, § 2895. Our legislature must have recognized the fact that Missouri was closely following, in its legislation, the common-law rules upon the subject of imprisonment or conviction, and having elected to depart from the language of the Missouri statute, our legislature evidently disclosed an intention to depart from the common-law rule, and the Missouri rule, and we believe that this is clearly evidenced by the fact that in all other respects the two statutes are similar. In the able brief by appellee, an interesting discussion is had of the statutory and constitutional provisions of our statute, which is not only instructive, but strengthens us in the conclusion at which we have arrived. We do not desire to add this to our opinion, however, and thereby further lengthen the same. It is our conclusion that the legislature of New Mexico had in mind the general rule that exceptions contained in Statutes of Limitations in favor of particular persons or classes are to be construed with strictness, and that implied or equitable exceptions are not to be grafted upon the statute, where the legislature has not made the exception in express words in the statute. Further, that the legislature, having before it the Missouri statute, which, in express terms, excepted persons imprisoned for less than life, elected to depart from the language of that statute, and from the effect of imprisonment under the English Statute of Limitations, which unquestionably can have no application to our changed circumstances and conditions. In view of these conclusions we cannot hold that the term "under any legal disability," as contained in our statute, should be construed as including persons imprisoned.

For the reasons stated, the judgment of the trial court is affirmed; and it is so ordered.

**Parker, J., concurs.**

**Roberts, J., dissents.**

Petition for rehearing denied, June 10, 1918.

**Annotation—Imprisonment as a disability within saving clause of Statute of Limitations.**

In *Piggott v. Rush* (1836) 4 Ad. & El. 913, 111 Eng. Reprint, 1027, 6 Nev. & M. 376, 2 Harr. & W. 29, 6 L. J. K. B. N. S. 272, it was held that assumpsit for unliquidated damages was within the saving clause of the Statute of Limitations, § 7, 21 James I. chap. 16, as to persons imprisoned, so that, where the plaintiff was imprisoned at the time when the cause of action first accrued, the statute did not begin to run until her release.

In *Tallman v. Mutual F. Ins. Co.* (1867) 27 U. C. Q. B. 100, where there was a loss under a fire insurance policy, which occurred before the passage of a short Statute of Limitations as to policies, which saved the rights of parties under legal disability, a plea of the statute was held not to be answered by a reply that the insured, at the time the statute was passed, was in prison, not saying for felony, and continued there until his death, and that the action was commenced within a reasonable time after his death. The court assumed that the policy was a specialty, and stated that the statute of James I. had no application to such a specialty contract.

*Wood v. Ward* (1878; S. D. Ohio) Fed. Cas. No. 17,965, arose under the statute of Ohio, which did not run against persons imprisoned when the cause of action accrued. In that case, the plaintiff, who was a free woman, had been kidnapped from her home in Ohio and delivered to the defendant in Kentucky, who sold her into slavery. It was held that if, upon her release from imprisonment, she returned to Ohio as soon as she could do so, and if, during her absence, she did not reside in the same state with the defendant, the statute did not commence to run until she returned to the state of Ohio.

It will be observed that it is held in *MUSGRAVE v. MCMANUS*, ante, 348, that a person imprisoned is not within the exception in the Statute of Limitations as to persons "under any legal disability," as there is no disability in a convict in New Mexico to institute a civil action.

Where the statute provided that if a person entitled to bring an action should be, at the time the cause of action accrued, under any legal disability, he should be entitled to bring such action within one year after such disability should be removed, and the statute fur-

ther provided that the phrase, "under legal disability," includes persons within the age of minority, or of unsound mind, or imprisoned," and the plaintiff, being imprisoned, commenced an action in the nature of a writ of error coram nobis to set aside his sentence, etc., his action was held not barred by the Statute of Limitations. *State v. Calhoun* (1893) 50 Kan. 523, 18 L.R.A. 838, 34 Am. St. Rep. 141, 32 Pac. 38.

Where the cause of action arose on the 15th of September, 1893, and from March 27, 1894, to July 12, 1898, the plaintiff was confined in the penitentiary under conviction and sentence of a horse theft, and, before conviction, had been continuously confined in the jail on that charge from August 4th, 1893, until he was taken to the penitentiary, except during the time of his absence from jail as an attached witness, when he was still in the custody of the sheriff, it was held that the plaintiff was, to all intents and purposes, "a person in prison" when the cause of action arose, and that he so remained until within less than a year before the filing of the suit, and was therefore within the exception in the Statute of Limitations as to a person imprisoned. *Lasater v. Waites* (1902) — Tex. Civ. App. —, 67 S. W. 518. But this case was reversed and the cause dismissed, on the ground that the action was brought in the wrong county (1902) 95 Tex. 553, 68 S. W. 500.

A Statute of Limitations of a state of the Union, which postpones the running of the statute to the removal of the disability, where the plaintiff is, when the right of action accrues, "in the state prison," does not apply to a case where, when the action accrued, the plaintiff was in an insane asylum in Ontario, Canada. *Alexander v. Thompson* (1912) 115 C. C. A. 33, 195 Fed. 31.

The exception of imprisonment in the former Tennessee statute was not contained in the Code (*Bledsoe v. Stokes* (1872) 1 Baxt. (Tenn.) 312), and, consequently, imprisonment of a plaintiff was no reason why the statute should not run against him.

Where the statute provides that actions in trespass on the person and of false imprisonment must be brought within one year next after the cause of action accrued, but saves the right to sue to persons imprisoned until one year after they are at large, the statute does



not begin to run against a person held as a slave, until she is set at liberty. *Mattilda v. Crenshaw* (1833) 4 Yerg. (Tenn.) 299, where the court said that "the statute is a substantial copy from the 21 James I."

But in *Downs v. Allen* (1882) 10 Lea (Tenn.) 652, it was held that a complainant was not "imprisoned," within the saving of the Statute of Limitations, where she was only nominally held, under an instrument executed by her last master and duly registered by trustees, upon the express terms of setting her free as soon as it could be done and, until then, she was to enjoy her own time and be subject to her own control, without interference or disturbance from anyone, and the record demonstrated that the trust was fully executed in this behalf, to wit: She hired her own time,

received all her own wages, went where she pleased, and was to all intents and purposes, so far as her owners were concerned, a free person, and there was not the least evidence that they undertook to control her in any way.

In *Berry v. Berry* (1893) 15 Ky. L. Rep. 865, 22 S. W. 654, it was held that, in an action by a free person held as a slave, the court would be wholly disinclined to apply the Statute of Limitations until the actual freedom occurred; but in this case nearly twenty years had elapsed after "their actual freedom occurred," and the Statute of Limitations was held to have barred their suit for hire.

In *Ponder v. Cox* (1858) 26 Ga. 485, it was said that there was no statute to bar a slave's suit for freedom.

B. B. B.

#### ALABAMA SUPREME COURT.

FIRST NATIONAL BANK OF NEW  
BROCKTON, Appt.,  
v.

A. McINTOSH.

(— Ala. —, 79 So. 121.)

#### Condition — for support — effect.

1. A condition subsequent is created by a conveyance on condition of support of grantor during life which cannot be defeated by a subsequent conveyance to strangers. For other cases, see *Covenants and Conditions*, II. a, V. in *Dig. 1-52 N. S.*

#### Mortgage — subject to condition.

2. A mortgage of property, the recorded deed to which contains a condition for support of the grantor during life, is subject to such condition.

For other cases, see *Covenants and Conditions*, III. d, 1, in *Dig. 1-52 N. S.*

#### Limitation of action — laches — enforcement of condition subsequent.

3. A mortgagee of property conveyed on condition of support cannot defeat enforce-

ment of the condition on the ground of laches, if the grantor continued at all times in possession of the property.

For other cases, see *Limitation of Actions*, I. b, 2, in *Dig. 1-52 N. S.*

(April 25, 1918.)

**A**PPEAL by defendant from a decree of the Circuit Court for Coffee County in favor of complainant in a suit for cancellation of a deed and mortgage. Affirmed.

The facts are stated in the opinion.

Messrs. C. W. Simmons and H. L. Martin for appellant.

Mr. William W. Sanders, for appellee:

Plaintiff has the right in a court of equity to a decree declaring the forfeiture, and that he be reinvested with the title to his lands.

*Shannon v. Long*, 180 Ala. 128, 60 So. 273; *Seaboard Air Line R. Co. v. Anniston Mfg. Co.* 186 Ala. 264, 65 So. 187.

The recital in the deed, when construed in connection with the surrounding circumstances, makes it a condition subsequent, the violation of which or the nonobservance of

**Note.** — The effect of a provision in a deed for the support of the grantor is considered in a note in 43 L.R.A.(N.S.) 918, and its continuation in L.R.A.1917D, 627, on "Relief of grantor in conveyance in consideration of agreement to support, which is broken by grantee."

As to whether the grantor's right to rescind for breach of condition as to support descends to his heirs or representatives, see note in 23 L.R.A.(N.S.) 232.

As to whether a grantor may rescind a deed executed in consideration of future support, where performance by the grantee is, without fault on his part, prevented by the grantor, see note in 25 L.R.A.(N.S.) 932.

As to whether an agreement for support in consideration of a conveyance may be made the basis of an equitable lien upon the property conveyed, see note in 13 L.R.A.(N.S.) 726, and its continuation in 28 L.R.A.(N.S.) 607.

Upon the question whether a provision in a devise for the support of a third person is to be regarded as a charge, a condition subsequent, or a condition precedent, see note in L.R.A.1917A, 617.

As to what constitutes an excuse for failure of the grantee to perform an agreement to support, see note in L.R.A.1917E, 658.

which results in a forfeiture of the estate at the election of the complainant.

*Bell County v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268; *Elyton Land Co. v. South & North Ala. R. Co.* 100 Ala. 396, 14 So. 207; 6 Am. & Eng. Enc. Law, 2d ed. 503; *Davis v. Davis*, 81 Vt. 259, 130 Am. St. Rep. 1044, 69 Atl. 876; *Glocke v. Glocke*, 113 Wis. 303, 57 L.R.A. 458, 89 N. W. 118; *Abbott v. Sanders*, 80 Vt. 179, 18 L.R.A. (N.S.) 725, 130 Am. St. Rep. 974, 66 Atl. 1032, 12 Ann. Cas. 898; *Gardner v. Knight*, 124 Ala. 273, 27 So. 298; *Thomas v. Record*, 47 Me. 500, 74 Am. Dec. 500.

*Thomas, J.*, delivered the opinion of the court:

The bill was filed by a grantor against the grantee in a deed and her mortgagee, praying the cancelation of the deed and mortgage for failure of compliance with the conditions contained in the deed. Respondents interposed demurrer, assigning as a ground thereof that the bill was without equity. The demurrer being overruled, an appeal was taken by the mortgagee, and the decree on demurrer is made the basis of appropriate assignment of error.

That a court of equity has jurisdiction appropriate here has been declared by this court. *Shannon v. Long*, 180 Ala. 128, 134, 60 So. 273; *Seaboard Air Line R. Co. v. Anniston Mfg. Co.* 186 Ala. 264, 65 So. 187; *Gardner v. Knight*, 124 Ala. 273, 27 So. 298; *Elyton Land Co. v. South & North Ala. R. Co.* 100 Ala. 396, 14 So. 207; *Torrent Fire Engine Co. v. Mobile*, 101 Ala. 559, 14 So. 557.

Is, then, the condition in the deed a condition precedent or a condition subsequent? Appellee contends that when construed in the light of the circumstances under which the deed was made, as averred in the bill, the condition was a material and inducing consideration for the execution of the deed—a condition subsequent, the nonobservance of which resulted in the forfeiture of estate, at the election of complainant-grantor.

The facts averred are, in substance, that on the 5th day of March, 1907, the complainant, being the owner and in the possession of the lands in question, made a conveyance thereof to his daughter, M. L. McIntosh, and that he was joined therein by his wife, who has since died; that this conveyance was in form a warranty deed, based upon the recited considerations of love and affection, the agreement of the grantee to take care of the grantors "during their lifetime," and \$1 in hand paid, the receipt whereof was thereby acknowledged. The granting clause was as follows: "That we . . . do grant, bargain, sell, and convey unto the said M. L. McIntosh the following described

property . . . [describing it]. This conveyance is made by us, however, upon the condition that the said M. L. McIntosh shall take care of us during the remainder of our natural lives, and that she shall give us a home with her on said premises and provide for us in a way which her means will authorize so long as we or either of us may live."

The habendum clause, "To have and to hold the same unto the said M. L. McIntosh, her heirs and assigns forever," concluded with covenants of warranty. Thereafter the grantee secured her note to the First National Bank of New Brockton, by a mortgage purporting to convey the lands in question. The bill makes said bank and the grantee in the deed, M. L. McIntosh, parties respondent, and prays a cancelation of the deed and the mortgage on the grounds stated, yet asks that redemption be permitted if the mortgage be held a valid lien on the lands.

The distinctions between conditions precedent and conditions subsequent, together with the general rules of construction of conditions in written instruments, have been often discussed by the courts. In 8 R. C. L. § 156, *Deeds* (pages 1098, 1099), this phase of the subject is treated of as follows: "Whether a condition in a deed is a condition precedent or a condition subsequent depends on the construction of the language used by the grantor, in connection with the purpose of the grant, and on the intent of the parties as collected from the whole contract, whatever the order in which they are found or the manner in which they are expressed. It is difficult, therefore, to formulate any exact test by which to determine whether a condition is precedent or subsequent. . . . Moreover, certain general tests are recognized. Thus, conditions subsequent are those which, in terms, operate on an estate conveyed, and render it liable to be defeated for breach of the conditions, the title passing to the grantee, subject to divestiture on failure to perform the condition; while conditions precedent are those which must take place before the estate can vest or be enlarged, and if land is conveyed on a precedent condition the title will not pass until the condition is performed."

In this jurisdiction we have recently declared that "while, as a general rule, a court of equity disfavors forfeitures, it will, when, by reason of the breach by the grantee or lessee of a condition subsequent in a conveyance or lease, the conscience of the situation demands it, declare that a forfeiture has occurred, and cancel and hold for naught such conveyance or lease. This is especially true when the plain language of the instru-

ment shows that it was the purpose of the parties to declare that the breach should operate as a forfeiture, and the situation of the parties is such that to uphold the instrument as still validly existing after the breach would be inequitable and unjust." *Shannon v. Long*, 180 Ala. 128, 60 So. 273.

See also *Seaboard Air Line R. Co. v. Anniston Mfg. Co.* 186 Ala. 264, 65 So. 187; *C. W. Zimmerman v. Daffin*, 149 Ala. 380, 9 L.R.A. (N.S.) 663, 123 Am. St. Rep. 58, 42 So. 858; *Davis v. Davis*, 130 Am. St. Rep. 1044, and note (81 Vt. 259, 69 Atl. 876); *Bell County v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268; *Smith v. Smith*, 64 Neb. 563, 90 N. W. 560; *Galt v. Provan*, 60 Am. St. Rep. 317, note, (131 Iowa, 277, 108 N. W. 760).

"No precise or technical words are required in a deed to create a condition precedent or subsequent. It is said that the words 'proviso,' 'ita quod,' and 'sub conditione,' are the most proper to make a condition, yet they have not always that effect, but frequently serve for other purposes, sometimes operating as a qualification or limitation, and sometimes as a covenant (4 Comyns's Dig. 376, 377); but whether they amount to the one or the other may be matter of construction, dependent on the contract, the nature of the circumstances, and the intention of the party creating the estate. The intention of the party to the instrument, when clearly ascertained, is of controlling efficacy. But when that is not clearly manifest, the construction to be given to the deed, as has been well said, will, after all, depend less upon artificial rules, than upon the application of good sense and sound equity to the object and spirit of the contract in the given case. 4 Kent, Com. 125, 133; 4 Comyns's Dig. 378; *Finlay v. King*, 3 Pet. 346, 7 L. ed. 701; *Hayden v. Stroughton*, 5 Pick. 528; *Underhill v. Saratoga & W. R. Co.* 20 Barb. 455; *Nicoll v. New York & E. R. Co.* 12 N. Y. 121." *Elyton Land Co. v. South & North Ala. R. Co.* 100 Ala. 396, 14 So. 207; *C. W. Zimmerman Mfg. Co. v. Daffin*, 149 Ala. 380, 9 L.R.A. (N.S.) 663, 123 Am. St. Rep. 58, 42 So. 858; 2 Devlin, Deeds, § 970.

In 6 Am. & Eng. Enc. Law, 2d ed. 503, note 5, we have authority that conditions for the support of or payment of money to the grantor, or any other person or persons named, are generally construed as conditions subsequent, in Missouri, Illinois, and Wisconsin.

In a note to *Davis v. Davis*, 130 Am. St. Rep. 1044, the editor collects the authorities to the effect that (1) though courts generally do not favor conditions subsequent in deeds of conveyance, yet this particular class of cases, involving an agreement by

grantee to support grantor, is, in many jurisdictions, made an exception to the general rule, and, although the obligations in form rest in covenant, they are construed to rest in condition; or, in other words, the conveyance made under such circumstances is not absolute, and the title to the property conveyed may be divested from the grantee and revested in the grantor, upon breach of the condition subsequent. The reasons for this exception are: "To protect the weak, to prevent the realization of contemplated frauds, of unconscionable bargains, and, generally, of administering justice between man and man." *Glocke v. Glocke*, 113 Wis. 303, 57 L.R.A. 458, 89 N. W. 118; *Knutson v. Bostrak*, 99 Wis. 469, 75 N. W. 156.

(2) That "equity deals with the situation the same as with any other where a reversion of title has taken place by re-entry, or its equivalent, for condition broken. It establishes the title to the property in accordance with the facts, and clears away all apparently interfering writings and records, giving such other relief as may be necessary to fully accomplish that end. . . . True, neither the deed nor the mortgage states in express terms that the estate is granted upon condition, but the word 'condition' is not necessary for the creation of an estate upon condition, if it plainly appears from the words used that the intent of the parties was to create an estate of that description." *Richter v. Richter*, 111 Ind. 456, 12 N. E. 698; *Glocke v. Glocke*, *infra*, 113 Wis. 320, 57 L.R.A. 458, 89 N. W. 118; *Gilchrist v. Foxen*, 95 Wis. 428, 70 N. W. 585; *Stilwell v. Knapper*, 69 Ind. 558, 35 Am. Rep. 240; *Watters v. Bredin*, 70 Pa. 235; *Knutson v. Bostrak*, *supra*.

In *Elbert v. Gildemeister*, 106 Minn. 83, 118 N. W. 155, there was nothing in the case to show that the deed contained a "re-entry clause," but the court set aside the deed and contract "for the failure of the grantee to furnish support to the grantor." And in a New York case, where the grantor had, by a quitclaim deed, conveyed lands to the grantee, "his heirs and assigns forever, to have and to hold, . . . in trust," to secure the grantor's support, the court declared that the property was "conveyed in fee simple upon condition," and that the grantee, "having complied with the terms of the agreement," was entitled to the land, upon the grantor's death, freed from any charge. *Mott v. Richtmyer*, 57 N. Y. 49.

In *Glocke v. Glocke*, 113 Wis. 303, 311, 312, 57 L.R.A. 458, 89 N. W. 121, the supreme court of Wisconsin, treating of circumstances where the intent of the grantor was to secure personal performance by the grantee of the obligations stipulated—there

being no adequate remedy for such a breach of the agreement by the grantee as would prevent the grantor from realizing the purpose of the grant, other than a restoration, so far as practicable, of the parties to their former position—said that a court of equity will read out of the papers evidencing the agreement a condition subsequent upon which the property was conveyed, enforceable by the grantor the same as any other such condition in the conveyance of property. The court said: "Respondent had in mind the benefits of filial regard,—something which, under ordinary circumstances, uninfluenced by disturbing conditions, is invaluable; something which can neither be estimated in nor bought with money, nor made the equivalent of anything else in a mere commercial transaction. The natural yearning of a person to have, in his declining years, the full benefit of that regard, is well illustrated by the frequency with which persons, circumstanced as respondent was when the transaction in question occurred, part with all or substantially all their property, trusting to the beneficiary to administer the same with the fidelity which becomes a son, in face of the fact shown by experience that failure, absolute failure, will probably result, and be accompanied with loss of the enjoyment that legitimately belongs to the parental relation; and not only by loss thereof, but a substitution thereof of the most annoying of all hostile relations that can exist between acquaintances, not going to the extent of imperiling the safety of persons or property in a physical sense. Such contracts have come to be looked upon as almost, if not quite, presumptively improvident in their inception, and in that view courts of equity have gone to great lengths to remedy the mischief by reading out of them a condition, where a covenant only is expressed, upon which may be founded, on principle, a right of rescission, where justice requires it for the protection of the weak, the exercise of which will undo the mischief ab initio, and restore the parties, substantially, to their original situation. In this case it seems that the hope and expectation of filial regard was the moving cause on the part of respondent in transferring his property to his son. The contract contained the characteristic features found in most agreements of its class with which courts have commonly had to deal."

In *Thomas v. Record*, 47 Me. 500, 74 Am. Dec. 500 (much like the case at bar) the language of the deed held to be a condition subsequent was: "I give the said Samuel T. Record this deed on the following condition, to wit: The said Samuel T. Record shall maintain and support myself, the said Perez T. Record, and Asenth Record, wife

of the said Perez T. Record, for and during the term of their natural lives, and shall at all times furnish them with suitable and proper support, and shall treat them with kindness, and in all respects conduct towards them as is the duty of a son to his parents."

The opinion construing the condition subsequent was: "Does the language in a deed constitute a condition? There can be no doubt that such is the fact. In the language of the court, in *Gray v. Blanchard*, 8 Pick. 284: 'The words are apt to create a condition; there is no ambiguity, no room for construction; and they cannot be distorted so as to convey a different sense from that which was probably the intent of the parties.' The conditions are consistent with the nature of the grant; not incompatible with any rule of law; not requiring anything immoral; and not inconsistent with public policy. Nor is there any evidence of fraud or collusion between the defendant and Samuel T. Record, in the case as presented. It is usual in the grant to reserve in express terms to the grantor and his heirs, a right of entry for breach of condition; but a grantor, or his heirs, may enter and take advantage of a breach, though there be no such clause of entry in the deed. 4 Kent, Com. 123; *Gray v. Blanchard*, supra."

In *Sewall v. Henry*, 9 Ala. 24, wherein Judge Campbell was of counsel, and the opinion was by Chief Justice Collier, the facts being that S. executed to H. a bill of sale for a negro man, at the price of \$250 in hand paid, it was agreed at the same time by the vendee, in writing, that in consideration of such sale he would sell to the vendor the slave in question, at the price stated in the bill, "if applied for on the 1st day of January next" thereafter. It was held "that these several writings did not constitute a mortgage, nor could it be intended that the latter was a mere undertaking by the vendee to stipulate with the vendor for a resale on the day designated. but in itself it provided for a resale, and left nothing open for future adjustment."

The case of *Gardner v. Knight*, 124 Ala. 273, 27 So. 298, is not an authority against the relief here sought because of the nonperformance of the condition subsequent in the deed prayed to be canceled. In the conveyance construed in *Gardner's Case*, there was attached no condition. It was a conveyance of land upon the considerations of love and affection, and the sum of \$5 acknowledged to have been paid by a daughter, and the promise of the grantee's husband to maintain the grantor. It was held that, in the absence of language showing a condition subsequent was intended, it was shown only that the simple obligation of a third party

was accepted by the grantor, and that there was nothing to show that the grantor relied upon anything except this personal promise of such third party to maintain the grantor. That this is the proper interpretation of the decision is shown by the statement of Judge McClellan, 124 Ala. page 276: "In this deed the grantor reserved to himself the possession of the premises during his life."

And (124 Ala. on page 276: "On the averments of the bill the case is to be treated for all the purposes of this appeal as if the only consideration for the deed in question and the only consideration recited therein was the undertaking of J. C. Knight [not the grantee in the deed, but her husband] to provide for the grantor and to make the specified improvements on the land. So considered, complainant's title to the relief specially prayed is rested upon three grounds: First, that J. C. Knight (and Lucy too for that matter) utterly failed and refused to carry out his said covenant or undertaking. . . . The fact that J. C. Knight failed to carry out his undertaking or that both he and his wife failed and refused to carry out the undertaking in consideration of which the conveyance was made is no ground for the cancellation of the conveyance. The undertaking was in no sense a condition subsequent upon the breach of which the conveyance was void or voidable, but at most it was a mere covenant on the part of J. C. Knight to pay, acquit, and satisfy the price of the land in a particular way, or rather the consideration upon which the deed was made; and there is no more room or reason for a cancellation of the conveyance for default in the satisfaction of such a consideration or for failure to carry out such an undertaking than there would have been had the consideration been so much money, and the purchaser had made default in the payment thereof. In both cases the remedy of the vendor would be on the undertaking, and not by way of cancellation and reversion of title in himself."

The Gardner deed is clearly distinguishable from that in the instant case (1) in that in the former the grantor reserved to himself the possession of the premises during his life, thus making provision for himself, so long as he might live, independent of the promise of his son-in-law to support him, and there was no reason why a condition subsequent should be annexed; (2) in that that transaction was not only one of self-protection, by the reservation of the life estate, but was one of reliance on the personal obligation of the son-in-law, not the grantee in the deed, to support and minister to the grantor, "to cover one room of the house on the premises . . . and also

to build a buggy house 12x14 feet, also to build another house 18x18 feet, also to build certain fences on the premises owned by said Knight." No such substantial and material considerations characterized the deed here in question; this conveyance was to the grantee daughter, in consideration of personal care, ministration, and support of old and dependent parents.

In *Burroughs v. Burroughs*, 164 Ala. 329, 28 L.R.A.(N.S.) 607, 137 Am. St. Rep. 59, 50 So. 1025, 20 Ann. Cas. 926, there was no condition subsequent recited in the deed, only a cash consideration, with no collateral written agreement, a part of the transaction, to the contrary. As to this the court (164 Ala. page 330) said: "The bill . . . pointedly alleges that the sum recited in the deed exhibited with the bill, viz., \$150, was not the consideration for the conveyance, and that it never was paid. Following the first stated averments, the true consideration for the conveyance is alleged as quoted above"—support and maintenance of complainant for the balance of her natural life.

Thus, this case is not opposed to the views here announced, nor to the decision in *Brindley v. Brindley*, 197 Ala. 221, 72 So. 497.

In *Woodley v. Woodley*, — Ala. —, 79 So. 134, there was a deed and a mortgage, which, constituting one transaction, were construed together. The transaction involved the conveyance by the father to his son of certain real properties, on consideration that the grantee was to give the grantor-mortgagor "one-fourth of the crop grown by the defendant on said land which was, together with \$1, the consideration expressed in the mortgage executed by defendant to complainant. Held, that such condition was a condition subsequent." The court said: "The legal title which passed by the grantor's deed was reverted in him by the mortgage executed by the grantee to secure the performance of his promise to give the grantor one fourth of the crops during his life and the further promise, of necessary implication, that, in order to be able to give one fourth, crops would be planted from year to year and cultivated in a reasonably husbandly manner. . . . Considering the two instruments as one, the law applies itself to the intention to be gathered from the language of the whole instrument. . . . According full consideration to the rule that conditions subsequent, going to the destruction or defeasance of estates created, are not favored, we are nevertheless of the opinion that the two instruments in question, taken together, created an estate in the defendant upon the condition subsequent that he should perform the stipulations of the mortgage."

We have here the case of a husband and wife, who, owning a tract of land upon which they live, desire to provide for themselves in their old age, and who, having a daughter in whom they repose confidence, agree to convey to her this homestead tract upon the consideration and condition that she will give them her personal ministrations, provide for them a home thereon, and take care of them as long as they or either of them shall live. Apt words are employed in the deed to show that the estate of the daughter and her right under the deed were dependent upon her subsequent performance of the obligations therein contained.

The intention of the grantors may be gathered, not only from the recitals of the deed, but from the surrounding circumstances, and the relation and situation of the parties the one to the other. The intention of the grantors to the instrument in question, to create a condition subsequent on which should depend the continued investment of the title in the grantee, is shown, not only by the recitals in the deed, but by the averred conditions and circumstances surrounding the parties thereto, at the time of its execution and delivery. Such a just and reasonable construction of the instrument, consistent with the circumstances of its execution and delivery, is the law of the case, and forbade the grantee therein to convey said lands to a third party, and defeat the purpose of the grantor's conveyance. If the provision in question be not construed as a condition subsequent, then this father is at the mercy of a daughter in whom he unwisely reposed trust and confidence, as evidenced by his deed to her and by the circumstances culminating in this suit. The province of courts of equity is to protect innocent grantors in deeds of this kind from impositions oftentimes resulting from confidence and trust improvidently reposed.

As to respondent bank and those holding under the grantee, they were sufficiently put on inquiry to be chargeable with full knowledge of the fact of the existence of such condition subsequent. It has been held sufficient notice or knowledge to a party in interest, if the circumstance or fact is sufficient to excite attention and put him on guard and so call for inquiry; that this is notice of everything to which the inquiry would lead. *Veitch v. Woodward Iron Co.* — Ala. —, 76 So. 124; *J. S. Carroll Mercantile Co. v. Harrell*, — Ala. —, 74 So. 252; *Cole v. Birmingham Union R. Co.* 143 Ala. 427, 39 So. 403; *Adler v. Van Kirk Land & Constr. Co.* 114 Ala. 551, 62 Am. St. Rep. 133, 21 So. 490; *James v. James*, 55 Ala. 525; *Pepper v. George*, 51 Ala. 194, and all the earlier authorities

there collected. The deed in question, with its condition subsequent, duly recorded, gave notice to the bank of its contents. The purchaser of real properties is charged with notice of such recitals of conveyances in his chain of title. *Veitch v. Woodward Iron Co.* supra, and authorities; 1 *Warvelle, Vend. & P.* 2d ed. § 262; 2 *Devlin, Deeds.* 3d ed. p. 1367, § 738a.

Respondent bank's demurrer of laches in the assertion of right by complainant is without force. The bill shows the complainant to be in the possession of the property, and at all times to have been so, both before and after the execution of the deed, and at the time of the filing of the bill. Nothing therein indicates that the grantee in the conveyance asserted any right, title, or interest, adverse or otherwise, in and to the property in question. It is necessary that the assertion of adverse right be shown by the bill, as well as acquiescence in such adverse right, and possession by the complainant for a time which a court of equity would regard as unreasonable and to the prejudice of the adverse party, in order to establish laches in the party so acquiescing. *Treadwell v. Torbert*, 122 Ala. 300, 25 So. 216; *Montgomery Light Co. v. Lahey*, 121 Ala. 131, 136, 25 So. 1006; *Haney v. Legg*, 129 Ala. 619, 87 Am. St. Rep. 81, 30 So. 34; *Ashurst v. Peck*, 101 Ala. 499, 14 So. 541; *Zeigler v. Zeigler*, 180 Ala. 246, 60 So. 810; *Veitch v. Woodward Iron Co.* — Ala. —, 76 So. 124; *Gilmer v. Morris*, 80 Ala. 78, 60 Am. Rep. 85. See 5 *Pom. Eq. Jur.* 33 (6), and many authorities, to the effect that the party in possession of land, who resorts to a court of equity to settle a question of title, is not chargeable with laches, no matter how long the delay.

The decree of the Circuit Court sitting in equity was free from error, and it is affirmed.

*Anderson, Ch. J., and Mayfield and Somerville, JJ., concur.*

#### UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

MRS. A. L. BERRY, Plff. in Err.,

v.

PULLMAN COMPANY.

(249 Fed. 816.)

Joint debtor — release — covenant not to sue.

1. One joint tort-feasor is not released

Note.—As to effect of release of one joint tort feasor on liability of the other, see annotation following this case, post, 363, and references therein to annotations on related questions.

from liability to the injured party by the latter's covenant not to sue the other, which expressly reserves any rights the injured person may have against the one not released.

For other cases, see *Joint Creditors and Debtors*, II. in *Dig. 1-52 N. S.*

**Pleading — defense — satisfaction of claim.**

2. A plea in an action against one joint tort-feasor to recover for personal injuries that plaintiff has not suffered damages to the extent of the amount received from the other tort-feasor, and that he has been fully paid for his injuries, presents an issuable defense, and the conclusiveness of the defense is not admitted by a demurrer.

For other cases, see *Pleading*, VII. e, in *Dig. 1-52 N. S.*

(March 16, 1918.)

**ERROR** to the District Court of the United States for the Northern District of Mississippi (Niles, District Judge) to review a judgment dismissing an action brought to recover damages for personal injuries, for which defendant was alleged to be responsible, but liability for which defendant claimed had been released. Reversed.

The facts are stated in the opinion.

Argued before Walker and Batts, Circuit Judges, and Newman, District Judge.

Messrs. **James A. Cunningham** and **W. D. Anderson**, for plaintiff in error:

If the injured party reserves his rights against the other joint tort-feasors, then they are not discharged.

34 Cyc. 1086-1090; 38 Cyc. 536-538; Lovejoy v. Murray, 3 Wall. 1, 18 L. ed. 129; Bigelow v. Old Dominion Copper Min. & Smelting Co. 225 U. S. 132, 56 L. ed. 1023, 32 Sup. Ct. Rep. 641, Ann. Cas. 1913E, 875; Weinman v. DePalma, 232 U. S. 575, 58 L. ed. 737, 34 Sup. Ct. Rep. 370; Drake v. Mitchell, 3 East, 258, 102 Eng. Reprint, 594, 7 Revised Rep. 449; Carey v. Bilby, 63 C. C. A. 361, 129 Fed. 203; Chicago & A. R. Co. v. Averill, 224 Ill. 516, 79 N. E. 654; Gilbert v. Finch, 173 N. Y. 456, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133; El Paso & S. R. Co. v. Darr, — Tex. Civ. App. —, 93 S. W. 166; Barnum v. Cochrane, 139 Cal. 494, 73 Pac. 247; Louisville & E. Mail Co. v. Barnes, 117 Ky. 860, 64 L.R.A. 574, 111 Am. St. Rep. 273, 79 S. W. 261; Bailey v. Delta Electric Light, P. & Mfg. Co. 86 Miss. 634, 38 So. 354; Nelson v. Illinois C. R. Co. 98 Miss. 295, 31 L.R.A. (N.S.) 689, 53 So. 620.

Special pleas which amount to the general issue only will be treated as the general issue, and bad as special pleas.

Wallace v. Seales, 36 Miss. 53; Alex-

ander v. Eastland, 37 Miss. 554; Fitch v. Asher, 56 Miss. 571; Burrus v. Gordon, 57 Miss. 93; Tyler's Stephens Pl. 360.

Messrs. **William M. Cox**, **Robert H. Thompson**, **J. Harvey Thompson**, **Francis B. Daniels**, and **Howard T. Wilcoxon**, for defendant in error:

An unlimited covenant not to sue is a release.

Stebbins v. Niles, 25 Miss. 267; Moelle v. Sherwood, 148 U. S. 21, 37 L. ed. 350, 13 Sup. Ct. Rep. 426; Chapman v. Sims, 53 Miss. 154; Bannard v. Duncan, 79 Neb. 189, 126 Am. St. Rep. 661, 112 N. W. 353.

A release for a consideration of one joint tort-feasor acquits and discharges the other joint tort-feasor.

Babcock & W. Co. v. Pioneer Iron Works. 34 Fed. 338; O'Shea v. New York, C. & St. L. R. Co. 44 C. C. A. 601, 105 Fed. 559; Tanana Trading Co. v. North American Trading & Transp. Co. 136 C. C. A. 389, 220 Fed. 783; The St. Cuthbert, 157 Fed. 792; Clabaugh v. Southern Wholesale Grocers' Asso. 181 Fed. 706; Abb v. Northern P. R. Co. 28 Wash. 428, 58 L.R.A. 293; Flynn v. Manson, 19 Cal. App. 400, 126 Pac. 181; Louisville & N. R. Co. v. Allen, 67 Fla. 257, L.R.A.1915C, 20, 65 So. 8; Snyder v. Witt, 99 Tenn. 618, 42 S. W. 441; Ayer v. Ashmead, 31 Conn. 447, 83 Am. Dec. 154.

**Newman**, District Judge, delivered the opinion of the court:

The plaintiff in error here brought suit against the Pullman Company for damages, alleged in the petition to be \$25,000, for injuries she sustained while being removed from a Pullman car on which she was a passenger from Memphis, Tennessee, to Tupelo, Mississippi. She alleges that when she went on the Pullman car the company had notice that she was an invalid, and would require special attention as such. The Pullman car was being operated from Memphis to Tupelo over the St. Louis & San Francisco Railroad, of which James W. Lusk, W. B. Biddle and W. C. Nixon were at that time receivers. In being removed from the Pullman car, in an invalid's chair, she says, in her suit, that by the negligence of the Pullman employees she was allowed to fall on a hard rock pavement, and thereby received her injuries, which, she says, were severe and permanent. She says in her suit against the Pullman Company that "a porter of the defendant company wilfully and negligently passed an 'all right' signal to the train to pull out, at a time when plaintiff was in a position of great peril, and the same known to him, or by the exercise of reasonable care would have been known."

As defense to this suit against the Pullman Company, two special pleas were filed, in which it was set up, in effect, that the plaintiff, after she was injured, brought suit against the St. Louis & San Francisco Railroad Company and its receivers for such injury, and afterwards settled with the receivers for the sum of \$1,000. The pleas, while somewhat different in character, make, with one exception which will be referred to hereafter, a single question, and that is the claim that the release of the receivers of the railroad company for the sum of \$1,000, and the paper executed to them as a release of liability on their part, had the effect of releasing also the other joint tort-feasor the Pullman Company. The pleas are called the first and second pleas. The second plea has attached to it the following:

Covenant Not to Sue.

Whereas, on or about December 23, 1913, the undersigned, Annie T. Lee Berry, of Booneville, Mississippi, while a passenger on a passenger train of the St. Louis & San Francisco Railroad, then being operated by James W. Lusk, W. C. Nixon, and W. B. Biddle, receivers, while being removed from a car of the Pullman Company, at Tupelo, Mississippi, by employees of the said Pullman Company, she being then an invalid, received injuries, which, she says, are of a serious and permanent nature; and

Whereas, the undersigned, Julius E. Berry, as the husband of Annie T. Lee Berry, claims to have been put to expense and suffered loss and damages by reason of the accident and injuries to his said wife, Annie T. Lee Berry; and

Whereas, the undersigned, Annie T. Lee Berry and Julius E. Berry, claim that the accident and injury was the result of the actionable negligence of the receivers aforesaid, James W. Lusk, W. C. Nixon, and W. B. Biddle, and the Pullman Company, through their respective agents and employees, and, being present and knowing the facts surrounding the accident and injury, believe the negligence of the aforesaid receivers to have been slight, while that of the Pullman Company was gross; and

Whereas, James W. Lusk, W. C. Nixon, and W. B. Biddle, as receivers of the St. Louis & San Francisco Railroad, are desirous of preventing litigation against them and the resultant expenses thereof, to recover damages for their negligence, if any, and such receivers expressly deny that they were guilty of any negligence; and

Whereas, the undersigned, Annie T. Lee Berry and Julius E. Berry, are willing to

covenant not to sue the said railroad receivers or their employees for the injuries sustained, or that may hereafter develop, by reason of said accident, but desire to expressly reserve unto themselves their right of action against the Pullman Company and the agents and employees of said Pullman Company:

Now, therefore, in consideration of the sum of one thousand dollars (\$1,000), to us this day paid by James W. Lusk, W. C. Nixon, W. B. Biddle, receivers, St. Louis & San Francisco Railroad, we hereby covenant and agree not to sue or prosecute any suit, action at law, or bill in chancery, against the said railroad receivers, or their employees, to recover damages for and on account of the accident and injury aforesaid, but in so doing distinctly and expressly reserve unto ourselves any and all rights of action we may have against the Pullman Company, to recover damages for said accident and injuries, this instrument not being executed in full settlement of our entire cause of action for the said accident and injuries, but being a mere quitclaim and covenant not to sue, so far as it may relate to any interest of the said receivers and railroad, but not applying in any sense to any cause of action we may have against the Pullman Company, or the employees of the Pullman Company.

Before executing this instrument, the undersigned, having fully informed themselves of its contents, covenant and represent that they are the persons and bear the relations therein named, are of lawful age, and legally competent to execute it, have been advised by counsel to execute it voluntarily, with full knowledge thereof.

Given under our hands, this the ..... day of March, 1915.

[Signed] (Mrs.) A. L. Berry.

J. E. Berry.

Witness: W. H. Critz,  
Sara L. Buchanan.

The two pleas were demurred to, and both demurrers overruled, and, the plaintiff declining to plead further, final judgment was entered dismissing the plaintiff's case, from which judgment this writ of error is prosecuted.

The question is, therefore, whether this paper, executed by Mrs. Berry and her husband J. E. Berry, to the receivers of the railroad company, is a release of the Pullman Company. This question has been before the courts, and the decisions are not at all in accord. In 34 Cyc. 1086, the law is thus stated: "A release under seal of one joint tort-feasor releases him and all his joint wrongdoers, because a sealed release operates to extinguish the cause of action.



Moreover, it has been held that a reservation of the rights of the injured party against the releasee's cotort-feasors is repugnant to the nature of the instrument and void, for the right of action cannot be extinct as to one tort-feasor and alive as to his fellow wrongdoers, and, having been destroyed as to one, it is extinguished for the benefit of all. The logical and legal soundness of this rule, however harsh its application may be in the particular case, is undoubted, provided the sealed instrument is once construed to be a release, but to escape the application of this principle, where it would work injustice and defeat the evident intention of the parties, the modern tendency of the courts is to construe, if possible, such instruments as covenants not to sue, which accordingly do not release the co-obligors. Moreover, the common law has been altered in some jurisdictions by statute."

This question has been before the supreme court of Kentucky in *Louisville & E. Mail Co. v. Barnes*, 117 Ky. 860, 64 L.R.A. 574, 111 Am. St. Rep. 273, 79 S. W. 261. What was there held can probably be determined from the fourth headnote of the case, which is as follows: "The acceptance by one who has a cause of action against two joint tort-feasors, of a sum of money from one of them in part satisfaction and in consideration of a release of the tort-feasor making the payment, does not preclude recovery against the other."

That case was very thoroughly considered, as shown by the opinion of the court. In the briefs of counsel, which precede the opinion of the court, will probably be found all the cases which were deemed pertinent, pro and con, up to the time that decision was made in 1904. A strong case on this subject is a decision of the supreme court of Tennessee in the case of *Smith v. Dixie Park & Amusement Co.* 128 Tenn. 112, 157 S. W. 900. The court, in the opinion there, by Mr. Justice Williams, says: "A number of courts hold that a release which shows that it is not intended to evidence a settlement of the plaintiff's entire demand based on a tort, but reserves the right to pursue one or more of the joint wrongdoers for the balance, is not to be treated as a release of all, but as a covenant not to sue, with result of nonrelease of such other or others,"—citing the cases, and then proceeds: "The reasons advanced in support of these decisions are that the rule gives effect to the intention of the parties executing the instrument, without violating any rule of morals or public policy, and that it tends to encourage compromises, which the law favors.

The cases holding to the contrary are numerous, and are believed to give the weight of authority to the maintenance of the rule that such a release will not, nothing else appearing, be deemed a mere covenant not to sue,"—citing a considerable number of cases. The court proceeds, later in the opinion, to say: "Releases of, and covenants not to sue, a wrongdoer have from early times been considered distinct. A covenant not to sue one of several joint obligors or joint tort-feasors did not at common law operate to discharge others from liability, since it was said not to have the effect, technically, of extinguishing any part of the cause of action."

And still later this: "Indicia of a covenant not to sue may be said to be: No intention on the part of the injured person to give a discharge of the cause of action, or any part thereof, but merely to treat in respect of not suing thereon (and this seems to be the prime differentiating attribute); full compensation for his injuries not received, but only partial satisfaction; and a reservation of the right to sue the other wrongdoer."

One of the strongest cases on this subject is a decision by the circuit court of appeals for the eighth circuit. *Carey v. Bilby*, 63 C. C. A. 361, 129 Fed. 203. The opinion by Circuit Judge Thayer in that case so fully covers the question here that we quote the larger part of it, which is brief, as follows:

"It is an old and well-established rule of law that the release of a cause of action as against one of two or more joint tort-feasors or joint obligors operates as a release of all. This is upon the theory that, when one has received full compensation for a wrong, no matter from which wrongdoer or from what source, the law will not permit him to recover further damages. *Lovejoy v. Murray*, 3 Wall. 1, 17, 18 L. ed. 129, 134. When a release of a cause of action for a tort is given by the injured party to one of two or more persons who committed the wrong, the release is construed most strongly against the party executing it. The law indulges in the presumption that the release was given in full satisfaction for the injury, and upon a sufficient consideration, and will not permit the presumption to be overcome by oral proof to the contrary. *Ellis v. Esson*, 50 Wis. 138, 6 N. W. 518, 520, 36 Am. Rep. 830; *Bronson v. Fitzhugh*, 1 Hill, 185, 186. Sometimes, however, as in the case in hand, a release executed in favor of one wrongdoer is accompanied with the reservation of the right to sue others who were jointly concerned in the wrong, and in such cases the question has frequently

arisen, How shall such an instrument be interpreted? Shall the reservation of the right to sue others be ignored, and the instrument treated as raising a conclusive presumption that full compensation for the wrong has been made, as though it were a technical release under seal, or shall the reservation of the right to sue others be taken to mean that full compensation has not been received by the injured party, and that he merely intended to agree with the released party not to pursue him further, but without releasing his cause of action against the other wrongdoers, or admitting that he has received full compensation for the injury? With reference to this question the authorities are not in accord. Some courts are disposed to hold, and have held, that when such an instrument contains apt words releasing one of the joint wrongdoers, it operates to release all, and that any clause inserted therein reserving a right to sue others after one has been released is repugnant to the release, in that it defeats or attempts to defeat, the natural legal effect of the instrument; and that it should therefore be ignored. *McBride v. Scott*, 132 Mich. 176, 61 L.R.A. 445, 102 Am. St. Rep. 416, 93 N. W. 243, 1 Ann. Cas. 61, 13 Am. Neg. Rep. 335; *Abb v. Northern P. R. Co.* 28 Wash. 428, 58 L.R.A. 293, 92 Am. St. Rep. 864, 68 Pac. 954, and cases there cited. Other courts hold, however, that such an instrument should be given effect according to the obvious intent of the person executing it, and that it should not be treated as a technical release, operating to destroy his cause of action as against all of the joint tort-feasors, but rather as a covenant not to sue the party in whose favor the instrument runs. *Gilbert v. Finch*, 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133; *Matthews v. Chicopee Mfg. Co.* 3 Robt. 711, 712; *Ellis v. Esson*, 50 Wis. 138, 36 Am. Rep. 830, 6 N. W. 518; *Hood v. Hayward*, 124 N. Y. 1, 16, 26 N. E. 331; *Sloan v. Herrick*, 49 Vt. 327; *McCrillis v. Hawes*, 38 Me. 566; *Miller v. Beck*, 108 Iowa, 575, 79 N. W. 345; *Price v. Barker*, 4 El. & Bl. 760, 776, 777, 119 Eng. Reprint, 281, 3 C. L. R. 927, 24 L. J. Q. B. N. S. 130, 1 Jur. N. S. 775.

"We are of opinion that the doctrine enunciated in the cases last cited is supported by the greater weight of authority, and is founded upon the better reasons. It has the merit of giving effect to the intention of the party who executes such an instrument, which should always be done when the intention is manifest, and it can be given effect without violating any rule of law, morals, or public policy. Besides, we are not aware of any sufficient reason

which should preclude a person who has sustained an injury through the wrongful act of several persons from agreeing with one of the wrongdoers, who desires to avoid litigation, to accept such sum by way of partial compensation for the injury as he may be willing to pay, and to discharge him from further liability, without releasing his cause of action as against the other wrongdoers. The law favors compromises generally, and it is not perceived that an arrangement of the kind last mentioned should be regarded with disfavor. The release which was read in evidence in the case at bar plainly shows that the sum paid by Hysham was not accepted by the plaintiffs as full compensation for the injury which they had sustained; that it was not in fact, full compensation for the injury; and that they had no intention of releasing their cause of action as against Carey. Why, then, should it be given an effect contrary to the intent of the one who executed it? We perceive no adequate reason for giving it such effect, and accordingly agree with the lower court that it did not release Carey."

In Mississippi, the supreme court of that state, in *Bailey v. Delta Electric Light P. & Mfg. Co.* 86 Miss. 634, 38 So. 354, state their view of the law on this subject as follows: "Under this state of facts, the partial satisfaction for the injuries received by the servant made by the master, not intended to be a settlement in full and not received as nor in fact being full compensation, cannot inure to the other person, whose concurrent negligence caused the injury complained of. We are not unmindful that in many jurisdictions it is held that any release of one tort-feasor operates to absolve all others from liability. We prefer, however, to adopt the reasoning of that other numerous line of decisions which hold that, in order for such release to have this legal effect, the satisfaction received by the party injured must be intended to be and accepted as full compensation for all injuries inflicted. This is more in accord with justice, and in better harmony with the principles of enlightened jurisprudence, which will not permit a party suffering a wrong to be deprived of his right to redress by any purely technical reasoning. We refer specially, as supporting this conclusion, to the strongly reasoned case of *Louisville & E. Mail Co. v. Barnes*, 117 Ky. 860, 64 L.R.A. 574, 111 Am. St. Rep. 270, 273, 79 S. W. 261, where the whole subject is exhaustively discussed, and the true rule clearly and definitely set out."

While we concede that the authorities on this subject are not harmonious, yet

we think the weight of authority, at all events the authorities which we are disposed to recognize as sound, treat a covenant not to sue, such as that given in this case, as a mere agreement to release the one joint tort-feasor by whom the settlement is made, and not as a release of the cause of action, leaving the other joint tort-feasors liable to the person injured. It is always understood and in all these cases it is held that the joint wrongdoer against whom the suit was brought, when such a settlement with another wrongdoer has been made as pleaded, is entitled, pro tanto, to the amount received in settlement by the plaintiff injured as a credit on any liability which may be found to exist against the one sued.

It will be perceived that the covenant not to sue contains the following language: "This instrument not being executed in full settlement of our entire cause of action for the said accident and injuries, but being a mere quitclaim and covenant not to sue, so far as it may relate to any interest of the said receivers and railroad."

Stress is laid, in the argument here, on the use of the expression "quitclaim." We do not see that this term "quitclaim" amounts to any more than is elsewhere expressed in the paper—that it is an agreement not to sue the railroad company or the receivers. They yield their rights of recovery for the wrong done, simply as against the party making the payment. The term "quitclaim," of course, does not properly apply in such an instrument. It is usually and generally a conveyance of land without warranty, and can hardly be properly used elsewhere; but here it clearly does not effect the fact that the purpose of the instrument and the intention

of the parties is simply to agree that they will not sue the railroad company or the receivers, with the express stipulation that they reserve their rights as against the Pullman Company. To give any other construction to this paper would do violence to the intention of the parties, and to what we think the clear purpose and intent of the instrument is.

Another claim made here is that the effect of the second plea, admitted by the demurrer to be true, is an acknowledgment on the part of the plaintiffs that they had been paid in full of all damages sustained. The language of the plea which is invoked in this connection is this: "Defendant further avers and charges that plaintiff did not suffer damage because of the matters and things charged in the declaration in this cause to the extent of \$1,000, and that she had well and truly been fully paid for and on account of the alleged wrongs and injuries charged to have been suffered by her."

We think this made simply an issuable defense, about which evidence will be heard by the jury, and it will be determined on the trial whether or not she has been injured as much or more than the \$1,000 which she has received. If she has been paid in full for her injuries, it will be so found. If she has not, the \$1,000 should be credited on any recovery she may have.

The judgment of the District Court is reversed, and the cause remanded, with instructions to proceed in accordance with what has been stated in this opinion.

Judgment reversed.

Petition for rehearing denied, April 10, 1918.

## Annotation—Effect of release of one joint tort-feasor on liability of the other.

- I. Scope, 363.*
- II. Release under seal, 363.*
- III. Release not under seal, 364.*
- IV. Covenants not to sue, and releases construed as covenants, 370.*

- V. Accord and satisfaction, 373.*
- VI. Dismissal or entry of nolle prosequi as to part, 373.*
- VII. Release to or satisfaction by one not in fact liable, 373.*

### *I. Scope.*

The earlier cases on this question are discussed in the note to *Abb v. Northern P. R. Co.* 58 L.R.A. 293.

Other questions of interest have been

discussed in other notes in this series of reports.<sup>1</sup>

### *II. Release under seal.*

That a release, under seal, of one joint

<sup>1</sup>The release of one of two or more persons severally but not jointly liable for a tort, as affecting the liability of others, is discussed in note to *State use of Cox v.*

*Maryland Electric R. Co.* L.R.A.1917A, 273.

As to release of employer by acceptance of benefit of relief fund as affecting other

tort-feasor, releases all, is well settled, as shown in the earlier note,<sup>2</sup> and the rule of the earlier cases has been followed in a majority of the cases decided since the date of that note.<sup>3</sup> The courts are not agreed as to the reason for this holding; the reason most frequently advanced is that, one joint tort-feasor being liable for all damages inflicted by the tort, when he has paid a consideration and received a release, the injured party will be presumed to have received a consideration for the entire injury.<sup>4</sup>

That a release, under seal, of one joint tort-feasor, releases all, is usually held true, even though there is a reservation of rights against the others.<sup>5</sup> But in at least one<sup>6</sup> of the recent cases, the theory that a release of one tort-feasor discharges all is stated to rest upon the presumption that there has been a satisfac-

tion for the tort, and it is held that, where there is an express reservation of rights against other joint tort-feasors, the intent of the parties may be inquired into, and, if it appears that the sum received in consideration of the release of the one joint tort-feasor was not intended as full satisfaction for the tort, the release does not operate to discharge the other joint tort-feasors.

### III. Release not under seal.

The courts are not agreed as to the effect of an unsealed release of one joint tort-feasor upon the others.<sup>7</sup> It is held, in some cases involving a release not under seal, without considering the intention of the parties, that a release of one joint tort-feasor releases all.<sup>8</sup> It has been stated that, "if the injured person executes a release to one of the joint

tort-feasors, see note to *Ridgeway v. Sayre Electric Co.* L.R.A.1918A, 996.

As to release by person injured as affecting his claim against physician or surgeon employed by other party, see note to *Martin v. Cunningham*, L.R.A.1918A, 227.

The effect of assignment of a claim ex delicto to one against whom it was asserted, to enable him to maintain an action thereon against a third party, is discussed in the note to *Tanner v. Bowen*, 7 L.R.A. (N.S.) 534.

The right to show by extrinsic evidence that payment of judgment against or consideration for release of alleged joint tort-feasor was not a satisfaction of claim is discussed in the note to *Fitzgerald v. Union Stock-Yards Co.* 33 L.R.A.(N.S.) 983.

<sup>2</sup> See note in 58 L.R.A. 293.

<sup>3</sup> *Allen v. Ruland* (1906) 79 Conn. 405, 118 Am. St. Rep. 146, 65 Atl. 138, 8 Ann. Cas. 344; (but see *Dwy v. Connecticut Co.* infra, note 6); *Louisville & N. R. Co. v. Allen* (1914) 67 Fla. 257, L.R.A.1915C, 20, 65 So. 8; *Murphy v. Penniman* (1907) 105 Md. 452, 121 Am. St. Rep. 583, 66 Atl. 282 (dictum) (holding that a release under seal, executed by a receiver under an order of court which did not authorize such a release, would be regarded as an unsealed release); *Carpenter v. W. H. McElwain Co.* (1916) — N. H. —, 97 Atl. 560; *Stires v. Sherwood* (1915) 75 Or. 108, 145 Pac. 645; *Dufur v. Boston & M. R. Co.* (1903) 75 Vt. 165, 53 Atl. 1068, 13 Am. Neg. Rep. 461. And see *Smith v. Roydhouse, A. & Co.* (1914) 244 Pa. 474, 90 Atl. 919, infra, note 43.

In *Casey v. Auburn Teleph. Co.* (1913) 155 App. Div. 66, 139 N. Y. Supp. 579, the release was under seal, but no point is made of this fact by the court, the other tort-feasor being held discharged because the release contained no reservation.

<sup>4</sup> *Louisville & N. R. Co. v. Allen* (Fla.), and *Carpenter v. W. H. McElwain Co.* (N. H.) supra.

L.R.A.1918F.

<sup>5</sup> See note in 58 L.R.A. 295.

*Louisville & N. R. Co. v. Allen* (Fla.) supra, holding that a release which recited that a sum of money was received "in full compromise, payment, discharge, accord and satisfaction," for or on account of the injury, operated as a release of the other joint tort-feasor, even though there was a reservation that the instrument should not release the other tort-feasor from liability for the injury, and expressly reserved the right to sue such tort-feasor.

<sup>6</sup> *Dwy v. Connecticut Co.* (1914) 89 Conn. 74, L.R.A.1915E, 800, 92 Atl. 883.

<sup>7</sup> See note in 58 L.R.A. 295.

<sup>8</sup> *Jones v. Chism* (1904) 73 Ark. 14, 83 S. W. 315, holding that a settlement made by a landowner with one of several trespassers, after action had been brought against them for damages for the trespass, by which settlement the owner received a sum of money in full of all claims and demands as damages against the trespasser with whom the settlement was made and agreed to dismiss, as to him, the suit, released the other trespassers.

*Mooney v. Chicago* (1909) 239 Ill. 414, 88 N. E. 194, holding that a release given to one joint tort-feasor, reciting full satisfaction of any and all claims against him on account of the injury sustained, is a release of another joint tort-feasor.

*Vandalia R. Co. v. Nordhaus* (1911) 161 Ill. App. 110 (dictum); *Gore v. Henrotin* (1911) 165 Ill. App. 222; *Horgan v. Boston Elev. R. Co.* (1911) 208 Mass. 287, 94 N. E. 386.

*Hubbard v. St. Louis & M. River R. Co.* (1903) 173 Mo. 249, 72 S. W. 1073, holding that an instrument, acknowledging the receipt of a stated sum of money, in consideration of which the injured person remised, released, and forever discharged the tort-feasor with whom the settlement was made, from liability, by "reason of any matter, cause, or thing whatever, whether the same arose upon contract or upon tort, and es-

tort-feasors, it operates to bar an action against the others, for the reason that the cause of action is satisfied, and no longer exists."<sup>9</sup> Some cases make a distinction between a mere "release," and a "satisfaction" for the injury. The injured party is held to have the right "to choose whether he will seek redress against all or a less number of those jointly liable to him. . . . A naked promise not to sue, an action against a part only of the joint tort-feasors and a forgiveness of the others, or a formal release, unsupported by a consideration,

will, in neither case, operate as a release of those not favored. In other words, a release in fact may be given to a part of the joint trespassers, although no part of the damage has been paid, and those not released held liable for the whole. . . . A contract, which purports to be a satisfaction for the wrong and a release of the wrongdoer, jointly liable with others, to be effective, must clearly show that the injured party, for a consideration, has surrendered to the party in whose favor the contract runs, all claim for recompense for an on account of" the tort.<sup>10</sup>

pecially from all claim which I now have, or may hereafter have, arising . . . from or on account of personal injuries sustained by me," etc., released the other joint tort-feasor.

*Laughlin v. Excelsior Powder Mfg. Co.* (1911) 153 Mo. App. 508, 134 S. W. 116, holding that a release of one joint tort-feasor releases the other, so that attorneys for the injured party, who had a lien upon the recovery for their fees, could not recover of the other joint tort-feasor.

*Tanner v. Bowen* (1906) 34 Mont. 121, 7 L.R.A.(N.S.) 534, 115 Am. St. Rep. 529, 85 Pac. 876, 9 Ann. Cas. 517, holding that the satisfaction by a livery stable keeper of a claim of the owner of a horse, which had been loaned to the livery stable keeper and rented out by him to a patron, through whose negligence the horse was killed, extinguished the claim, so that the livery stable keeper, to whom an assignment of the claim was made, could not recover of the person to whom the horse was loaned. See note appended to this case in 7 L.R.A.(N.S.) 534, as to the effect of assignment of a claim ex delicto to one against whom it was asserted to enable him to maintain an action thereon against a third party.

*Howard v. J. H. Harris Plumbing Co.* (1911) 154 N. C. 224, 70 S. E. 285, stating it to be well settled "that a release of one or more joint tort-feasors, executed in satisfaction for an injury, is a discharge of them all, on the ground that the party can have but one satisfaction for his injury."

*Sircey v. Hans Rees' Sons* (1911) 155 N. C. 296, 71 S. E. 310, holding that a settlement with one joint tort-feasor releases the other, even though the tort of the one with whom the settlement is made was one growing out of contract for the plaintiff's services. The court stated that "whether the plaintiff had sued in tort, or had waived the tort and sued on the contract, if he could do so, can make no difference. He has received what he regarded as full compensation for his injury, and the law will not give him more than he said was enough, whatever may be the technical form of the action he might have brought against the railway company."

*Gregg v. Wilmington* (1911) 155 N. C. 18, 70 S. E. 1070; *Slade v. Sherrod* (1918) 175 N. C. 346, 95 S. E. 557; *Ingram v. Carl-*

*ton Lumber Co.* (1915) 77 Or. 633, 152 Pac. 256; *Peterson v. Wiggins* (1911) 230 Pa. 631, 79 Atl. 767 ("whenever satisfaction has been received from one of several joint tort-feasors, all are thereby discharged").—*Conway v. Pottsville Union Traction Co.* (1916) 253 Pa. 211, 97 Atl. 1058; *The St. Cuthbert* (1907) 157 Fed. 799.

In some cases holding the other tort-feasor discharged, in which the release was under seal, no point is made of this fact. *Stires v. Sherwood* (1915) 75 Or. 108, 145 Pac. 645 (no reservation of rights in the release); *Dufur v. Boston & M. R. Co.* (1903) 75 Vt. 165, 53 Atl. 1068, 13 Am. Neg. Rep. 461.

A settlement made by the administrator of a decedent with the employer of the decedent, for wrongful death, and a release of such employer from any further liability, was held to extinguish the administrator's cause of action, under the statute giving a right of action for the wrongful death of a person, so that no suit could thereafter be maintained against a physician, for malpractice in the treatment of the decedent after his injury. *Almquist v. Wilcox* (1911) 115 Minn. 37, 131 N. W. 796.

A release by a messenger of an express company, of his employer, from liability for damages for personal injuries caused by the negligence of the railroad company, on whose lines the express company was operating, with the knowledge of a contract, by which the express company undertook to indemnify the railroad company against liability for such injuries, is held, in *Robinson v. St. Johnsbury & L. C. R. Co.* (1907) 80 Vt. 129, 9 L.R.A.(N.S.) 1249, 66 Atl. 814, 12 Ann. Cas. 1060, to operate in favor of the railroad company.

An invalid release of one joint tort-feasor does not release the other. *Chicago & A. R. Co. v. Wagner* (1915) 239 U. S. 452, 60 L. ed. 379, 36 Sup. Ct. Rep. 135, 11 N. C. C. A. 1087.

<sup>9</sup> *Tanana Trading Co. v. North American Trading & Transp. Co.* (1915) 136 C. C. A. 389, 220 Fed. 783, approving of *Farmers Sav. Bank v. Aldrich* (1911) 153 Iowa, 144, 133 N. W. 383, *infra*, note 19.

<sup>10</sup> *Cleveland, C. C. & St. L. R. Co. v. Hilligoss* (1908) 171 Ind. 417, 131 Am. St. Rep. 258, 86 N. E. 485, holding that a release given by the injured employee of a

"Satisfaction," within the meaning of these cases, is simply a release, for a consideration, of the claim against the party to whom it is given.<sup>11</sup>

Some cases hold that a release of one joint tort-feasor releases all, regardless of the intention of the parties;<sup>12</sup> at least, if there is full compensation for the injuries.<sup>13</sup> An injured party, who has once received satisfaction from a joint tort-feasor, has not the legal right to sue the other joint tort-feasor for the same injury.<sup>14</sup> In some cases,<sup>15</sup> there was an acknowledgment of a full settlement and satisfaction for the injuries, and it is held that the other joint tort-feasors

were thereby released, although, following this acknowledgment, there was a limitation that the settlement was only "so far as . . . [the tort-feasors with whom the settlement is made] are concerned." The Missouri court<sup>16</sup> states that, when full satisfaction of all the injuries complained of is acknowledged, "any effort to reserve a cause of action against those jointly liable will not prevent the operation of the bar as to those not included in the release."

Even where the injured person has expressly reserved his rights against the remaining tort-feasors, and has not acknowledged full satisfaction for the tort,

traction company to his employer, in consideration of an agreement to re-employ him for such time as might be satisfactory to the traction company, released a railroad company jointly responsible for the injury. The court states that the recoverable damage of the employee was unliquidated and uncertain, that it might be much or little, and whatever consideration he accepted as satisfaction for what he surrendered will be held as adequate.

<sup>11</sup> *Snyder v. Mutual Teleph. Co.* (1907) 135 Iowa, 215, 14 L.R.A.(N.S.) 321, 112 N. W. 776.

<sup>12</sup> *Flynn v. Manson* (1912) 19 Cal. App. 400, 126 Pac. 181, holding that a settlement by a plaintiff with one of the defendants, in an action begun by the plaintiff against several joint tort-feasors, released the other defendants, notwithstanding an express provision in the instrument releasing the defendant with whom the settlement was made that, in executing the release, it was not the intention of the plaintiff that it should operate as a release of the liability of the other defendants, or either of them, but, on the contrary, that it was the plaintiff's intention that the cause of action against the other defendants should exist and continue with the same force and effect as if the release had never been made.

*Farmers Sav. Bank v. Aldrich* (1911) 153 Iowa, 144, 133 N. W. 383; *Sunlin v. Skutt* (1903) 133 Mich. 208, 94 N. W. 733; *Gilbert v. Timms* (1905) 28 Ohio C. C. 107 (unliquidated demand); *Smith v. Dixie Park & Amusement Co.* (1913) 128 Tenn. 112, 157 S. W. 900 (dictum).

This rule is approved by the court in *Tanana Trading Co. v. North American Trading & Transp. Co.* (1915) 136 C. C. A. 389, 220 Fed. 783, although the release there involved contains no reservations of the right against the other tort-feasor, and the court, in distinguishing the case from the decision in *Gilbert v. Finch* (1903) 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133, *infra*, note 23, states that in that case the release contained an express reservation, while, in the case at bar, there was an absolute release, containing no reservation.

The mere desire on the part of the per-

son injured that a settlement with one party, of any claim that she could or might have made against it on account of the injury, shall not release the third person against whom she makes a claim for the same injury, or her belief that the settlement will not have the effect of releasing the latter, does not deprive it of such effect. *Snyder v. Mutual Teleph. Co.* (1907) 135 Iowa, 215, 14 L.R.A.(N.S.) 321, 112 N. W. 776.

<sup>13</sup> *Carpenter v. W. H. McElwain Co.* (1916) — N. H. —, 97 Atl. 560, holding that a settlement with one joint tort-feasor in which a release was given, headed, "Settlement in full for personal injuries," and containing an acknowledgment of payment "in full settlement of all my claims and causes of action which I now have or hereafter may have against the said . . . (tort-feasor with whom settlement was made), on account of an accident . . . causing injury to me. It is expressly understood and agreed that the said sum is the sole consideration of this release, and is in full settlement of all my claims and causes of action,"—is an acknowledgment of full satisfaction for the injury, and discharges the other joint tort-feasor.

See comment in text following note 21, *infra*.

<sup>14</sup> *Clabaugh v. Southern Wholesale Grocers' Assn.* (1910) 181 Fed. 706.

<sup>15</sup> *Dulaney v. Buffum* (1903) 173 Mo. 1, 73 S. W. 125, holding that a settlement made by the plaintiffs with two of the defendants, while an appeal from a verdict and judgment for the defendants was pending, whereby the plaintiffs acknowledged receipt from the defendants with whom the settlement was made of a sum of money, which it stated to be "in full settlement and satisfaction of all claims and demands in our favor, or in favor of either of us, on account of the matters and things set up or referred to in the petition in the above-entitled suit, so far as said two defendants are concerned; and we hereby agree to at once discontinue and dismiss said suit, so far as said two defendants are concerned," discharges the other defendant.

<sup>16</sup> *Dulaney v. Buffum* (Mo.) *supra*.

it has been held that a release of one tort-feasor releases all.<sup>17</sup>

It is the theory of at least some of these courts that, in case of an unliquidated demand, it cannot be said that the payment of any sum, however small, in consideration of a release, does not or cannot operate as compensation for the injuries.<sup>18</sup> The Iowa court<sup>19</sup> states that "where the matter in controversy with one of two or more alleged wrongdoers is as to a liability common to all of them, and the settlement is made on consideration relating to the existence of such liability and its extent, it is not competent for the claimant, by expressly or impliedly reserving the right to recover an additional amount from the others on account of the same liability, to defeat the effect of the release which he gives."

Other cases give effect to the intention, and hold that, if an intention not to release the other joint tort-feasors does appear, they are not released, if the amount received as consideration for the release

is not full compensation for the injury.<sup>20</sup> These cases are not necessarily inconsistent with those cited supra,<sup>21</sup> which refused to give effect to the intention, since those cases were decided upon the assumption that the party had received full satisfaction.

That a release of one tort-feasor does not operate to release a joint tort-feasor, contrary to the intention of the parties, is especially true, where the amount of the losses can be accurately ascertained, and the amount received in settlement with the one tort-feasor is less than the total amount of the loss.<sup>22</sup>

Again, the intention of the parties not to release the other joint tort-feasor has been given effect, where there was not a full compensation from the one joint tort-feasor with whom the settlement was made, and the release contained an express provision that it should not affect or impair the claim against the other tort-feasor.<sup>23</sup> The court<sup>24</sup> states:

<sup>17</sup> *McBride v. Scott* (1903) 132 Mich. 176, 61 L.R.A. 445, 102 Am. St. Rep. 416, 93 N. W. 243, 1 Ann. Cas. 61, 13 Am. Neg. Rep. 335.

<sup>18</sup> *Flynn v. Manson* (1912) 19 Cal. App. 400, 126 Pac. 181; *Gilbert v. Timms* (1905) 28 Ohio C. C. 107.

<sup>19</sup> *Farmers Sav. Bank v. Aldrich* (1911) 153 Iowa, 144, 133 N. W. 383.

<sup>20</sup> *Fitzgerald v. Union Stock Yards Co.* (1911) 89 Neb. 393, 33 L.R.A.(N.S.) 983, 131 N. W. 612, holding that a settlement with one joint tort-feasor, acknowledging "full payment, settlement, release, and satisfaction and discharge of all claims and demands of any nature whatsoever, . . . against "the tort-feasor with whom the settlement was made, growing out of the injury in question, and reciting further that "I do hereby release and forever discharge, . . . [the tort-feasor with whom the settlement was made] its lessors, lessees, and controlled companies . . . from all debts, suits, causes of action, claims and demands whatsoever," arising from the injuries in question, did not conclusively show that full compensation for the entire injury had been received, and therefore did not necessarily release the other tort-feasor.

*Hawth v. Sambo* (1916) 100 Neb. 160, 158 N. W. 1036; *Tankersley v. Lincoln Traction Co.* (1917) 101 Neb. 578, 163 N. W. 850; *El Paso & S. R. Co. v. Darr* (1906) — Tex. Civ. App. —, 93 S. W. 166; *St. Louis, I. M. & S. R. Co. v. Bass* (1911) — Tex. Civ. App. —, 140 S. W. 860; *J. Rosenbaum Grain Co. v. Mitchell* (1911) — Tex. Civ. App. —, 142 S. W. 121; *Kropidowski v. Pfister & V. Leather Co.* (1912) 149 Wis. 421, 39 L.R.A.(N.S.) 509, 135 N. W. 839 (see infra, note 37); *Carey v. Bilby* (1904)

63 C. C. A. 361, 129 Fed. 203; *Walsh v. New York C. & H. R. R. Co.* (1912) 204 N. Y. 58, 37 L.R.A.(N.S.) 1137, 97 N. E. 408, see infra, note 29.

<sup>21</sup> See cases in notes 13-16.

<sup>22</sup> *Murphy v. Penniman* (1907) 105 Md. 452; 121 Am. St. Rep. 583, 66 Atl. 282, holding that a settlement made by the receivers of a bank, who had brought an action against directors for losses to the bank by reason of unlawful loans, by which the directors with whom the settlement was made paid a stated sum and were released, did not discharge the other directors, where the settlement was made on the distinct understanding that the other directors were not to be discharged.

<sup>23</sup> *Gilbert v. Finch* (1903) 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133.

Upon the authority of *Gilbert v. Finch* (N. Y.) supra, the court, in *Walsh v. Hanan*, (1904) 93 App. Div. 580, 87 N. Y. Supp. 930, held that a release given to one joint tort-feasor did not release the other, where all rights of action for the injury against the others were reserved without any reference to the consideration for the release.

In *Casey v. Auburn Teleph. Co.* (1913) 155 App. Div. 66, 139 N. Y. Supp. 579, a case involving a release under seal, but in which the court does not, apparently, give any effect to the seal, the other tort-feasor was held discharged, because the release contained no reservation of rights against him, on the authority of *Gilbert v. Finch* (N. Y.) supra.

In *Hirschfield v. Alsberg* (1905) 47 Misc. 141, 93 N. Y. Supp. 617, a release of one joint tort-feasor was held not to be a release of the other, where it was given subject to a reservation of right to sue the

"Where the release contains no reservation, it operates to discharge all the joint tort-feasors; but, where the instrument expressly reserves the right to pursue the others, it is not technically a release, but a covenant not to sue, and they are not discharged."

It is made a rule by statute, in some jurisdictions, that receipts, releases, and discharges must be given effect, according to the intention of the parties.<sup>25</sup> Under such a Code provision, a release of one joint tort-feasor does not discharge others, where it was not so intended.<sup>26</sup>

It has been held that a release given

other tort-feasor, and where it appeared that the amount received in settlement was not full compensation for the injury.

*Morris v. North American Mercantile Agency* (1907) 53 Misc. 574. 103 N. Y. Supp. 761.

<sup>24</sup> *Gilbert v. Finch* (N. Y.) supra.

<sup>25</sup> A statute providing that all receipts, releases, and discharges in writing, whether of a debt of record or a contract under seal, or otherwise, shall have effect according to the intention of the parties thereto, does not have reference to actions ex delicto, but is confined to actions ex contractu. *Smith v. Dixie Park & Amusement Co.* (1913) 128 Tenn. 112, 157 S. W. 900.

<sup>26</sup> *Home Teleph. Co. v. Fields* (1907) 150 Ala. 306, 43 So. 711. And see *Thompson v. Nashville, C. & St. L. R. Co.* (1909) 160 Ala. 590, 49 So. 340, infra, note 30.

<sup>27</sup> *German American Coffee Co. v. O'Neil* (1918) 102 Misc. 165, 169 N. Y. Supp. 421. Two theories are advanced by the court in support of this decision. One is that the legal representatives of the deceased tort-feasor are not jointly liable with the surviving tort-feasor; the other theory rests upon a statute which, in providing for the survival of action for wrong done to property rights or interests of another, provides that an action may be brought by the person injured against the executors or administrators of the wrongdoer, "in the same manner and with the like effect, in all respects, as actions founded upon contracts." In connection with this statute, the court refers to another, relating to the settlement with or release of a joint debtor, which provides that such settlement or release "does not impair the creditor's right of action against any other joint debtor, or his right to take any proceeding against the latter, unless an intent to release or exonerate him appears affirmatively upon the face thereof." The court holds that a release given to the legal representatives of a deceased wrongdoer has the same effect as a release given to a joint debtor in cases arising under contract.

<sup>28</sup> *Edens v. Fletcher* (1908) 79 Kan. 139, 19 L.R.A.(N.S.) 618, 98 Pac. 784. The instrument involved in this case provided for a dismissal as to certain of the defendants in the action which had been begun by the

to the legal representatives of a deceased joint tort-feasor does not discharge the surviving tort-feasor, unless an intent to release the survivor is manifest from the release.<sup>27</sup>

An intention not to release the other joint tort-feasor is, of course, clearly evidenced by an express statement to that effect.<sup>28</sup> And the evidence of such an intention is clearer where, in addition to the express statement that no release of the other tort-feasor was intended, it appears that the consideration for the release was received in partial satisfaction, only, for the tort.<sup>29</sup> That the sum was

injured party, and acknowledged "full satisfaction and payment for all damages and injuries arising out of or in any manner connected with the causes of action in the petitions in these causes alleged against the defendant's released. The plaintiff hereby reserving, and not in any manner waiving, any rights or causes of action against any of the other defendants."

*Scott v. Kansas State Fair Assn.* (1918) 102 Kan. 653, 171 Pac. 634, holding that a reservation of the right to sue the other joint tort-feasor may be made orally.

The instrument involved in *Chicago & A. R. Co. v. Averill* (1905) 224 Ill. 516, 79 N. E. 654, is not set out in full in the opinion. It is referred to as a release, but not as one within the meaning of the rule that a release of one joint tort-feasor releases both, and is further stated to have expressly provided that the agreement should not be held or construed to be a release of any damages or right of action arising to the injured person, by reason of any matters at that date existing, and is treated by the court as a covenant not to sue.

*El Paso & S. W. R. Co. v. Darr* (1906) — Tex. Civ. App. —, 93 S. W. 166; *St. Louis, I. M. & S. R. Co. v. Bass* (1911) — Tex. Civ. App. —, 140 S. W. 860; *Carey v. Bilby* (1904) 63 C. C. A. 361, 129 Fed. 203.

Some cases seemingly give effect to the intention of the parties, only when there is a reservation of the right against the other tort-feasors. See *Gilbert v. Finch* (1903) 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133, supra, note 23. It has, however, been held in this state that the settlement of an action against one of two joint tort-feasors does not bar an action against the other, unless it is shown to have been made under circumstances which operate to discharge the other. *Walsh v. New York C. & H. R. R. Co.* (1912) 204 N. Y. 58, 37 L.R.A.(N.S.) 1137, 97 N. E. 408.

<sup>29</sup> *Home Teleph. Co. v. Fields* (1907) 150 Ala. 306, 43 So. 711, holding the other joint tort-feasor not released by a release discharging the joint tort-feasor with whom the settlement was made from any claims on account of the tort, but containing a



received in partial satisfaction, only, has been held sufficient to show an intention not to release the other joint tort-feasors, and therefore not to bar an action against them.<sup>30</sup> The fact that there has been only a partial satisfaction is emphasized in other cases, holding the other joint tort-feasors not released, and the intention of the parties not to release such other joint tort-feasors is minimized or not mentioned.<sup>31</sup>

In any event, recovery against the other tort-feasors is confined to the excess of the damages incurred, above the amount of the settlement;<sup>32</sup> if the

amount paid is equal to or greater than the damages suffered by the injured party, there is no right of recovery against the other tort-feasors.<sup>33</sup>

It has been held that an acknowledgment of "full payment and satisfaction of all claims and demands of every kind and description, against" the party released, followed by a statement that the injured party "does hereby release said Bartholomew (the tort-feasor) from all such claims and damages," is an acknowledgment of full satisfaction, and releases the other joint tort-feasor.<sup>34</sup>

As shown in the preceding subdivi-

provision that it was expressly understood and agreed that the payment was made only on account of any sum that the settlor might be entitled to recover for the death of her intestate, but was not intended as a satisfaction of the entire amount that she might be entitled to on account of said death, nor as a release of any claim that she might have against the other joint tort-feasor on account of the death of her intestate.

*Feighley v. Hoffman & Sons Mill. Co.* (1917) 100 Kan. 430, 165 Pac. 276, holding that the dismissal of a railway company, which was a defendant in an action for flooding land, did not release a milling company, which was sued jointly with the railway company for the same injury, where the instrument by which the railway company was dismissed expressly reserved any and all rights or causes of actions against any of the other defendants, and stated it to be the intention of the plaintiff to reserve his right to continue his suit and claim against all of the other defendants, and to proceed against them. It was understood that only a partial compensation of the damages was made by the railway company.

<sup>30</sup> *Thompson v. Nashville, C. & St. L. R. Co.* (1909) 160 Ala. 590, 49 So. 340, holding, under a statute making a release operate according to the intention of the parties, that whether a release which acknowledges the receipt of a sum of money from one tort-feasor and releases him from all damage and responsibility for the accident, without mentioning the other tort-feasor, operates to release the other tort-feasor, presents to the jury the question whether such sum was received in full satisfaction of the injury; if it was not so received, it is only, pro tanto, a bar to an action against the other wrongdoers.

*J. Rosenbaum Grain Co. v. Mitchell* (1912) — Tex. Civ. App. —, 142 S. W. 121.

<sup>31</sup> *Louisville & E. Mail Co. v. Barnes* (1904) 117 Ky. 860, 64 L.R.A. 574, 111 Am. St. Rep. 273, 79 S. W. 261. The court here states that, if the injured party had accepted the money "in satisfaction of his cause of action or claim for damages, then it would have operated as a release and a bar to any other proceeding against

appellant on account thereof. But it is shown by the proof, without contradiction, that it was accepted as only part satisfaction, and a release of the Marsden Company, but not in satisfaction of his cause of action and claim for damages. . . . The law ought not to be that a release of one tort-feasor, by his making a partial satisfaction for the wrong done, should operate as a release of the other wrongdoers."

*Covington v. Westbay* (1914) 156 Ky. 839, 162 S. W. 91.

In *Bailey v. Delta Electric Light, Power, & Mfg. Co.* (1905) 86 Miss. 634, 38 So. 354, a release given to one tort-feasor, upon receiving a partial satisfaction for the injury from him, is held not to release another tort-feasor. It is impossible to tell from the opinion whether the court treats the tort-feasors as joint tort-feasors or not. It is stated that the declaration states a cause of concurrent negligence, but the legal principles which fix liability upon the two tort-feasors joined in the suit are essentially different; that one was liable by reason of an alleged failure to discharge the duty which the master owed to his servants in providing a safe place to work; while the other was liable, if at all, for the negligent acts of its employees; that the negligence of one was passive and of the other, active, though the negligence of both concurred in inflicting the injury; and that, under this state of facts, the partial satisfaction for the injuries received by the servant made by the master, not intended to be a settlement in full and not received as, nor in fact being, full compensation, cannot inure to the other person whose concurrent negligence caused the injury complained of.

<sup>32</sup> *Covington v. Westbay* (1914) 156 Ky. 839, 162 S. W. 91; *Gaetjens v. New York* (1911) 145 App. Div. 640, 130 N. Y. Supp. 405; *St. Louis, I. M. & S. R. Co. v. Bass* (1911) — Tex. Civ. App. —, 140 S. W. 860; *J. Rosenbaum Grain Co. v. Mitchell* (1911) — Tex. Civ. App. —, 142 S. W. 121.

<sup>33</sup> *Button v. Louisville* (1909) — Ky. —, 118 S. W. 977.

<sup>34</sup> *Fennell v. Fechter* (1918) 181 Ky. 101, 203 S. W. 879.

sions, some courts give effect to the intention of the parties; hence if, in a settlement with one joint tort-feasor, there is a reservation of rights against the other joint tort-feasor, the latter is not released.<sup>35</sup> Other courts refuse to give effect to the intention of the parties; hence, hold that the other joint tort-feasor is released, notwithstanding the reservation of rights.<sup>36</sup>

Compare with *Edens v. Fletcher* (1908) 79 Kan. 139, 19 L.R.A.(N.S.) 618, 98 Pac. 784, *supra*, in which there was an acknowledgment of full satisfaction and payment for all damages and injuries arising out of or in any manner connected with the causes of action against the tort-feasor with whom the settlement was made. In the *Edens* Case, however, there was an express reservation of the right against any and all other defendants.

<sup>35</sup> See, *supra*, text to notes 23 et seq.

In *Wisblood v. Omaha Merchants Exp. & Transfer Co.* (1915) 98 Neb. 757, 154 N. W. 539, an action for injuries from a defective appliance used by a transfer company, employed to move a heavy machine from the factory of the injured person's employer, it is stated in the official headnote, that a settlement with the employer by the injured person, and a release which expressly reserved his right of action against the transfer company, did not defeat his action against the transfer company.

<sup>36</sup> See, *supra*, text to notes 12 et seq.

<sup>37</sup> *Dardanelle & R. Co. v. Brigham* (1911) 98 Ark. 169, 135 S. W. 869, holding that a settlement made by a plaintiff in an action against two railway companies for the wrongful death of her intestate, with one of the defendants, whereby the plaintiff agreed to prosecute her suit solely against the other company, and dismiss the action against the company with which the settlement was made, and that, if she failed to recover damages from the other company, the company making the settlement would, within a stated time, pay to the plaintiff a stated sum and the cost of the action, and that, in the event of a recovery from the other company of less than a stated sum, the company making the settlement would pay to the plaintiff a sum sufficient in amount to aggregate, with the amount of the judgment, such sum, was a covenant to sue, which did not release the company against which the plaintiff agreed to prosecute the action. It was further agreed in the contract that the company making the settlement would at once pay to the plaintiff a stated sum, which was to be credited on the total amount to be paid under the contract, should there be any further liability thereon.

*Texarkana Teleph. Co. v. Pemberton* (1908) 86 Ark. 329, 111 S. W. 257; *Chicago & A. R. Co. v. Averill* (1906) 224 Ill. 516, 79 N. E. 654; *Yeates v. Illinois C. R.*

#### IV. *Covenants not to sue, and releases construed as covenants.*

By the great weight of authority, a covenant not to sue one joint tort-feasor is held not to amount to a release, and therefore such an agreement is held not to discharge the other tort-feasors.<sup>37</sup> Such an instrument is held not to operate as a release of the tort-feasor to whom it is given, but such tort-feasor

*Co.* (1908) 145 Ill. App. 11, affirmed without reference to this point in (1909) 241 Ill. 205, 89 N. E. 338; *Vandalia R. Co. v. Nordhaus* (1911) 161 Ill. App. 110; *Balsley v. Hetzel* (1913) 182 Ill. App. 136; *Louisville Times Co. v. Lancaster* (1911) 142 Ky. 122, 133 S. W. 1155, holding this rule to apply, although the party released is the primary wrongdoer; *Matheson v. O'Kane* (1912) 211 Mass. 91, 39 L.R.A.(N.S.) 475, 97 N. E. 638, Ann. Cas. 1913B. 267; *Johnson v. Von Scholley* (1914) 218 Mass. 454, 106 N. E. 17 (instrument under seal); *White v. Beverly Bldg. Asso.* (1915) 221 Mass. 15, 108 N. E. 921; *Musolf v. Duluth Edison Electric Co.* (1909) 108 Minn. 369, 24 L.R.A.(N.S.) 451, 122 N. W. 499; *Himmelberger-Harrison Lumber Co. v. Dallas* (1912) 165 Mo. App. 49, 146 S. W. 95.

*Judd v. Walker* (1911) 158 Mo. App. 156, 138 S. W. 655, holding that an agreement with one of the defendants in an action admitting the receipt of a stated sum of money, in consideration of which "it is agreed that the case, so far as [this tort-feasor] is concerned, shall be dismissed, and that the further prosecution of the same be only against" the other tort-feasor, did not release the other tort-feasor.

*Hawkins v. Missouri P. R. Co.* (1914) 182 Mo. App. 323, 170 S. W. 469, 7 N. C. C. A. 1003.

*McDonald v. Goddard Grocery Co.* (1914) 184 Mo. App. 432, 171 S. W. 650, holding that an agreement between the plaintiff in an action and two of the defendants therein, in which it was stipulated and agreed that, so far as these defendants were concerned, "this cause shall be dismissed as to them, and the same shall not be further prosecuted as against" such defendants, and that the further prosecution of the case should be against the other defendant, did not release the other defendant, where it appeared that the sum in consideration of which it was given was not a full satisfaction for the injury.

*Pickett v. Wren* (1914) 187 Mo. App. 83, 174 S. W. 156, holding that an agreement between the plaintiff and one of the defendants, in an action brought for fraud and deceit, reciting that, in consideration of the payment of a stated sum of money by the said defendant to the plaintiff, "it is agreed that this case, so far as [the defendant with whom the settlement was made] is concerned, shall be dismissed, and that the further prosecution . . . shall

must resort to a suit for breach of the covenant, in case suit is brought against him.<sup>38</sup> Other cases hold that, to avoid circuity of action, a covenant not to sue may be pleaded as a defense to the prosecution of the suit against the person to whom it is given.<sup>39</sup> Some cases hold a covenant not to sue to be a release of the party in whose favor it is given, as distinguished from a release of the claim for the injuries; the injured party is held to have the right thus to release one joint tort-feasor without releasing the other.<sup>40</sup>

An injured person can, however, have be against" the other defendant, is a covenant not to sue, and does not release the other defendant.

Mason v. Stephens (1915) 168 N. C. 370, 84 S. E. 527; Slade v. Sherrod (1918) — N. C. —, 95 S. E. 557; Cincinnati, D. & T. Traction Co. v. Holbrook (1909) 32 Ohio C. C. 724.

Lisle v. Anderson (1916) — Okla. —, L.R.A.1917A, 128, 159 Pac. 278. The agreement here stated that, for a certain consideration, "I do agree and covenant that I shall never institute or prosecute any suit on account of my said injuries against said . . . or either of them."

Smith v. Dixie Park & Amusement Co. (1913) 128 Tenn. 112, 157 S. W. 900; Nashville Interurban R. Co. v. Gregory (1916) 137 Tenn. 422, 193 S. W. 1053; Robertson v. Trannell (1904) 98 Tex. 364, 83 S. W. 1098.

Kropidowski v. Pfister & V. Leather Co. (1912) 149 Wis. 421, 39 L.R.A.(N.S.) 509, 135 N. W. 839, holding that a release of and covenant not to sue one of several joint tort-feasors, given upon a valuable consideration which expressly states that the sum received is merely a part satisfaction of the claim, will not prevent a suit against the other wrongdoer. The instrument here involved was under seal.

<sup>38</sup> Chicago & A. R. Co. v. Averill (1906) 224 Ill. 516, 79 N. E. 654; Matheson v. O'Kane (1912) 211 Mass. 91, 39 L.R.A.(N.S.) 475, 97 N. E. 638, Ann. Cas. 1913B, 267; McDonald v. Goddard Grocery Co. (1914) 184 Mo. App. 432, 171 S. W. 650; Nashville Interurban R. Co. v. Gregory (Tenn.) supra (it is here stated that some of the cases allow the covenant to be pleaded in defense of the action to avoid circuity.)

<sup>39</sup> Judd v. Walker (1911) 158 Mo. App. 156, 138 S. W. 655.

<sup>40</sup> Parry Mfg. Co. v. Crull (1913) 56 Ind. App. 77, 101 N. E. 756.

<sup>41</sup> Parry Mfg. Co. v. Crull (Ind.) supra. The instrument given in this case, after reciting the facts of the injury and that a settlement was desired, "but in such way that such settlement shall not impair or affect the claim of said Crull against any person or corporation other than said railroad company, for negligently causing or helping to cause the said injury," recites

but one satisfaction for his injuries; the amount paid to the person in whose favor the covenant not to sue is given will be regarded as a satisfaction, pro tanto, as to the joint tort-feasors.<sup>41</sup> But a contrary position has seemingly been taken.<sup>42</sup>

The view has been taken that a joint tort-feasor is released by a settlement with another tort-feasor, in which an instrument was given, covenanting not to sue the tort-feasor with whom the settlement was made.<sup>43</sup>

A question of considerable importance,

the receipt of a stated sum of money, and contains the agreement that the injured party will never "sue or bring any action to be brought against said . . . railway company, on account of injuries and damage to him occasioned by or growing out of the accident above described." It is further stated in the instrument that the injured party had demanded compensation for the injuries in a sum greater than that paid. The court states that it was not shown that the injured party's claim for his injuries had been fully paid and satisfied; that, if it had, there could be no second satisfaction; but, it being expressly agreed that the amount paid was only a partial satisfaction, the other joint tort-feasors were not relieved as to the residue of the damage.

Judd v. Walker (1911) 158 Mo. App. 156, 138 S. W. 655; Himmelberger-Harrison Lumber Co. v. Dallas (1912) 165 Mo. App. 49, 146 S. W. 95.

<sup>42</sup> In Nashville Interurban R. Co. v. Gregory (Tenn.) supra, it was insisted, for the other tort-feasor, that any recovery obtained against it should be credited with the amount the plaintiff below received from the other tort-feasor, in consideration for the covenant not to sue. The court, in denying this release, stated that "inasmuch as such a covenant can only be pleaded by the covenantee by way of set-off or recoupment, and is not a satisfaction of the claim for damages, it is difficult to understand how it could be available at all to another tort-feasor, either to bar the suit against him or to reduce the recovery had against him. He has no semblance of right to a cross action."

<sup>43</sup> Smith v. Roydhouse, A. & Co. (1914) 244 Pa. 474, 90 Atl. 919. There is not a full discussion in this case. The court relies upon the earlier case of Peterson v. Wiggins (1911) 230 Pa. 631, 79 Atl. 767 (see note 8, supra), a case involving a release, thus indicating that no distinction is made between a covenant not to sue and a release. It does not appear in the Smith Case whether the amount received was in full satisfaction for the injury; if it was, the case, of course, falls within the rule of the foregoing cases. It seems, however, as above stated, that the court makes no distinction between a release and a cove-

in this connection, arises over what is a covenant not to sue. Some courts have treated a release, in which there is a reservation of rights against the other tort-feasors, as a covenant not to sue.<sup>44</sup> This anomalous theory seems to have been adopted on the assumption that, if the instrument given upon the settlement with one tort-feasor be called a "release," its effect will be to discharge the other joint tort-feasor; but, if it be called "a covenant not to sue," it need not necessarily result in a discharge. It is apparent that the name given the instrument by the court cannot change its character. If, in terms, such instrument releases the tort-feasor with whom the settlement is made, it cannot, consistently with the use of language, be called a covenant not to sue; yet this is precisely what has been done. Instead of calling the instrument what its terms indelibly stamp it to be, viz., a release, and holding that it will be given effect according to the intention of the parties the foregoing courts have confused the question by calling it a covenant not to sue. In a Connecticut case,<sup>45</sup> the majority opinion concludes that "if the intent of the parties to the release is to be effectuated, and justice accomplished, these instruments must be given the legal effect, consonant with the intent of the parties, of covenants not to sue, . . . and not of releases, within the meaning and intent of the rule under discussion." Justice Wheeler, in an opinion concurring in the

result, but not in the reasoning, criticizes this interpretation of the instrument in question, and states that, by such an interpretation, "an instrument which in terms, so plain that all may read, is a straight release," is construed "to be a covenant not to sue, . . . because at the end of the release is a reservation of the rights of the releasor to sue any other party." Justice Wheeler then states that, in order to avoid the consequences of the release of the one joint tort-feasor for a small sum, for a serious injury, the majority opinion construes the instrument to be what, manifestly, the parties never intended it to be, namely, a covenant not to sue; and thus the court avoids the application of this harsh rule where the instrument contains a reservation of the right to sue other joint tort-feasors; but in all other cases, where there is a release without the reservation, according to the majority opinion, the rule applies. and action against other joint tort-feasors is barred, even though satisfaction had not been had for the injury. Justice Wheeler is of the opinion that the rule itself should be changed, rather than modified by exceptions which are sustained by a forced construction of men's agreements.

Other courts, in dealing with instruments which, in form, are covenants not to sue, have laid down certain tests or indicia of such covenants. It has been stated that "the reservation of the right to sue other joint tort-feasors is obvious-

nant not to sue. In *Smith v. Roydhouse, A. & Co. (Pa.)* supra, the agreement provided that, in consideration of a stated sum of money, "I do hereby agree to bring no suit against . . . company for or on account of the injuries received by me, . . . and I do further covenant and agree to save harmless the said . . . company from any and all loss growing out of the said accident and injury to me," and was signed and sealed by the injured party.

<sup>44</sup> *Dwy v. Connecticut Co. (1914)* 89 Conn. 74, L.R.A.1915E, 800, 92 Atl. 883; *Gilbert v. Finch (1903)* 173 N. Y. 455, 61 L.R.A. 807, 93 Am. St. Rep. 623, 66 N. E. 133; *Carey v. Bilby (1904)* 63 C. C. A. 361, 129 Fed. 203.

In *Kropidowski v. Pfister & V. Leather Co. (1912)* 149 Wis. 421, 39 L.R.A.(N.S.) 509, 135 N. W. 839, the instrument, which was, in that case, treated as a covenant not to sue, acknowledged the receipt from the tort-feasor with whom the settlement was made of a stated sum of money, in consideration of which the instrument recited that "I hereby release and forever discharge said . . . company . . . of and from any and all actions, claims, and demands against said . . . company," by

reason of the accident, following which there was the agreement that "I hereby covenant and agree with said . . . company that, in consideration of the payment of said sums, I will not begin or prosecute any action against said . . . company on account of said accident or injuries." It then contained an express statement that the sums so received were not an accord and satisfaction for the whole injury suffered, but only as part satisfaction thereof.

An instrument reciting the receipt of a stated sum of money, "in full compromise, payment, discharge, accord and satisfaction of and from any and all claims and demands which I . . . have against said Pensacola Electric Company, its employees, officers, or agents, for or on account" of the injury, and reciting that "this release shall not release (the joint tort-feasor) from liability for said injuries, and said Allen reserves the right to sue [the joint tort-feasor] therefor," is held to be a release, and not a covenant not to sue, in *Louisville & N. R. Co. v. Allen (1914)* 67 Fla. 257, L.R.A.1915C, 20, 65 So. 8.

<sup>45</sup> *Dwy v. Connecticut Co. (Conn.)* supra.

ly necessary to a covenant not to sue."<sup>46</sup> Again, it has been stated that the "indicia of a covenant not to sue may be said to be: "No intention on the part of the injured person to give a discharge of the cause of action, or any part thereof, but merely to treat in respect of not suing thereon (and this seems to be the prime differentiating attribute); full compensation for his injuries not received, but only partial satisfaction; and a reservation of the right to sue the other wrongdoer."<sup>47</sup>

The fact that the injured person has, in the instrument, agreed to hold the tort-feasor, with whom the settlement is made, harmless from any and all claims or liabilities by reason of said accident, does not prevent the instrument from being regarded as a covenant not to sue.<sup>48</sup>

#### V. Accord and satisfaction.

An accord and satisfaction by one joint tort-feasor is held to be a discharge

of all.<sup>49</sup> Payment and acceptance of a sum of money in satisfaction of an unliquidated demand is a good accord and satisfaction.<sup>50</sup> But an accord without satisfaction does not release the other joint tort-feasor.<sup>51</sup>

#### VI. Dismissal or entry of *nolle prosequi* as to part.

The discontinuance, as to one tort-feasor, of an action brought against several tort-feasors, does not release the others.<sup>52</sup>

#### VII. Release to or satisfaction by one not in fact liable.

This question has been discussed in the notes to *Abb. v. Northern P. R. Co.* 58 L.R.A. 293; *Snyder v. Mutual Teleph. Co.* 14 L.R.A.(N.S.) 322, and *Randall v. Gerrick*, L.R.A.1918D, 179.

<sup>46</sup> *Musolf v. Duluth Edison Electric Co.* (1909) 108 Minn. 369, 24 L.R.A.(N.S.) 451, 122 N. W. 499.

<sup>47</sup> *Smith v. Dixie Park & Amusement Co.* (1913) 128 Tenn. 112, 157 S. W. 900. The court in this case was dealing with an instrument in which the injured party, in consideration of the sum of money therein mentioned, expressly agreed and covenanted "to dismiss and not further prosecute my suit now pending against it in the circuit court of . . . county, and I further agree, for myself, my heirs, and personal representatives, not to reinstitute said suit or prosecute any other suit against said . . . company, by reason of the injuries above referred to, . . . and I agree to hold harmless said . . . company for any and all claims or liabilities against it, by reason of said accident." And it was expressly stated not to be intended to be a release of any claim or action against the other joint tort-feasor.

<sup>48</sup> *Smith v. Dixie Park & Amusement Co.* (Tenn.) supra; *Robertson v. Trammell* (1904) 98 Tex. 364, 83 S. W. 1098.

See *Smith v. Roydhouse, A. & Co.* (1914) 244 Pa. 474, 90 Atl. 919, supra, note 44.

<sup>49</sup> *Wallner v. Chicago Consol. Traction Co.* (1910) 245 Ill. 148, 91 N. E. 1053; *Gore v. Henrotin* (1911) 165 Ill. App. 222.

<sup>50</sup> *Wallner v. Chicago Consol. Traction Co.* (Ill.) supra.

<sup>51</sup> *White v. Beverly Bldg. Asso.* (1915) 221 Mass. 15, 108 N. E. 921.

<sup>52</sup> *Feighley v. C. Hoffman & Son Mill Co.* (1917) 100 Kan. 430, 165 Pac. 276; *Matheson v. O'Kane* (1912) 211 Mass. 91, 39 L.R.A.(N.S.) 475, 97 N. E. 638, Ann. Cas. 1913B, 267.

L.R.A.1918F.

The dismissal of an action brought against one who is assumed to be a joint tort-feasor with another, against whom a separate action had been brought, upon an entry of "neither party; no further suit to be brought for the same cause of action," is held, in *White v. Beverly Bldg. Asso.* (Mass.) supra, not to be a release of the defendant in the other action. The court states that the entry of "neither party" in an action does not indicate that the cause has been adjudicated; that it means nothing more than that neither party appears to prosecute or defend the action, and is equivalent to a nonsuit and default by consent of the parties, after which no judgment can be rendered by the court.

The understanding that an action against a tort-feasor is to be dismissed does not constitute a release. *Nagle v. Hake* (1904) 123 Wis. 256, 101 N. W. 409, 17 Am. Neg. Rep. 393.

In *Louisville & E. Mail Co. v. Barnes* (1904) 117 Ky. 860, 64 L.R.A. 574, 111 Am. St. Rep. 273, 79 S. W. 261, a settlement was made with one of two defendants, but the action was allowed to proceed to judgment, whereupon the amount of the settlement was applied in reduction of the judgment. The court states that there was an understanding between the parties, before the trial, that the amount was to be offered and accepted, and the party with whom settlement was made was to be released and the case dismissed against it, and that the dismissal was in conformity with this understanding. See case supra, note 31.

And see *Judd v. Walker* (1911) 168 Mo. App. 156, 138 S. W. 655, supra, note 38.

W. A. E.

## MASSACHUSETTS SUPREME JUDICIAL COURT.

HENNEBIQUE CONSTRUCTION COMPANY

v.

BOSTON COLD STORAGE &amp; TERMINAL COMPANY.

(230 Mass. 456, 119 N. E. 948.)

**Contract — building — final certificate — what is.**

1. Under a building contract making all payments due when certificates for the sum are issued and providing that no certificate except the final certificate shall be conclusive evidence of performance of the contract, a letter from the architect to the contractor, stating that the building is accepted subject to the provisions that certain specified items shall be attended to, and failing to fix the amount due, is not the final certificate provided for by the contract.

*For other cases, see Contracts, IV. d, in Dig. 1-52 N. S.*

**Trial — question for jury — construction of contract.**

2. The court and not the jury must determine whether or not an architect's letter accepting a building is a final certificate, within the meaning of the building contract.

*For other cases, see Trial, II. c, 6, in Dig. 1-52 N. S.*

(May 31, 1918.)

**E**XCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover an amount alleged to be due on a building contract, which resulted in a verdict in plaintiff's favor. Sustained.

The material portions of the contract upon which the suit is founded were as follows:

Article IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work and materials shall be the sum of one hundred eighteen thousand one hundred and eighty (\$118,180) dollars, subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the owner to the contractor as hereinafter set forth, in current funds, and only upon certificates of the architects as follows:

First, not later than forty-five days after the contractor shall begin work upon the said building for the purpose of carrying out the terms of this contract, which date shall be certified to by the architects, the owner

shall pay to the contractor 85 per cent of all work completed and all materials permanently put in place, and a sum ascertained in the same manner at the end of every thirty days thereafter until the completion of the said building. Forty-five days after the completion of the said building, in case all of the other terms of this contract have been complied with, the balance of said sum shall be paid by the owner to the contractor; but the contractor hereby agrees with the owner that it will provide the sum of forty-two thousand one hundred and eighty-one (\$42,181) dollars by the sale by it at par of forty-four thousand four hundred (\$44,400) dollars, at the par value, of the preferred stock of the owner, and the owner agrees to pay to the contractor for the sale of the said stock for it the sum of \$5 per share on the said stock sold by the contractor, and said funds are to be furnished as aforesaid by the contractor to the owner, so that one third at least of the cash payments called for above at the times the same become due and payable shall be paid by the money so furnished by the contractor, and the balance of the said forty-two thousand one hundred and eighty-one (\$42,181) dollars shall be furnished so that the payment to be made forty-five days after the completion of the contract shall consist of the said balance, plus cash furnished by the owner from other sources.

The final payment shall be made within forty-five days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued.

If at any time there shall be evidence of any lien or claim for which, if established, the owner of the said premises might become liable, and which is chargeable to the contractor, the owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify it against such lien or claim. Should there prove to be any such claim after all payments are made, the contractor shall refund to the owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the contractor's default.

Article X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

**Note.** — As to sufficiency of conditional or qualified architect's certificate, see annotation following this case, post, 377.

Article XII. In case the owner and contractor fail to agree in relation to matters of payment, allowance or loss referred to in articles III. or VIII. of this contract, or should either of them dissent from the decision of the architects referred to in article VII. of this contract, which dissent shall have been filed in writing with the architects within ten days of the announcement of such decision, then the matter shall be referred to a board of arbitration to consist of one person selected by the owner, and one person selected by the contractor, these two to select a third. The decision of any two of this board shall be final and binding on both parties hereto. Each party hereto shall pay one half of the expense of such reference.

On March 16, 1912, the architect wrote to the defendant a letter reading as follows: "We inclose a letter which we propose to send to the Hennebique Construction Company, in accordance with our conversation of yesterday. Will you kindly look over this letter and see if it meets with your understanding of the matter, and return to us with whatever comments you have to make on it."

The letter referred to therein as inclosed was dated March 16, 1912, was addressed to the plaintiff, and read as follows:

"We beg to advise you that the building on New Street, which you have just completed for the Boston Cold Storage & Terminal Company, is accepted, subject, however, to the provision that the various items mentioned in our conversation with your Mr. Baffrey and with Mr. Freeman are satisfactorily attended to at once. These items are in general as follows:

"Cleaning the tile work.

"Fixing sliding doors in rear of building on first floor.

"Fixing the ventilators in windows and repairing putty where it has run.

"Cleaning windows and exterior walls.

"Repairing casings around fire escape doors.

"Suitable weather strips at bottoms of fire escape doors."

Mr. Alonzo E. Yont, for defendant:

The court should have ruled on the construction of the letter presented as a certificate under the terms of the contract.

Palmer v. Clark, 106 Mass. 373.

The final certificate should contain a certification that the terms of the contract have been complied with, together with a computation of the balance due.

Roy v. Boteler, 40 Mo. App. 213; Barney v. Giles, 120 Ill. 154, 11 N. E. 208; Snaith v. Smith, 7 Misc. 37, 27 N. Y. Supp. 380; Tilden v. Buffalo Office Bldg. Co. 27 App.

Div. 510, 50 N. Y. Supp. 511; Wyckoff v. Meyers, 44 N. Y. 143; Morgan v. Birnie, 9 Bing. 672, 131 Eng. Reprint, 766, 3 Moore & S. 76; Norcross Bros. Co. v. Vose, 199 Mass. 81, 85 N. E. 468; Hathaway v. Stone, 215 Mass. 212, 102 N. E. 461; Beharrell v. Quimby, 102 Mass. 571, 39 N. E. 407; Norcross v. Wyman, 187 Mass. 25, 72 N. E. 347.

Mr. William C. Adams for plaintiff.

Braley, J., delivered the opinion of the court:

The record recites that the defendant's exceptions "are intended only to raise the question whether the letter from the architects to the plaintiff of March 16, 1912, could be found to be a final certificate under the terms of the contract, and whether it precludes the defendant from recouping for damages." The auditor found that the defendant had suffered damages because the building had not been constructed in all details as required by the contract, but he apparently did not make any assessment, because he ruled that "the defendant was precluded by the final certificate from recoupment for such damages." The tenth article reads: "It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials."

The uncontradicted evidence, to the admission of which neither party objected, shows that, during construction, many changes were made, and "extras" ordered, which were the subject of discussion between the architects and the plaintiff, and that during the period preceding the date of the action the amounts in dispute had not been settled, or referred to arbitration as provided for in article XII. The defendant, however, occupied the building at some time previous to the date of a letter that one of the architects wrote, inclosing a letter which he proposed sending to the plaintiff, to which the defendant replied, Your "letter of acceptance" to the plaintiff "is correct in accordance with the understanding, . . ." and thereupon the letter was forwarded which is relied on as being the final certificate required under articles IX. and X. The material portions state that "the building . . . which you have just completed for the . . . company is accepted subject, however, to the provision that the various items mentioned in our conversation with your Mr. Baffrey and with Mr. Freeman are satisfactorily attended to at once."

The items are then enumerated, and before bringing suit the plaintiff, as the defendant concedes, complied with these requirements. But, notwithstanding the letter, the correspondence thereafter between the defendant and the plaintiff, and between the plaintiff and the architects, unequivocally shows the defendant as constantly asserting that the contract had not been fully performed in many important details, to remedy which it had been or would be put to large expenditures, while the plaintiff, inclosing a statement of its account, asked the architects "to go over this statement, and let us know if you are able to issue the final certificate according to same, or if any adjustment should be made, to urge upon a prompt action to settle the controversy." The architect, who, during the correspondence, apparently acted for the firm of architects named in the contract of which he was a member, was a witness at the trial, and upon being asked, "Up to the time you received this letter you had not made out any architect's certificate, or any other statement beyond the letter, . . . and you had not in any manner adjusted or determined on the amount of the balance due the plaintiff under the contract, so that the exact figures could be put in the form of a certificate?" replied, "I don't think that, under the contract, the way the parties looked at it, we could. . . . I think we took the stand that our letter of March 16th was sufficient."

While it is obvious that neither party understood that the letter had ended their difficulties leaving nothing more to be done, and that the final payment had become due, the letter, which, at most, is only a qualified or conditional acceptance of the building, does not specify the amount of the payment, or furnish any data from which it could be computed. By article IX., "the final payment shall be made within forty-five days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued."

The forty-five days do not begin to run until the final certificate of payment is furnished, and it is settled by *Norcross Bros. Co. v. Vose*, 199 Mass. 81, 85 N. E. 468, under a contract the same in form, that a letter containing acceptance of the building upon condition that the contractor is to remedy certain defects of workmanship or of materials, is not, of itself, a final certificate which can be treated as conclusive evidence of performance. Nor does the contract read that the final payment is to be made when the architects have accepted the building, and that such acceptance shall be conclusive upon the

parties. If it did, a statement signed by them, showing acceptance, might be sufficient. *Leverone v. Arancio*, 179 Mass. 439, 442, 61 N. E. 45; *Glacius v. Black*, 50 N. Y. 145, 150, 10 Am. Rep. 449. The architects also, even if they were not to take evidence, are empowered and required to act as if they were arbitrators, and, the final payment having been made dependent on their determination as manifested by the certificate, there can be no conclusive evidence entitling the plaintiff to the balance of the contract price, less such deductions, if any, as they may determine, until this duty has been performed. *Loftus v. Jorjorian*, 194 Mass. 165, 80 N. E. 235; *Gilmore v. Courtney*, 158 Ill. 432, 41 N. E. 1023.

The parties, under the express terms of the contract, were not required to make adjustments by which all disputes should be settled and the amount of the final payment fixed. It is implied from the instrument as a whole, that, as the result of the architects' honest judgment, the certificate or decision, which is to be final, shall also be complete. *Chiam v. Schipper*, 51 N. J. L. 1, 13, 2 L.R.A. 544, 14 Am. St. Rep. 668, 16 Atl. 316; *Hudson v. McCartney*, 33 Wis. 331, 345. The contractor is entitled to know how much is finally coming to him, concerning which, as the plaintiff contends, there can be no further controversy, and the owner has the right to be informed of the amount he has to pay within the time prescribed, so that he can make the necessary arrangements, and avoid being subjected to the costs and annoyance of litigation, to which he may have no defense. *Beharrell v. Quimby*, 162 Mass. 571, 39 N. E. 407; *Hathaway v. Stone*, 215 Mass. 212, 102 N. E. 461; *Wilson v. Borden*, 68 N. J. L. 627, 54 Atl. 815; *Sharpe v. San Paulo R. Co.* L. R. 8 Ch. 597, 609, 29 L. T. N. S. 9.

The architects also, under article III., are, in the first instance, to determine what sums should be allowed for alterations, as well as whether any deductions are to be made for imperfect or incompleting work or unsuitable materials, and if neither party dissented their decision is final. *Norcross v. Wyman*, 187 Mass. 25, 72 N. E. 347; *Herbert v. Dewey*, 191 Mass. 403, 77 N. E. 822. It is plain that, material alterations having been made, it was the duty of the architects to act as required. But the record shows that when the action was begun the amounts claimed by the plaintiff for changes or alterations, or "extras" ordered, had neither been approved by the architects or submitted to arbitration under article XII, as suggested by them. The provision as to alterations did not relieve the plaintiff from its agreement to perform the work according to the plans and specifications, as they had



been modified. It would seem to be reasonably clear that, under this condition of affairs, the defendant ought not to be deprived of the protection of the contract.

A certificate under article X. means and was intended by the parties to mean a statement in writing authenticated by the signature of the architects that the final payment, naming the amount, is payable to the plaintiff under the terms of the contract. *Wyckoff v. Meyers*, 44 N. Y. 143, 144; *St. John's College v. Aetna Indemnity Co.* 201 N. Y. 335, 340, 94 N. E. 994. It was such a certificate, given under a contract which in all essential particulars corresponded with the contract in question, which was adjudged to be conclusive in *Hathaway v. Stone*, 215 Mass. 212, 102 N. E. 461. The construction of the contract, and of the letter when read in connection with the contract, was a question for the court, and not for the jury to whom it was submitted. The plaintiff has offered as a final

certificate only the letter, which as previously said is not in form or substance the final certificate called for under the contract. We are therefore of opinion that the defendant's second request, that "article IX. of the contract requires an architect's final certificate," should have been given, and the instructions under which the jury were permitted to find that the letter of acceptance was such a certificate were erroneous. It may be added that, while the letter of acceptance was sent with its assent, the question how far, if at all, the letter operated as a waiver by the defendant of the right to insist upon the plaintiff's procuring a certificate, as a condition precedent to maintaining an action for the unpaid balance of the contract price, and whether, if a waiver were found, the defendant can recoup for defective workmanship or materials, are questions not raised by the record, and not argued by counsel. Exceptions sustained.

### Annotation—Sufficiency of conditional or qualified architect's certificate.

It will be seen that it is held in *HENNEBIQUE CONSTR. CO. v. BOSTON COLD STORAGE & TERMINAL CO.* ante, 374, that the acceptance of a building, upon condition that the contractor is to remedy certain defects in workmanship or of materials, is not in itself a final certificate, which can be treated as conclusive evidence of performance.

This is in accord with principle and authority.

Thus, it was held that it was not a final certificate, where the architect returned a bill of the contractor, deducting a few dollars in pencil, and then wrote on the face of the bill, "Approved for [the amount less the pencil reduction] less the sum of allowance agreed upon," and the architect returned this paper to the contractor with a letter, showing that he should place the allowances at several thousand dollars, *Norcross Bros. Co. v. Vose* (1908) 199 Mass. 81, 85 N. E. 468, where the contract provided that "no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials."

So, a contract, whose last payment is to be made "when all the houses were finished completely according to the specification, and when the owner should receive from the architect his certificate

that the work was fully and completely finished according to the specification," is not satisfied by a certificate signed by the architect, stating that "I, therefore, in duty bound pronounce the said houses finished, and if not literally so in every punctilio, they are done in that manner that, was I the owner, I would accept them for myself; still, as to extra wall and work omitted that is embraced in specification, also as to their being finished at a stated period of time, is not in my province to express an opinion. I, therefore, on the work and materials taken as a whole, certify that I am satisfied, and hope the parties concerned will also be satisfied that I have acted conscientiously." *Smith v. Briggs* (1846) 3 Denio (N. Y.) 73.

So, where 20 per cent of the work was to be paid for on the final certificate of the superintendent, on completion, the following was not considered to be such final certificate, within the terms of the contract: "I certify that . . . in my opinion Mr. Ludlam has furnished all the wood material under contract for Wilson's house according to the specifications, except small matters which I will adjust under the terms of the contract, and Mr. Ludlam need not furnish anything further," particularly where the matters unsettled were more than half the builder's claim; but it was held, under the circumstances of the case, that the contractor's certificate

was waived or dispensed with. *Ludlam v. Wilson* (1901) 2 Ont. L. Rep. 549.

In *Strauss v. Hanover Realty & Constr. Co.* (1909) 133 App. Div. 743, 118 N. Y. Supp. 193, it was held that letters by the architect to the contractor, one requiring certain things to be done, the other stating that all that he had requested had been done except one certain thing, did not amount to a final certificate within the meaning of the contract, as they did not purport to be certificates, nor did they indicate that after a final and thorough examination the work had been found satisfactory and according to the terms of the contract.

In *Davidson v. Francis* (1902) 14 Manitoba L. R. 141, the contract provided that the architect should certify that the work was completed to his satisfaction, and he certified that the builders were entitled to a certain sum in full, "less \$4.25, which amount may be held back till the items of work in the following list are done," specifying the items, and adding: "Note, I consider the guaranty in specification will cover any leak in roof," and he certified later that the small items amounting to \$4.25 had now been attended to, and he therefore certified that the builders were entitled to the sum which was specified in the first certificate. The first certificate had annexed to it and forming part of it a statement, showing how the total due was arrived at, which included "deduction for bad floor, etc., \$50." The court said: "The two certificates must be read together, and, being so read, they show the troubles as to the roof, floor, and shelving still unremedied. As to these items, therefore, it cannot be implied that the architect has certified their completion to his satisfaction."

It appears to have been held in *Bloomington Hotel Co. v. Garthwait* (1907) 227 Ill. 633, 81 N. E. 714, though the case is not entirely clear, that, where an architect's certificate is given with the understanding of the parties that certain work is to be done by the contractor, it will not be conclusive as against the owner.

But the performance of work mentioned in a conditional certificate may result in an acceptance. Thus, where the contract provided that the contractor should procure all necessary certificates regarding his payments, and the architect, by his certificate, stated that when some slight additions were made to the work it would be acceptable, and

the evidence tended to show that the work had been done, and the architect, on being so notified, made no objections, the court considered that these facts showed a sufficient acceptance of the work to authorize the builders to maintain an action to recover the balance, if any, to which they might be entitled under the contract. *Mills v. Weeks* (1859) 21 Ill. 561.

Of course, where a contractor signed an indorsement on a certificate, to the effect that the amount of that certificate, which was paid to him, was received "on the express understanding the defective plastering would be made perfectly satisfactory before any further payment was made," he was bound by that contract. *Formann v. Walsh* (1897) 97 Wis. 356, 65 Am. St. Rep. 125, 72 N. W. 881.

And where, before the contract was entirely completed, the architect gave a certificate as to a part payment, before it was due, with a letter stating: "This certificate is given with the understanding that you are to let [the owner] have immediate possession of the house," it was held that the contractor could not recover upon the certificate, where it appeared that he had not let the owner have immediate possession. *Dobey v. Watson* (1913) 97 S. C. 349, 81 S. E. 658.

There are a number of cases holding that incomplete or qualified certificates or mere orders are not sufficient.

Thus, the bill of charges checked by the architect and sent to the owner is not a certificate that the whole of the building and work contracted for has been executed and completed to the architect's satisfaction. *Morgan v. Mirney* (1823) 9 Bing. 672, 131 Eng. Reprint, 766, 3 Moore & S. 76.

So, it was held that a mere order, signed by the architect, addressed to the owner, requesting her to pay the builder a certain sum "to apply on account of your building," was not a certificate within the terms of a contract for payments in instalments, whereby the owner agreed to pay money upon a certificate, signed by the architect, "to the effect that the work is done in strict accordance with the drawings and specifications, and that he considers the payment properly due." *Michaelis v. Wolf* (1891) 136 Ill. 68, 26 N. E. 384.

So, it was held that a statement by the architect, showing the balance "due by plaintiff," but nothing more, was insufficient where the contract required the certificate to show that the whole job had been completed and accepted

by the architect, that his final estimate was of the amount due on the contract, and that the work had been performed agreeably to the drawings and specifications, under his direction and to his satisfaction (evidently, the court meant to say "due by defendant"). *Roy v. Boteler* (1890) 40 Mo. App. 213.

In *Barney v. Giles* (1887) 120 Ill. 154, 11 N. E. 206, it was held that a certificate of the architect, certifying that the contractors are entitled to a payment of a certain sum by the terms of the contract, and having below the signature of the architect the words, "Remarks;—work has been measured at building," was not a final certificate within the terms of the contract, requiring "the presentation of the architect's certificate, certifying that the contract has been well and truly performed, and accepted by him, and that all damages or allowances which should be paid or made by the parties of the second part, have been deducted from the amount of the said final certificate."

Where a contract provided that payment would be made on monthly certificates made by the architect, 85 per cent to be paid and the other 15 per cent to be payable thirty days after the work was fully completed and accepted by the owner in writing, it was held that the owner was not concluded by certificates of the architect stating: "This certificate is an expression of the architect's opinion and shall at no time be considered as a legal obligation on his part; neither shall same be considered as an acceptance of any work done or materials furnished." *Wacker v. Essex* (1918) — Ind. App. —, 119 N. E. 466.

Where, by the contract, the balance was to be due in two months after the architect should have expressed his satisfaction with the completion of the work, and the architect, by letter, expressed his satisfaction with the work, but did not give the final certificate until more than a year afterward, it was held that an action would not lie until after two months subsequent to the final certificate. *Coleman v. Gittins* (1884) 1 Times L. R. (Eng.) 8.

Where the work was to be done to the satisfaction of the engineer it was held that the certificate was not a final one, which set forth debits and credits as if all the work had been performed, but contained this charge against the builder: "Retained, pending repairs, \$500," and, after making this charge, the balance was brought out in favor of the plaintiffs of \$6,807.66, and then follows:

"We hereby certify that the above statement, amounting to six thousand six hundred and seven <sup>94</sup>/<sub>100</sub> dollars is correct and has not been previously certified." There was no statement that the work had been fully executed or completed, and nothing respecting the satisfaction of the engineer, in the certificate, which started out as follows: "For work done by Messrs. Merriam & Symington up to 31st July, 1910." *Merriam v. Public Parks Bd.* (1912) — *Manitoba* —, 2 D. L. R. 702.

Where, under a contract, payment was to be made in three instalments, the second payment "when all is completed," and the last payment thirty days after the work is completed, it was provided that "no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, against any claim of the owner." No certificate was given for the first payment, but the second certificate provided: "This is to certify that Mr. Joseph R. Beharrell is entitled to \$500, being the second payment on the contract dated December 24th, '90, with Mr. E. R. Orcutt, for the erection of a dwelling house at South Lowell, Massachusetts." It was held that this certificate was not a final certificate within the meaning of the agreement. *Beharrell v. Quimby* (1894) 162 Mass. 572, 39 N. E. 407.

A progress certificate is not a waiver of a claim for damages for delay, because it authorizes payment of a sum which the owner would be entitled to set off against any such damages. *Cockshutt Plow Co. v. Alberta Bldg. Co.* (1910) 3 Alberta L. R. 503.

In some of the cases the certificates have been held sufficient in substance.

Thus, where the contract provided that the last instalment was to be paid "when all the work is completely finished, and certified to that effect by the architects," a certificate certifying that the last payment, specifying the amount, is due the contractors on your buildings . . . as per contract," was held to be, in substance, all that the contract required. *Wyckoff v. Meyers* (1870) 44 N. Y. 143.

So, a certificate is none the less a final certificate, because it recommends retaining, out of the several thousand dollars due, the sum of \$180 for putting a fourth coat of paint on six apartments in the building, which could not well be done on account of the same being occu-

pied by tenants of the owner. *Weeks v. Little* (1877) 15 Jones & S. (N. Y.) 1.

Where an architect, in May, certified to the fact that the contract was completed the last of February, and that the contractor was entitled to the final payment, amounting to a certain sum, "subject to such deduction for allowances for work omitted at the rates, as provided for in the contract, still to be submitted by the owner, as may be approved by me as architect," and also certified as to the amount of damages for the delay caused to the owner as provided for in the original contract, it was held that the first and third parts of the certificate were sufficient; assuming that the second part was insufficient, the contractor was not precluded from recovering the balance due upon the contract because he did not produce a further certificate, first, for the reason that he produced the only one he could, the only one the architect would give him; second, because the owner's failure to submit his claim to the architect caused the defect in it; third, because the owner's discharge of the architect prevented his further acting for and between the contracting parties, and granting a proper certificate. *Neidlinger v. Onward Constr. Co.* (1905) 107 App. Div. 398, 95 N. Y. Supp. 1148, affirmed in (1907) 188 N. Y. 572, 80 N. E. 1114.

Where the contract for a bridge provided that the last payment should not be made until the superintendent had furnished a certificate that the work had been completed in accordance with the terms of the contract, and the superintendent of the building of the bridge, which was to cost about \$16,000, wrote to the owners that the planking on the piers still remained to be finished, and could not be done until the river was much lower, that it should have been done in August of the preceding year, but that the contractor failed to do the work, and stated: "With this exception I am willing to accept the bridge as it stands. I should advise you to hold back about \$300, to insure the completion of the planking at such time as the state of water will admit of the work being properly done," it was held that this was substantially a final certificate, and that a certificate could not be refused if the work had been completed in substantial compliance with the contract, and what remained could not then be reasonably required to be done. *Washington Bridge Co. v. Land & River Improv. Co.* (1895) 12 Wash. 272, 40

Pac. 982, where, however, it was held that the certificate had been waived.

It seems to have been the theory of *Pashby v. Birmingham* (1856) 18 C. B. 2, 139 Eng. Reprint, 1262, that, when the balance due upon the whole contract was to be paid partly in three and partly in twelve months after the architect's certificate of final completion to his satisfaction the architect's certificate need not state the amount due, but the case is obscure.

Under a contract, providing that the contractor may, if he considers he has completed the work, notify the architect in writing to that effect, and the architect shall issue a final certificate that the work is completed and the last payment due under the contract, indicating the amount thereof, or stating in writing in what respect the work is incomplete, it was held that a certificate, showing the amount due after deducting an item for work not completed as authorized under the contract, need not contain the statement that the work was completed as required by the contract. *Brown v. Bannatyne School Dist.* (1912) — *Manitoba*, —, 2 D. L. R. 264.

In a case where there was a certain penalty of \$25 a day for certain specified delays, and the evidence showed that there were no such delays, it was held that remarks below the signature of the architect, indicating that the builder was to be charged with delay, were no part of the certificate. The certificate read that the contractor was "entitled to a final payment of \$517.62, by the terms of the contract." Under the signature of the architect was written the following: "Remarks: This contractor delayed the work of the building twelve days for which the contract provides a forfeiture of \$25 per day as liquidated damages." The court said: "We infer from the form of the certificate, and the fact that the appended statement was not formally incorporated in the certificate and a deduction made from the amount due and signed by the architect, that he did not construe the contract as giving him the power to make the deduction. But, however that may be, we do not think the appended remarks are a part of the certificate, and therefore there was no ground or basis for defendant in error to refuse to pay the amount of the face of the certificate on presentation thereof to it for payment." *Scott v. First Nat. Bank* (1909) 151 Ill. App. 561.

It may be noted that where the contract provides that the owner may

terminate the employment of the contractor, if the architects will certify that the refusal, neglect, or failure of the contractor to comply with the contract is sufficient ground for such action, a letter by the architect to the owner, complaining about the work and stating

that, "if you deem it advisable, we will forward to the contractor the formal notice to discontinue work which you have already sent us for the purpose," is not a sufficient certificate under the contract. *Wilson v. Borden* (1903) 68 N. J. L. 627, 54 Atl. 815. B. B. B.

# MICHIGAN SUPREME COURT.

GEORGE W. SICKLES

v.

FREDERICK SCHAEEN et al., Appts.

(— Mich. —, 168 N. W. 454.)

**Usury — tax in addition to interest.**

A stipulation in a mortgage requiring the mortgagor to pay taxes assessed on the mortgage, in addition to the highest rate of lawful interest, renders the contract usurious, although the mortgagee was a non-resident whose securities were not taxable in the state and the mortgagor has never been required to pay any taxes.

For other cases, see *Usury*, I. a, in *Dig.* 1-52 N. E.

(*Fellows, Kuhn, and Bird, JJ., dissent.*)

(July 18, 1918.)

**APPEAL** by defendants from a decree of the Circuit Court for Antrim County, in Chancery, in favor of plaintiff in a suit to foreclose a mortgage. Reversed.

The facts are stated in the opinion.

Mr. C. L. Dayton, for appellants:

Interest upon interest cannot be figured after the mortgage is due.

*McVicar v. Denison*, 81 Mich. 348, 45 N. W. 659.

Both the mortgages were usurious in that they required the mortgagors to pay 7 per cent interest and all taxes that might be assessed upon the mortgage.

*Rosen v. Rosen*, 159 Mich. 72, 134 Am. St. Rep. 713, 123 N. W. 559; *Union Trust Co. v. Radford*, 176 Mich. 50, 141 N. W. 1091; *Vandervelde v. Wilson*, 176 Mich. 185, 142 N. W. 553; *Houghteling v. Gogebic Lumber Co.* (*Stirling v. Gogebic Lumber Co.*) 165 Mich. 498, 35 L.R.A. (N.S.) 1106, 131 N. W. 109.

Recovery should be limited to the principal sum, less payments actually made, however designated at the time of payment. *Estey v. Capitol Invest. Bldg. & L. Asso.* 131 Mich. 502, 91 N. W. 753.

**Note.** — The question whether requiring the mortgagor to pay mortgage or recording tax constitutes usury is discussed in the annotation following this case, post, 383.

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Mr. Thomas D. Meggison, for appellee:

Neither of said mortgages was usurious.

*Howell v. Gordon*, 127 Mich. 517, 86 N. W. 1042; *Taggart v. Sanilac County*, 71 Mich. 20, 38 N. W. 639; *Stack v. Detour Lumber & Cedar Co.* 151 Mich. 21, 16 L.R.A. (N.S.) 616, 114 N. W. 876, 14 Ann. Cas. 112; *Union Trust Co. v. Radford*, 176 Mich. 63, 141 N. W. 1091; *Green v. Grant*, 134 Mich. 467, 96 N. W. 583; *Vandervelde v. Wilson*, 176 Mich. 188, 142 N. W. 553; *Rosen v. Rosen*, 159 Mich. 72, 134 Am. St. Rep. 713, 123 N. W. 559; *Continental Nat. Bank v. Fleming*, 170 Mich. 624, 134 N. W. 656.

**Ostrander, Ch. J., delivered the opinion of the court:**

Defendants gave their note, dated November 27, 1908, payable sixteen months after date to the order of plaintiff, for \$265, with interest at 7 per cent per annum. To secure payment they executed a mortgage upon land described as the southwest quarter of the northeast quarter of section 6, and south half of the southwest quarter of section 5, town 30 north of range 7 west, Antrim county, Michigan. Plaintiff was a nonresident of the state, and it is recited in the mortgage that he is of Seattle, Washington. The mortgage contains a covenant of the mortgagors to pay all taxes which shall be assessed upon the mortgage, whether as personal property or as an interest in real estate. The bill in this cause was filed August 17, 1914, to foreclose this mortgage, and it is charged therein that an examination of the records shows that *Lewis E. Sayre*, of Los Angeles, California, has or claims rights in the land "as a prior encumbrancer." Said Sayre is therefore named in the bill as a defendant. He entered an appearance by solicitor and before the hearing, stating in substance on said notice of appearance that Sayre had assigned his mortgage to plaintiff, and it was stipulated by the parties that an assignment of his said mortgage and the debt to plaintiff was duly made by his attorney in fact October 15, 1915, and recorded.

Answering the bill, defendants (jointly and severally) refer to the Sayre mortgage,

say that the loans were made to them by an agent and representative of both mortgagees, the said agent being the only one known personally to them in the transaction, that they have paid the agent interest on each mortgage, are ready and anxious to pay both mortgages, and ask the court to consider both mortgages and ascertain and declare the sum due on each and both. It was agreed that testimony should be taken with respect to both mortgages and the sums due upon them. There was no amendment of the bill, but, before the hearing was concluded, formal proof was made of an assignment of the Sayre mortgage to plaintiff.

The Sayre mortgage was given by defendant Frederick Schaen February 10, 1903, to secure his note for \$350, dated that day, due three years after date, payable to the order of Lewis E. Sayre, with interest at 7 per cent. The note was written upon or into a printed form which contained the printed words "after maturity." Over these words, but without erasing them, the words "per annum" were inserted with a typewriter, before the note was executed. The mortgage describes the south half of the southwest quarter of section 5 town 30 north of range 7 west, and describes no land on section 6.

The cause proceeded to a decree, dated October 11, 1916, and filed December 4, 1916, in which decree it is found that there is due on the Sayre mortgage \$433.32, which sum defendant Frederick Schaen is personally liable to pay, and due on the mortgage described in the bill \$408.20, which both defendants are liable personally to pay. In default of payment, the premises described in the joint mortgage to plaintiff are ordered sold, the decree being in the usual form.

The objections made in this court to the decree are stated in the appellants' brief as follows:

"(1) If the testimony introduced by the complainant be taken as true, still the amount found by the court as due upon the mortgages is in excess of the true amount.

"(2) The defendants claim: That both mortgages were usurious, inasmuch as they provided for the maximum rate of interest allowed under our statutes and provided that the mortgagor in the one instance, and the mortgagors in the other shall pay all taxes that might be assessed upon the mortgages. That by reason of usury the complainant is not entitled to interest.

"(3) That the defendants were entitled to certain payments that were not credited to them, and that the court found an

amount due in excess of the amount actually due.

"(4) That no decree should have been taken on the Sayre mortgage for interest until after the maturity of the mortgage, for the reason that the note itself did not draw interest until after maturity, and there was no allegation in any of the pleadings asking for a correction of the note.

"(5) The defendants claim that there were payments made upon the Sickles mortgage, that were credited on the Sayre mortgage, and that this worked an injustice to defendant Edward Schaen."

1. Following the United States rule, *McVicar v. Denison*, 81 Mich. 348, 45 N. W. 659, *Wallace v. Glaser*, 82 Mich. 190, 21 Am. St. Rep. 556, 46 N. W. 227, and *Lowe v. Schuyler*, 187 Mich. 526, 153 N. W. 786, the method of computing interest adopted by the court was the correct one. No mathematical mistake is pointed out.

2. The contracts (notes and mortgages) reserve the highest lawful rate of interest. The provision and contract in the mortgages that the mortgagor will also pay "... particularly all taxes which shall be assessed upon this mortgage whether as personal property or as an interest in real property," with the further stipulation that payment "of such taxes on the mortgage interest of said party of the second part, shall not, in any case, be considered and treated as a payment on either the interest or the principal of this mortgage," amount in form, and in legal effect, to a further reservation of interest. In the opinion of this court in *Green v. Grant*, 134 Mich. 462, 463, 96 N. W. 583, in considering a contract not per se usurious, but which might or might not be so, depending upon circumstances, the doctrine that it is the essence of an usurious transaction that there shall be an unlawful and corrupt intent on the part of the lender to take illegal interest is approved. It was also said:

"If, at the time the contract was made, he knew that the aggregate of interest reserved and taxes to be paid would exceed the statutory rate—as he would, if the interest reserved was the maximum interest—the contract is usurious."

See also *Stack v. Detour Lumber & Cedar Co.* 151 Mich. 21, 16 L.R.A.(N.S.) 616, 114 N. W. 876, 14 Ann. Cas. 112; *Vandervelde v. Wilson*, 176 Mich. 185, 142 N. W. 553.

Plaintiff says, in substance, that it appears upon the face of each of the mortgages that the mortgagee does not reside in Michigan, that it was not the policy of this state, when the mortgages were given, and is not now, to tax credits owned by

nonresidents (Howell v. Gordon, 127 Mich. 517, 86 N. W. 1042), and therefore the provision in the mortgages requiring the payment of taxes assessed against the mortgage or the mortgagee as its owner is without effect in fact, and should be held to be without effect in law, because any intent to exact more than 7 per cent interest is negated. There is testimony tending to prove that only 7 per cent has been demanded of the mortgagors, and paid by them, that they have never been required or requested to pay any sum as taxes on the mortgages or the mortgage interest of the owners, and that the agent of the mortgagees, before his attention was called to it by the solicitor for plaintiff did not know that the mortgages contained the clause referred to. If the question of usury or no usury may, in this case, be determined by the intent of the lender to exact it, and his intent by evidence outside of the written contracts, the evidence is persuasive that the intent to exact or to receive usury was wanting.

We have held the contract itself to be conclusive when the mortgage is owned by a resident of this state. Ought it to be held to be inconclusive when the mortgage is and appears upon its face to be owned by a nonresident, there being nothing to show whether, by the law of the owner's domicile, the mortgage, or the credit of which it is the evidence, is taxable? Upon this record, the question is no broader than this. It must be answered in the negative, because the stipulation in the mortgage is broad enough to impose upon the mortgagor the duty to pay taxes upon the mortgage assessed to the owner at his domicile, and there is no presumption that the mortgage is not taxable by the law of the owner's domicile. It must be held that the contracts are, both of them, usurious.

3. Defendants were given proper credit for all sums they have paid.

4. This point, in view of what has been said, becomes unimportant.

5. Appellants' argument in this behalf is not easy to follow. The conclusion to which it is supposed to lead is not stated. What correction, if any, the testimony requires should be made, is not indicated.

6. There is no evidence of a proper ten-

der to plaintiff of the money claimed by defendants to be his due. There is evidence that on February 28, 1914, they considered that they owed him at least \$628, and in a letter to his agent they advise him that this sum is on deposit in a named bank to his credit—"at your order and subject to your control."

The amount due upon the mortgages must be recomputed, defendants being charged with no interest, and credited in reduction of the principal debt, in each case, with such payments, and such only, as the trial court found had been made. A decree will be entered in this court reversing the decree appealed from, stating the sum due to plaintiff in accordance with this opinion, in other respects corresponding with the usual form of decrees in foreclosure proceedings. No more than sixty days from the date of filing this opinion will be allowed for paying the sum found to be due, and a sale of the premises will be ordered in default of such payment. It is probable that counsel will agree upon the amount due.

Steere, Stone, Brooke, and Moore, JJ., concurred with Ostrander, Ch. J.

Fellows, J., dissenting:

One of these mortgagees resides in Washington, the other in California. At the time both mortgages were given, the mortgagees were not liable for the payment of any taxes on the mortgages in the state of Michigan. Howell v. Gordon; 127 Mich. 517, 86 N. W. 1042. Taxation is regulated by statute. There is no proof in the case that under the statutes of Washington or California either of these mortgagees was subject to taxation. I think that one who assails a contract as usurious because of a tax clause contained in it, which may or may not render it so, dependent on legislative enactment of another state, must sustain the burden of proving that, under such legislative enactment, such contract is taxable. I think the decree should be affirmed, with costs.

Kuhn and Bird, JJ., concurred with Fellows, J.

#### Annotation—Usury: requiring mortgagor to pay mortgage or recording tax.

This note is a continuation of a note in 51 L.R.A.(N.S.) 465, to which reference should be made for the earlier decisions.

An agreement by a borrower to pay

all taxes which may in the future be assessed against real property owned by such borrower, including the interest granted to the lender by virtue of a mortgage taken to secure the payment

of the money loaned, is held, in *Deming Invest. Co. v. Grigsby* (1917) — **Okl.** —, 163 Pac. 530, not necessarily to taint the contract with usury, it not appearing that any law existed authorizing the levy of any special tax against the interest of the mortgagee in real estate, or that there was any intention or purpose on the part of the mortgagee in any wise to enforce such provision.

In *Seamen's Bank for Sav. v. McCollough* (1915) 166 App. Div. 271, 151 N. Y. Supp. 600, affirmed on opinion below in (1917) 221 N. Y. 692, 117 N. E. 1083, it was held that the payment by a mortgagor of the mortgage recording tax, imposed by a statute not prescribing by whom the tax should be paid, under an agreement with the mortgagee making such payment a condition of the

loan, did not make the mortgage usurious.

In *Re Elmore Cotton Mills* (1914) 217 Fed. 810, it was held that, where the law requires the mortgagee to pay the mortgage tax, a mortgage reserving the full legal rate of interest and binding the mortgagor to pay for recording and the tax required to be paid on the mortgage is usurious.

But in *Robertson Bkg. Co. v. Chamberlain* (1916) 143 C. C. A. 82, 228 Fed. 500, it was held that, notwithstanding the statute imposing a mortgage tax provided that it should "be paid for by the lender," yet, as it contained nothing to indicate that it was any part of its purpose to deal with the subject of usury, it did not forbid the making of an agreement by the mortgagor to pay such tax. **E. S. O.**

#### MICHIGAN SUPREME COURT.

ALEXANDER H. PEARSON

v.

EDD GARDNER et al., Plffs. in Err.

(— Mich. —, 169 N. W. 485.)

#### Specific performance — in favor of vendor.

Specific performance of a contract to purchase real estate may be enforced in favor of the vendor, if the vendee has made partial payments of the purchase price and taken possession of and altered the premises so as to make refusal to perform inequitable.

For other cases, see *Specific Performance*, I. c, 1, in Dig. 1-52 N. S.

(July 18, 1918.)

**E**RROR to the Superior Court for Livingston County to review a judgment in favor of plaintiff in an action brought to enforce specific performance of a contract to purchase real estate. Affirmed.

The facts are stated in the opinion.

Messrs. Willis L. Lyons and F. J. Shields, for plaintiffs in error:

If plaintiff did not tender his deed, abstract, and insurance paper within the five days, then he did not comply with

**Note.** — As to whether alterations by the vendee of real property, lessening its value, will give the vendor the right to specific performance of a contract not satisfying the requirements of the Statute of Frauds, see note following this case, post, 386.

As to whether possession alone will warrant the granting of specific performance of a parol contract to convey, or gift of, real property, see note in 8 L.R.A.(N.S.) 870.

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the terms of his agreement, and is asking a court of equity to grant him relief, when he has not done equity himself.

36 Cyc. 699, 701.

A party who seeks to enforce the specific performance of a contract is called upon to make out a plain case and establish it by proofs.

*Harrington v. Holcomb*, 75 Mich. 535. 42 N. W. 1003; *Dunton v. Outhouse*, 64 Mich. 419, 31 N. W. 411; *Kelly v. Kelly*, 54 Mich. 30, 19 N. W. 580.

Specific performance of a contract is not a matter of right in a court of equity, but rests upon the sound discretion of the court.

*Chicago, K. & S. R. Co. v. Lane*, 150 Mich. 176, 113 N. W. 22; *Cox v. Raider*, 138 Mich. 249, 101 N. W. 531; *Hicks v. Turek*, 72 Mich. 311, 40 N. W. 339.

Part performance, to take a parol contract for the purchase of land out of the Statute of Frauds, should be of unequivocal acts that confirm the existence of the contract.

*Millard v. Ramsdell*, Harr. Ch. (Mich.) 373; *Dragoo v. Dragoo*, 50 Mich. 573. 15 N. W. 910; *Sullivan v. Ross*, 98 Mich. 587, 57 N. W. 821.

Mr. Louis E. Howlett, for defendant in error:

Defendants by their acts of commission and omission have so conducted themselves as to estop them from now saying that this contract is void.

*Cilley v. Burkholder*, 41 Mich. 749. 3 N. W. 221; *Dickinson v. Wright*, 56 Mich. 42, 22 N. W. 312; *Peckham v. Balch*, 49 Mich. 181, 13 N. W. 506; *Bomier v. Caldwell*, 8 Mich. 463; *Davis v. Strobridge*, 41



Mich. 157, 6 N. W. 205; Proctor v. Plumer, 112 Mich. 393, 70 N. W. 1028; Bushnell v. Rowland, 118 Mich. 618, 77 N. W. 271; Minneapolis Threshing Mach. Co. v. Davis, 3 L.R.A. 798, note.

Brooke, J., delivered the opinion of the court:

Bill for specific performance. On June 6, 1917, defendants entered into an oral contract with the plaintiff for the purchase of a house and lot in the village of Hamburg. At the time of the purchase the plaintiff gave the defendants the following receipt:

Hamburg, Michigan, June 6 [there is a 6 and a 7 over it], 1917. Received of Edd Gardner and Della Gardner one hundred dollars (\$100) on purchase price of house and lot in Hamburg village. Balance of eighteen hundred dollars (\$1,800) to be paid and deed given in five days.

A. H. Pearson.

The \$100 mentioned in said receipt was paid by defendants to plaintiff. Under the oral contract plaintiff, a physician and surgeon, agreed to rent from the defendants a small office building located on one corner of the lot for a period of one year, with an option for one additional year, at \$5 per month, the \$60 for the first year's rent to be deducted from the purchase price. Plaintiff immediately vacated the house and, three days later, on the morning of the 10th, defendants took possession of the house and the barn located on the premises.

It is the claim of plaintiff that he and his wife had executed a deed of the property, and on the fifth day after the agreement told defendants it was ready, but that he was advised by them that their money was in a bank in Detroit, and would not be available for a few days; that shortly thereafter defendant Della Gardner was called away because of the illness of a relative, and remained absent for some time. This was denied by the defendants. The record shows that there was considerable discussion between the parties about carrying out the deal up to the latter part of July, when the defendants finally refused to further proceed. Thereupon plaintiff prepared a new deed, the former one having been destroyed, and on the 1st day of August made a tender of the deed, the unexpired insurance policy, and the abstract of title. A second tender was made on August 10th, in the presence of a witness. Performance on the part of the defendants was again refused. In the meantime, the defendants

had continued in the possession of the property, had removed one of the partitions on the lower floor of the dwelling house, making two rooms into one, changed the location of the kitchen sink, trimmed the lower limbs from a couple of shade trees in front of the house, and had harvested the vegetables from the garden. They continued in possession and retained the same at the time of the trial in the court below on the 12th day of December, 1917.

It is conceded by counsel for plaintiff that the written evidence of the contract is insufficient under the Statute of Frauds. The only question involved is whether the defendants, by their acts in making partial payment, taking possession, reaping the fruits of the garden, and changing the character of the premises, have done sufficient to take the case out of the statute, and to equitably entitle plaintiff to the decree for specific performance which was awarded by the court below. Partial payment of the purchase price alone is not sufficient to take the case out of the statute. Possession alone is insufficient, but where there is a partial payment and possession, accompanied by acts of ownership of the vendee, changing the character of the freehold, and lessening its value, a court of equity may award a decree for specific performance. *Peckham v. Balch*, 40 Mich. 179, 18 N. W. 506; *Cole v. Cole Realty Co.* 169 Mich. 347, 135 N. W. 320. It is true that in the case cited the action was brought by the vendee rather than the vendor, but it is well settled that specific performance is granted in favor of the vendor of land as freely as in favor of the vendee, though the relief actually obtained by him is the recovery of money, the purchase price. The rule is stated in 36 Cyc. 686, as follows: "The vendor or lessor may have specific performance of a contract which has been part performed. This is in part because the delivery of possession by him to the vendor involves a change of condition on his part as well as on the part of the vendee, and points to a contract concerning the land; chiefly because, in cases where the remedy is available to the vendee, it should, on the ground of mutuality, be available to the vendor likewise"—citing cases in note 24.

See also 6 Pom. Eq. Jur. § 747, and *Langdell, Brief Survey of Eq. Jur.* pp. 50-52.

The parties agree as to the exact terms of the oral contract. The defendants entered into possession thereunder, and still retain such possession. They paid a portion of the purchase price, and have

exercised such rights and acts of dominion over the property, in changing its character, as would, in our opinion, make it

inequitable for them now to decline full performance of the oral contract.

The decree is affirmed.

**Annotation—Acts by vendee lessening value of property as affecting right of vendor to a specific performance of contract in relation to land, that does not comply with the Statute of Frauds.**

The idea that acts done by a vendee of lands, in possession under an oral contract, having the effect to depreciate the value of the property, will afford ground for awarding specific performance at the instance of the vendor, rests on the same foundation as the well-established doctrine applied in the converse situation, that equity will enforce such a contract at the instance of a vendee who has made improvements in reliance thereon, viz., that the refusal to perform operates as a fraud on the other party. It is, accordingly, subject to the same qualifications and limitations, as is instanced by the case of *Bennett v. Dyer* (Me.) *infra*. The acts relied upon in *PEARSON v. GARDNER*, ante, 384, would seem, however, to afford a very slender basis for the interposition of a court of equity.

In *Fay's Estate* (1906) 213 Pa. 428, 62 Atl. 991, it was held that the vendor was entitled to the specific performance of an oral contract, where the vendee had paid part of the purchase money, gone into possession of the property, which had a special value as a stone quarry, and had quarried and removed quantities of stone, the value of which was not readily ascertainable, so that it was impossible to award compensation in damages.

In *Chambers v. Rowe* (1864) 36 Ill. 171, the court decreed, at the instance of the vendor, specific performance of a parol contract for the sale of land, the purchaser of which had been put into possession, had paid a part of the price, and had stripped it of much of the timber growing upon it. It appeared, however, that he did not interpose the Statute of Frauds by plea or answer.

But in *Bennett v. Dyer* (1896) 89 Me. 17, 35 Atl. 1004, where the purchasers, under an oral contract, entered upon the land and plowed a driving park upon it, and thereafter refused to perform, it was held that, as the vendor might be compensated in damages, specific performance would not be decreed.

In *Lawrence v. Saratoga Lake R. Co.* (1885) 36 Hun (N. Y.) 467, it was held that a vendor was entitled to the specific

performance of a contract not signed by the defendant, who, after accepting the vendor's proposition, had gone into possession and proceeded so to change the face of the property, for the purpose of constructing a railroad across it, by digging ditches, building embankments, cutting down trees and changing water-courses, that the premises could not be restored to their former condition. Although these acts would seem to have lessened the value of the premises for other than railroad purposes, the court put its decision on the ground that, as the contract might have been enforced by the vendee, it could be enforced by the vendor, saying: "The defendant has proceeded to construct its track and to do many other acts, making permanent changes upon the land, so that the land cannot be restored to plaintiffs in its original condition. These facts are a ground for the enforcement of the contract, although it is not in writing. The reason is, that it would be a fraud for the vendor to permit the vendee, under a verbal contract, to make permanent improvements, and then to deprive the vendee of the land by ejectment. And rights must be mutual. If, then, a vendor cannot refuse performance when the vendee has entered and made improvements, conversely, the vendee cannot refuse to perform in such a case, on the ground that the contract was verbal."

Other cases which, although not within the scope of this note, may be of collateral interest, are those in which the right of a vendor or lessor to the specific performance of a contract to purchase or lease has been based upon alterations made by him in the property, for the purpose of performing his part of the contract. Thus, in *Andrew v. Babcock* (1893) 63 Conn. 109, 26 Atl. 715, where, in addition to possession delivered and taken, the vendor detached and removed from the building a boiler, shafting, vats, and other property, at a large expense, by reason of which removal the building became unfitted for the purposes for which the vendor had heretofore used them, it was held that sufficient

part performance by the vendor was shown, to take the case out of the Statute of Frauds.

And in *Seaman v. Aschermann* (1881) 51 Wis. 678, 37 Am. Rep. 849, 8 N. W. 818, and *Forrester v. Reliable Transfer Co.* (1910) 59 Wash. 86, 109 Pac. 312, Ann. Cas. 1912A, 1093, the les-

sor of premises under an agreement not conforming to the requirements of the Statute of Frauds, who had, at large expense, prepared the premises for the special benefit of the lessee, solely because of and in reliance upon the leased contract, was held entitled to specific performance or damages. E. S. O.

# VERMONT SUPREME COURT.

GILBO & SWARTZ

v.

JAMES A. MERRILL, Admr., etc., of Anna S. Merrill, Deceased.

(— Vt. —, 104 Atl. 10.)

## Sale — guaranty of efficiency of plant — construction.

A guaranty of the efficiency and operation of the plant by one undertaking to install a windmill water system according to specifications is merely a guaranty of such efficiency as the work, properly carried out according to the specifications, will afford.

For other cases, see *Sale, II. a, in Dig.* 1-52 N. S.

(May 17, 1918.)

**E**XCEPTIONS by plaintiff to rulings of the County Court for Chittenden County made during the trial of an action brought to recover the balance alleged to be due on a windmill contract, which resulted in a verdict for defendant. Reversed.

The facts are stated in the opinion.

Messrs. Powell & Powell for plaintiff.

Messrs. V. A. Bullard and Sherman R. Moulton for defendant.

Haselton, J., delivered the opinion of the court:

This is an appeal to the county court from the disallowance by the commissioners on the estate of Anna S. Merrill of the plaintiffs' claim. In county court the case was tried on a declaration in assumpsit in the common counts. The plea was the general issue. The trial was by the court, and on findings made judgment was rendered for the defendant. The plaintiff brings a bill of exceptions.

The plaintiffs are successors to Gilbo & Tobin, who contracted with Anna S. Merrill and her husband James A. Merrill, to install on the Merrill farm in Addison, on the shore of Lake Champlain, a water system, comprising a windmill, a tank and

tank house, a pipe leading from the lake to the windmill, a pipe leading from the windmill to the tank, and other pipes. Gilbo & Tobin and Gilbo & Swartz, who have been treated throughout as standing in the shoes of Gilbo & Tobin, will herein be spoken of indifferently as the plaintiffs. Following the language of the bill of exceptions the word "defendant" is herein used to designate the intestate, her husband, a party to the contract, her estate, or her administrator, as the sense may require. No confusion can result. The defense on trial was by way of recoupment and the claim of non-acceptance. The contract was not fully performed by the plaintiffs within the time specified in the contract, in certain respects as found and designated by the court. Some time after the expiration of the period fixed for the completion of the contract, the defendant caused a letter to be written to the plaintiffs, pointing out certain failures to perform, and stating that the things left undone must be done by a day named or the defendant would proceed to do them and charge the plaintiffs therefor. No one appearing in answer to the letter, the defendant undertook the completion of the work and, in doing so, paid out various sums. Thereafter the defendant commenced to operate the plant, and because of inefficient or improper construction the windmill fell, and the defendant was obliged to expend a sum named to repair it. The court finds that the plant, from the commencement of its use until the defendant sold the premises on which it stood, never operated in a satisfactory and efficient manner; that it was at no time an efficient working windmill water plant; and that the main trouble with it lay in the size of the pipe from the windmill to the tank, or in the intake pipe. The court finds that the pipe from the windmill to the tank was too small for the intake pipe. There is expressed an inability to find how much it would have cost to correct this defect, which is treated as chargeable to the plaintiffs, but there is a finding that, in addition to making the repairs referred to, the defendant was obliged to purchase a gasoline engine costing \$51 in order to make this windmill plant constantly available. The contract price for the plant agreed upon was something over

**Note.**—For construction of guaranty of efficiency as affected by specifications, see annotation following this case, post, 388; and references therein to annotations on related questions.

\$800. The defendant had paid to plaintiff \$400 on account, and claimed to have been damaged through the default of the plaintiffs under the contract to an amount more than the balance unpaid under the terms of the contract. On its findings and failures to find, the court rendered judgment for the defendant, as stated at the outset.

The finding which the court makes the main cause of damages to the defendant is, as already appears, the finding as to the size of the pipes. The pipes were, however, of the precise size fixed by the contract, and the plaintiffs took an exception on this ground. The force of the claim under this exception the defendant attempts to meet by pointing out, what is true, that the contract contained this clause: "The efficiency and the operation of the plant is guaranteed," and by calling attention to the finding that the plant was not efficient. But the contractors were, nevertheless, bound to follow the specifications, and the guaranty of efficiency was no more than a guaranty of such efficiency as the work, properly carried out in accordance with the specifications, would afford. *Bush v. Jones*, 6 L.R.A.(N.S.) 774, 75 C. C. A. 582, 144 Fed. 942; *MacKnight Flintic Stone Co. v. New York*, 160 N. Y. 72, 54 N. E. 661; 6 R. C. L. 860. There are in the case no findings that reach back of the contract and make

the plaintiffs responsible to the defendant on account of its terms and specifications. So, in regard to this fundamental basis of the judgment, very substantial error intervened.

The court found that the contract was not complied with because the floor of the tank house within its walls, the floor upon which the tank rested, was of an unstable character. The plaintiffs excepted to this finding, and also to the finding already mentioned that the windmill accident was due to improper construction. These two exceptions the plaintiffs brief. But there was some evidence to support each finding, and as to the tank floor, windmill, and some other matters there were no specifications which prevented the full operation of the undertaking for the construction of an efficient plant.

Some exceptions to the exclusion of evidence were taken, but the evidence shut out against exception was properly excluded, either because of remoteness, or because its admissibility under the plaintiffs' specification was not made to appear. Some questions that might naturally have arisen in the trial of the case are not presented by the bill of exceptions.

Judgment reversed and cause remanded.

*Miles, J.*, did not sit.

### **Annotation—Construction of guaranty of efficiency as affected by specifications.**

As to an implied warranty of fitness of an article bought for a special purpose, see notes in 22 L.R.A. 187; 15 L.R.A.(N.S.) 868; 31 L.R.A.(N.S.) 783, and 34 L.R.A.(N.S.) 737. As to implied warranty by manufacturer of machinery or apparatus, not in itself defective, of fitness for use under existing conditions, see note in 6 L.R.A.(N.S.) 180. As to whether or not a statement by the seller as to the economy of operation of machinery constitutes a warranty, see note in L.R.A.1917C, 1078.

It is the general rule that a general warranty as to the efficiency or working qualities of a plant or a part thereof will be construed with reference to the terms of the contract of sale as a whole. If the manufacturer agrees to install the plant and guarantees its efficiency for the purpose intended, the mere fact that the size and dimensions of the different parts of the system are specified will not serve to limit the scope of the guaranty; but it will be construed to cover the efficiency of the machinery or plant for the purpose for which it is

installed. Where, however, the contract calls for a designated plant or system to be built or furnished according to certain specifications, a general warranty as to the fitness or working qualities of the plant will be so limited in its scope as to warrant or guarantee the efficiency of the machinery of the particular specifications, and it will not be construed as a guaranty that the machinery furnished according to such specifications will, in fact, be efficient, or do the work expected of it, or which it was intended to do. Such a warranty is complied with if machinery is furnished which complies with the specifications and the terms of the warranty, as regards quality, workmanship, etc., although, as a plant, it does not meet the needs or expectations of the buyer and does not work efficiently. *GILBO v. MERRILL*, ante, 387, is an illustration of the construction of a guaranty of the latter character.

Applying this rule, it has been held that under a contract to install an elevator according to a certain plan, and

which described as a part thereof a drum of a certain diameter, a warranty to "furnish the work heretofore mentioned in a first-class workmanlike manner" was construed not to warrant the efficiency of the elevator with such drum; and, hence, it did not constitute a breach of the warranty that the elevator would not properly and efficiently operate with a drum of that character. *Bancroft v. San Francisco Tool Co.* (1898) 120 Cal. 228, 52 Pac. 496.

So, a guaranty that a boiler will be a first-class job has been held to relate merely to the character of the material and workmanship as required by the specifications, and not to cover its power or working qualities. *Milwaukee Boiler Co. v. Duncan* (1894) 87 Wis. 120, 41 Am. St. Rep. 33, 58 N. W. 232.

An agreement to furnish an engine of a certain horse power, and a dynamo of a certain candle power, to be installed in a designated building and connected with the boiler and lighting system already installed, the engine to be of a designated horse power, and the dynamo to be of a certain candle power, does not constitute a warranty that the plant as a whole, after these parts are installed, will produce the power designated, or that it will serve the purpose of the buyer, especially where the articles furnished are second-hand. *Kernan v. Crook* (1905) 100 Md. 210, 59 Atl. 753.

As also bearing upon this point, attention is called to the rule that no implied warranty of the working qualities of machinery arises, where the article furnished complies with the specifications. *Caldwell Bros. & Co. v. Coast Coal Co.* (1910) 58 Wash. 461, 108 Pac. 1075; *Mianus Motor Works v. Vollans* (1915) 83 Wash. 680, 145 Pac. 997.

Where a contract is made for a steam engine, boiler, etc., to be installed in the purchaser's mill and the make, size, and

power of the machinery are specified, there is no implied warranty that the plant will furnish power enough to operate the mill. *Wheaton Roller-Mill Co. v. John T. Noye Mfg. Co.* (1896) 66 Minn. 156, 68 N. W. 854.

On the other hand, where the plans and specifications of a house were furnished at the time the contract was made to install the heating system in ranges provided for by the builder, the guaranty as to the working qualities and efficiency of the heating system was applicable and binding only upon the builder furnishing ranges according to such specifications, and a requirement that sufficient flues should be furnished, of a sufficient draft, only required flues of a sufficient draft for the ranges, as shown by the specifications; and the seller could not require that the flues be of a sufficient draft for the system as installed. *Brummett v. Nemo Heater Co.* (1901) 177 Mass. 480, 59 N. E. 58.

Applying the rule referred to, that, where there is a contract to install certain apparatus or a system, the mere fact that the size or dimensions of the system are furnished will not operate to limit the scope of the warrant, it has been held that the scope of the guaranty that an engine should be of the best material and workmanship, and equal or superior to any similar engine on the market, was not affected by the fact that the contract required that the engine was to be furnished complete according to certain specifications. Under such circumstances, the guaranty will be construed to be that, when built according to specifications, the engine will be as good for the purpose for which it was intended as any engine which could be purchased from any other manufacturer of like wares. *Iroquois Furnace Co. v. Wilkin Mfg. Co.* (1899) 181 Ill. 582, 54 N. E. 987. A. G. S.

## GEORGIA SUPREME COURT.

ASA G. CANDLER

v.

GEORGIA THEATER COMPANY et al.

(— Ga. —, 96 S. E. 226.)

**Landlord and tenant — Limiting use.**

1. A lessor may, by express provision,

Headnotes by GEORGE, J.

**Note.**—The question whether covenants with respect to "theater," "drama," etc., include motion pictures is considered in the

L.R.A.1918F.

limit the general rights of a lessee as regards the use of demised premises.

*For other cases, see Landlord and Tenant, I. b, 1, in Dig. 1-52 N. S.*

**Specific performance — covenants of lease.**

2. Equity will enforce restrictive covenants of a lease, though irreparable damage will not result from a breach of the covenants.

*For other cases, see Equity, I. a, in Dig. 1-52 N. S.*

annotation following this case, post, 393, and see references therein to annotations on related questions.

**Landlord and tenant — theater — limited use.**

3. A covenant in a lease of a theater building, which requires the lessee to operate the house at all times "as a first-class theater, catering to the best class of people," limits the general rights of the lessee as regards the use of the demised premises, and is, in effect, an implied negative covenant against the use of the building for any purpose other than that named.

*For other cases, see Landlord and Tenant, II. b, 1, in Dig. 1-52 N. S.*

**Contract — construction — meaning of words.**

4. Generally, words in a contract are to be given their usual and primary meaning at the time of the execution of the contract, but words of art, or words connected with a peculiar trade, are to be given the signification attached to them by experts in such art or trade. This rule is one of construction, and, like every such rule, is subordinate to the intention of the parties to the contract.

(a) A moving picture show, although "first-class" and "catering to the best class of people," is not within the primary meaning of the covenant in the lease above indicated, executed in 1908 and renewed in 1915, requiring the lessee to operate the house "as a first-class theater."

(b) The words, "as a first-class theater," as employed in the covenant of the lease above indicated, are descriptive of the character of the performance within the building, rather than of the building itself.

*For other cases, see Contracts, II. d, in Dig. 1-52 N. S.*

**Landlord and tenant — lease — construction by parties.**

5. The construction placed upon a covenant in a lease by the parties thereto, as shown by their acts and conduct, is entitled to much weight and may be conclusive upon them. Accordingly, where the owner of a building demised the same for a period of five years with the privilege of renewal for a like period, under a lease which required the lessee to operate the building at all times during the term of the lease, or any renewal thereof, "as a first-class theater catering to the best class of people," and where the lessee, during the period of the original lease, at all times exhibited moving pictures in connection with spoken drama in the demised premises, and for certain periods exhibited moving pictures exclusively, to the knowledge of the lessor, who, without objection, continued to accept the monthly rentals for the use of the building, and where thereafter the lease was renewed "upon the terms and conditions set out in said original agreement," and the lessee continued to exhibit moving pictures in connection with the spoken drama, and during certain periods exhibited moving pictures exclusively in the building, and expended a large sum of money in order to enable it to do so, the judge of the superior court did not err in refusing to grant

an interlocutory injunction, on the prayer of the lessor, restraining the lessee from exhibiting the moving pictures exclusively within the theater; it being conceded that the pictures exhibited were first-class and catered to and attracted the best class of people.

*For other cases, see Landlord and Tenant, II. b, 1, in Dig. 1-52 N. S.*

(June 14, 1918.)

**E**RROR to the Superior Court for Fulton County to review a judgment refusing an injunction to restrain defendants from exhibiting moving pictures in a theater leased by defendants. Affirmed.

The facts are stated in the opinion.

Messrs. Candler, Thomson, & Hirsch. for plaintiffs in error:

The word theater, as used in the agreement, was clearly used in the primary sense of the meaning of the word theater, and if a moving picture show is in any sense whatsoever a theater, it is only in a secondary sense, which secondary meaning, if it exists at all, is a very recent development. and was not in the minds of the parties at the time the contract was executed.

Shore v. Wilson, 9 Clark & F. 355, 8 Eng. Reprint, 450, 5 Scott, 958; Bruner v. Moore [1904] 1 Ch. 305, 73 L. J. Ch. N. S. 377. 52 Week. Rep. 295, 89 L. T. N. S. 738, 20 Times L. R. 125; Mallan v. May, 13 Mees. & W. 511, 153 Eng. Reprint, 213, 14 L. J. Exch. N. S. 48, 9 Jur. 19; Clearwater v. Bowman, 72 Kan. 92, 82 Pac. 526.

The courts recognize a distinction between the word theater and the term "moving pictures" or "motion pictures."

Mutual Film Co. v. Industrial Commission, 236 U. S. 247, 59 L. ed. 561, 35 Sup. Ct. Rep. 393; Kalem Co. v. Harper Bros. 222 U. S. 55, 56 L. ed. 92, 32 Sup. Ct. Rep. 20, Ann. Cas. 1913A, 1285; Block v. Chicago, 239 Ill. 251, 130 Am. St. Rep. 219. 87 N. E. 1011; Ex parte Lingenfelter, 64 Tex. Crim. Rep. 30, 142 S. W. 555, Ann. Cas. 1914C, 765; State v. Penny, 42 Mont. 118, 31 L.R.A.(N.S.) 1155, 111 Pac. 727; Re Bossner, 18 Idaho, 519, 110 Pac. 502; Harper v. Klaw, 232 Fed. 609; Klein v. Beach, 151 C. C. A. 282, 239 Fed. 108; Alexander v. State, 56 Ga. 478.

The evidence of Ansley and Gilmore clearly shows that the term theater was not intended to include a moving picture show.

Illges v. Dexter, 77 Ga. 36; Kauffman v. Raeder, 54 L.R.A. 247, 47 C. O. A. 278, 108 Fed. 171; Foley v. Abbott, 66 Ga. 115; Novelty Hat Mfg. Co. v. Wiseberg, 126 Ga. 800, 55 S. E. 923; Simpson v. Sanders, 130 Ga. 271, 60 S. E. 541; Ford & Co. v. Lawson. 133 Ga. 237, 65 S. E. 444; Chicago Auditorium Asso. v. Fine Art Bldg. 244 Ill. 532,

91 N. E. 65, 18 Ann. Cas. 253, 6 R. C. L. 228, 232, 233; Ullman v. Chicago & N. W. R. Co. 112 Wis. 150, 56 L.R.A. 246, 88 Am. St. Rep. 949, 88 N. W. 41, 6 R. C. L. 232; Saltburg Gas Co. v. Saltburg, 138 Pa. 250, 10 L.R.A. 193, 20 Atl. 844; Hoffman v. Aetna F. Ins. Co. 32 N. Y. 405, 88 Am. Dec. 337; Rogers v. Galloway Female College, 64 Ark. 627, 39 L.R.A. 636, 44 S. W. 454.

The restriction in the lease was legal and binding.

16 R. C. L. § 229; Chandler v. Hart, 161 Cal. 405, 119 Pac. 516, Ann. Cas. 1913B, 1094; Godfrey v. Black, 39 Kan. 193, 7 Am. St. Rep. 544, 17 Pac. 849; Denecke v. Miller, 142 Iowa, 486, 119 N. W. 380, 19 Ann. Cas. 949; Ferris v. American Brewing Co. 155 Ind. 539, 52 L.R.A. 305, 58 N. E. 701; Reed v. Lewis, 74 Ind. 426, 39 Am. Rep. 88; Newbold v. Peabody Heights Co. 70 Md. 493, 3 L.R.A. 580, 17 Atl. 372.

Plaintiff is entitled to equitable relief.

Northern P. R. Co. v. McClure, 9 N. D. 73, 47 L.R.A. 149, 81 N. W. 52; Glidden v. Second Ave. Invest. Co. L.R.A.1915C, 221, note; 16 R. C. L. § 232; Ferris v. American Brewing Co. 155 Ind. 539, 52 L.R.A. 305, 58 N. E. 701; Godfrey v. Black, 39 Kan. 193, 7 Am. St. Rep. 544, 17 Pac. 849; Maddox v. White, 4 Md. 72, 59 Am. Dec. 67; Joseph Schlitz Brewing Co. v. Nielsen, 77 Neb. 808, 8 L.R.A.(N.S.)494, 110 N. W. 746; Joyce, Inj. §§ 484, 489; Jones, Land & T. §§ 383, 384; Spalding Hotel Co. v. Emerson, 69 Minn. 292, 72 N. W. 119; Kraft v. Welch, 112 Iowa, 695, 84 N. W. 908; Tipping v. Eckesley, 2 Kay & J. 264, 69 Eng. Reprint, 779; Manners v. Johnson, L. R. 1 Ch. Div. 673, 45 L. J. Ch. N. S. 404, 24 Week. Rep. 481; Stees v. Kranz, 32 Minn. 313, 20 N. W. 241; Stines v. Dorman, 25 Ohio St. 580; Parker v. Nightingale, 6 Allen, 341, 83 Am. Dec. 632; Sutton v. Head, 86 Ky. 156, 9 Am. St. Rep. 274, 5 S. W. 410; Diamond Match Co. v. Rober, 106 N. Y. 473, 60 Am. Rep. 464, 13 N. E. 419; Avery v. Langford, Kay, 663, 69 Eng. Reprint, 231, 2 Eq. Rep. 1097, 23 L. J. Ch. N. S. 837, 18 Jur. 905, 2 Week. Rep. 615; McCurry v. Gibson, 108 Ala. 451, 54 Am. St. Rep. 177, 18 So. 806; Ropes v. Upton, 125 Mass. 258; Zimmermann v. Gerzog, 13 App. Div. 210, 43 N. Y. Supp. 339; Stewart v. Bedell, 79 Pa. 336; Watrous v. Allen, 57 Mich. 362, 58 Am. Rep. 363, 24 N. W. 104; Phoenix Ins. Co. v. Continental Ins. Co. 87 N. Y. 400; Morris v. Lagerfelt, 103 Ala. 608, 15 So. 895; Glock v. Howard & W. Colony Co. 123 Cal. 1, 43 L.R.A. 199, 69 Am. St. Rep. 17, 55 Pac. 713; Hull v. Sturdivant, 46 Me. 34; O'Connor v. Tyrrell, 53 N. J. Eq. 427, 30 Atl. 1061.

Messrs. Dodd & Dodd for defendants in error.

George, J., delivered the opinion of the court:

On October 22, 1908, E. P. Ansley entered into an agreement, with Ben Kahn, by which Ansley agreed to erect a theater with certain equipment and furnishings at a designated location in the city of Atlanta, the theater to be constructed in accordance with plans made by a named architect, subject to such alterations as Kahn might desire. The agreement provided that Kahn was to lease the theater, when completed, at the annual rental of \$7,500 for the term of five years, "with the privilege of renewal for another period of five years at an increased rental of \$1,000 per year." The agreement contained the following clause, around which the controversy in this case revolves: "The said Kahn also agrees that the house will be operated at all times during the term of this lease or any renewal thereof as a first-class theater, catering to the best class of people."

The theater was built with stage and dressing rooms necessary to a regular theatrical performance. It was equipped according to the contract. About one third of the theater building is taken up with the stage and dressing rooms, wholly unnecessary to a moving picture show. From the completion of the theater in 1910, and during the term of the original lease, the lessee operated therein "the high-class vaudeville," at all times in connection therewith moving pictures, and for certain periods moving pictures exclusively, and at considerable expense. On February 28, 1915, and agreeably to the contract, the lease was renewed for an additional term of five years, beginning March 1, 1915, and ending February 26, 1920, "upon the terms and conditions set out in said original agreement," etc. By mesne conveyances the title to the building passed into the plaintiff, and the lease thereof, by successive transfers, to the defendant. In the spring of 1917, the lessee ceased conducting vaudeville performances, and announced the intention to exhibit thenceforth moving pictures in said theater, whereupon the plaintiff brought this suit in equity to enjoin the exhibition of moving pictures in said theater building, basing its contention on the ground that such conduct on the part of the lessees would be a breach of the provisions of the lease requiring the house to be operated "as a first-class theater, catering to the best class of people." The contention is that a first-class moving picture show, although it caters to the best class of people, is not a "first-class theater" within the meaning of the provision in the

contract. Upon the hearing for interlocutory injunction it was conceded, and is here conceded, that the lessees had and were exhibiting first-class moving pictures, showing first-class productions by the leading "artists of the screen;" that the theater so conducted catered to and in fact attracted the best class of people. The injunction was refused, and the plaintiff excepted.

1-3. In the absence of restrictive covenants, it is generally said that the tenant has no right to use the demised premises for a purpose not contemplated by the parties, and materially different from that for which the premises were apparently intended. 18 R. C. L. 736, § 228. The lessor may always, by express provision, limit the general rights of the lessee as regards the use of the demised premises. Equity will enforce restrictive covenants of a lease, though irreparable damage will not result from a breach of the covenants. Joyce, *Inj.* §§ 584, 489; Jones, *Land. & T.* §§ 383, 384. The covenant in the lease under consideration is not in form a restrictive covenant, but imposes an affirmative duty upon the lessee. The duty to operate the house at all times "as a first-class theater, catering to the best class of people," limits the general rights of the lessee as regards the use of the demised premises, and is, in effect, an implied negative covenant against the use of the building for any purpose other than that named. 2 High, *Inj.* 4th ed. § 1151a.

4. The lease under consideration was executed in 1908. At that date moving pictures were in a very crude state of development. The contract, by its terms, was to continue over a period of five years, with the privilege of renewal for a like period of years. It was renewed in 1915. At the latter date moving pictures had reached a very high state of development; but words in a contract are ordinarily to be given their primary meaning at the time of the execution of the contract; and words of art, or words connected with a peculiar trade, are to be given the signification attached to them by experts in such art or trade. However, this rule is one of construction, and, like every such rule, is subordinate to the intention of the parties.

The primary meaning of the word "theater," in 1908, did not include a moving picture show, even if such exhibitions were within the secondary meaning of the word. The word "theater," from the Greek, means literally, "a place for seeing." As defined by all the standard authorities, a theater is a building especially adapted to dramatic, operatic, or spectacular representations; a playhouse. This court, in *Alexander v. State*, 56 Ga. 478, considered a theater as

a building. The adjective "theatrical," as used by all the standard authorities, means of or pertaining to the theater, especially in the matter of dramatic or spectacular representations; befitting the stage, dramatic. In a decision rendered by the supreme court of Alabama, long before moving pictures were known (*Jacko v. State*, 22 Ala. 73), it was held that the word "drama" is "broad enough to cover any representation in which a story is told, a moral conveyed, or the passions portrayed, whether by words and actions combined, or by mere actions alone."

In *Ex parte Lingenfelter*, 64 Tex. Crim. Rep. 30, 142 S. W. 570, Ann. Cas. 1914C, 765 (1912), the court of criminal appeals of Texas said: "A theater is but a reproduction of some play, or scene, by acting, by pantomimes, or by tableau; a moving picture exhibition is also but a reproduction of these same scenes and plays."

This language was not precisely in point upon the question before the Texas court, and under our rule would be regarded as obiter. In 1911, in a case dealing with the right to make a moving picture of a copyrighted book, the Supreme Court of the United States held that a moving picture was a dramatic production. *Kalem Co. v. Harper*, 222 U. S. 55, 56 L. ed. 92, 32 Sup. Ct. Rep. 20, Ann. Cas. 1913A, 1285. The word "theater," as employed in the clause of the contract in the instant case, is descriptive of the character of the performance within the building, rather than of the building itself. The precise question presented by this record is whether the word "theater," when so used, is broad enough to permit the exhibition by the lessee of moving pictures exclusively. It cannot be left out of view that the primary purpose of the lessor, evidenced by the contract, was to protect the property to the end that its value might be increased rather than decreased. The lessor, therefore, covenanted that the building must be operated as a theater, and "as a first-class theater, catering to the best class of people." He desired for his theater a reputation and a name. Taking into consideration the primary meaning of the words in the contract at the date of the covenant, we are of the opinion that the covenant, requiring the lessee to operate the building "as a first-class theater," limited the rights of the lessee to use the building for the exhibition of theatrical performances as those terms were understood, and excluded the right of the lessee to use the building for a moving picture show. Two moving picture shows were in operation in the city of Atlanta in 1908; but these shows were staged in ordinary storehouses, while the lessor con-



structed a building with a large stage and ample dressing rooms. The stage and ante-rooms cover about one third of the floor space of the theater building, and are wholly unnecessary in a moving picture show. The word "theater" in 1915, the date of the renewal of the lease, perhaps included a moving picture show; but neither in 1908 nor in 1915 was a moving picture show included within the meaning of a "first-class theater," as employed by the parties to the lease contract.

5. The construction placed upon a covenant in a lease, as in case of all contracts, by the parties thereto, as shown by their acts and conduct, is entitled to much weight, and may be conclusive upon them. 5 Elliott, Contr. § 4556. Many decisions might be cited to the effect that, where particular use has been made of the demised premises to the knowledge of the lessor, who, without objection, continues to accept the rents and profits from the lessee, the former will be estopped to deny the latter's right to so use the premises under the terms of the lease. *Herscher v. Brazier*, 38 Ill. App. 655; *Oglesby v. Hughes*, 96 Va. 115, 30 S. E. 439; *District of Columbia v. Gallaher*, 124 U. S. 505, 31 L. ed. 526, 8 Sup. Ct. Rep. 585. The lessee, both during the original period of the lease and after its renewal, exhibited moving pictures at all times in connection with spoken drama, and during certain periods moving pictures exclusively, in the demised premises. In order to do so, the record shows that the lessee expended a large sum of money. The lessor, with knowledge of these facts and without objection, continued to accept the monthly rentals for the use of the theater building. In these circumstances, we are unwilling to hold that the judge of the superior court erred in refusing to enjoin the lessee as prayed. On the contrary, we rule that the interpretation placed upon the contract by the parties, as shown by their acts and conduct, authorized the judge to deny to the lessor the harsh remedy that is now sought to be invoked against the lessee. *Florida C. R. Co. v. Cherokee Saw-*

*mill Co.* 137 Ga. 815, 74 S. E. 523 (2). We more readily reach this conclusion because the denial of the injunction by the judge in this case has the effect to preserve the existing status of the parties, until the jury can determine the question of estoppel involved.

The evidence of theatrical managers, playwrights, and dramatic critics, to the effect that moving pictures, presenting the leading artists of the country in plays of dramatic excellence, are first-class theatrical or dramatic performances, was admitted and considered by the court. This evidence was objected to upon the ground that it was not confined to the status of the moving picture at the date of the execution of the original lease, and upon the further ground that the same was mere opinion evidence. We are of the opinion that this evidence should have been excluded, but upon the ground that the contract is free of ambiguity, and that the words contained in the covenant did not require the aid of extrinsic evidence to give effect to the plain and expressed intention of the parties. Consideration of this evidence will not, however, require a reversal, inasmuch as the injunction was denied generally; and, as we have seen, the judge did not err in refusing to grant the injunction upon the ground of estoppel.

Judgment affirmed.

All the Justices concur, except Fish, Ch. J., absent, on account of sickness.

Atkinson, J., concurs specially as to the ruling announced in the fifth division:

The use of the building for moving picture shows, and acceptance of rents with knowledge of such use, and without objection, tends to show mutual assent to departure from the strict letter of the contract, within the meaning of the Civil Code, § 4227; and, before the lessor could sue to enjoin such use, it would be necessary to give reasonable notice of his intention to return to the exact terms of the contract. But such departure would not, under all circumstances, work an estoppel against insistence upon the terms of the contract.

### Annotation—Covenants with respect to "theater," "drama," etc., as including motion pictures.

A diligent search has disclosed no case other than *CANDLER v. GEORGIA THEATER CO.* ante, 389, passing upon the question whether covenants with respect to theaters include moving picture shows.

Numerous cases discussing the question whether various statutes, regulating theaters and other places of amusement, include moving picture shows, may be

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found in notes to *State ex rel. Ebert v. Loden*, 40 L.R.A.(N.S.) 193, treating generally of regulations affecting moving pictures; and notes to *Topeka v. Crawford*, 17 L.R.A.(N.S.) 1157; *Re Hull*, 30 L.R.A.(N.S.) 465; and *Zucarro v. State* (1917) L.R.A.1918B, 361, treating generally of the applicability of Sunday Laws to moving pictures. J. D. C.

## KANSAS SUPREME COURT.

THOMAS BREEN et al.

v.

MARGARET BREEN, Appt.

(102 Kan. 766, 173 Pac. 2.)

**Homestead — partition.**

A homestead occupied by a childless testator and his wife at the time of his death, and thereafter occupied by the widow, who elects to take under the law rather than under the will, cannot be partitioned without her consent, at the suit of collateral heirs who were never members of the testator's family.

*For other cases, see Partition, I. in Dig. 1-52 N. S.*

(April 6, 1918.)

**A**PPEAL by defendant from a judgment of the District Court for Clay County sustaining a demurrer to the answer and cross petition in an action brought for the partition of certain land. Reversed.

The facts are stated in the opinion.

Messrs. Lee Monroe, James A. McClure, and C. M. Monroe, for appellant:

A surviving widow, there being no children, may assert her homestead right as against partition at the suit of collateral heirs, claiming title as devisees of her deceased husband.

Towle v. Towle, 81 Kan. 675, 27 L.R.A. (N.S.) 550, 107 Pac. 228; Weaver v. First Nat. Bank, 76 Kan. 540, L.R.A. (N.S.) 110, 123 Am. St. Rep. 155, 94 Pac. 273; Johnson v. Olson, 92 Kan. 819, L.R.A. 1915E, 327, 142 Pac. 256; Sawin v. Osborn, 87 Kan. 828, 126 Pac. 1074, Ann. Cas. 1914A, 647; Spencer v. Barker, 96 Kan. 360, 149 Pac. 736; Breen v. Davies, 94 Kan. 474, 146 Pac. 1147; Cropper v. Goodrich, 89 Kan. 589, 132 Pac. 163; Gatton v. Tolley, 22 Kan. 678; Martindale v. Smith, 31 Kan. 272, 1 Pac. 569; Barbe v. Hyatt, 50 Kan. 86, 31 Pac.

Headnote by JOHNSTON, Ch. J.

**Note.** — The question whether the continuance of the family is a condition of the continuance of the homestead, where its existence is a condition of the inception of the homestead, is treated in the note to Weaver v. First Nat. Bank, 16 L.R.A. (N.S.) 111. See also Koehler v. Gray, L.R.A. 1918D, 1088.

Generally, as to what constitutes a "family" under homestead and exemption laws, see notes to Sheehy v. Scott, 4 L.R.A. (N.S.) 365, and Union Trust Co. v. Cox, L.R.A. 1917C, 361.

For wife as head of family within Homestead and Exemption Laws, see note to Jetton Lumber Co. v. Hall, 51 L.R.A. (N.S.) 1121.

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694; Compton v. People's Gas Co. 75 Kan. 572, 10 L.R.A. (N.S.) 787, 89 Pac. 1039; Keyes v. Hill, 30 Vt. 759; Voelz v. Voelz, 88 Wis. 461, 60 N. W. 707; Funk v. Baker, 21 Okla. 402, 129 Am. St. Rep. 788, 96 Pac. 608; Fore v. Fore, 2 N. D. 260, 50 N. W. 712; Wells v. Sweeney, 16 S. D. 489, 102 Am. St. Rep. 713, 94 N. W. 394.

Mr. C. Vincent Jones also for appellant.

Messrs. F. L. Williams, James L. Hogan, and William M. Beall, for appellees:

The property that was the testator's homestead is subject to partition.

Towle v. Towle, 81 Kan. 675, 27 L.R.A. (N.S.) 550, 107 Pac. 228; Pittman v. Pittman, 81 Kan. 643, 27 L.R.A. (N.S.) 602, 107 Pac. 235; First Nat. Bank v. Carter, 81 Kan. 694, 107 Pac. 234; Breen v. Davies, 94 Kan. 474, 146 Pac. 1147; Spencer v. Barker, 96 Kan. 360, 149 Pac. 736; Vining v. Willis, 40 Kan. 309, 20 Pac. 232; Carmen v. Kight, 85 Kan. 13, 116 Pac. 231; Martindale v. Smith, 31 Kan. 270, 1 Pac. 569.

Johnston, Ch. J., delivered the opinion of the court:

This is an appeal from the judgment of the trial court sustaining a demurrer to the defendant's answer and cross petition. The litigation arose over the estate of Thomas Breen, deceased, and two appeals have already been taken to this court upon certain phases of the contest. Breen v. Davies, 94 Kan. 474, 146 Pac. 1147; Breen v. Davies, 99 Kan. 110, 160 Pac. 997. The present action was brought by the devisees of the deceased against his widow Margaret Breen, to recover their shares of the estate of the decedent and to have it partitioned among the heirs. One half of all the real estate of the deceased was devised to plaintiffs, who are the two brothers, a sister, a nephew, a niece, and a cousin of the deceased, and all of them residents and citizens of Ireland, and the other half was given to his wife, the defendant. Part of the land in controversy was a tract of about 70 acres of land, which was the homestead of the deceased and his wife, who had no children, and it is still occupied by his widow. The defendant concedes the plaintiffs' interest in and right to a partition of all of the land involved except the homestead, and contends that, as she had continuously occupied it since her husband's death, and has no intention to abandon it or live elsewhere, it remains a homestead and is not subject to partition. Defendant also alleged that she had duly elected in the probate court to take under the law, and not under the will, and that she had never consented to any attempt on the part of the deceased to divest himself or her of the homestead right in this particular property. When the trial

court sustained the demurrer to defendant's cross petition and held the homestead to be subject to partition, defendant elected to stand upon her cross petition, and the court gave judgment awarding the plaintiffs their respective shares and directing a partition of all the lands of the estate.

The only question involved in this appeal is: May a homestead occupied by a childless testator and his wife at the time of his death, and thereafter occupied by his widow, who elects to take under the law rather than under the will, be partitioned at the suit of collateral heirs who were never members of the testator's family? We must look to the Constitution and the statutes for an answer to the question. Under the Constitution, the homestead is a grant to the family, and within the meaning of the grant the surviving spouse, although without children, is to be regarded as the family of the deceased owner, and entitled to hold the homestead exempt from forced sale under any process of the law. The grant has been enlarged to some extent by the Statute of Descents and Distribution, which provides that the homestead which continues to be occupied by the family after the death of the owner shall be wholly exempt from the distribution under any of the laws of the state, as well as from the debts of the intestate, and shall also be the absolute property of the widow and children. Gen. Stat. 1915, § 3825. It has already been determined that the homestead privilege is not terminated by the death of the owner, but persists in favor of the family, even though it may consist of but a single person, and that the surviving wife, although the sole occupant, is entitled to the shelter of the home and benefit of the exemption as fully as it was enjoyed by her husband and herself before his death. *Cross v. Benson*, 68 Kan. 495, 64 L.R.A. 560, 75 Pac. 558; *Weaver v. First Nat. Bank*, 76 Kan. 540, 16 L.R.A.(N.S.) 110, 123 Am. St. Rep. 155, 94 Pac. 273; *Sawin v. Osborn*, 87 Kan. 828, 126 Pac. 1074, Ann. Cas. 1914A, 647. The Statute of Wills provides that "any married person having no children may devise one half of his or her property to other persons than the husband or wife." Gen. Stat. 1915, § 11,791.

But the widow of the testator, having elected to take under the law and not under the will, is entitled to all the privileges accorded by the Statute of Descents and Distributions, the same as if her husband had died intestate. Gen. Stat. 1915, § 11,798. By that statute, the family of the deceased owner—the widow and children, and, if no children, then the widow—occupying the homestead, is entitled to hold

it absolutely free from distribution under any of the laws of the state.

Plaintiffs contend that the constitutional exemption only applies while the owner is living; that the devolution of title is a matter of statutory regulation; and that upon the death of the owner, leaving a will, the rights of the family are to be determined by the Statute of Wills. It is true that the transfer of title, and the distribution of the state of a deceased person are controlled by the statute, and not by the constitutional guaranty of exemption, but it has been expressly held that the constitutional exemption does not end with the death of the owner, but continues as long as the family occupies it as a residence. To sustain plaintiffs' contention as to the duration of the homestead right, it has been said that it would be "to ingraft upon the words of the Constitution, 'shall be exempted from forced sale under any process of law,' the alien phrase 'during the lifetime of the owner whose family occupies it.' The Constitution itself forbears to express any such limitation. Such an interpretation can scarcely be made in a document which enumerates its own exceptions and prescribes its own limitations, and much less should it be undertaken when the result would be to abridge the scope and curtail the benignant power of a remedial charter." *Cross v. Benson*, 68 Kan. p. 503, 64 L.R.A. 560, 75 Pac. 561, *supra*.

The constitutional guaranty does not undertake to control the transmission of title to property, neither is it restricted by the statutes regulating the transfer of title, for to whomsoever the title of the property may go, and whether it goes by descent or by will, the homestead right continues as long as the family occupies the home as a residence. The contention that, the owner having disposed of his property by will, the homestead right ends as to the property devised to the plaintiff, and the rule limiting the distribution of homesteads prescribed in the Statute of Descents and Distribution does not apply, cannot be upheld, since the Statute of Wills itself provides that if the widow elects to take under the law her rights will be the same as if her husband had died intestate. The widow having availed herself of this privilege and taken under the law, we must look to the Statute of Descents and Distribution to ascertain her rights as against the claims of the plaintiffs. That statute, as we have seen, reaffirms and extends the exemption given by the Constitution. But for that statute, the homestead guaranty would have remained indefinitely in the family of the owner occupying the house, wholly exempt from debts and distribution. If authority

exists for terminating the homestead right and for distribution of the homestead property, it must be found in the statute. It is provided, as we have seen, that the homestead shall be exempt from the payment of debts and from distribution during its occupancy by the widow and children. The design of the law is that the homestead entire is to be enjoyed by the widow and children constituting the family, and, if the owner left no children, the widow is to continue in its enjoyment, and, if children were left and no widow, the children are entitled to it. Gen. Stat. 1915, § 3827. The conditions upon which a division or distribution of the homestead may be made have been expressly enumerated by the legislature, and those are: If the widow marries again, or the children of the family arrive at the age of majority. And, of course, it may be ended by abandonment. Gen. Stat. 1915, § 3828.

If the widow is the only constituent of the family, as in this case, there can be no distribution without consent, unless the widow ends the family relation by another marriage. The court went to the limit in *Towle v. Towle*, 81 Kan. 675, 27 L.R.A. (N.S.) 550, 107 Pac. 228, in holding that the homestead of the widow might be partitioned when all of the children reached majority. This holding was based upon the theory that the homestead privilege given by the Constitution was one extended to the family of the intestate, and was intended as much for the benefit of the children who constituted a part of the family as it was for the widow, and that therefore the homestead might be divided among them when the youngest child arrived at the age of majority. The logic of the case is that the legislature, looking to the welfare of the children as well as the widow, provided for a division of the property among the members of the family. Those who are outside of the family do not come within the terms of the statute authorizing distribution and have no right to claim the privileges and benefits conferred upon members of the family. The plaintiffs who are col-

lateral heirs have never lived in the home of the owner, and, indeed, they have never been citizens or residents of this country. The homestead right should not be disturbed, nor should there be any interference with its enjoyment through a division or distribution, unless it is expressly provided by statute. Authority has been granted to divide the homestead among members of the family, but nothing in the law suggests that strangers to the family circle can break up the home and obtain a division of the property so long as its homestead character is preserved, and it is occupied by the family of the deceased as a home. In this case the widow constitutes the entire family of the owner, she has never married, nor has she done anything to divest her of the homestead privilege. As was said in *Voelz v. Voelz*, 88 Wis. 461, 464, 60 N. W. 707, 708: "Our laws have thrown around the homestead every necessary protection for the humane and beneficent use for which it was designed, and no such exception by which the widow could be divested of it is found in the statute. It would require positive legislation to subject the widow's homestead to the uncertain tenure of the capricious action of the heirs, whenever they might wish to have a partition or sale of the lands of the estate. There is not only no such provision, but, as we have seen, the statutes and the nature of the homestead right preclude any such interference with it."

See also *Keyes v. Hill*, 30 Vt. 759.

It must be held that a homestead occupied by a childless testator and his wife at the time of his death, and thereafter occupied by his widow, who elects to take under the law rather than under the will, cannot be partitioned without her consent at the suit of collateral heirs who were never members of the testator's family.

The judgment is reversed, and the cause remanded, with directions to enter judgment in favor of the defendant.

Petition for rehearing denied, June 14, 1918.

#### OKLAHOMA SUPREME COURT.

STATE OF OKLAHOMA, Plff. in Err.,

v.

J. S. HERBER.

(— Okla. —, 173 Pac. 651.)

#### Appeal bond — defense.

In an action upon a criminal appeal bond, it is a sufficient defense for the bondsmen

to show that the principal in the case had been, subsequent to the execution of the bond, arrested and held in custody of the law to answer a criminal charge, and convicted of said criminal charge and confined, under judgment and sentence, in the state penitentiary, thereby preventing the principal from appearing and said bondsmen from producing said principal in court to abide and submit to the judgment of the

Note. — The liability of bail where the principal fails to appear from no fault of

Headnote by PRYOR, C.

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court in the cause wherein said appeal bond was given.

*For other cases, see Appeal and Error, X. in Dig. 1-52 N. S.*

(June 11, 1918.)

**E**RROR to the District Court for Logan County to review a judgment in favor of defendant in an action on an appeal bond given by defendant as surety. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. Arthur R. Swank, for plaintiff in error:

There was no voluntary surrender nor any pretense of surrendering whatever in the criminal case in which the bond was given.

Cameron v. Burger, 60 Or. 458, 120 Pac. 10; Roberts v. State, 4 Tex. App. 129; Edwards v. State, 39 Okla. 610, 136 Pac. 577.

The incarceration of Green in the penitentiary, upon a conviction for homicide committed after the original offense for which he was convicted and in which he gave the appeal bond in question, does not exonerate his sureties on the bond.

King v. State, 18 Neb. 375, 25 N. W. 519; State v. Horn, 70 Mo. 466, 35 Am. Rep. 437; Yarbrough v. Com. 89 Ky. 151, 25 Am. St. Rep. 524, 12 S. W. 143; Metcalf v. State, — Okla. —, L.R.A.1916E, 595, 156 Pac. 305; Edwards v. State, 39 Okla. 610, 136 Pac. 577; State v. Merrihew, 47 Iowa, 112, 29 Am. Rep. 464.

If there is a default in some one of the conditions of the bond, that is sufficient to authorize forfeiture.

State ex rel. Hankin v. Holt, 42 Okla. 472, 141 Pac. 969.

Mr. James Hepburn, for defendant in error:

The order of forfeiture was never entered in the records of the county court.

Edwards v. State, 39 Okla. 605, 136 Pac. 577.

The county court of Logan county was never opened for the transaction of business at any time during the April, 1914, term, prior to the 9th day of May (the date of the purported forfeiture).

American F. Ins. Co. v. Pappe, 4 Okla. 110, 43 Pac. 1085; Irwin v. Irwin, 2 Okla. 180, 37 Pac. 548; Wilson v. State, 3 Okla. Crim. Rep. 714, 109 Pac. 289; Collins v. State, 5 Okla. Crim. Rep. 254, 114 Pac.

1127; Baker v. State, 5 Okla. Crim. Rep. 186, 113 Pac. 991.

Where the same sovereign arrests the principal and prevents him from appearing at the time and place stipulated, the bail will be exonerated.

State v. Funk, 20 N. D. 145, 30 L.R.A. (N.S.) 211, 127 N. W. 722, Ann. Cas. 1912C, 743.

Pryor, C., filed the following opinion:

This is an action commenced on the 16th day of June, 1914, in the district court of Logan county, Oklahoma, by the plaintiff in error against the defendant in error, as surety for recovery on an appeal bond given by Lou Green in an appeal from a judgment of conviction in a criminal action in the superior court of Logan county to the criminal court of appeals of this state. The parties will be referred to as they appeared in the trial court and as they appear here. The petition alleges, in effect, that on the 26th day of January, 1912, Lou Green was convicted of the crime of having the unlawful possession of intoxicating liquors, and was sentenced by said court to serve a term of three months in the Federal jail, and to pay a fine of \$300, cost of prosecution; that an appeal was taken from said judgment of conviction to the criminal court of appeals of the state of Oklahoma; that to stay execution on said judgment, the said Lou Green executed the appeal bond sued upon with the defendants, J. S. Herber and Dan D. Diche, as sureties; that on the 5th day of February, 1914, the criminal court of appeals rendered judgment affirming the judgment of the lower court, and transmitted the mandate to the county court of Logan county; that on the same day said court issued commitment to the sheriff of Logan county, directing said sheriff to execute said judgment and sentence of the court against the said Lou Green; that the sheriff made a return of said commitment to the county court of Logan county, showing his inability to serve said commitment. The answer of the defendant consists of a general denial, and as a further defense that he had surrendered himself to the sheriff of Logan county, prior to the transmission of the said mandate from the criminal court of appeals to the county court of Logan county, and prior to the issuance of the commitment referred to in plaintiff's petition, and that he had been in the possession and custody of the sheriff

his own, including cases where the failure was due to his arrest and conviction on another charge, is discussed in the notes to Hargis v. Begley, 23 L.R.A.(N.S.) 136;

State v. Funk, 30 L.R.A.(N.S.) 211, and Com. v. Allen, 50 L.R.A.(N.S.) 252; and see later case, Metcalf v. State, L.R.A. 1916E, 595.

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continuously ever since said date, and, further, that there was never any valid judgment of forfeiture entered on said bond by the county court of Logan county. On the 3d day of November, 1915, the cause was tried to a jury, and at the conclusion of the evidence of both sides the court instructed the jury to return a verdict in favor of the defendant, for the reason that the uncontradicted evidence showed: First, that the principal of said bond, Lou Green, was in the custody of the plaintiff at the time he was called in open court, and his bondsmen were called to produce him in court; second, that judgment of forfeiture on which this suit is based was entered when the court was not in session. From the judgment of the directed verdict, the plaintiff appeals.

The question involved here for consideration is whether or not the surety on an appeal bond is exonerated from producing the accused for the purpose of submitting to the judgment of the court, after the cause has been affirmed, where it appears that the accused has been prevented from appearing by reason of his being arrested in the same jurisdiction for another offense, and convicted thereon, and sentenced to a term in the penitentiary, and was in custody of the law at the time that forfeiture was entered upon the appeal bond. The evidence is uncontradicted that the principal, Lou Green, in the bond sued upon, was arrested on the 7th day of September, 1913, by the sheriff of Logan county, charged with the crime of murder; that he was kept continuously from that date in the custody of the sheriff in the county jails of Kay and Logan counties until the 24th day of December, 1913, when the said Lou Green, principal, was convicted upon said charge of murder and sentenced to a forty-year term in the state penitentiary at McAlester. Where one is charged with crime and gives and executes bond for his appearance with surety, or has been convicted of crime and executes an appeal bond with surety, conditional upon his appearance in court and submitting to the judgment of the court, if affirmed, and afterwards is arrested and kept in custody on another crime in the same jurisdiction and by the same authorities, and thereby prevented from appearing according to the condition of his bond and submitting to the judgment of the court, and his sureties are thereby rendered unable to produce the principal in court to submit to said judgment, they are thereby exonerated as such sureties. *State v. Funk*, 20 N. D. 145, 30 L.R.A.(N.S.) 211, 127 N. W. 722, Ann. Cas. 1912C, 743; *Woods v. State*, 51 Tex. Crim. Rep. 595, 103 S. W. 895; *People v.*

*Robb*, 98 Mich. 397, 57 N. W. 257. In *State v. Funk*, supra, the court held: "It is a good defense to an action against the sureties on a bail bond that the state, intermediate the date of such bond and the time when, by the terms thereof, the principal was obligated to appear in court, caused the arrest of such principal on a criminal charge in another county, and kept him confined in the county jail thereof until after the date designated in the bond for his appearance. By such arrest and detention of the principal, performance of the conditions of the bail bond was rendered impossible by the state, the obligee in the bond, and therefore the default of the principal in failing to appear is excusable."

And that the holding of this court was not based upon a peculiar statute is shown by the following language of the opinion, which is both sound in reasoning and in the principles that it announces: "We have reached the conclusion that the judgment of the lower court must be reversed. We do not rest our decision, however, solely upon what we have above stated relative to the construction of § 10,270. We are convinced that the weight of authority, both on principle and reasoning, supports appellant's contention that when one is bound as bail for another for his appearance in a particular court, at a particular time, and the state, before the time stipulated for the appearance, arrests the principal and detains him at another place, thus preventing him from appearing at the time and place stipulated, the bail will be exonerated during such detention. There are many authorities which might be cited in support of this rule. We cite the following: *People v. Bartlett*, 3 Hill, 570; *Com. v. House*, 13 Bush, 679; *Woods v. State*, 51 Tex. Crim. Rep. 595, 103 S. W. 895; *State v. Row*, 89 Iowa, 581, 57 N. W. 306; *People v. Robb*, 98 Mich. 397, 57 N. W. 257; *Buffington v. Smith*, 58 Ga. 341; 3 Am. & Eng. Enc. Law, 2d ed. p. 719. In *State v. Row*, the Iowa court, among other things, said: 'It is not to be said, as a legal conclusion, that, had he not been imprisoned at the instance of the state, he would neither have appeared, nor his sureties produced him, when his appearance was called for. The state, by placing him in the penitentiary, had rendered it absolutely impossible for him to appear, or for the sureties on his bond to produce him. Under such circumstances there could be no default.' In *Woods v. State*, 51 Tex. Crim. Rep. 595, 103 S. W. 895, the Texas court tersely said: 'It may be that the appellant was properly indicted in the county of Hamilton, and in one sense this

may have been a fault on his part; still, in our view, it would constitute, no matter whether he was rightly or wrongly indicted in the other county, a sufficient cause for his exoneration, inasmuch as the very government which held him amenable to the charge in Bosque county had taken jurisdiction of him in Hamilton county.' "

There is some conflict in the decisions as to whether or not an arrest or detention in the Federal or a foreign jurisdiction will exonerate the bondsmen, but the law seems to be very generally settled that the detention in the same jurisdiction which prevents the accused from appearing in accordance with the conditions of the bond will exonerate his surety, and is a sufficient legal excuse for not producing him in court, as the bond provides.

In this case the defendant was in custody, charged with the crime of murder. It was not within his power to appear at the appointed time, nor was it within the power of his bondsmen to produce him in court for the purpose of submitting to the judgment of the court, but it was within the power of the state to produce the principal Lou Green in open court, for whatever purposes necessary to put the judgment of conviction into force and ef-

fect. Clearly, the trial court properly applied the law in instructing the jury that under the circumstances they should find for the defendant.

It is the contention of the plaintiff that the bond was forfeited on account of the failure of the principal, Lou Green, to pay the fine and cost of the prosecution. The appeal bond in criminal cases of this character is only conditioned that the accused shall appear and submit to whatever judgment might be rendered and affirmed against him. It is not the intent and purpose of such bonds to secure the payment of the fine and the costs. The bonds only serve a purpose of staying execution of the judgment and sentence until a hearing can be had on an appeal, and to guarantee the defendant's appearance at the appointed time, and submitting to the judgment of the court rendered. Therefore there was no forfeiture of the bond by failure of the defendant Green to pay said costs and fine.

The judgment of the trial court should therefore be affirmed.

Per Curiam:

Adopted in whole.

## COLORADO SUPREME COURT.

G. W. TALLMAN, Plff. in Err.,

v.

EFFIE HUFF.

(— Colo. —, 173 Pac. 869.)

### Deed — destruction — effect.

1. The destruction by a grantor at the request of the grantee of an unrecorded deed, and the execution of a new one to the grantee's wife, vests title in the wife.

*For other cases, see Deeds, II. f, in Dig. 1-52 N. S.*

### Appeal — finding on fraud — interference.

2. A finding of absence of fraud in a conveyance to a debtor's wife will not be interfered with on appeal if supported by evidence, although some evidence is unsatisfactory.

*For other cases see Appeal and Error, VII. 1, 3, a, in Dig. 1-52 N. S.*

(June 3, 1918.)

**Note.** — As to the effect of destruction or cancellation, or redelivery to grantor for that purpose, of delivered but unrecorded deed, see annotation following this case, post, 402.

L.R.A.1918F.

**E**RROR to the District Court for San Miguel County to review a judgment in favor of plaintiff in an action brought to recover possession of certain real estate. Affirmed.

Statement by Garrigues, J.:

May 13, 1915, Effie Huff brought suit in ejectment under Code 1887, chap. 23 (Colo. Code Civ. Proc. 1908, chap. 23), in the district court of San Miguel county, against G. W. Tallman, as defendant below, to recover possession of certain real estate in the town of Norwood. August 21, 1915, defendant answered. The first defense is in substance a general denial; the second alleges that January 2, 1913, Asa Huff, plaintiff's husband, caused the record title to the premises to be placed in her name, but that the property really belonged to him, and August 25, 1913, defendant caused an attachment to be levied on it as his property; that judgment was recovered against him, and the attachment sustained; that upon execution sale defendant was the purchaser, and August 16, 1915, obtained a sheriff's deed for, and is now the owner in possession and entitled to the possession of, the property under the sheriff's deed.

March 31, 1913, Tallman paid a note of \$500 which he had signed with Mr. Huff as accommodation maker at the Bank of Telluride, and the attachment suit against him was to recover on this indebtedness. In that suit judgment was obtained against Mr. Huff, and the attached property was sold on execution. Tallman bid it in and obtained a sheriff's deed August 16, 1915.

Plaintiff and her husband were married in August, 1910, and she claims her funds, which she placed in his hands after they were married, were used by him in paying for the place, and that she authorized him to purchase it for her. None of the witnesses conflict in their testimony. Morgan, the person from whom the property was purchased, testified, in substance, that he sold the property to Mr. Huff November 27, 1911, for \$1,120 in cash, and on that day executed and delivered a deed to him; that October 11, 1912, Mr. Huff returned to him the unrecorded deed and requested him to destroy it and make a new deed to his wife; that he (Morgan) burned the old deed in the presence of and at the request of Mr. Huff, and then and there executed and delivered to him in its place a new deed to his wife for the property. This second deed is dated November 22, 1911, was acknowledged October 11, 1912, and filed for record January 2, 1913.

Mrs. Huff testified regarding the transaction that her husband attended to buying the property for her at her request and with her money; that he brought the deed home, handed it to her, and said, "It has not been recorded; you will have to have it recorded; take care of it;" that she supposed it was all right, and put it away in her trunk without reading it; that as far as she knew nothing further was done with it, and it remained there for about a year; that her husband went away, and in getting her affairs in shape after he left she decided to record the deed; that, if it ever left her possession until she had it recorded, she did not know of it; and that she never knew that two deeds had been executed.

Mr. Huff conducted a saloon business in Norwood, and he and his wife had lived in the house in question some time before it was purchased from Morgan. Shortly after the purchase he left and went to South America.

Mrs. Huff testified further, in substance, that the property was bought with her funds, and that she in fact paid the consideration, although her husband attended to the business. In accounting for how and where she obtained the money, she said she had an interest with her father and brother in live stock brought from South Dakota, and that, as the property was sold,

they turned over to her her share, which amounted to \$600; this evidence is not disputed, and is corroborated by other testimony; that she had \$250 when they were married that she had saved from stenographic work; that her brother made her a wedding present of \$100; that she boarded the men who worked in her husband's saloon, kept a cow and chickens, and sold milk and eggs, from which sources combined, she saved up \$200; that, instead of depositing it in the bank, she turned all the money over to her husband to keep for her, with the understanding that it should be used in buying a home; that after they moved into the Morgan house and had lived there for a time, she decided she liked it, and authorized him to buy it for her; that she gave this money to her husband to keep for her, to be used in buying them a home; and that he told her he had used the money in paying for the Morgan property.

The court found that plaintiff furnished the funds to purchase the property, with the understanding that the title was to be taken in her name, and that at the time of the attachment levy it was her property, and not the property of her husband, that no credit was obtained by her husband on account of his supposed ownership of the property, that she did not take the title for the purpose of defrauding her husband's creditors, and that she is, and was at the time of the beginning of this suit, the owner of the legal and equitable title, and entered judgment accordingly.

Mr. L. W. Allen, for plaintiff in error:

The conveyance from Morgan to plaintiff was a nullity and did not pass the legal title.

Hutchinson v. Hutchinson, 16 Colo. 349, 26 Pac. 814; Dennison v. Barney, 49 Colo. 442, 113 Pac. 519; Gideon v. Gideon, 99 Kan. 332, 161 Pac. 595; 13 Cyc. 723; 8 R. C. L. pp. 1021, 1022; Sally v. Sandifer, 2 Mill, Const. 445, 12 Am. Dec. 687; Gilbert v. Bulkley, 5 Conn. 262, 13 Am. Dec. 57; Farrar v. Farrar, 4 N. H. 191, 17 Am. Dec. 410; Rogers v. Rogers, 53 Wis. 36, 40 Am. Rep. 756, 10 N. W. 2; Dimmick v. Dimmick, 95 Cal. 323, 30 Pac. 547; Weygant v. Bartlett, 102 Cal. 224, 36 Pac. 417; Howard v. Huffman, 3 Head, 562, 75 Am. Dec. 783; Matheson v. Matheson, 139 Iowa, 511, 18 L.R.A. (N.S.) 1167, 117 N. W. 755; Tyler v. Currier, 147 Cal. 31, 81 Pac. 319; Trull v. Skinner, 17 Pick. 213; Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638.

The conveyance to plaintiff was in fraud of creditors, and void.

Knapp v. Day, 4 Colo. App. 21, 34 Pac. 1008; Innis v. Carpenter, 4 Colo. App. 30,



34 Pac. 1011; First Nat. Bank v. Kavanagh, 7 Colo. App. 160, 43 Pac. 217; Rose v. Dunklee, 12 Colo. App. 403, 56 Pac. 342; House v. Johnson, 19 Colo. App. 524, 76 Pac. 743; Stockgrowers' Bank v. Newton, 13 Colo. 245, 22 Pac. 444; Grimes v. Hill, 15 Colo. 359, 25 Pac. 698; Gwynn v. Butler, 17 Colo. 114, 28 Pac. 466; Mulock v. Wilson, 19 Colo. 296, 35 Pac. 532; Wells v. Schuster-Hax Nat. Bank, 23 Colo. 534, 48 Pac. 809; Helm v. Brewster, 42 Colo. 25, 93 Pac. 1101; Tibbetts v. Terrill, 44 Colo. 94, 96 Pac. 978; Thuringer v. Trafton, 58 Colo. 250, 144 Pac. 866; Culver v. Graham, 3 Wyo. 211, 21 Pac. 694; Anderson v. Reed, 20 N. M. 202, L.R.A.1916B, 862, 148 Pac. 502.

Mr. Buel R. Wood, for defendant in error:

Where a grantee in an unrecorded deed surrenders to the grantor his interest in the land and returns the deed, the grantor is thereby invested with such an equitable interest as will be good defense to a suit by the grantee to establish title.

Happ v. Happ, 156 Ill. 183, 41 N. E. 39; Sanford v. Finkle, 112 Ill. 146; Gillespie v. Gillespie, 159 Ill. 84, 42 N. E. 305; Matheson v. Matheson, 159 Iowa, 511, 18 L.R.A.(N.S.) 1167, 117 N. W. 755.

The deed from Morgan to plaintiff vested in her the equitable title.

Russell v. Meyer, 7 N. D. 335, 47 L.R.A. 637, 75 N. W. 262; 2 Jones, Real Prop. § 1259; Gillespie v. Gillespie, 159 Ill. 84, 42 N. E. 305; Brown v. Brown, 142 Iowa, 125, 120 N. W. 724; Hallett v. Alexander, 50 Colo. 37, 34 L.R.A.(N.S.) 328, 114 Pac. 490, Ann. Cas. 1912B, 1277.

Garrigues, J., delivered the opinion of the court:

Plaintiff in error argues four points: First, that recording a deed that has been delivered is not necessary to convey title to the grantee, and under our decisions the unrecorded deed from Morgan to Mr. Huff conveyed the title to the latter; that the cancellation and destruction of the unrecorded deed, under our statute requiring conveyances to be in writing, did not re-establish title in Morgan, therefore, when he made the second deed purporting to convey the premises to Mrs. Huff, it conveyed no title, because the title still remained in Mr. Huff, notwithstanding the burning by Morgan of the unrecorded deed, and that this title was attached and sold on execution and is the basis of Tallman's deed; second, that the evidence does not show beyond a reasonable doubt that Mrs. Huff furnished the funds that paid for the premises; third, that if she did furnish the funds, the title was taken in her name for the purpose of hindering, delaying, and

defrauding her husband's creditors, in which she participated; fourth, that the conveyance to her was in fraud of creditors and is void. From the view we are inclined to take of the matter a decision of the first point disposes of the case.

When Huff took the unrecorded deed back to Morgan and requested him to destroy it and make a new deed to his wife, to which Morgan consented, and then and there canceled the original deed by burning it with the mutual intention that it should be destroyed and a new deed executed in its place, and after such destruction of the original deed Morgan, at the request of Mr. Huff, made a new deed to Mrs. Huff, the practical effect of the transaction was the same as if the grantor had made the deed originally to Mrs. Huff; and no mere theory regarding the destruction of the original deed not reinvesting the grantor with title can change the practical effect of the transaction. The voluntary surrender and destruction of an unrecorded deed by the grantor, at the request of the grantee, where the intention of all the parties is to reinvest the title in the grantor, reinvests the grantor with the whole title; at least, this is the practical effect of such a transaction. Anyhow, Mr. Huff, after the destruction of the deed, had no title which he could assert against anyone, or in any court; consequently Tallman acquired no title at the judicial sale. Whatever trust, if any, was established in the premises in Mr. Huff, was extinguished by operation of law when, at his request, the deed was burned and canceled by Morgan, and a new deed in its place executed to his wife. So we shall treat the case the same as though the original deed was made to Mrs. Huff, and give no effect to the unrecorded deed that was burned. We know there are many authorities holding the contrary, especially among the older cases, but we think the trend of modern authority is as above announced. The following cases tend to support this position: Matheson v. Matheson, 159 Iowa, 511, 18 L.R.A.(N.S.) 1167, 117 N. W. 755; Brown v. Brown, 142 Iowa, 125-133, 120 N. W. 724; Happ v. Happ, 156 Ill. 183, 41 N. E. 39; Gillespie v. Gillespie, 159 Ill. 84, 42 N. E. 305; Russell v. Meyer, 7 N. D. 335, 47 L.R.A. 637, 75 N. W. 262; Farrar v. Farrar, 4 N. H. 191, 17 Am. Dec. 411; Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638; Howard v. Huffman, 3 Head, 562, 75 Am. Dec. 783, 784; 2 Jones, Ev. § 420; Tiedman, Real Prop. p. 561, § 741.

The disposition of this branch of the case eliminates all questions regarding a resulting trust or preferred creditors and

matters of a like nature that have been argued, and the only question remaining is whether the conveyance to plaintiff is in fraud of creditors and void. Upon this point the case is so very close to the border line that we would not disturb a finding of the court either way. Because we might have found differently had we been the trier of the facts makes no difference. It was the province of the trial court to

pass upon the questions of fact, and while it is true there is no conflict in the testimony and some of it is quite unsatisfactory, still we do not feel that the finding is so unsupported by the evidence as to require a reversal as a matter of law.

The judgment is therefore affirmed.

HILL, Ch. J., and SCOTT, J., concur.

**Annotation—Effect of destruction or cancelation, or redelivery to grantor for that purpose, of delivered but unrecorded deed.**

The earlier decisions upon the question above stated are collected in a note in 18 L.R.A.(N.S.) 1167, and a supplemental note in 34 L.R.A.(N.S.) 495.

In the following subsequent decisions the courts have found occasion to restate the familiar doctrine that the title to real estate is not affected by the accidental loss or destruction of a duly executed and delivered but unrecorded deed (*White v. Moffett* (1913) 108 Ark. 490, 158 S. W. 505), or by the fact that the grantor obtained possession of and destroyed the deed without the grantee's consent (*King v. Fragley* (1912) 19 Cal. App. 735, 127 Pac. 813; *Havice v. Havice* (1913) 257 Ill. 393, 100 N. E. 923; *Metropolitan Trust & Sav. Bank v. Perry* (1913) 259 Ill. 183, 102 N. E. 218; *Hays v. Dean* (1917) — Iowa, —, 164 N. W. 770).

The rule that a grantor, having parted with his title by a good and sufficient

deed, duly delivered, cannot, of his own accord, without the consent of the party in interest, destroy or suppress his deed, and thereby reinvest himself with the title so conveyed, is strictly one of law, and will be enforced in all law actions where the facts bring them within its scope; but where an unrecorded deed is by the parties surrendered or canceled by mutual consent, with the idea of re-investing the grantor with the title he has conveyed, equity will give effect to such transaction so far as to declare such grantor the equitable owner, and estop the original grantee and those claiming through or under him from asserting title under the surrendered deed. *Hays v. Dean* (Iowa) supra.

And there is no sound reason for refusing to apply the same rule where a deed has been lost, and the parties treat it as having been surrendered and canceled. *Ibid.* E. S. O.

**UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.**

**UNITED STATES OF AMERICA**

v.

**FREDERICK KRAFFT, Plff. in Err.**

(249 Fed. 919.)

**War — Espionage Act — elements of guilt.**

1. The success of the attempt need not be shown to warrant conviction under the act of Congress providing that whoever shall wilfully attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military and naval forces of the United States shall be punished.

*For other cases, see War, in Dig. 1-52 N. S.*

**Evidence — espionage — sufficiency.**

2. A public speaker of prominence, who,

**Note.** — For decisions under the Espionage Act of June 15, 1917, see annotation following this case, post, 410, and references therein to annotation on related questions.

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with deliberation, addresses from a platform in a populous city a crowd composed in part of soldiers in the uniform of the United States when that country is at war, to the effect that the government could not compel troops to cross the seas, that such an attempt was a damned shame, that the people should have a right to vote on the question, may be found to be guilty of an attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, within the meaning of the Federal Espionage Act.

*For other cases, see Evidence, XII. f, in Dig. 1-52 N. S.*

**Evidence — previous utterances.**

3. Upon the trial of one for violation of the Espionage Act by attempting to incite insubordination in the military forces of the United States, evidence is not admissible that, at a previous time, accused had stated that he was in favor of war with Germany.

*For other cases, see Evidence, XI. k, in Dig. 1-52 N. S.*

Same — opinion as to how far uniform could be recognized.

4. Upon trial of one for attempting to incite insubordination in persons in the military service of the United States by addressing a crowd containing soldiers, from a raised platform in a public street, evidence is admissible as to how far away one could recognize a uniform under the conditions under which he acted.

*For other cases, see Evidence, XI. t, in Dig. 1-52 N. S.*

(April 23, 1918.)

**E**RROR to the District Court of the United States for the District of New Jersey (Davis, District Judge), to review a judgment convicting defendant of violation of the Espionage Act by attempting to cause insubordination in the military forces of the United States. Affirmed.

The facts are stated in the opinion.

Argued before Buffington, McPherson, and Woolley, Circuit Judges.

Messrs. Henry Carlless, Harrison P. Lindabury and Morris Hillquit for plaintiff in error:

There is no proof that defendant uttered the words charged in the indictment.

*People v. Davis*, 1 Wheeler, C. C. 235; *Gendron Iron Wheel Co. v. Santschi*, 17 Ohio C. C. 723, 8 Ohio C. D. 578; *Chicago Cottage Organ Co. v. Caldwell*, 94 Iowa, 584, 63 N. W. 336; *United States v. Bishop*, 60 C. C. A. 123, 126 Fed. 183; *Phenix Ins. Co. v. Kerr*, 66 L.R.A. 569, 64 C. C. A. 251, 129 Fed. 723; *Mandelbaum v. Swift*, 154 Ill. App. 578; *Illinois C. R. Co. v. Long*. — Ky. —, 128 S. W. 890; *Hatcher v. Pennsylvania R. Co.* 60 N. J. L. 227, 54 Atl. 563; *Huff v. Welch*, 115 Va. 74, 78 S. E. 573.

Even if the statements charged against defendant in the indictment were supported by proof, they would not constitute an offense under the statute.

*The Ben R.* 67 C. C. A. 290, 134 Fed. 784; *United States v. Starn*, 17 Fed. 435; *Field v. United States*, 69 C. C. A. 568, 137 Fed. 6; *Interstate Drainage & Invest. Co. v. Freeborn County*, 85 C. C. A. 532, 158 Fed. 270; *United States v. Goldenberg*, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3; *Atlantio Coast Line R. Co. v. United States*, 94 C. C. A. 35, 168 Fed. 175; *United States v. Musgrave*, 160 Fed. 700; *St. Louis & S. F. R. Co. v. Delk*, 86 C. C. A. 95, 158 Fed. 931, 14 Ann. Cas. 233; *United States v. Jackson*, 75 C. C. A. 41, 143 Fed. 783; *United States v. Nakashima*, 87 C. C. A. 646, 160 Fed. 842; *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; *United States v. Palmer*, 3 Wheat. 610, 4 L. ed. 471; *Unit-*

*ed States v. Union P. R. Co.* 91 U. S. 72, 23 L. ed. 224; *Mason v. Cranbury Twp.* 68 N. J. L. 149, 52 Atl. 568.

There was no proof that defendant caused or attempted to cause insubordination, disloyalty, mutiny, or refusal of duty in the military service of the United States.

*Griffin v. Thompson*, 202 N. Y. 104, 95 N. R. 7; *Field v. United States*, 69 C. C. A. 568, 137 Fed. 6; *The Ben R.* 67 C. C. A. 290, 134 Fed. 784; *United States v. Starn*, 17 Fed. 435.

There is no proof that he committed the acts charged against him wilfully.

*Hazle v. Southern P. Co.* 173 Fed. 431; *Felton v. United States*, 96 U. S. 600, 24 L. ed. 875; *State v. Grassle*, 74 Mo. App. 313; *State v. Preston*, 34 Wis. 675.

Evidence to the effect that defendant could recognize the soldiers alleged to have been in his audience was inadmissible.

17 Cyc. 103.

Messrs. Charles F. Lynch and Andrew J. Steelman, for defendant in error:

The jury by its verdict found that defendant uttered the words charged in the indictment, and the question should be considered by this court only so far as to ascertain whether there was any legal proof in support thereof.

*Crumpton v. United States*, 138 U. S. 361, 34 L. ed. 958, 11 Sup. Ct. Rep. 355; *Moore v. United States*, 150 U. S. 62, 37 L. ed. 998, 14 Sup. Ct. Rep. 26; *Humes v. United States*, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 602; *MacDonald v. United States*, 12 C. C. A. 339, 24 U. S. App. 25, 63 Fed. 429; *Anderson v. Territory*, 6 Ariz. 185, 56 Pac. 717; *Hyde v. Territory*, 8 Okla. 69, 56 Pac. 852; *Kellogg v. United States*, 43 C. C. A. 179, 103 Fed. 200; *Bandy v. United States*, 157 C. C. A. 394, 245 Fed. 98; *Armstrong v. State*, 17 L.R.A. 484, note; *Goldman v. United States*, 245 U. S. 474, 62 L. ed. 410, 38 Sup. Ct. Rep. 166.

The statements alleged to have been made by defendant under the circumstances charged and proved constitute an offense under the statute.

36 Cyc. 1106; *Thornley v. United States*, 113 U. S. 310, 28 L. ed. 999, 5 Sup. Ct. Rep. 491; *United States v. Tyler*, 105 U. S. 244, 26 L. ed. 985; *Lake County v. Rollins*, 130 U. S. 642, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; *Re Downing*, 5 C. C. A. 575, 14 U. S. App. 434, 56 Fed. 470; *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; *Field v. United States*, 69 C. C. A. 568, 137 Fed. 6; *Re Gardiner*, 4 C. C. A. 155, 14 U. S. App. 6, 53 Fed. 1013; *United States v. Jackson*, 75 C. C. A. 41, 143 Fed. 783; *United States v. Goldenberg*, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3.

Whether defendant wilfully committed the acts charged was a question of fact, founded on evidence, and may not be reviewed.

40 Cyc. 938; *United States v. Sugarman*, 245 Fed. 604; *United States v. Boyd*, 45 Fed. 851; *Spurr v. United States*, 174 U. S. 728, 734, 43 L. ed. 1150, 1152, 19 Sup. Ct. Rep. 812; *Felton v. United States*, 96 U. S. 699, 702, 24 L. ed. 875, 876; *United States v. Union P. R. Co.* 94 C. C. A. 433, 169 Fed. 65; *Potter v. United States*, 155 U. S. 438, 446, 39 L. ed. 214, 217, 15 Sup. Ct. Rep. 144; *United States v. Pierce*, 245 Fed. 878.

It was not necessary to prove that the United States or its service was actually injured.

*United States v. Pierce*, supra; *Crumpton v. United States*, 138 U. S. 361, 34 L. ed. 958, 11 Sup. Ct. Rep. 355.

**Buffington**, Circuit Judge, delivered the opinion of the court:

In the court below Frederick Kraft was charged with the violation of § 3 of the Act of June 15, 1917, which provides: "Whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, . . . shall be punished by a fine of not more than \$10,000, or imprisonment for not more than twenty years, or both." [40 Stat. at L. 219, chap. 30, Comp. Stat. —, § 10,212c.]

The indictment contained four counts, the first of which charged defendant with "knowingly, wilfully, and unlawfully attempting to cause insubordination in the military and naval forces of the United States, in that he, the said Frederick Kraft, did then and there speak to Martin T. Gunning, corporal in Company K, First New Jersey Infantry, who had been duly mustered into the military service of the United States, and Albert Barton, corporal in the First New Jersey Infantry, who had been duly mustered into the military service of the United States and divers other persons who were members of the military forces of the United States, and did then and there say: 'I can't see how the government can compel troops to go to France.' 'If it was up to me, I'd tell them to go to hell.' 'It's a damn shame.' 'I can't see why the Socialists here have not the same rights as in Germany.' 'They send their own Senators down to Washington, and they will not let the people do it'—and divers other words and sentences which are to the grand jury unknown." The count concluded with the averment that this was done "with the intent of him, the said

Frederick Kraft, to influence, persuade, and cause the said persons, who were members of the military forces of the United States, to become insubordinate, contrary to the form of the statute," etc. The second count averred Kraft had used the same words and in like hearing with intent "to influence, persuade, and cause the said persons, who were members of the military forces of the United States, to become disloyal to the United States," etc.; the third count charged him with intent "to influence, persuade, and cause the same the said persons, who were members of the military forces of the United States, to mutiny, to the injury of the military service of the United States;" and the fourth count, with intent "to influence, persuade and cause the said persons, who were members of the military forces of the United States, to refuse to do the duties imposed on them as such members of the military forces of the United States, to the injury of the United States," etc.

To this indictment the defendant pleaded not guilty. The jury heard the proofs, which consisted of five witnesses, all of whom were enlisted men, and who were present on the occasion when Kraft is alleged to have used the words charged, and who were called on behalf of the government, and also the testimony of the defendant and twelve other witnesses, whose testimony was to the effect that Kraft had not used the language specified in the indictment.

At the conclusion of the testimony the defendant, who was represented by able counsel, asked the court to direct a verdict of acquittal on the ground, *inter alia*, that "the facts or statements charged in the indictment do not show any intent to cause the thing charged; that is, insubordination, disloyalty, mutiny, or refusal of duty. That, while they may produce certain results, there is nothing in the words themselves that tends to produce that result, to the extent of charging intent, which is a necessary element in the charge. That there is no proof in this case that the defendant made these statements with the intent to do the things charged in the four counts of the indictment; that is, with intent to cause insubordination in the army, or with intent to cause disloyalty in the Army, or with intent to cause mutiny in the Army, or with intent to cause refusal of duty in the Army. And I submit that, without intent being established by the affirmative case of the government, no conviction can lie."

As further ground to support such request for binding instructions of acquittal, the defendant contended: "That the evi-

dence cannot be complete until it is shown that these things are to the injury of the service of the United States, . . . and that there is no evidence showing that such injury has occurred to the service of the United States. Assuming that the words were said, there is no evidence that the words had any more effect than to cause a disturbance in the crowd."

This request the court denied, saying: "As I view it, there are really two questions, both of which are jury questions. The first question is whether or not the defendant spoke the words which are alleged in the indictment and which he is charged with speaking. If he did not, that ends the case. The jury will determine whether he did that or not. Second, if he did, what was the intent in his own mind in speaking them? What effect did he intend that they should have upon those who listened, who were already in the service, or might possibly be called into the service; and it seems to me that, under the circumstances, that should be determined by the jury. Therefore, your motion will be denied, and an exception granted."

This holding, viz., that there were two questions of fact involved, first, were the words charged spoken? and, secondly, if spoken, what was Krafft's intention in speaking them — What effect did Krafft intend they should have on those hearing them? was afterwards embodied in the charge which is printed in full on the margin.<sup>1</sup>

<sup>1</sup> "The action which you have been called upon to try is an indictment found by a grand jury in this district against the defendant, Frederick Krafft, for the violation of an act of Congress approved June 15, 1917, which provides, among other things, that whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval service, is guilty of the crime which this statute denounces.

"It has been admitted that the United States is at war. There are two considerations which enter into every verdict,—the law and the facts. The law is exclusively for the court; the jury have not any business with it, except as it is laid down by the court, and it is the duty of the jury to accept the law as the court defines it. The court alone is responsible for accurately expounding the law to you. The facts are exclusively for the jury, and the jury are to find what the facts were from the evidence, and then determine whether or not, under the testimony and the law as laid down by the court, the defendant is guilty or not guilty. 'Insubordination' is defined by the Standard Dictionary, one of the best

In thus confining the jury to the two issues specified above, the court in effect denied the contention of defendant's counsel that, to constitute the crime, the government was required to go further, and show not only that the words were used with the intent to effect insubordination, disloyalty, mutiny, or refusal of duty, but that they actually did produce that effect, and injured the United States service. Did the court commit error in so holding? Was it necessary for the government, not only to show the defendant used the words, not only that he used them with intent to cause insubordination, but that his counsel and purpose actually caused mutiny, insubordination, disloyalty or refusal to obey orders? We cannot accept this view. Indeed, the clear statement of the defendant's proposition is its best refutation, for if that position be sound the defendant's guilt would be determined, not by what he did in the way of counseling disloyalty, but in what his hearers did in the way of following his directions. In other words, the defendant could do all in his power to bring about disloyalty, but as long as he did not succeed he committed no crime; but, if his counsel induced action, and that action resulted in insubordination or mutiny, then what the defendant did by way of counsel was later made a crime by the person who followed his counsel. Manifestly, Congress had no such purpose in view, nor can the simple and plain words of the act be given such

authorities, as being 'the state of being insubordinate; disobedience to constituted authority,'—which, under this statute, is the military or naval authority. 'Disloyalty' is defined by the same authority to be 'the state of being disloyal; unfaithful to one's government,'—and in this case it would be disloyalty or unfaithfulness to the constituted military or naval authorities. 'Mutiny' means 'to rise against lawful or constituted authority, particularly in the naval or military service.' 'Refusal of duty' is 'to reject or refuse to perform the duties imposed by the military or naval authorities.' Now, the question for you gentlemen to determine is whether or not the defendant caused or attempted to cause insubordination, disloyalty, mutiny, or refusal of duty, as I have defined those words to you. In your consideration of the facts, and in reaching your verdict, I charge you that the defendant is presumed to be innocent until proved to be guilty beyond a reasonable doubt. A reasonable doubt means a doubt that is founded in reason and arises from the evidence. So, gentlemen of the jury, you are limited to the evidence in your consideration of this case, and your verdict should be founded upon nothing else

meaning. In that regard the statute does not specify the writings, speech, or indeed the kind of means to be used; it makes one comprehensive, inclusive crime,—"whoever, when the United States is at war shall cause." That means actually cause, succeed in causing; that is one crime the statute specifies, and also whoever shall wilfully "attempt to cause" is put on the same status.

Both "wilfully causing" and "wilfully attempting to cause" are by the statute made alike criminal; and, such being the case, the attempt to cause being forbidden, as well as the causing, there is no ground to construe or apply this statute on the theory that insubordination, mutiny, or disloyalty must be effected. To so hold

would be to defeat the whole purpose of the statute. For the purpose of the statute as a whole was not to wait and see if the seed of insubordination—in this case, sown in August in Newark; at a later date, in some camp—sprang into life and brought forth fruit, but it was to prevent the seed from being sown initially. Moreover, it is clear that this new statute was to enable the civil courts to prevent the sowing of the seeds of disloyalty, for with the fruits of disloyalty, to which a misguided soldier might be led by the disloyal advice, the military court-martial already provided was sufficient. The statute was not addressed to the misguided man who was in the service, but was manifestly to include anyone—for

than that,—not upon prejudice, sympathy, or any outside, extraneous matter. Your finding of the facts should be determined by what you have heard in this courtroom from sworn witnesses whom you have seen. You have listened to them; you have watched them, both for the government and for the defense; and it is within your province to pass upon the credibility of those witnesses, whether you are going to believe this one or the other one,—whether this one was deliberately misrepresenting or the other one, or whether this one or that one is mistaken. You are to pass upon their credibility, and upon the weight which you are going to give to their testimony, and find your verdict, not upon their names, not upon their politics, nor upon their creed, but upon the evidence which was presented before you. Politics here and there crept in; but, gentlemen of the jury, it has no place in your consideration. You are to shut your eyes to every last thing except the testimony which was presented before you, and in deliberating upon that use your common sense and all the brains that God has given you, without prejudice, without partiality, and mete out to this defendant what law and justice require.

"An indictment is a charge against a person. The government contends that the defendant violated this statute in causing or attempting to cause insubordination. That you will find in the first count. By 'count' I mean a separate charge. A bill of indictment is based on one or more charges, which charge that the defendant violated the law in this particular or in the other particular, and the separate charges are what are called counts. The first count charges as I have stated to you. The second count charges, in substance, that the defendant violated this statute in causing or attempting to cause disloyalty in the military or naval forces of the United States. The third count is that he caused or attempted to cause mutiny in the military or naval forces, to the injury of the government; and the fourth count is that he caused or attempted to cause refusal of duty in the military or naval forces of the

United States, to the injury of the same. If he did that, gentlemen of the jury, he is guilty. If he did not do it, he is not guilty. It is for you to determine whether or not he did. In your deliberations there will be two questions which you will have to decide. The government charges that he violated the statute in the ways in which it is charged in the indictment by the utterance of these words at the time and place which has been testified before you: 'I cannot see how the government can compel troops to go to France. If it was up to me I would tell them to go to hell. It is a damned shame. I cannot see why Socialists here have not the same rights as in Germany. They send their own Senators down to Washington to vote on conscription, and they will not let the people do it.'

"The first question, gentlemen of the jury, which you will have to determine, is whether or not the defendant said these words. If he did not, that ends the case, and your verdict should be not guilty. If you should reach the conclusion that he did say those words, then a further question arises, and that is: What did the defendant intend by the use of those words? As a matter of law, it would not be sufficient for him to say those words, without intending wilfully to cause insubordination, disloyalty, mutiny, or refusal of duty, or some of them, in order to constitute guilt. In order to hold the defendant guilty, he must have said those words with the intention of accomplishing some one of those things. Now, that might be accomplished by speaking directly to soldiers who were in the military forces of the United States. It might be accomplished by speaking to a crowd partly composed of those who were subject to draft and might be called thereafter. It is for you, from all the facts which have been testified to, to determine, first, whether or not the defendant used the words which he is alleged and charged to have used. If you find that he did, then it is for you to determine with what intention he used those words, because, if he did not use those words wilfully and intentionally to cause or to attempt to cause insubordination, disloyal-

"whoever" is a broad, inclusive word—who in any way wilfully created or attempted to cause insubordination. Clearly the court below was right in holding that if, in fact, the defendant used the language alleged, and if his purpose was wilful to cause insubordination, then the statute was violated. Clearly it was right in holding that, to constitute the crime at the start, it was not necessary for that wilful purpose to succeed.

Turning to the charge of the court, we note, first, that, in pursuance of its duty to expound the law, the court quoted the statute in full, and then explained to the jury, in words to which no exception can be taken, what constituted insubordination, disloyalty, mutiny, and refusal of

duty, respectively, viz.: "Insubordination" is defined by the Standard Dictionary, one of the best authorities, as being 'the state of being insubordinate; disobedience to constituted authority,'—which, under this statute, is the military or naval authority. 'Disloyalty' is defined by the same authority to be 'the state of being disloyal; unfaithfulness to one's government,'—and in this case it would be disloyalty or unfaithfulness to the constituted military or naval authorities. 'Mutiny' means 'to rise against lawful or constituted authority, particularly in the naval or military service. 'Refusal of duty' is 'to reject or refuse to perform the duties imposed by the military or naval authorities.'"

ty, mutiny, or refusal of duty, as I have defined them to you, he is not guilty; but, if he did, then he is guilty.

"I have tried to make the law governing the case plain to you gentlemen. The court has no idea as to the facts. If he had, he would not tell you; that is your business. You will therefore retire and bring in your verdict.

"I have several requests here from the defendant. The first request I think I have covered; the second I have covered; the third, fourth, and fifth I have covered. In fact, I think I have covered all of them, except the last one. Is that right, Mr. Lindabury?

"Mr. Lindabury: Yes.

"The court: Then, as I understand it, they are all withdrawn, except the last one, as having been substantially covered in my charge.

"Mr. Lindabury: Yes, your Honor.

"The court: Gentlemen, the last request is: 'If the jury finds that the defendant made the statements alleged in the indictment, and that the statements were made as the result of sudden anger and without deliberation, the defendant must be acquitted.' I so charge you. As I understand this point, it is directed to this phase of the law: That the defendant cannot be convicted unless he did what he did with intention. When he said those words,—if he said them,—if he intended wilfully to cause one of those things which the statute denounces, then he is guilty; if he did not, he is not guilty.

"It is important, gentlemen of the jury, that nothing should interfere with the military and naval forces of the United States, when it is at war and in a death struggle. It is just as important, gentlemen of the jury, that at this time and all other times the liberty of individual citizens who have not committed crime be protected. So, in your deliberation, you will consider the fact, and the fact alone, as to whether this defendant made these statements, and, if he did, did he make them with intention wilfully to cause insubordination, disloyalty, mutiny, or refusal of duty? But, gentle-

men, the importance of noninterference, as I have said a while ago, with the military and naval forces when the United States is at war, should not influence you in the least to find a verdict that is not based absolutely upon the evidence, by the ordinary rules of logic and common sense; in other words, it should not make you convict a man more quickly than you would do in other times or under other circumstances. Your sole duty consists in finding just what the facts are, and the fact that we are at war only bears on that as giving rise to this statute. So, shut out everything but the evidence, as I have charged you, every influence of every kind, and use your common sense and the ordinary rules of logic, and weigh the testimony of all of these witnesses, both pro and con, as they have related what occurred that night at that place, and determine whether the defendant used those words, and, if he did, what his intention was,—whether he used them wilfully, with intent to cause insubordination, disloyalty, mutiny, or refusal of duty.

"Mr. Lindabury: Your Honor said that it is important that the conduct of the war be not interfered with in any way. I feel that that leaves the impression that any interference is a violation of this statute, and I would like to have an exception to that part of your Honor's charge.

"The court: Do you want me to change that, or charge it over in any way?

"Mr. Lindabury: The point being that any interference is not a violation of law. It is only the things that are prohibited by the statute that the jury should consider as interference.

"The court: Gentlemen of the jury, Mr. Lindabury has called my attention to the fact that I stated that it was important that the naval and military forces of the United States should not be interfered with in the discharge of their duty, or words to that effect. We have in this case nothing to do with that at all, unless it comes within the provisions of this statute,—only that the defendant did or said something wilfully and with intent to cause insubordination, disloyalty, mutiny, or refusal of duty."

The jury were then instructed that the question for it to determine was "whether or not the defendant caused or attempted to cause insubordination, disloyalty, mutiny, or refusal of duty, as I have defined those words to you." The charge called the jury's attention to the presumption of innocence of the defendant, to their duty to give him the benefit of all reasonable doubt, and that their verdict should be founded wholly on the testimony of witnesses before them, and should not be based on prejudice, sympathy, or any extraneous matter. The jury were then instructed that the first question for them was to determine whether the defendant had used the alleged words, and, if they found he did not, that ended the case. If they found he did, then they were to take up the further question of Kraft's intent in using those words; the court in that regard saying: "If you should reach the conclusion that he did say those words, then a further question arises, and that is: What did the defendant intend by the use of those words? As a matter of law, it would not be sufficient for him to say those words, without intending wilfully to cause insubordination, disloyalty, mutiny, or refusal of duty, or some of them, in order to constitute guilt. In order to hold the defendant guilty, he must have said those words with the intention of accomplishing some one of those things. Now, that might be accomplished by speaking directly to soldiers who were in the military forces of the United States. It might be accomplished by speaking to a crowd partly composed of those who were subject to draft and might be called thereafter. It is for you, from all the facts which have been testified to, to determine, first, whether or not the defendant used the words which he is alleged and charged to have used. If you find that he did, then it is for you to determine with what intention he used those words, because if he did not use these words wilfully and intentionally, to cause or to attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, he is not guilty; but, if he did, then he is guilty."

The court further charged that "if the jury finds that the defendant made the statements alleged in the indictment, and that the statements were made as the result of sudden anger and without deliberation, the defendant must be acquitted."

We have thus quoted from the charge at length, to show that the law was properly construed by the court, and the questions of fact were clearly and properly defined, and their determination left to

the jury. The jury having found the words charged were used, and that Kraft used them with the wilful intent charged, we are bound to accept this verdict and these findings as conclusive, if there was any evidence from which a jury could reasonably draw the findings it has made. *Humes v. United States*, 170 U. S. 216. 42 L. ed. 1011, 18 Sup. Ct. Rep. 602.

This court has only appellate jurisdiction, and, no matter what our opinion of the facts may be, we cannot, as the court below could have, grant a new trial; but our province is to examine the evidence, and ascertain if there was evidence to submit to the jury; or, to put it in another way, whether it was the court's duty to withdraw the case from the jury and direct the defendant's acquittal. With that in view, the judges of this court have severally examined and collectively discussed all the evidence, and we agree that the court below was bound, under the proofs, to submit the case to the jury. As the record comes before us, while we find much testimony given by the defendant and the large number of witnesses called by him, which testimony, if believed, would have warranted the jury in finding the defendant had never used the words alleged, we also find the testimony of some witnesses, much fewer in number, but whose testimony, if believed, warranted the jury in finding the words alleged were spoken by the defendant. It is neither our province nor purpose to discuss that testimony. That was wholly for the jury, who saw and heard the witnesses, and they were the tribunal of the defendant's fellow citizens the law made judges of the truth of the testimony for and against the defendant. Our duty is to see whether the government produced any such material testimony against him that it had to be submitted to the jury.

Referring, first, to the proof that Kraft had used the words alleged and specified in the indictment: The record shows, if believed, such proof was given by two non-commissioned officers—Gunning and Barton. These two men were together, and had the same opportunity of seeing and hearing. Gunning's testimony was: "I do not see why the government can compel troops to cross the ocean. It is not in the Constitution. It is a damned shame. Why the hell should we do it? Why have not the Socialists of America the same right as they have in Germany, to vote for or against the war? They send their own Senators to vote for conscription. Why don't the people have a chance?"

Barton's testimony was: "When I first saw him, I had come down from the Mandarin, Corporal Gunning and myself, and



he stopped to light a cigarette, and then all of a sudden I heard somebody hollering, 'If it was up to me, I would tell them to go to hell.' I said to Corporal Gunning, 'There is something the matter over there;' and we started over, and we got in the center of the crowd, and when we got there he was saying: 'I cannot see how the government can compel troops to go to France. If it was up to me, I would tell them to go to hell. It is a damned shame. Why have not the Socialists of America the same privilege as they have in Germany?' He said: 'They have their own Senators down there vote for conscription, instead of having the people vote.' The crowd was interrupting him all the time. Q. You have said 'he' and 'him' all the time. Whom do you mean? Who was doing this talking? A. Mr. Krafft."

In view of this proof, it was the court's duty to submit to the jury whether they believed the testimony of these men, or that of the defendant that he had not used the words, or of his many witnesses to the effect that he had not used them, that they had not heard them, or that they were used by men in the crowd, and not by the defendant. The jury had all these witnesses before them; they could judge of the weight to be given to each severally, the opportunity they had to see, their manner on the stand, and all those elements which enabled the jury to fairly and justly determine whether the words charged were spoken that night by Krafft. The jury having found the words were used, this court must go further, and inquire: Was there any evidence, any facts, or whether there were any circumstances or surroundings, from which the jury could fairly infer they were wilfully used by the defendant, with the wilful intent of causing or attempting to cause insubordination in the military forces of the United States?

In that regard the proofs tended to show the defendant was a man of mature years, well educated, accustomed to public speaking, and his purpose was to persuade people to the beliefs he espoused. He was a man of much public prominence, had been a candidate for governor of New Jersey,—a man whose vocation as an editor turned his attention to public affairs, and whose purpose and paid or volunteered occupation was to educate and persuade his hearers to his beliefs. The proofs also show that he was speaking from an elevated platform, in a central place in a populous city, to a large crowd, and that in the crowd were from thirty to fifty men in uniform, who were plainly dis-

tinguishable. The United States was at war; the Conscription Act had been passed, which subjected the men selected to the orders of the military authorities of the country. Under such circumstances, a jury could reasonably infer that a man who undertakes to lead his hearers to adopt his spoken views must in reason, be held to have intended his words should have, if followed, the effect in action which his counsel in words advised.

As we have seen, the court instructed the jury that, if the words were spoken in sudden anger or without deliberation, they should acquit. The verdict must therefore be taken as a finding that the alleged words were not uttered in sudden anger, but with deliberation. A man who has thus spoken with deliberation must be held to have intended the natural and probable consequences of his words: "for by thy words thou shalt be justified, and by thy words thou shalt be condemned." Considering, then, the time, the fact of the country being at war, the audience (composed of both soldiers and civilians) to whom the words were addressed, the vehemence with which they were spoken, the duty of obedience which men in the service, or men liable to service, owed to the military authority, the impending conscription then in prospect, and the likelihood that all men in the service might be ordered overseas, can we say, as a matter of law, the language, used at the time it was, did not tend to cause, or was not an attempt to cause, insubordination? And, bearing on the relevance and significance of the time and circumstances words are spoken, we may repeat what was heretofore said: "War is the dividing line. What was only foolish and unwise in word and deed last week, in peace, may be treason when war comes. Remember, when war comes, no man can serve two masters. As of old the message comes: 'Choose ye this day whom ye will serve.'"<sup>3</sup>

Clearly, then, this question of wilful intent was one for the jury to determine, and by their verdict they have determined the wilful purpose of the defendant was to cause insubordination. And in view of that finding, and under the law, we must accept the verdict of the defendant's twelve fellow citizens, which verdict in substance has found a matured and experienced public man advising younger and more impressionable men to insubordination in the military service. And we cannot close our eyes to the fact that such advice, if fol-

<sup>3</sup>Instructions given to applicants for naturalization in court at Philadelphia, April 6, 1917.

lowed by these young men, might later subject them to court-martial and execution.

We have recited these facts at length, to show the defendant has had a court trial, a fair hearing, the aid of able counsel, and that the testimony of his witnesses has been heard and decided by a jury of his fellow citizens. Such being the case, there is no ground for this appellate court setting aside this verdict and the sentence imposed thereon, unless the court committed error in admitting or refusing to admit evidence. These latter assignments have had our thoughtful attention, but we find no error therein.

The first was in the court's refusal to allow as evidence the testimony of a witness who had heard the defendant some time previously say he was in favor of the war with Germany. We fail to see how any expression of opinion on the part of the defendant at some other time and place was material to the present issue, which issue was: First, did the defendant use, on August 9, 1917, at Newark, the language alleged? and, second, if so, did he use it with the wilful purpose to cause or attempt to cause insubordination? What he said or did at other times and places was not material to the issues, on trial.

Another assignment referred to allowing the witness Gunning, in answer to the question, "How far could a person of ordinary sight recognize a soldier in that light, if standing upon a box of the height of the one on which the defendant was standing that night?" to testify, "With moderate sight he should recognize a soldier in uniform at a distance of 500 feet or more." The admission of such testimony must, in the nature of things, be largely a question of judicial discretion, and unless we find an abuse of discretion, or that the defendant was prejudiced by such testimony, the cause should not be reversed. We are of opinion the court committed no error.

This witness had already testified as follows:

Q. And Market street to your knowledge is a sort of a great white way, well lighted up at night?

A. Yes.

Q. How is it lighted up at night?

A. It is very bright. It is known as a white way.

Q. Was it light enough for you to see uniforms in the audience around you?

A. Yes, sir.

Q. It was light enough for you to pick out so many uniforms around you?

A. Yes.

Q. How far away could you detect that a man was a soldier?

A. I would know he was a soldier if he was 500 feet away.

Q. In that light could you see a soldier's uniform 500 feet away?

A. Yes.

Q. Are you sure of that?

A. Positive.

After this testimony the witness was then asked, "Could you tell that, if you were standing on the soap box that the defendant was standing on—could you see that far and detect the uniform?" and on objection being made the court itself suggested the question be put in the form in which it was allowed. Manifestly, this question, proper as we view it, lost any significance it had, when admitted, in view of the direction the proof on the part of the defendant took, for not only did the defendant, when he went on the stand, make no point of not being able to see the uniformed soldiers in the crowd, but the testimony given by some of his own witnesses was that the place was brightly illuminated.

Finding no error in the record to warrant reversal, the record must be remanded to the court below, and its judgment be affirmed.

Petition for writ of certiorari denied by the Supreme Court of the United States, June 10, 1918 (247 U. S. 520, 62 L. ed. 1246, 38 Sup. Ct. Rep. 582).

### Annotation—Decisions under the Espionage Act of June 15, 1917.

For court decisions under the Selective Service Act of May 18, 1917, see annotation to *Franke v. Murray*, L.R.A.1918E, 1015.

The exclusion of seditious matter from the mails under the Espionage Act is treated in the note appended to *Masses Pub. Co. v. Patton* in L.R.A.1918C, 79.

The so-called Espionage Act of June 15, 1917, chap. 30 (40 Stat. at L. 217,

L.R.A.1918F.

Comp. Stat. —, § 10,212a), is of wide scope and only a portion of it deals with the disclosure of national defense secrets. It treats of such varied matters as the control of vessels in the territorial waters of the United States, in times of national emergency, and forbids injury to vessels engaged in foreign commerce or interference with such commerce by violent means. It deals with

the disturbance of foreign relations and violations of the neutrality of the United States. It provides, among other things, for the issuance of passports, and imposes a penalty for their illegal use and falsification, and prohibits the counterfeiting of the government seal or the unlawful use of the mails.

The few cases which, up to this time, have construed the provisions of the Espionage Act, have dealt mainly with § 3, which points out three classes of acts which it denounces under a penalty. The first consists in the wilful making or conveying of false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies. The second consists in wilfully causing or attempting to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States. The third consists in wilfully obstructing the recruiting or enlistment service of the United States to the injury of the service of the United States. *United States v. Pierce* (1917) 245 Fed. 886.

The provisions of the Espionage Act, § 3, which forbids the making or conveyance of false reports or false statements with the intent to interfere with the operation or success of either military or naval forces of the United States, or to promote the success of its enemies, are not repugnant to the guaranties of freedom of speech or of the press, contained in the 1st Amendment to the Constitution of the United States. *Ibid.*

Nor does the fact that a pamphlet which contains false statements calculated to discourage our armies and enlisted men or impair their morale, or to discourage compliance with the draft laws and interfere with their enforcement, in violation of § 3 of the Espionage Act, was circulated as an argument in favor of a political party, bring it within the protection of the constitutional guaranties of freedom of speech and of the press. *Ibid.* The court observes: "While a political party and its individual members may advocate the repeal of existing laws, their amendment and improvement, and point out defects, they have no constitutional right to counsel, advise, encourage, and solicit resistance to the execution of the laws, or to refuse to obey them.

Slanders of the President of the United States and of the nation are false reports and false statements within § 3

of the Espionage Act of June 15, 1917. *United States v. Hall* (1918) 248 Fed. 150.

And spreading broadcast a pamphlet in which the purposes and motives of the President of the United States and of Congress, in entering into the war with Germany, are impugned and grossly misrepresented and falsified, and which presents exaggerated descriptions of the horrors of the war, possible and impossible, and contains many false statements calculated to incite opposition to the war and opposition to the government, and also calculated to interfere with the morale of our armies, discourage enlistments, registration, willing military service, and to encourage desertion, constitutes a crime under § 3 of the Espionage Act, forbidding the making or conveyance of false statements or false reports with intent to interfere with the operation or success of either the military or naval forces of the United States, or to promote the success of its enemies. *United States v. Pierce* (1917) 245 Fed. 878.

The making or conveyance of false reports or false statements with the intent to interfere with the operation or success of either the military or naval forces of the United States, or to promote the success of the enemies of the United States, constitutes a crime under § 3 of the Espionage Act, whether the operation or success of the military or naval forces be actually interfered with, or the success of the enemies of the United States be actually promoted, or not. *Ibid.*

But it is said that one's beliefs, opinions, and hopes are not "false reports and false statements" within the meaning of § 3 of the Espionage Act of June 15, 1917. *United States v. Hall* (Fed.) *supra*.

Nor is the Espionage Act intended to suppress criticism or denunciation, truth or slander, oratory or gossip, argument or loose talk, but only false facts, wilfully put forward as true, and broadly with the specific intent to interfere with Army or Navy operations. *Ibid.*

The offenses prohibited by § 3 of the Espionage Act, although made substantive crimes by the statute, are in the nature of attempts, which are efforts with specific intent to commit specific crimes, which efforts fail, but are apparently adapted to accomplish the intended crimes, and are of such magnitude and proximity to the object of their operation that they are reasonably calculated

to excite public fear and alarm that such efforts will accomplish the specific crimes. *Ibid.*

A specific intent to interfere with the operation or success, loyalty or discipline, of the military or naval forces, in violation of § 3 of the Espionage Act, should not be inferred from the utterance of false reports inimical to the President, and false statements as to the reasons which led to the war with the imperial government of Germany, where they were made largely as kitchen gossip or saloon or street debate in a village containing some 60 people and located 60 miles from the railway, and far distant from the Armies or Navy of the United States. *Ibid.*

The court in this case takes the view that interference with the operation or success of the military forces or naval forces is not the natural and ordinary consequence of such slanders, but that they are rather calculated to lead to a breach of the peace and a broken head for the slanderer. It will be noted that this decision is not in harmony with the other cases construing the act, which hold that it need not be shown that the utterances actually interfered with the operation or successes of the military or naval forces of the United States, or actually promoted the success of its enemies, and that one deliberately making the forbidden false reports or statements must be held to have intended the natural and probable consequences of his words, and that a jury may reasonably infer that he intended his words should have, if followed, the effect in action which his counsel in words advised. In *United States v. Pierce* (1917) 245 Fed. 878, it is said that "any and all acts and words or writings that interfere with the operation or success of the military or naval forces of the United States, and all attempts, successful or unsuccessful, by acts, words, or writings, to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States in time of war, work to the injury of the service of the United States."

Intent to interfere with the operation or success of the military or naval forces, or to promote the success of our enemies, or a wilful attempt to cause insubordination, or refusal of duty in the forces of the United States, may be inferred from the nature and character of the false statements made and promulgated and the surrounding circumstances and conditions, and on a consideration of the

conditions under which made and of the persons to whom made. *Ibid.*

Whether the acts charged in an indictment under the Espionage Act, § 3, are of the kind and character condemned by the law which forbids the making and conveying of false reports and statements with the intent to promote the success of the enemies of the United States, and prohibits acts designed to obstruct recruiting and enlistment, is a trial question rather than one of pleading, determinable on demurrer. *United States v. Schaefer* (1918) 248 Fed. 291.

And whether false statements, contained in a pamphlet which was circulated broadcast, were merely to advocate the principles and doctrines of a political party, or were intended to discourage the war, enlistments, and recruiting, and impair the morale of our army, and thereby interfere with the operation and success of the military and naval forces of the United States, to the injury of the United States, is a question for the jury. *United States v. Pierce* (Fed.) *supra*.

Men registered under the Selective Draft Act of May 18, 1917, and who have received their serial numbers from Washington, are "in the military forces of the United States" within the meaning of § 3 of the Espionage Act, which declares it to be an offense to wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States. *United States v. Sugarman* (1917) 245 Fed. 604.

On the contrary, it is held that "military and naval forces," as the term is used in § 3 of the Espionage Act, mean those organized and in service, and do not include persons merely registered and subject to future organization and service. *United States v. Hall* (1918) 248 Fed. 150, *supra*.

Statements made with intent to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, in violation of § 3 of the Espionage Act, constitute an offense thereunder, although it is not shown that they produced the intended result. *UNITED STATES v. KRAFFT*, ante, 402.

An averment in an indictment under § 3 of the Espionage Act, that defendant attempted to cause insubordination, disloyalty, and refusal of duty is sufficient, although there is no specific allegation of intent on the part of the

defendant, since an attempt, in its very nature, includes and involves intent. *United States v. Sugarman (Fed.) supra.*

A man who speaks with deliberation words calculated to cause insubordination in the military forces must be held to have intended the natural and probable consequences of his words. *UNITED STATES v. KRAFFT, ante, 402.*

Whether words were uttered with wilful intent to cause insubordination in the military service, in violation of § 3 of the Espionage Act, is a question for the jury. *Ibid.*

Findings by the jury that the words charged were used by the defendant, and with the wilful intent to cause insubordination in the military forces of the United States, are conclusive upon the circuit court of appeals, if there was any evidence from which the jury could reasonably draw the findings made. *Ibid.*

An indictment drawn under § 3 of the Espionage Act, which charges that the defendant at a given time and place attempted to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces of the United States by urging certain young men, who had been registered under the act of Congress, not to report for military duty, sufficiently acquaints the defendant with the facts, although it does not set forth what was said by him in the way of urging, counseling, and advising disloyalty and refusal of duty. *United States v. Sugarman (Fed.) supra.*

That one charged with making certain statements with the wilful purpose of causing insubordination in the military forces, in violation of § 3 of the Espionage Act, stated at some other time and place that he was in favor of the war with Germany, is immaterial. *UNITED STATES v. KRAFFT, ante, 402.*

The admission, on the trial of one charged with using certain language with intent to cause insubordination in the military forces, in violation of § 3 of the Espionage Act, of testimony as to how far a person of ordinary sight, if standing where the accused did, could see a uniformed soldier in the crowd, in the light prevailing on the night in question, is not erroneous, nor could it be prejudicial where witnesses for the accused testified that the place was brilliantly illuminated. *Ibid.*

One who urges young men not to enlist, extravagantly and untruly depicts the horrors, dangers, and consequences

of war, impugns the motives and purpose of the President and Congress in declaring war, and misrepresents the objects sought to be obtained by our government in declaring the existence of a state of war, may be found guilty of a wilful obstruction of the recruiting or enlistment service of the United States, to the injury of such service, in violation of § 3 of the Espionage Act, although the government is unable to prove that a single person was induced by such acts not to enlist who otherwise would have enlisted. *United States v. Pierce (Fed.) supra.*

The foregoing decision is in direct conflict with the holding in *United States v. Hall (1918) 248 Fed. 150, supra*, that, to sustain a charge of "wilfully obstructing the recruiting or enlistment service of the United States, to the injury of the service of the United States," actual obstruction and injury must be proved, not mere attempts to obstruct, since the Espionage Act does not create the crime of attempting to obstruct, but only the crime of actual obstruction, when causing injury to the service.

The words "to the injury of the service of the United States," in § 3 of the Espionage Act, relate to and qualify the offense of wilfully obstructing the recruiting or enlistment service of the United States, and need not be included in counts based on the preceding clauses of the section, forbidding the wilful making or conveying of false reports or statements, or wilfully causing or attempting to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States. *United States v. Pierce (1917) 245 Fed. 878, supra.*

An indictment charging a violation of § 3 of the Espionage Act by disseminating false reports or statements, and by soliciting young men not to enlist, need not disclose the names of the persons solicited, the particular time or days when the solicitations took place, or the language used in making them. *United States v. Pierce (1917) 245 Fed. 888.*

One charged with the distribution of pamphlets containing false reports or statements with intent to obstruct enlistments, in violation of § 3 of the Espionage Act, and who is informed by the indictment of the names of some of the persons to whom the pamphlets were given, is not entitled to a bill of particulars as to the names of others, declared to be to the grand jurors unknown, to

whom the pamphlets are alleged to have been distributed. *Ibid.*

Nor should one accused of having solicited young men not to enlist, in violation of § 3 of the Espionage Act, be granted a bill of particulars as to the names of those solicited and the language or substance of the language used, where the names of those solicited are alleged in the indictment to be unknown to the grand jurors, and the nature and character and general substance of the solicitations are indicated by the overt acts charged. *Ibid.*

One charged with a violation of § 3 of the Espionage Act by the circulation of false reports and the solicitation of persons with intent to obstruct enlistment is not entitled to a list of witnesses examined by the grand jury, which privilege is confined by U. S. Rev. Stat. § 1033, Comp. Stat. 1916, § 1699, to cases of treason and capital offenses. *Ibid.*

Nor is he entitled to be furnished with a list of such witnesses under the 6th Amendment to the Federal Constitution, providing that the accused should be confronted with the witnesses against him, which only means that he is entitled to attend the trial and to hear the witnesses testify. *Ibid.*

### Conspiracy.

An averment in an indictment for conspiracy based on the Criminal Code of the United States, § 37 and § 3 of the Espionage Act, that, from the date of the beginning of war between the United States and the imperial German Government to the day of the presentment of the indictment, the defendants, at a certain place, unlawfully and feloniously conspired to interfere with, hinder, and delay the execution of certain specified laws of the United States, and that the conspiracy was a continuing one, and was that each of the defendants should discourage, obstruct, and prevent the prosecution by the United States of said war, and delay the execution of such laws by personal solicitation, public speeches, and the distribution of various pamphlets intended to influence persons available for military duty to fail to register and to refuse to submit to registration and draft for service in the military and naval forces, and to fail and refuse to enlist for service therein, which is followed by a charge of overt acts in execution of such conspiracy, sufficiently shows what the conspiracy was and what the conspirators were to do. *United States v. Pierce* (1917) 245 Fed. 878. A. W. R.

### IOWA SUPREME COURT.

L. E. ELLIS, Admr., etc., of Edward F. Larson, Deceased,  
v.

INTERSTATE BUSINESS MEN'S ACCIDENT ASSOCIATION, Appt.

(— Iowa, —, 168 N. W. 212.)

**Insurance — accident — satisfaction with accidental character of injury.**

1. A proviso in an accident insurance policy that the directors may waive the clause denying recovery in case of death from gunshot wound, unless the accidental character of the injury is established by an eyewitness, permits recovery, if the evidence is such that the insurer should be satisfied with such accidental character, which is a question for the court.

*For other cases, see Insurance, VI. b, 3, a, in Dig. 1-52 N. S.*

**Evidence — sufficiency — accidental character of accident.**

2. The accidental character of a gunshot

wound causing death is shown by evidence negating suicidal intent, and tending to show the discharge of a gun lying among rags and implements on a shelf in a garage when one working on a car reached onto the shelf for a needed implement.

*For other cases, see Evidence, XII. b, in Dig. 1-52 N. S.*

**Same — admissibility — res gestæ.**

3. A statement by one receiving a fatal gunshot wound, immediately after its occurrence, to the first person whom he sees, is admissible in evidence in an action on an accident insurance policy on his life, as part of the res gestæ.

*For other cases, see Evidence, X. d, in Dig. 1-52 N. S.*

**Insurance — witness of accident — who is.**

4. The wife of one killed by the accidental discharge of a gun lying on the shelf of a garage in which he was at work is an eyewitness of the accident within the meaning of a clause in an accident insurance policy, where he left the house attired for work on his car, to go to the garage and returned

**Note.**—As to validity and construction of provision in insurance policy requiring the fact or circumstances of loss to be established by eyewitness, see annotation following this case, post. 420.

L.R.A.1918F.

Various questions arising out the defense of suicide to an action on a policy of life or accident insurance are treated in notes cited in L.R.A. Indexes under the title, "Insurance," subtitle, "Suicide."

within three or four minutes seeking help, and stating that he had been hurt.  
*For other cases, see Insurance, III. d, 2, in Dig. 1-52 N. B.*

(June 27, 1918.)

**A**PPEAL by defendant from a judgment of the District Court for Polk County in favor of plaintiff in an action brought to recover the amount alleged to be due on an accident insurance policy. Affirmed. The facts are stated in the opinion.

Messrs. Dunshee, Haines, & Brody, for appellant:

Declarations made by the insured to plaintiff's witnesses, though within the *res gestæ* rule, did not transform the witnesses into eyewitnesses of the event; therefore, the cause of action was not established.

*Roeh v. Business Men's Protective Asso.* 164 Iowa, 199, 51 L.R.A.(N.S.) 221, 145 N. W. 479, Ann. Cas. 1915C, 813.

The use of the declarations of the insured to establish the accidental discharge of the rifle is prohibited by the terms of the by-law.

*Ibid.*

Mrs. Larson did not become an eyewitness to the discharge of the gun by reason of the fact that she heard the declarations made by her husband.

*Ibid.*

*Spaulding v. Chicago, St. P. & K. C. R. Co.* 98 Iowa, 205, 87 N. W. 227; *Baltimore & P. R. Co. v. Landrigan*, 191 U. S. 461, 48 L. ed. 262, 24 Sup. Ct. Rep. 137.

Messrs. Carr, Carr, & Evans, for appellee:

Deceased's wife, testifying to the statements made by him at the time he came into the house, testified to direct observations of such facts and circumstances as, of themselves, and without the aid of the inference or presumption that arises from the instinct of self-preservation, indicated that the shooting was accidental.

*Roeh v. Business Men's Protective Asso.* 164 Iowa, 199, 51 L.R.A.(N.S.) 221, 145 N. W. 479, Ann. Cas. 1915C, 813; *Lewis v. Brotherhood Accl. Co.* 194 Mass. 1, 17 L.R.A.(N.S.) 714, 79 N. E. 802.

The statements made by deceased upon entering the house, being admissible as part of the *res gestæ*, were themselves part of the event.

10 R. C. L. 160; *Britton v. Washington Water Power Co.* 59 Wash. 440, 33 L.R.A.(N.S.) 109, 140 Am. St. Rep. 858, 110 Pac. 29; *Martinez v. People*, 55 Colo. 51, 132 Pac. 64, Ann. Cas. 1914C, 559; *Alsever v. Minneapolis & St. L. R. Co.* 115 Iowa, 338, 56 L.R.A. 748, 88 N. W. 841; *Sutcliffe v. Iowa State Traveling Men's Asso.* 118

Iowa, 220, 97 Am. St. Rep. 298, 93 N. W. 90.

Weaver, J., delivered the opinion of the court:

It is conceded of record that the plaintiff's intestate died March 14, 1916; that his death resulted from a gunshot wound without any other concurring or contributing cause, and that at the time of his death he held a valid policy of accident insurance in the defendant association. Suit being brought on the policy, the defendant answered, denying liability on the theory that, although the death of the insured is shown to have been caused solely by external and violent means, proof of its accidental character is not established in the manner stipulated in the policy. It pleads that the deceased, in applying for membership in the association and for a policy of insurance therein, entered into the following agreement: "I hereby agree that I will accept the certificate of membership which may be issued to me, subject to all the provisions, conditions, and limitations contained in the articles of incorporation and by-laws of said association as the same now are or as they may be legally amended and changed; and I agree to comply with all the provisions thereof."

The answer further alleges that among the provisions of the articles and by-laws of the association to which the deceased thus subscribed are the following:

"The right of any member or person, claiming by, through and under any certificate issued to any member to claim weekly benefits or indemnity from the association shall be fixed and established by the provisions of the articles of incorporation and of the by-laws in force at the time the accident occurred or sickness commenced out of which any claim arises. Section 15 of article 4.

"The contract between the association and its members shall consist of the articles of incorporation and by-laws and the application. Section 3 of article 1.

"This association shall not be liable for the payment of benefits or indemnity on account of disability or death resulting from a bodily injury caused by the discharge of firearms, unless the member, or person claiming by, through or under any certificate issued to such member, shall establish the accidental character of such discharge by the testimony of at least one person, other than the member, who was an eyewitness of the event: *provided that the board of directors may waive this limitation when they are satisfied that said discharge was accidental.* Section 5 of article 4."

The accidental character of Larson's death is denied, and the sole contention of the defendant in the court below and in this court is that plaintiff has failed to establish that fact in the manner or by the testimony prescribed in § 5, article 4, last above quoted.

The testimony, in addition to the conceded facts already mentioned, is very brief. It tends to show that deceased and his wife had been out in an automobile which did not appear to be working well, and they came home about 4 o'clock in the afternoon. The wife went into the house, and deceased went to work on the car. A little later deceased came in to dinner, after which he returned to the garage. Of what followed the wife, testifying as a witness, says that within two or three minutes after he went out she heard him come rapidly into the kitchen, and as he entered, he called to her: "Come here, Nita, quick; I am hurt." Going to him she found him standing in the room. He was dressed in his overalls, and had a monkey wrench in his hand. To her inquiry, "How are you hurt?" he said: "I feel as if something hit me; I was reaching on the shelf for the grease gun when something knocked me over; I think it must have been the 22; I didn't know it was there." Then, sitting down, he asked his wife to examine his side, and added that he was feeling faint. To the doctor, who soon arrived, he repeated his story substantially as before. The wife, referring to the rifle, says it was a hammerless gun, which she had herself often used, and the trigger pull was extremely light. The safety device was operated by slipping it to the side, and it would "slip with the slightest touch." In connection with the statement made by the injured man to the doctor he said: "I thought it was an electric shock at first. It knocked me down. I got up, and saw some smoking rags or something of the sort, the end of the rifle sticking out."

This witness also examined the situation at the garage and says: "There is shelving along the north wall, occupying the east portion of the north wall, in the northeast corner of the garage. We found a 22 rifle lying on one of the shelves. The butt end was against the east end of the shelf, and the rifle lying at an angle across the shelf. The muzzle stuck over the edge of the shelf 2 or 3 inches. The rifle was covered with some rags, and there was a tire pump lying on top of the gun and some rags under the tire pump. There was a grease gun lying there mixed up among the rags. The muzzle was sticking out as you look towards the shelves, and the wire plunger, with a loop for a handle, was in

the debris on the shelf. These rags were apparently rags which had been used for wiping the car. There was a rag over the muzzle of the gun with a hole burned through. The charred hole was 2 or 3 inches in diameter, and it allowed the rag to drop so that the muzzle of the gun stuck through the hole."

One other witness gives practically the same description.

The only evidence offered on the part of defendant was the several provisions of the articles and by-laws of the association, and the concession by plaintiff that they were in force and effect at the time of the injury and death of the insured.

At the close of the evidence both parties moved for a directed verdict. The defendant's motion being overruled, its counsel said to the court: "That leaves nothing, I take it, but to direct a verdict for plaintiff," and a ruling was entered accordingly. From the judgment on the directed verdict the defendant has appealed.

I. The first question presented is the construction of the contract of insurance with special reference to the effect upon such contract of § 5, article 4, of appellant's articles of incorporation, which section we have already quoted in full. The appellant's position is, that the case before us is in all essential respects the parallel of *Roeh v. Business Men's Protective Asso.* 164 Iowa, 199, 51 L.R.A.(N.S.) 221, 145 N. W. 479, Ann. Cas. 1915C, 813, and that the rule there approved and applied requires a reversal of the judgment entered in the trial court. We think, however, there is a very clear and important distinction between the contract in the *Roeh* Case and the one now to be considered. True, § 5, article 4, down to the beginning of the final clause does follow the very language of the article in the *Roeh* Case, but adds thereto the provision which we have italicized in the quotation: "*Provided that the board of directors may waive this limitation when they are satisfied that said discharge was accidental.*"

Reading the entire article in connection with this final provision, it seems very clear that it was not intended to exempt the association from all liability for the death of a member from a gunshot wound where there is no eyewitness of the occurrence, but to limit such exemption to cases where the proof of the accidental character of the injury is not established by the evidence to the satisfaction of the directors. If this be not its meaning, what effect shall we give it? It must be presumed that the proviso means something, and surely it is not to be dismissed as a mere reservation by the insurer of a right to make the bene-



fiary of the policy a gift, if the board of directors shall be so charitably inclined. The language of the contract in this respect has been chosen by the insurer, and, under familiar principles, it is to be given the most favorable construction of which it is reasonably capable in support of the plaintiff's claim. It is well settled, also, that an insurer cannot constitute itself the final judge or arbiter of the merits of a claim made against it, by inserting in its policy a provision that any claim thereunder must be established by proof of its satisfaction. For example, in *Braunstein v. Accidental Death Ins. Co.* 1 Best & S. 782, 121 Eng. Reprint, 904, 31 L. J. Q. B. N. S. 17, 8 Jur. N. S. 506, 5 L. T. N. S. 550, an English case, the policy provided that, before payment of the indemnity, proof satisfactory to the board of directors of the accidental character of the injury must be furnished, and it was there held that this must be interpreted as meaning no more than that the proof must be reasonably satisfactory, and that the board could not deprive the plaintiff of his right to recover by unreasonably refusing to be satisfied. See also *Traiser v. Commercial Travellers' Eastern Acci. Asso.* 202 Mass. 292, 88 N. E. 901; *Charter Oak L. Ins. Co. v. Rodel*, 95 U. S. 237, 24 L. ed. 434; *Buffalo Loan Trust & S. D. Co. v. Knights Templar & M. Mut. Aid Asso.* 126 N. Y. 450, 22 Am. St. Rep. 839, 27 N. E. 942; *Reynolds v. Equitable Acci. Asso.* 59 Hun, 13, 1 N. Y. Supp. 738; *Accident Ins. Co. v. Bennett*, 90 Tenn. 256, 25 Am. St. Rep. 685, 16 S. W. 723; *Noyes v. Commercial Travellers' Eastern Acci. Asso.* 190 Mass. 171, 76 N. E. 665. In the *Noyes* Case the Massachusetts court quoted the *Braunstein* Case approvingly and says: "There is an implication that the directors will act reasonably, and the requirement is the same as if the words 'acting reasonably' were inserted, in connection with the words 'said board.'"

Speaking upon the same subject, the court in the *Traiser* Case, after holding that, upon the proofs offered, the jury might find that the death was accidental, adds: "If the jury should so find, we are of opinion they also would have the right to say that the same fair preponderance of the evidence which had convinced their judgments ought to have produced the same conviction in the minds of other reasonable men. It would be an anomaly for us to decide otherwise. It cannot be said as a matter of law that reasonable men were bound to come to only one conclusion. . . . It is not for the defendant, in a case of contradictory evidence, finally and decisively to pass upon the rights of the insured, if such a condi-

tion as this has been reasonably complied with."

In *Buffalo, Loan Trust & S. D. Co. v. Knights Templar & M. Mut. Aid Asso.* it is said that a requirement of "satisfactory proof" entitled the association to demand that the fact "should be shown with reasonable definiteness and certainty." The rule of these precedents is without exception in the cases so far as we have been able to discover. As suggested in the *Traiser* Case, it would be contrary to all reason and all sound principle to hold it competent for an insurer in a contract to clothe himself with power or authority "to pass finally and decisively . . . upon the rights of the insured." The courts cannot thus be ousted of their jurisdiction to settle and adjudicate disputes involving rights of persons and property. *Lewis v. Brotherhood Acci. Co.* 104 Mass. 1, 17 L.R.A. (N.S.) 714, 79 N. E. 802; *Utter v. Travellers' Ins. Co.* 65 Mich. 546, 8 Am. St. Rep. 913, 32 N. W. 812; *Fidelity & C. Co. v. Crays*, 76 Minn. 450, 79 N. W. 531; *Fidelity & C. Co. v. Elckhoff*, 63 Minn. 170, 30 L.R.A. 586, 56 Am. St. Rep. 464, 65 N. W. 351.

II. Construing the contract as indicated in the preceding paragraph, we have then to inquire whether, upon the evidence produced, the jury could properly find that the accidental character of *Larson's* death had been established by proofs which "ought to satisfy reasonable men acting reasonably." This question must be answered in the affirmative. The entire *res gestæ* developed by the testimony tends strongly to show that the gun was accidentally discharged. There is not only an entire absence of evidence tending to show suicidal purpose or predisposition on the part of the deceased, but practically every circumstance shown is consistent with and gives support to the opposite conclusion. That he had been engaged in working about his car is shown by the testimony of his wife, by the condition of things in and about the garage immediately after his injury, and by the fact that he had clothed himself in his overalls or working suit. He had come into the house to his dinner, and, so far as appears, there was nothing in his conduct to excite the special notice or alarm of his wife. Dinner over, he returned to his work, but almost immediately—two or three minutes the witness says—he came back in a hurried manner, carrying a monkey wrench in his hand and calling his wife to come quickly, for he was hurt. His explanation given at the moment is clearly admissible evidence, and, if true, indicates that, in reaching for or taking down the "grease gun," with which to lubricate some part of the car, he had moved the rifle

lying upon the shelf in such manner as to cause its discharge. His immediate and hurried return to the house, his prompt call for help from his wife, and for medical aid, are quite inconsistent with an attempt at suicide. The fact that the rifle was found lying on the shelf or bench with the muzzle angling outward, the delicate character of its trigger action, its being under a more or less confused aggregation of rags and implements used in caring for the car, and the further significant fact that the load appeared to have been discharged through a rag lying over its muzzle, all corroborate the story told by him as to the manner of his injury. That the proved facts and circumstances, as a whole, would justify a finding that the alleged accidental discharge of the gun was established to a reasonable certainty, and that the board of directors, as reasonable men acting reasonably, should have so found, is scarcely open to doubt.

III. The foregoing considerations are sufficient to require an affirmance of the judgment below, without entering into any discussion as to whether, if we were to ignore the effect of the last clause of section 5, article 4, of the defendant's articles of incorporation, such judgment could be sustained. It is perhaps proper, however, to point out that the opinion in *Roeh v. Business Men's Protective Asso.* supra, does not hold that, to satisfy the provision for "eyewitnesses" of the accident, some witness must be produced who actually saw the discharge of the gun which caused the injury. The rule or principle there approved is stated in these words: "The event referred to in the by-law relied upon is manifestly death resulting from a bodily injury caused by the discharge of firearms, and provides that the independent testimony should come from one who was an eyewitness of that event. . . . Not only is the beneficiary to prove the operating cause of death, as that it was from a gunshot wound, but he must prove by an eyewitness of the event that the gun was accidentally discharged. It is not enough that he prove that it might have been so committed. His proof must be stronger than that, and fairly preponderate in favor of the proposition that the gun was accidentally discharged. . . . In the case at bar, the event, that is to say, the accidental character of the discharge of firearms resulting in death, must be established by at least one person other than the insured, and 'who was an eyewitness' does not necessarily mean that the witness should have seen the exact manner of the discharge; but it seems to us that it does

comprehend the presence of the witness at or near the scene, and his direct observation of such facts and circumstances connected with the immediate transaction, as of themselves, and without any aid from presumption or inference arising from love of life, or the instincts of selfpreservation, indicate that the shooting was accidental."

Following this statement of the proposition, the opinion then quotes and adopts, as expressing the views of this court, an extract from *Lewis v. Brotherhood Acci. Co.* 194 Mass. 1, 17 L.R.A.(N.S.) 714, 79 N. E. 802. "An eyewitness is a person who testifies to what he has seen. By the terms of this policy, the facts and circumstances of the accident and injury are to be established by those who saw them. Not only are the facts and circumstances of the injury to be established by an eyewitness, but also of the accident; that is, the operating cause of the injury. Enough must be testified to by eyewitnesses to show the operating cause of the injury, or at least to show that at the time of the injury there was an operating cause to which the accident may fairly be attributed, and to indicate, in a general way, the nature of that cause and the manner of its working."

As will be readily seen, this statement of the rule is much less rigid and inflexible than the one contended for by appellant. Perhaps no better illustration is needed than a statement of the facts in the *Lewis Case*, in which the court announced the above rule, and permitted the plaintiff to recover upon a policy containing a requirement of an eyewitness of the event. One Lewis, being insured against accident, was drowned. The policy which he held contained a provision that, in case the insured died by drowning or by shooting, there could be no recovery against the insurer, except upon proof of the facts and circumstances of the accident and injury by the testimony of an actual eyewitness. It was shown that Lewis and a young lady were seen on the river in a canoe which Lewis was paddling. A little later the empty canoe was found floating upon the river, and the dead bodies of Lewis and his companion were thereafter found in the river. No one saw the canoe upset, or saw Lewis or the young lady struggling or alive in the water. In other words, there was no living eyewitness of the immediate facts of the drowning. There were, however, two witnesses who were on the river about five minutes before 4 o'clock in the afternoon of that day, and met Lewis and the lady going in the opposite direction. They appeared to be chatting and in good

spirits, nothing unusual in their manner, or in the appearance or action of the canoe. One of these witnesses testified, also, that 3 or 4 minutes after this meeting and after a point of land had intervened, shutting the canoe and its occupants from his view, he heard a cry or scream of some kind, but did not return to see what, if anything, was the matter. Another witness, with a friend, was on the river "about 4 o'clock," and, as they rounded a bend, they came upon the upturned canoe, and discovered articles of clothing floating on the surface. Close examination of the witness seems to have developed the time of this discovery to have been ten or fifteen minutes after 4. The owner of the canoe testifies that Lewis was a good boatman; that the canoe was what he would call medium safe, but that a person would have to be more careful with it than with a larger one. These facts, the court held, sufficiently satisfied the provision in the insurance contract, requiring proof by eyewitnesses. The views expressed on this point constitute an illuminating example of the practical application of the abstract rule or principle which that court elsewhere expresses, and approved by us in the Roeh Case, and on which the appellant largely relies. The opinion proceeds as follows: "The jury might have found, on the evidence of actual eyewitnesses, that shortly before the time when the accident happened Lewis and Miss Hurley were upon the river in what might be called a 'cranky' canoe, liable to overturn at any moment unless unusual care was exercised both by Lewis and his companion; that within five (perhaps fewer minutes of the time at which they were last seen alive the canoe was overturned and the bodies were under water. Here then is shown upon the testimony of eyewitnesses an operating cause, namely the imminent liability of the capsizing of the boat by reason of its cranky nature, taken in connection with the fact that it had two occupants, of whom one was a young woman not shown to have been experienced in aiding to keep the canoe in balance. It is not the case of a boat which is of such size and construction as to be not liable to be upset by the movements of persons in it, but it is the case of a cranky canoe having two persons in it, where a not unusual movement, even of one of them, may result in capsizing of it. An operating cause . . . is ever present under such circumstances, and that cause is disclosed by . . . eyewitnesses. Moreover, upon the evidence, the jury might have found that the movements of the canoe and its occu-

pants were shown by eyewitnesses up to a time within three or four minutes of the accident, and that every operating cause of the accident, except the one . . . shown to have been present, was fairly excluded by the testimony of these same eyewitnesses. It must be held that, in the case before us, the facts and circumstances of the accident and injury were established by eyewitnesses, within the meaning of the policy.

In other words, if the eyewitnesses testify to personal observations of the "operating cause," it is not required that they shall have seen that cause in actual operation.

If the rule and reasoning here made use of by the Massachusetts court in the Lewis Case, and adopted and approved by us in the Roeh Case, are sound—and we think they are—it seems hardly open to question that the judgment for plaintiff in the present case is fairly sustainable. If a "cranky canoe" is an ever-present cause of accident to those riding therein, is it not equally clear that a loaded gun with very delicate trigger action, in a position where it may be disturbed by a careless or thoughtless movement, is an ever-present operating cause of peril to those who may be employed within its reach? And if the tracing of the movements of the occupants of the canoe may stop anywhere from five to fifteen minutes short of the final catastrophe, and still the testimony be that of "eyewitnesses, within the meaning of the policy," it will require very considerable ingenuity to find reason for saying, in this case, that the two or three minutes intervening between Larson's leaving the house and his hasty reappearance, exclaiming he was hurt, is such a break or hiatus in the history of the case by eyewitnesses as will defeat an action on the policy. To repeat once more the statement of the principle announced in the opinion from which we have quoted so extensively: "Enough must be testified to by eyewitnesses to show the operating cause of the injury, of at least to show that at the time of the injury there was an operating cause to which the accident may fairly be attributed, and to indicate in a general way the nature of that cause and the manner of its working."

The record in the case at bar fairly fills the measure of this requirement.

No reversible error is shown, and the judgment of the district court is affirmed.

Preston, Ch. J., and Gaynor and Stevens, JJ., concur.

Petition for rehearing denied.

**Annotation—Insurance; validity and construction of provision requiring the fact or circumstances of loss to be established by eyewitness.**

This note supplements that to Roeh v. Business Men's Protective Asso. 51 L.R.A.(N.S.) 221, on the above question.

A few recent cases have involved provisions of the character under consideration.

It will be noticed that the provision involved in *ELLIS v. INTERSTATE BUSINESS MEN'S ACCL. ASSO.* ante, 414, excluding liability in case of death by the discharge of firearms unless the accidental character of the injury was established by an eyewitness, contained a clause that the board of directors might waive this limitation when they were satisfied that the discharge was accidental; and that it was held that this provision did not exempt the insurer from all liability for death from a gunshot wound, where there was no eyewitness, but limited it to cases where the accidental character of the injury was not established by the evidence, to the satisfaction of the directors. But it will be observed that the court held that the board could not unreasonably refuse to be satisfied; and that if the accidental character of the insured's death was established by proof which ought to satisfy reasonable men, acting reasonably, a recovery might be had, and the evidence was held sufficient to so establish the accidental character of the injury, there being testimony showing that the insured had been working around his automobile in the garage; that he had come to the house for dinner and, after it was over, returned to his work, but almost immediately came back, carrying a wrench, and calling to his wife that he was hurt; that he stated to her that he reached for a tool on a shelf and, in doing so, moved a rifle on the shelf in such a manner as to discharge it, with the result that he was shot.

While, from the view taken, it was unnecessary for the court to go further, it did so, and adopted the rule that the provision as to an eyewitness did not require the production of one who actually saw the discharge of the gun which caused the injury, but that, if an eyewitness was produced who testified to personal observations of the operating cause, this was all that was required, and the evidence of the insured's wife who saw him a few moments after he was shot, was held sufficient to establish the accidental character of the injury by an eyewitness.

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In *Lundberg v. Interstate Business Men's Accl. Asso.* (1916) 162 Wis. 474, 156 N. W. 482, Ann. Cas. 1916D, 667, it was held that a provision excluding liability for injury caused by firearms, unless the circumstances were established by an eyewitness, was not void as being against public policy.

In this case, a statute required that portions of policies, which purported, by reason of the circumstances under which a loss was incurred, to reduce the indemnity, should be printed in bold-faced type, and required insurance companies to submit a copy of the form of their policies to the insurance commissioner for approval; and it was held that after the commissioner had approved a policy, containing a provision excluding liability on account of bodily injury produced by the discharge of firearms, unless the claimant should establish the accidental character of the injury by an eyewitness, expert evidence could not be received in an action on such a policy to show that this provision was not printed in bold-faced type.

It was held in this case, that the plaintiff had failed to establish the accidental character of an injury by the testimony of "an eyewitness of all the circumstances of the casualty," where it appeared that, shortly before the occurrence, a person saw the insured, who had been fishing, rowing toward a landing; that, while in a house, such person heard the discharge of a gun from the direction of the landing; that, soon after, she went to the landing and found the insured lying in the bottom of the boat, with a bullet hole through his body and his discharged rifle lying near him.

In *Moses v. Illinois Commercial Men's Asso.* (1914) 189 Ill. App. 440, an amendment to a by-law, providing that an insurer should not be liable on account of disability or death of any member, resulting from the discharge of firearms, when there was no witness to the discharge of such arms except the member himself, was held reasonable, not against public policy, and a valid part of the contract of insurance.

And in *Connell v. Iowa State Traveling Men's Asso.* (1908) 139 Iowa, 444, 116 N. W. 820, a like provision was held an exception of liability which, like other exceptions, must be set up and proved as a defense by the insurer. J. T. W.

## NEBRASKA SUPREME COURT.

LE ROY FUSSELL, Plff. in Err.,  
v.

STATE OF NEBRASKA.

(— Neb. —, 166 N. W. 197.)

**Constitutional law — penalty for failure to obey decree.**

1. Section 1, chap. 186, Laws 1915, making it a misdemeanor for "any husband, against whom a decree for divorce and alimony for the support of his children shall have been rendered," to neglect or refuse to comply with the decree, and declaring a penalty therefor, is not in conflict with either § 10, art. 1, of the Federal Constitution, or § 16, art. 1 of the Constitution of the state, as an *ex post facto* law.

*For other cases, see Constitutional Law, I, b, 1, in Dig. 1-52 N. S.*

**Same — imprisonment — debt.**

2. The decree of the district court in a divorce suit, providing that the husband shall pay to the wife certain instalments each month for the support of their minor child, is not a "debt" in the ordinary sense of the term, and the act of the legislature of 1915, providing for the imprisonment of the husband for refusal to make such payments, is not in violation of the provisions of § 20, art. 1, of the Constitution of this state, which provides that no person shall be imprisoned in any civil action for debt. *For other cases, see Imprisonment for Debt, Dig. 1-52 N. S.*

**Indictment — venue — sufficiency.**

3. An information whose caption gives the name of the state and the county, and which charges that the designated crime was committed in said county and state aforesaid, alleges the venue with sufficient certainty.

*For other cases, see Indictment, etc., II, a, in Dig. 1-52 N. S.*

**Venue — prosecution for failure to obey decree.**

4. A prosecution based on the provisions of chapter 186, Laws 1915, is properly brought in the district court of the county in which the decree in the divorce proceeding was rendered.

*For other cases, see Venue, I, in Dig. 1-52 N. S.*

**Appeal — assistant to prosecutor.**

5. Error cannot be predicated in a misdemeanor case on the ground that the coun-

ty attorney called to his assistance another lawyer without the order of the court.

*For other cases, see Appeal and Error, VII, m, 7, a, in Dig. 1-52 N. S.*

(January 21, 1918.)

**E**RROR to the District Court for Otoe County to review a judgment convicting defendant of failing and neglecting to pay monthly instalments for the support of his child. Affirmed.

The facts are stated in the opinion.

Messrs. **Andrew P. Moran** and **Anthony E. Langdon**, for plaintiff in error:

The law did not become effective, if at all, until July 8th, 1915, long after the decree was entered, and is therefore *ex post facto*.

*State v. McCoy*, 87 Neb. 385, 28 L.R.A. (N.S.) 583, 127 N. W. 137; *Marion v. State*, 16 Neb. 349, 20 N. W. 289; *Re Medley*, 134 U. S. 160, 33 L. ed. 835, 10 Sup. Ct. Rep. 384; *King v. Missouri*, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443; *State v. Hoon*, 78 Neb. 618, 111 N. W. 462; *Ware v. Sanders*, 146 Iowa, 233, 124 N. W. 1081; *Anderson v. Ritterbusch*, 22 Okla. 761, 99 Pac. 1002; *Diamond State Iron Co. v. Husbands*, 8 Del. Ch. 205, 68 Atl. 240; *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Gay v. State*, 105 Ga. 599, 70 Am. St. Rep. 68, 31 S. E. 560; *State, Alden, Prosecutrix, v. Newark*, 40 N. J. L. 92; *Porritt v. Porritt*, 16 Mich. 140.

Chapter 186, Laws of 1915, is unconstitutional and void, for the reason that it provides imprisonment for debt, and is repugnant to § 20, art. 1, of the Constitution.

*Leeder v. State*, 55 Neb. 133, 75 N. W. 541.

The court had no jurisdiction to hear and determine the case and impose sentence, for the reason that nowhere in the information is it alleged that the crime was committed within the jurisdiction of the court and within the county of Otoe.

*McCoy v. State*, 22 Neb. 420, 35 N. W. 202; *Cuthbertson v. State*, 72 Neb. 729, 101 N. W. 1031.

The misconduct of the prosecuting attorney jeopardized the right of the defendant to a fair and impartial trial, guaranteed by the Constitutions of the state and of the United States, and was highly prejudicial to the defendant.

*Chicago, B. & Q. R. Co. v. Kellogg*, 55 Neb. 748, 76 N. W. 402, 5 Am. Neg. Rep. 50; *Hansen v. Mallett*, 101 Neb. 339, 163 N. W. 145.

Messrs. **Willis E. Reed**, Attorney General, and **W. F. Moran** for the State.

**Headnotes by HAMER, J.**

**Note.** — As to constitutionality of statute for the enforcement of decree for alimony or for punishment for disobedience thereof, see annotation following this case, post, 424.

Generally, as to constitutionality of imprisonment for debt, see the notes to *Carr v. State*, 34 L.R.A. 634, and *State v. Prudential Coal Co.* L.R.A.1915B, 645.

Hammer, J., delivered the opinion of the court:

This is an appeal from a judgment in a criminal prosecution based on the provisions of chapter 186, Laws 1915, § 1, which reads as follows: "Whenever any husband, against whom a decree for divorce and alimony for the support of his children shall have been rendered by any court in this state, shall, without good cause, refuse or neglect to pay to the persons noted the amounts and [in the] manner provided by such decree, he shall be guilty of a misdemeanor and shall, on conviction, be imprisoned in the county jail not less than three nor more than six months for each offense, provided the refusal or neglect to so pay each separate instalment or payment of such money as provided by the decree shall be held to be separate offense and punishable as such."

Le Roy Fussell was the defendant in the instant case, and his trial in the district court for Otoe county resulted in a verdict of guilty on eleven counts contained in the information. He was sentenced to serve a term of three months in the county jail on each of the counts, to be served consecutively, and that he pay the costs of prosecution. He has appealed.

The appellant, by his brief, assails the act as unconstitutional and, as one of his reasons for the attack, contends that the law is an *ex post facto* law; that it conflicts with § 10, art. 1, of the Federal Constitution, and § 10, art. 1, of the Constitution of this state, the latter of which provides: "No bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities shall be passed."

The record discloses that on the 14th day of January, 1915, the district court of Otoe county rendered a decree in a divorce case providing that defendant should pay the plaintiff, his divorced wife, \$10 per month, commencing on the 1st day of January, 1915, for the support of their minor daughter, Eva Louise Fussell; and this prosecution was based on defendant's refusal to pay the sums of money so ordered by the decree of the court.

It is contended that, when the decree was rendered, there was no provision of law for its enforcement other than the ordinary process of the courts, such as execution, attachment, or garnishment; that the act in question placed the defendant in a worse situation than he was in prior to its enactment, and was, therefore,

as to him, an *ex post facto* law. Answering this contention, it may be said that the act in question was not amendatory of any statute, but was an independent act, which was evidently passed by the legislature for the express purpose of giving the district court power to enforce orders and decrees in divorce cases. Ordinarily, the court would have such power by a contempt proceeding; but this court having held in *Leeder v. State*, 55 Neb. 133, 75 N. W. 541, and *Segear v. Segear*, 23 Neb. 306, 36 N. W. 536, that a decree for permanent alimony is not so enforceable, the legislature, seeing the necessity for granting additional power to the court, by which its decrees should be enforced, passed the act now under consideration for that purpose. The act, standing by itself, cannot be said to violate the provisions of either the Federal Constitution or the Constitution of the state, as an *ex post facto* law. The legislature had the power to enact such a law, as far as those constitutional provisions were concerned. The act does not amend or change any other statutory provision; and, as the defendant had not been guilty of any crime at the time it was enacted, it cannot be said to operate as an *ex post facto* law as to him. Again, the record shows that defendant did not refuse to comply with the terms of the decree in question, until after the law went into effect. It is therefore difficult to see how it affected him in any way, until after his refusal to obey the order of the court. 8 Cyc. 1035; *Jaehne v. New York*, 128 U. S. 189, 32 L. ed. 398, 9 Sup. Ct. Rep. 70; *Flaherty v. Thomas*, 12 Allen. 428; *Bittenhaus v. Johnston*, 92 Wis. 588, 32 L.R.A. 380, 66 N. W. 805.

In 8 Cyc. 1035, it is said: "Laws which would be *ex post facto* if applied to offenses occurring before their passage will, if possible, be construed as having only a prospective effect."

Many cases are cited in support of this view. Giving this statute a prospective effect precludes any question as to its constitutionality in this case.

It is defendant's second contention that the act in question is unconstitutional for the reason that it provides for imprisonment for debt, and is repugnant to § 20, art. 1, of the Constitution of this state, which reads: "No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud."

This assignment presents a more difficult question. It is argued on the strength of the cases above cited that the decree, which

provides that defendant shall pay \$10 per month for the support of his minor child, creates a debt, for the nonpayment of which he cannot be imprisoned under any pretext. Our statute seems to control the situation. In *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735, it was said: "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by that court at any time, as the circumstances of the parties may require."

In *Bronk v. State*, 43 Fla. 461, 475, 99 Am. St. Rep. 119, 31 So. 252, the court says: "It is almost universally settled that alimony or maintenance from the husband to the wife is not a debt, within the meaning of the constitutional inhibition against imprisonment for debt."

We need not pursue this question further, for the reason that the decree in question here does not provide for the payment of permanent alimony to defendant's wife. Its only provision is that defendant shall pay \$10 per month for the support of his minor daughter, and therefore his refusal to make such payments brings him squarely within the provisions of the act in question. We do not think the allowance for the support of defendant's minor child bears any resemblance whatever to a debt, and therefore the Constitution does not forbid imprisonment for the defendant's refusal to obey the order of the court.

Defendant further contends that the verdict is not sustained by the evidence. This assignment of error must be disposed of according to the rule so long established that, when there is a conflict of evidence on a material question, the verdict of the jury will not be set aside. In the instant case there was evidence that the defendant was able to pay the several instalments. It appears that he was the president of an insurance company which was doing a profitable business; that he said, just before the complaint was filed in this case, that he had \$300 with which he could pay the amount claimed, which at that time was only \$110, but he refused to make such payment, for the reason that he would not pay anything to his former wife, for fear she might obtain some benefit thereby. The jury, having considered this evidence,

found a verdict against him, and we decline to set their verdict aside.

It is also contended that the court erred in overruling defendant's demurrer to the information, because no venue was alleged, and that the court erred in overruling defendant's objection to the testimony of the state for the same reason. Without setting out the information, it is sufficient to say that the state and county are set out in the margin and in the caption, and the offense is alleged to have been then and there committed. In *Bartley v. State*, 53 Neb. 310, 73 N. W. 744, and in *Dunn v. State*, 58 Neb. 807, 79 N. W. 719, it is said that, in such cases, the venue is sufficiently alleged. Therefore, this assignment should not be sustained. It is also contended that, because the plaintiff in the divorce suit had removed to Omaha, and the defendant in the instant case was residing there at the time this prosecution was commenced, the court had no jurisdiction to try the case. We think this contention is without merit. The prosecution was had for a refusal to comply with the order of the district court in the county where the decree was rendered, and this fact sufficiently answers this contention.

It is further contended that it was reversible error for the county attorney to have the assistance of attorney Livingston in the prosecution. The record discloses that this was a prosecution for a misdemeanor, and that as soon as the defendant objected to the appearance of Mr. Livingston he was promptly excluded from further participation in the prosecution, and it is not shown that the defendant suffered any injury. Therefore, defendant cannot complain, and this contention must be overruled.

Finally, it is contended that the gifts of small sums of money, from time to time, which defendant had made to his minor child without any regard to the decree in question, should operate as payment, according to the terms of the order of the district court, and should be a bar to this prosecution. The defendant's own testimony is a sufficient answer to this assignment. He never claimed that such gifts were paid on the decree, and the jury correctly found that they should not be so credited. As we view the record, it contains no reversible error, and the judgment of the district court is affirmed.

Sedgwick, J., not sitting.

Petition for rehearing denied.

**Annotation—Constitutionality of statute for the enforcement of decree for alimony or for punishment for disobedience thereof.**

Research has disclosed little authority on the question considered in *FUSSELL v. STATE*, ante, 421, and indicated in the above title, except cases on the question of imprisonment for failure to pay alimony as a violation of the constitutional provision against imprisonment for debt. Cases on this question are collected and discussed in the annotation to *State v. Prudential Coal Co.* L.R.A.1915B, 645, on constitutionality of imprisonment for debt, under VII. b, p. 651, and earlier notes therein referred to.

In *Judd v. Judd* (1900) 125 Mich. 228, 84 N. W. 134, a statute providing for punishment by fine and imprisonment for refusal to comply with an order of court for the payment of alimony, construed as applicable to a refusal to pay alimony under a decree rendered before the passage of the statute, was held not an unconstitutional interference with vested rights, since it related merely to the remedy.

And in *Ex parte Audet* (1915) 38 R. I. 43, 94 Atl. 678, it was held that the provision of the Federal Constitution, that no state shall deprive any person of life, liberty, or property without due process of law, was not violated by a statute authorizing the granting, in a divorce suit, of an allowance to the wife out of the husband's estate, and providing that the allowance should be so far regarded as a judgment for debt that execution might be issued thereon for amounts due and unpaid from time to time, to be shown by affidavits of the person entitled to the same, such execution to run against the goods of the husband, and, for want thereof, against his body; the objection being that the statute did not provide for a hearing on the question whether payment of the allowance had been made. The court said: "To state the matter of the petitioner's claim more specifically, he contends that the statute in question does not provide for a hearing upon the question as to whether payment of the allowance under the decree had been made; that in the present case he had had no hearing in fact; and that such question was adjudicated in his absence. The petitioner, as the respondent in the divorce proceeding, had full knowledge of the entry of the decree providing for the weekly allowance to his wife, and that, upon his failure to meet such payments, the same would ripen into a judg-

ment, upon which an execution might be issued against him, and upon which he would be liable to be committed to jail. If he was of insufficient ability to pay the allowance, he had the opportunity of presenting testimony and argument to that effect to the court, at the time when the decree was entered. If he became so impoverished at some later period as to be unable to continue such payments, he could have represented that fact to the court, and sought a modification of the decree or the annulment of that portion which related to allowance. The petitioner does not now allege that he has paid the allowance or that he has failed to pay it through lack of means, and it may therefore be assumed that he has neither paid nor become too poor to pay. With full knowledge of the judgment that was maturing against him, under the statute and the decree of the court, and that execution would become issuable thereon, the petitioner made no effort to modify or annul the decree, so far as the matter of allowance is concerned, but remained quiescent until he was committed to jail, and then asks for a writ of habeas corpus upon the ground that an execution was issued upon the judgment against him without a hearing. His position is no different from that of any other judgment debtor, who might contend that an execution was issued against him without his being accorded a hearing as to whether he had already paid the judgment. We see nothing unconstitutional in the act of the general assembly in question, nor that the petitioner has been in any way deprived of his liberty or property without due process of law."

Although not strictly within the scope of the note, attention is called to *People v. Albright* (1910) 161 Mich. 400, 126 N. W. 432, holding that a statute making desertion and abandonment of the wife, without providing necessary food and shelter, a felony, did not apply to a case where the abandonment occurred before the enactment of the statute, although the failure to make provision for the wife continued till the time of the bringing of the action; since the statute required both abandonment and nonsupport, and, if construed to apply to a case where the abandonment occurred before the statute was enacted, it would be an *ex post facto* law. R. E. H.



WISCONSIN SUPREME COURT.

LESLIE V. RAYMOND, Resp.,

v.

SAUK COUNTY, Appt.

(167 Wis. 125, 166 N. W. 29.)

**Highway — driving on fresh tar — negligence.**

1. One who, in daylight, drives an automobile upon a freshly tarred highway cannot, because of his own negligence, hold the county liable for injuries caused by the slippery condition of the road.

*For other cases, see Highways, IV. c, in Dig. 1-52 N. 8.*

**Same — absence of notices — effect.**

2. Absence of the statutory notices of the defective condition of a highway does not render the county liable for injuries to one having knowledge of such condition.

*For other cases, see Highways, IV. a, 5, in Dig. 1-52 N. 8.*

(Winslow, Ch. J., and Vinje and Siebecker, JJ., dissent.)

(January 5, 1918.)

**A** PPEAL by defendant from a judgment of the Circuit Court for Sauk County overruling a demurrer to the complaint in an action brought to recover damages for injuries to plaintiff's person and property, alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Bentley, Kelley, & Hill, for appellant:

The complaint contains no allegation that plaintiff used any precaution, except the allegation that he was driving with due care, and that is overborne by every other fact set out in the complaint.

Seaver v. Union, 113 Wis. 322, 80 N. W. 163.

Oiling these highways is simply part of the care and maintenance of highways, in doing which the county is exercising a governmental function. If it was done carelessly by the workmen, liability would not follow against the county.

Evans v. Sheboygan, 153 Wis. 287, 45 L.R.A.(N.S.) 98, 141 N. W. 265; Bruhnke

**Note.** — As to liability for injury due to oiling street, see annotation following Kelleher v. Newburyport, L.R.A.1917F, 712.

The effect on the question of contributory negligence of one's knowledge of an obstruction or defect in a street is considered at page 638 of the note to Lerner v. Philadelphia, 21 L.R.A.(N.S.) 614, and at page 634 of the note to Knoxville v. Cain, 48 L.R.A.(N.S.) 628, on the general subject of contributory negligence as affecting liability of municipal corporations for defects and obstructions in streets.

L.R.A.1918F.

v. La Crosse, 155 Wis. 485, 50 L.R.A.(N.S.) 1147, 144 N. W. 1100.

Where there is no structural defect in the highway, and an accident happens because of mere slipperiness, it does not constitute an actionable defect.

Cook v. Milwaukee, 24 Wis. 270, 1 Am. Rep. 183; Kleiner v. Madison, 104 Wis. 339, 80 N. W. 453; Burroughs v. Milwaukee, 110 Wis. 478, 86 N. W. 159; Cooper v. Waterloo, 98 Wis. 424, 74 N. W. 115; De Pere v. Hibbard, 104 Wis. 666, 80 N. W. 933; Koepke v. Milwaukee, 112 Wis. 475, 88 N. W. 238; Hyer v. Janesville, 101 Wis. 371, 77 N. W. 729, 5 Am. Neg. Rep. 268; Dapper v. Milwaukee, 107 Wis. 88, 82 N. W. 725; Kawiecka v. Superior, 136 Wis. 613, 21 L.R.A.(N.S.) 1020, 118 N. W. 192.

Messrs. Grotophorst, Thomas, Rieser, & Quale, for respondent:

Plaintiff had a right to assume that the highway was in a reasonably safe condition for public travel, or, in other words, that the oil had been placed on the highway in such quantity as not to endanger travel.

Seward v. Milford, 21 Wis. 485; Wall v. Highland, 72 Wis. 435, 39 N. W. 560.

Even if he had known of the defective condition of the highway, he could lawfully travel thereon without being guilty of contributory negligence as a matter of law.

Schmidt v. Franklin, 164 Wis. 128, 159 N. W. 724, 14 N. C. C. A. 366; Simonds v. Baraboo, 93 Wis. 40, 57 Am. St. Rep. 895, 67 N. W. 40; Kelley v. Fond du Lac, 31 Wis. 179; Kenworthy v. Ironton, 41 Wis. 647; Dralle v. Reedsburg, 130 Wis. 347, 110 N. W. 210; Gerrard v. LaCrosse City R. Co. 113 Wis. 258, 57 L.R.A. 465, 89 N. W. 125; Luedke v. Mukwa, 90 Wis. 57, 62 N. W. 931; Jung v. Stevens Point, 74 Wis. 547, 43 N. W. 513; Jenewein v. Irving, 122 Wis. 228, 99 N. W. 346, 903; Wiltse v. Tilden, 77 Wis. 152, 46 N. W. 234; Hopkins v. Rush River, 70 Wis. 10, 34 N. W. 909; Lubbers v. Manlius Twp. 172 Mich. 387, 137 N. W. 804; Pritchard v. Boscawen. — N. H. —, 97 Atl. 563; Tanner v. Rushford, 163 Wis. 196, 157 N. W. 759.

If the highway was defective, it was unquestionably the duty of the county to erect barriers or to post the proper notices.

Bills v. Kaukauna, 94 Wis. 310, 68 N. W. 992; Hanson v. Clinton, 156 Wis. 147, 145 N. W. 646; Seward v. Milford, 21 Wis. 485.

Negligence in permitting a defect in a street cannot be avoided by a plea of governmental function.

Hillstrom v. St. Paul, 134 Minn. 451, L.R.A.1917B, 548, 159 N. W. 1076.

The fact that the county may have been engaged in work of repair of the highway does not excuse it from the performance of the duty imposed by statute.

Klatt v. Milwaukee, 53 Wis. 196, 40 Am. Rep. 759, 10 N. W. 162.

Eschweller, J., delivered the opinion of the court:

The plaintiff and his wife, while riding in an automobile at about noon on August 13, 1916, on the road from Baraboo to Kilbourn, near a bridge at Dell creek, met with an accident causing personal injury to plaintiff and damage to his car, by reason of its sliding off the highway into the ditch.

The plaintiff asserts that Sauk county became liable to him for such resultant damages, on grounds which may be substantially stated as follows: That this was a county highway, and was defective and out of repair by reason of the negligence of the servants of the county, in that on the preceding day the agents and servants of the defendant negligently and carelessly spread upon said highway, at the place in question, large quantities of tar and oil, without covering the same with sand or other similar material; that the place is on a steep hill, and that, by reason of said large quantities of tar and oil thus deposited on such highway, the same became so slippery that cars could not be kept in the road, but slipped out of the main highway into the ditch; that the claimant at the time and place exercised due care and caution, not knowing the defective condition of said highway; that in going down toward said bridge he struck the slippery place with his car; and that the said slippery condition caused the automobile to slide into the ditch and turn over. He alleges upon information and belief that many other cars prior to that time slid from the main highway into the ditch and were damaged; that the county know or ought to have known the effects of placing upon the highways large quantities of oil and tar; and that by spreading such large quantities upon said hill on said highway it was made unsafe and dangerous for public travel. He also alleges that the county was further negligent in not putting up signs or giving warning of such defective condition of the highway. To this claim or complaint the defendant demurred on the ground that it appeared on the face thereof that there were not sufficient facts stated to constitute a cause of action. The demurrer being overruled, the defendant appealed.

L.R.A.1916F.

No right of action can arise against a municipality in this state for accidents happening on the highway, unless such liability is created by § 1339, Wis. Stat., there being no common-law liability. Uecker v. Clyman, 137 Wis. 38, 118 N. W. 247; Maxwell v. Wellington, 138 Wis. 607, 120 N. W. 505.

Section 1339, so far as material to the present case, provides that, if any damage shall happen to any person or his property by reason of the insufficiency or want of repair of a road which any county shall have adopted as a county road and is; by law, bound to keep in repair, such county shall be liable therefor. The fact that the county is making repairs does not relieve it from the necessity of exercising ordinary care to protect travelers on the highway from injury, during the time of making such repairs. Klatt v. Milwaukee, 53 Wis. 196, 40 Am. Rep. 759, 10 N. W. 162.

If a highway is discontinued or altered, it is the duty of the municipality to erect and maintain suitable signals or barriers to warn travelers of the fact. Bills v. Kaukauna, 94 Wis. 310, 68 N. W. 992; Hanson v. Clinton, 156 Wis. 147, 145 N. W. 646.

Furthermore, a traveler has the right to assume that the duty of such municipality has been performed, and that the public highway is reasonably safe for travel. Seward v. Milford, 21 Wis. 485; Wall v. Highland, 72 Wis. 435, 39 N. W. 560; Simonds v. Baraboo, 93 Wis. 40, 57 Am. St. Rep. 895, 67 N. W. 40; note in 21 L.R.A.(N.S.) 623, 652.

A traveler may pass upon such a highway while knowing that it is, in some respects, defective, if nevertheless he exercises ordinary care in the use of such highway, in view of its defective condition, and such use is not of itself, as a matter of law, contributory negligence. Schmidt v. Franklin, 164 Wis. 128, 159 N. W. 724, 14 N. C. C. A. 366; Jenewein v. Irving, 122 Wis. 228, 99 N. W. 340, 903.

But under all situations the plaintiff himself must exercise ordinary care for his own safety. A standard has been pretty definitely asserted by prior decisions of this court as to what is the ordinary care required of the driver of an automobile on the public highway in this state. In Lauson v. Fond du Lac, 141 Wis. 57, 23 L.R.A.(N.S.) 40, 135 Am. St. Rep. 30, 123 N. W. 629, and Pietsch v. McCarthy, 159 Wis. 251, 150 N. W. 482, it was held that a person, in driving his automobile on the highways, must maintain such rate of speed that he can bring it to a standstill within the distance that he can plainly see the objects or obstacles ahead of

him, and that failure to so operate the automobile is want of ordinary care. Both of these cases cited involved injuries at night, and the question of the use of lights on the automobiles for illuminating the highway ahead of them, but we see no good reason for not holding that the same standard applies for the daytime, and that the rule of ordinary care, as between the municipality and the driver of an automobile on the public highway, requires that such driver shall have the automobile under such control that he can bring it to a stop within the distance within which he can plainly see obstacles or dangers ahead of him.

It is only necessary in this case to determine the one question of whether or not, giving the complaint the most liberal construction possible, it appears upon the face thereof, as a matter of law, that there was such contributory negligence on the part of the driver that it will prevent his recovery.

The plaintiff in this case must stand charged, as a matter of law, with what is common knowledge, namely, that tar and oil just spread upon a highway create a slippery and therefore dangerous condition, and that such substances so spread upon a highway are plainly visible to the traveler in the daytime. There is nothing in the complaint from which there can be spelled out that anything else than that the slippery condition, caused by the placing of the tar and oil on the highway, caused the automobile to go into the ditch. An allegation that the plaintiff does not know of the defective condition of the highway from such cause cannot be held to obliterate such common knowledge, any more than could an allegation, if made, that such substances spread on a highway are not visible in the daytime. The driver of an automobile who, in broad daylight, knowingly drives his automobile over a highway, for the time made in a slippery and dangerous condition by reason of the application of tar and oil upon the same, must take the responsibility for accidents happening to him by reason of such slippery condition. He is chargeable, therefore, with contributory negligence for the resultant injury, as a matter of law.

The fact that under § 1317m6, subd. 7, Wis. Stat. the county highway commissioner had power, in his discretion, to suspend the right to travel on any highway in process of repair by posting notices forbidding such travel, or that there may have been negligence on the part of the county in not putting up signs, or giving other warning of such defective condition, cannot help the position of the plaintiff. Such signs or warning are for the purpose

only of giving to the traveler notice of the existence of any defect or danger. In the case before us he had this notice from the condition of the road itself. That the county might have given cumulative notice of the danger cannot help him. Upon the face of the complaint, the demurrer should have been sustained.

The order of the Circuit Court is reversed, and the cause remanded for further proceedings.

Vinje, J., dissenting (January 7, 1918):

I am unable to concur in the view that plaintiff was negligent, as a matter of law, in driving upon the oiled part of the highway. Oiled highways may be and are driven upon before sand is applied. It is not pleasant to do so, but reasonably safe under ordinary conditions, and often, as in this case, necessary, because the whole width of the passable part of the highway is oiled, and no other route is available. It is conceded that plaintiff could and should have seen the oil on the road before entering upon the same, and I construe the complaint to allege a voluntary entrance thereon. But the complaint alleges that the oil and tar were applied in such large quantities that it was impossible to keep a car in the road, and that plaintiff was not aware of this defective condition caused by an excess of tar and oil. I see nothing improbable or self-contradictory in such allegation. Why may not the defendant, as is alleged, have been negligent in applying the tar and oil? Is it impossible to apply too much? If not, why should plaintiff be denied a chance to prove that alleged fact? That tar and oil on the road may be seen at a distance is obvious; but that it may be determined from a distance that there is so much tar and oil thereon that cars cannot be made to stay in the road is not so obvious. And when plaintiff alleges that, unknown to him, such a condition of the road existed, he should be permitted to offer proof in support of his allegations. That he may probably fail to sustain them is immaterial on demurrer. If, however, he does sustain them, then he cannot be held to have assumed the risk resulting from the excessive oiling, because such risk could not be ascertained till too late to avoid it. The complaint, if possible, must be construed to state a cause of action, not to fall short thereof.

I am authorized to state that Chief Justice Winslow and Mr. Justice Siebecker concur in this dissent.

Petition for rehearing denied, April 3, 1918.

## UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

JUDSON HARMON et al., Receivers of the Cincinnati, Hamilton, & Dayton Railway Company, Plffs. in Err.,  
v.

LUCINDA BARBER, Admrx., etc., of James C. Barber, Deceased.

(247 Fed. 1.)

**Carriers — injury at transfer point — liability.**

1. A railroad company which issues a ticket to a point beyond its line, with a coupon for itself and the connecting carrier, is liable, in case it furnishes the passenger with a ticket to transfer him from one depot to the other at the junction point, for injury due to the negligence of the transfer company, although its ticket states that it is not responsible beyond its own line, and the transfer ticket states that it was "on account" of the transfer company.

*For other cases, see Carriers, II. q, in Dig. 1-52 N. S.*

**Same — failure to object to speed — negligence.**

2. A passenger on a public transfer is not negligent in failing to take steps to lessen the speed of the conveyance, so as to preclude his holding the owner liable in case he is injured by excessive speed.

*For other cases, see Carriers, II. g, 2, a, in Dig. 1-52 N. S.*

**Appeal — error in instruction.**

3. The use of the word "caused" instead of "contributed to," in defining the relation of plaintiff's negligence to the injury, is not reversible error, where the court's attention was not called to the matter, and it informed the jury that contributory negligence would bar recovery.

*For other cases, see Appeal and Error, VII. m, 4, a, (2), in Dig. 1-52 N. S.*

**Evidence — burden of proof — contributory negligence.**

4. Defendant in an action for a personal injury has the burden of showing contributory negligence.

*For other cases, see Evidence, II. h, 2, in Dig. 1-52 N. S.*

**Note.** — As to duty and liability of connecting carriers to passengers at junction point, see annotation following this case, post, 433, and references therein to annotations on related questions.

The question as to the personal negligence of one riding in an automobile driven by another, as affecting the liability of a third person for an injury, is discussed in the note to *Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co.* L.R.A.1915B, 953, which note also covers the question whether the negligence of the driver of the car is to be imputed to the passenger.

The burden of proof as to contributory negligence is discussed in the note to

L.R.A.1918F.

**Carriers — excessive speed — negligence.**

5. Operating a motor vehicle at a speed prohibited by statute, under penalty, is negligence towards a passenger.

*For other cases, see Carriers, II. g, 1, a, in Dig. 1-52 N. S.*

(January 8, 1918.)

**E**RROR to the District Court of the United States for the Southern District of Ohio (Hollister, District Judge) to review a judgment in favor of plaintiff in an action brought to recover damages for the wrongful death of plaintiff's decedent, alleged to have been caused by the negligence of defendants' agents. **Affirmed.**

The facts are stated in the opinion.

Argued before Knappen and Denison, Circuit Judges, and Killits, District Judge.

Messrs. Waite, Schindel, & Bayless and Herbert Shaffer, for plaintiffs in error:

There was not shown a special contract or undertaking by the receivers of the railway company that the plaintiff's intestate should be safely carried on the automobile of the Robbins Transfer Company.

*Pennsylvania R. Co. v. Jones*, 155 U. S. 333, 339, 39 L. ed. 176, 178, 15 Sup. Ct. Rep. 136; *Chicago & A. R. Co. v. Mulford*, 162 Ill. 522, 35 L.R.A. 599, 44 N. E. 861; 2 Redf. Railways, 5th ed. p. 292; *Milnor v. New York & N. H. R. Co.* 4 Daly, 355; *Boling v. St. Louis & S. F. R. Co.* 189 Mo. 219, 88 S. W. 35; *Brooke v. Grand Trunk R. Co.* 15 Mich. 332; *Hood v. New York & N. H. R. Co.* 22 Conn. 1; *Mosher v. St. Louis, I. M. & S. R. Co.* 127 U. S. 390, 395, 32 L. ed. 240, 251, 8 Sup. Ct. Rep. 1324; *Auerbach v. New York C. & H. R. R. Co.* 89 N. Y. 281, 42 Am. Rep. 290; *Little Rock & Ft. S. R. Co. v. Dean*, 43 Ark. 529, 51 Am. Rep. 584; *Nichols v. Southern P. Co.* 23 Or. 123, 18 L.R.A. 55, 37 Am. St. Rep. 664, 31 Pac. 206; 4 Elliott, Railroads, § 1596; *Nashville & C. R. Co. v. Sprayberry*, 9 Heisk. 852; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295, 54 Am. Rep. 238; *Young v. Pennsyl-*

*Oklahoma City v. Reed*, 33 L.R.A.(N.S.) 1085.

The question of the speed of an automobile as negligence is discussed in the notes in 25 L.R.A.(N.S.) 40; 38 L.R.A.(N.S.) 488; 42 L.R.A.(N.S.) 1180, and 51 L.R.A.(N.S.) 993.

The liability for injury to a passenger by negligent operation of an automobile is discussed in the notes in *Johnson v. Coey*, 21 L.R.A.(N.S.) 81, and in 35 L.R.A.(N.S.) 658.

As to the duty of the Federal courts to follow the decision of the state court on questions of state law, see note to *Snare & T. Co. v. Friedman*, 40 L.R.A.(N.S.) 380.

vania R. Co. 115 Pa. 112, 7 Atl. 741; Pennsylvania Co. v. Loftis, 72 Ohio St. 288, 106 Am. St. Rep. 597, 74 N. E. 179, 3 Ann. Cas. 3; St. Clair v. Kansas City, M. & B. R. Co. 77 Miss. 789, 28 So. 957; Gulf, C. & S. F. R. Co. v. Looney, 85 Tex. 158, 16 L.R.A. 471, 34 Am. St. Rep. 787, 19 S. W. 1039; McDonald v. Central R. Co. 72 N. J. L. 280, 2 L.R.A. (N.S.) 505, 11 Am. St. Rep. 672, 62 Atl. 405, 19 Am. Neg. Rep. 378; Michigan C. R. Co. v. Mineral Springs Mfg. Co. 16 Wall. 318, 324, 21 L. ed. 297, 301; Myrick v. Michigan C. R. Co. 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. Rep. 425.

Decedent was guilty of contributory negligence as a matter of law.

Webber v. Billings, 184 Mich. 110, 150 N. W. 332; Jefson v. Crosstown Street R. Co. 72 Misc. 103, 129 N. Y. Supp. 233; Rebillard v. Minneapolis St. P. & S. Ste. M. R. Co. L.R.A.1915B. 953, 133 C. C. A. 9, 216 Fed. 503; Baltimore & P. R. Co. v. Jones. 95 U. S. 439, 24 L. ed. 506, 7 Am. Neg. Cas. 340; Chicago G. W. R. Co. v. Mohaupt, 18 L.R.A. (N.S.) 760, 89 C. C. A. 457, 162 Fed. 665; St. Louis, I. M. & S. R. Co. v. Leftwich, 54 C. C. A. 1, 117 Fed. 127, 12 Am. Neg. Rep. 395; Winters v. Baltimore & O. R. Co. 163 Fed. 106; Mitchell v. New York, L. E. & W. R. Co. 146 U. S. 513, 36 L. ed. 1064, 13 Sup. Ct. Rep. 259.

The court erred in charging the jury that it was negligence, as a matter of law, to exceed the statutory speed limit of 15 miles an hour.

Schell v. DuBois, 94 Ohio St. 93, L.R.A.1917A, 710, 113 N. E. 664, 13 N. C. C. A. 982; Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659; Babbitt, Motor Vehicles, 2d. ed. § 1079.

Messrs. Matthews & Klein, Reese Blizzard, and John F. Laird, for defendant in error:

Defendant extended its line and responsibility beyond the physical termination of its line.

Northern P. R. Co. v. American Trading Co. 195 U. S. 439, 49 L. ed. 269, 25 Sup. Ct. Rep. 84; Smeltzer v. St. Louis & S. F. R. Co. 158 Fed. 648; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 668, 28 L. ed. 292, 4 Sup. Ct. Rep. 185; Ogdensburg & L. C. R. Co. v. Pratt, 22 Wall. 123, 22 L. ed. 827; Bank of Kentucky v. Adams Exp. Co. 93 U. S. 174, 23 L. ed. 872; Nashua Lock Co. v. Worcester & N. R. Co. 48 N. H. 339, 2 Am. Rep. 242; Clemmens v. Washington Park S. B. Co. 162 Fed. 815; Nashville & C. R. Co. v. Sprayberry, 9 Heisk. 852.

Barber was not guilty of contributory negligence.

Berry, Automobiles, 2d. ed. § 860; Baltimore & P. R. Co. v. Jones, 95 U. S. 439, 24 L. ed. 506, 7 Am. Neg. Cas. 340; Chicago G. W. R. Co. v. Mohaupt, 18 L.R.A. (N.S.) 760, 89 C. C. A. 457, 162 Fed. 665; St. Louis, I. M. & S. R. Co. v. Leftwich, 54 C. C. A. 1, 117 Fed. 127, 12 Am. Neg. Rep. 395; Winters v. Baltimore & O. R. Co. 163 Fed. 106; Mitchell v. New York, L. E. & W. R. Co. 146 U. S. 513, 36 L. ed. 1064, 13 Sup. Ct. Rep. 259.

more v. Maryland, 92 C. C. A. 335, 166 Fed. 641; Perkins v. Galloway, 194 Ala. 265, L.R.A.1916E, 1100, 69 So. 875; Lochhead v. Jensen, 42 Utah, 99, 129 Pac. 347.

The burden of proving contributory negligence rested on the defendant.

Baltimore & O. R. Co. v. Whitacre, 35 Ohio St. 627; Salmons v. Norfolk & W. R. Co. 162 Fed. 722; Snare & T. Co. v. Friedman, 169 Fed. 1, 40 L.R.A. (N.S.) 367, 94 C. C. A. 369, 21 Am. Neg. Rep. 311; Patton v. Illinois C. R. Co. 179 Fed. 530; Power v. Augusta, 191 Fed. 647; Moss v. Gulf Compress Co. 121 C. A. 67, 202 Fed. 657; Beutler v. Grand Trunk Junction R. Co. 224 U. S. 85-88, 56 L. ed. 679, 680, 32 Sup. Ct. Rep. 402; O'Hara v. Central R. Co. 106 C. C. A. 177, 183 Fed. 739; Bowker v. Donnell, 226 Fed. 359; Baltimore & O. R. Co. v. Taylor, 109 C. C. A. 172, 186 Fed. 830; Kraljer v. Snare & T. Co. 137 C. C. A. 108, 221 Fed. 253; Standard Marine Ins. Co. v. Traders' Compress Co. 46 Okla. 356, 148 Pac. 1019; Belt R. & Stockyards Co. v. McClain, 58 Ind. App. 171, 106 N. E. 742; Boswell v. Pannell, — Tex. —, 180 S. W. 593; Hughes v. Atlantic City & S. R. Co. 85 N. J. L. 212, L.R.A.1916A, 927, 89 Atl. 769; Hyer v. Holmes & Co. 12 Ga. App. 837, 79 S. E. 58; Sweeney v. Erving, 228 U. S. 233, 57 L. ed. 815, 33 Sup. Ct. Rep. 416, Ann. Cas. 1914D, 905.

Violation of the statute limiting the speed of automobiles was negligence.

Schell v. DuBois, 94 Ohio St. 93, L.R.A.1917A, 710, 113 N. E. 664, 13 N. C. C. A. 982; Cooper v. Baltimore & O. R. Co. 16 L.R.A. (N.S.) 715, 86 C. C. A. 272, 159 Fed. 82, 14 Ann. Cas. 693; Cincinnati, H. & D. R. Co. v. Van Horne, 16 C. C. A. 182, 37 U. S. App. 262, 69 Fed. 139; Lochhead v. Jensen, 42 Utah, 99, 129 Pac. 347; Huddy, Automobiles, § 39; Hinds v. Steere, 209 Mass. 442, 35 L.R.A. (N.S.) 658, 95 N. E. 844, 1 N. C. C. A. 134; Berry, Automobiles, § 149; Fairchild v. Fleming, 125 Minn. 431, 147 N. W. 434.

Knappen, Circuit Judge, delivered the opinion of the court:

The plaintiffs in error, as receivers (hereinafter called defendants), through their agent, sold and issued to decedent, Barber, a ticket, entitling him to transportation from Toledo, Ohio, to Columbus in that state, by way of Piqua. The ticket contained two coupons, the one for carriage from Toledo to Piqua, over the line of the Cincinnati, Hamilton, & Dayton Railway Company, the other from Piqua to Columbus, by way of the Pennsylvania line. At Piqua the receivers' agent issued and delivered to decedent a ticket for transfer from the Cincinnati, Hamilton, & Dayton depot to

the Pennsylvania depot, about a mile distant. While on the inter-depot journey, the automobile in which the decedent was riding was, through the asserted negligence of its driver, overturned, and decedent thereby killed. This action is for damages for the death. The case was tried to a jury, resulting in a verdict and judgment for the plaintiff administratrix.

The primary and most important question is whether the trial judge rightly held that, upon the record as presented, the defendants' contract of carriage included the transfer between the two depots at Piqua, or whether, as claimed by the defendants, the contract of interdepot transfer was that of an independent transfer company, the defendants, in issuing the transfer, acting merely as the transfer company's agent. This question is rightly treated by counsel for both parties as one of law.

The ticket given decedent at Toledo contained the stipulation that in selling the ticket "for passage over other lines, or in checking baggage on it, this company acts only as agent and is not responsible beyond its own line." The automobile in which decedent was being transferred from one station to the other was operated by a concern known as the Robbins Transfer Company, engaged in running a line of automobiles, including interdepot transfers in Piqua.

It may be conceded that defendants would not be liable for a negligent injury to decedent, while being carried by the Pennsylvania Company from Piqua to Columbus. *Auerbach v. New York C. & H. R. R. Co.* 89 N. Y. 281, 42 Am. Rep. 290; *Pennsylvania Co. v. Loftis*, 72 Ohio St. 288, 106 Am. St. Rep. 597, 74 N. E. 182, 3 Ann. Cas. 3; *Nashville & C. R. Co. v. Sprayberry*, 8 Baxt. 341, 35 Am. Rep. 705. It may also be conceded that, had the ticket contained a coupon for transfer by the Robbins Company between the two railway stations, defendants would not be liable for the transfer company's negligence; but the ticket would be regarded as evidencing distinct contracts of carriage with the two railway companies and the transfer company. The ticket, however, contained no coupon or other provision relating to transfer from depot to depot.<sup>1</sup>

Defendants contend that the disclaimer of responsibility contained in the ticket

applied, nevertheless, to the interstation transfer. Several considerations make strongly against this contention. The natural meaning of the expression "over other lines" would be "other railroad lines," not only under the doctrine of exclusion, but because such lines are alone mentioned in the ticket, which was silent as to transfer. The form of the ticket differs materially from that of the coupons attached to the railway ticket, in that, while both show their issue by the Cincinnati, Hamilton, & Dayton Railway (or its receivers), the interdepot transfer ticket shows on its face that it is "good for one through passenger and baggage . . . from C. H. & D. Railway depot, to P. C. & St. L. Railway depot," and is signed by defendants' general passenger agent; while the railroad coupons not only omit the words "good for," but are without the general passenger agent's signature. Defendants' answer admits that the transfer was issued "in consideration of the purchase price of" the railway ticket. The undisputed testimony of the automobile driver, introduced by defendants, is that, on the arrival of the Cincinnati, Hamilton, & Dayton train at Piqua, "he read the forms of the ticket off to the ticket agent, stating where the party had come from, where he was going, and the form of the ticket," upon which the interdepot transfer ticket was issued. The undisputed testimony of a member of the transfer company, who was defendants' witness, was that the compensation between that company and the "Cincinnati, Hamilton, & Dayton" is conducted by transfer tickets; we collect these monthly. The chauffeur has charge of the collecting of the transfer tickets." There was, otherwise, no testimony of the terms of the arrangement between the railroad company and the transfer company; the defendants' answer precludes a defense (which, indeed, is not asserted) that decedent was the passenger of the Pennsylvania Company, or that the latter company contributed toward the payment of the transfer company's charges. The only reasonable interpretation of the record is that defendants made the arrangement for the transfer and paid the transfer company therefor, the amount of such payment, however, not appearing, nor how much, if anything, was added on that account to what decedent would otherwise have paid for the railroad transportation. Presumably, defendants charged the passenger, in the aggregate, no more than his through fare on the competing roads. But it is clear that decedent was not to make and did not make any payment directly to the transfer company, or have any relation with it other than here stated. If the

<sup>1</sup> While a witness testified that there was attached to the ticket a "pink slip," which was exchanged at the Piqua ticket office for the transfer ticket, defendants conceded on the trial, and by brief in this court, that the ticket given decedent on Toledo consisted only of the body and the two railroad coupons.

two roads had had actual rail connection, and were the ticket a through one, it would have been defendants' duty, broadly speaking in the absence of special contract otherwise, to carry decedent to the end of their own line and deliver him to the Pennsylvania Company. *Michigan C. R. Co. v. Mineral Springs Mfg. Co.* 18 Wall. 318, 324, 21 L. ed. 297. 301; *Pennsylvania Co. v. Jones*, 155 U. S. 333, 39 L. ed. 176, 15 Sup. Ct. Rep. 136. What, in such case, would amount to a delivery to the succeeding carrier, we have no occasion to define. But treating the ticket as creating two separate and independent contracts, one by each of the two railroads, for carriage over its own road only, defendants would still have owed decedent some measure of accommodation in connection with opportunity to effect a transfer, even at a common junction point. *Texas & P. R. Co. v. Bigger*, 239 U. S. 330, 335, 338, 60 L. ed. 310, 315, 316, 36 Sup. Ct. Rep. 127, and see *Chicago, R. I. & P. R. Co. v. Stephens* (C. C. A. 6th C.) 134 C. C. A. 263, 218 Fed. 535, 545, 546. It was plainly to defendants' interest to provide through connection, in view of the short interval between the arrival of their train and the departure of the Pennsylvania train, and the presumed competition of other and shorter and actually through lines between Toledo and Columbus. Defendants had an undoubted right to guarantee time for immediate connection with the Pennsylvania Railroad at Piqua; indeed, the regular Toledo ticket agent would have had such authority. *Hayes v. Wabash R. Co.* 163 Mich. 174, 177, 31 L.R.A.(N.S.) 229, 128 N. W. 217.

The proposition that the railroad ticket was not, in fact, a through ticket, but that (as affecting the matter of transfer between depots) decedent had the right to stop at Piqua, loses its force, not only, to some extent, through the fact that the carriage had to be finished the day following the issue of the ticket (which following day was that of the transfer and injury), but especially through defendants' treatment of the ticket (at Piqua) as a through ticket, by delivering to decedent at that place an interdepot transfer ticket, showing on its face that it was issued on "through ticket;" and the necessary inference from the record is that defendants' regular practice was to furnish this interdepot transfer on through tickets between Toledo and Columbus, and presumably decedent understood that the price of the transfer was included in the amount paid for his ticket. It must be conceded that, in the absence of contract or custom, defendants would have been under no obligation to transfer decedent to the Pennsylvania station; yet,

taking into account all the elements stated, there is, to our minds, but one consideration lending substantial support to defendants' asserted freedom from responsibility, viz., that the transfer contained the words, "On account Robbins Transfer Company." But controlling force cannot be given to these words alone, not only because they do not clearly import an agency on defendants' part for the transfer company, but are fully as consistent with an identification for accounting purposes, only, between defendants and that company, but for the further reason that it does not appear that decedent ever read the transfer or knew that it contained words of the purport stated. The natural inference is to the contrary, for defendants' train was late, and there were but a few minutes to make the transfer to the Pennsylvania depot, and that at about 4:30 o'clock on a March morning; and the testimony is that the issue of the transfer and the taking of the automobile were hurried. The receipt of the transfer under such circumstances was not, in our opinion, enough, of itself, to make a contract between decedent and the transfer company, nor to advise the former that defendants were relieved from responsibility, or were acting merely as agents for the transfer company therein. In view of the not unusual practice of railroad companies to issue, as a part of through tickets, coupons for transfer lines wholly independent of the railroads, we think decedent, upon the record presented, would naturally have regarded the interdepot transfer (not provided for by ticket coupon) as the act of defendants. There was no substantial conflict of testimony affecting the point we are considering, and the court had to decide it as matter of law. Indeed, defendants asked for direction in their favor on this question, only as matter of law. While the question is not free from difficulty, upon a consideration of the entire record, we think the district court rightly held that defendants assumed to provide transportation their own passengers to the Pennsylvania station, and that, so far from defendants being merely the agents of the transfer company, the latter was an agency of defendants, adopted by them for carrying their own passengers to the Pennsylvania station. The instant case is in many respects *sui generis*. The authorities cited by defendants, with one exception, do not sustain their contention of nonliability, and the doctrine of the excepted case we cannot approve.

2. There was testimony that previous to and at the time of the upsetting of the car decedent was standing on the running board; that the accident occurred while

the machine was descending a long grade, and running at from 30 to 35 miles an hour. The court refused to charge, as matter of law, that decedent was guilty of contributory negligence. There was no error in this refusal, for the reason, if for no other, that there was affirmative testimony (which the jury had the right to believe) that decedent was sitting crosswise in the lap of another passenger (who was on the front seat), and thus on the edge of the machine, with his left foot on the inside, his right foot on the outside, and his head inside the car. The testimony as to the speed of the car ranged all the way from 10 to 15 miles up to 35 miles. Decedent was not guilty of contributory negligence from the fact that, as a passenger, having no control over the driver, he took no steps to lessen the speed. *Monongahela River Consol. Coal & Coke Co. v. Schinnerer* (C. C. A. 6th C.) 117 C. C. A. 193, 196 Fed. 381.

Complaint is also made of the refusal of certain requests upon the subject of contributory negligence. Their subject-matter was fully covered by the charge, unless in the fact that the effect of decedent's standing upon the running board was thus stated: "If the accident was directly caused by his standing on the running board, the plaintiff cannot recover."

Decedent's contributory negligence would bar recovery, if, but not unless, it directly and proximately contributed to the injury. *Toledo, St. L. & W. R. Co. v. Kountz* (C. C. A. 6th C.) 94 C. C. A. 244, 168 Fed. 840. "Contributed to" would have been a better expression than "caused." However, the court at least twice charged, in substance, that if decedent was guilty of contributory negligence plaintiff could not recover. The court's attention was not called to the criticism now made. Presumably, had that been done, the language would have been suitably modified. We find no reversible error in this respect. Indeed, defendants' request on the subject of contributory negligence was faulty, in omitting the words "directly and proximately," or their equivalents.

3. The trial court properly charged that the burden of proof of contributory negligence was on defendants. The rule is one of general law, enforced by the Federal courts, even where the rule of the state practice is otherwise. *Central Vermont R. Co. v. White*, 238 U. S. 512, 59 L. ed. 1436, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; *Erie R. Co. v. Weinstein* (C. C. A. 6th C.) 92 C. C. A. 189, 166 Fed. 274.

4. The Ohio statute (Gen. Code, § 12,604) provides that one operating a motor vehicle at a greater speed than 8 miles an hour

in the business and closely built-up portions of a municipality, or more than 15 miles an hour in other portions thereof, shall be fined not more than \$25. The accident occurred within the municipal limits. The trial court charged that the operation of the automobile at more than 15 miles an hour was negligence, and would be actionable, if it brought about the injury. Defendants criticize this instruction, first, as making an unlawful speed negligence *per se*, instead of merely evidence of negligence, and, second, on the ground that the statute was designed for the protection of those using the streets, and not for those within the car. We cannot agree with this contention. True, in *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659, it was said, speaking of the violation of a city ordinance, that the better and more generally accepted rule is that "such an act on the part of a railroad company is always to be considered by the jury as at least a circumstance from which negligence may be inferred in determining whether the company was or was not guilty of negligence."

The supreme court of Ohio, however, in *Schell v. Dubois*, 94 Ohio St. 93, L.R.A. 1917A, 710, 113 N. E. 664, 13 N. C. C. A. 982, in construing this very statute, held, as stated in the syllabus, that "the violation of a statute passed for the protection of the public is negligence *per se*, and where such act of negligence by a defendant is the direct and proximate cause of an injury not directly contributed to by the injured person, the defendant is liable."

This we think a construction of the Ohio statute, and, as such, binding upon the Federal courts. Nor do we agree with the proposition that the opinion of the court makes it clear that the purpose of the statute was not to protect those within the machine, but only those without. Such distinction would not, in our judgment, be a reasonable one. The construction thus put upon the statute in question is in harmony with the rule frequently announced by the supreme court of Ohio and by this court, in construing frog-blocking and other protective statutes, viz., that the breach of a statute designed for the protection of the public is negligence *per se*.<sup>2</sup>

<sup>2</sup> *Variety Iron & Steel Works Co. v. Poak*, 89 Ohio St. 297, 306, 106 N. E. 24; *Krause v. Morgan*, 53 Ohio St. 26, 43, 40 N. E. 886; *Toledo St. L. & W. R. Co. v. Kountz*, 94 C. C. A. 244, 168 Fed. 838; *Cooper v. Baltimore & O. R. Co.* 16 L.R.A. (N.S.) 715, 86 C. C. A. 272, 159 Fed. 82, 86, 14 Ann. Cas. 693; *Sterling Paper Co. v. Hamel*, 125 C. C. A. 44, 207 Fed. 300, 302; *Crucible Steel Forge Co. v. Moir*, 135 C. C. A. 49, 219 Fed. 151, 154, 8 N. C. C. A. 1006.



Section 12,603 does not, in our opinion, modify the effect of § 12,604.

The judgment of the District Court is affirmed.

Petition for a writ of certiorari denied by the Supreme Court of the United States March 18, 1918 (246 U. S. 666, 62 L. ed. 929, 38 Sup. Ct. Rep. 416).

### Annotation—Duty and liability of connecting carriers to passengers at junction point.

This note is limited to cases in which it appears that the passenger was traveling upon a through ticket of some sort, since, in the absence of such fact, the cases are usually governed by the rules or principles that control the liability of carriers for injuries to persons at ordinary stations. As indicated by the title, cases involving transfers between different lines or trains belonging to the same carrier are excluded.

In the case of *HARMON v. BARBER*, ante, 428, the liability of the initial carrier is based upon the theory that, under the particular circumstances of the case, it was the principal in the contract of transfer, and had merely made the transfer company its agent for performing the contract. There are not many cases on the question, and the facts or circumstances involved differ to such an extent that it is not possible to state any rule of law that would be applicable to all.

What constitutes a reasonable time, prior to the arrival or departure of trains, for keeping a railroad station open, lighted and heated for the use of passengers, is discussed in the note to *Abbot v. Oregon R. & Nav. Co.* 1 L.R.A. (N.S.) 851; and the liability of carrier for turning a waiting passenger out of depot is covered in the note to *Texas Midland R. Co. v. Geraldson*, 29 L.R.A. (N.S.) 799. In most of the cases cited in these notes, the question arose in respect to one who had come to the station to wait for a train on time or remained after reaching the station at his destination. In a few cases, however, the passenger was waiting for a delayed train or waiting between trains on defendant's road, with the trip partly completed. The latter class of cases bears some resemblance to the cases cited herein, in the view that special circumstances are relied upon to excuse or justify a longer stay at the station than would otherwise be allowable, but differ from them in the fact that there can be no attempt to shift the liability to another carrier.

The distinction between such cases and those to which this annotation is limited is clearly stated by the court in

*Riley v. Wrightsville & T. R. Co.* (1909) 133 Ga. 413, 24 L.R.A. (N.S.) 379, 65 S. E. 890, 18 Ann. Cas. 208, where it is said: "If the contention of each of the defendants were sustained, the result would be that a female passenger might buy from a railroad company a through ticket over its road and a connecting road, and might be carried to a junction where a joint waiting room was provided and maintained for such through passengers to await the connection, at a point in the country where no other accommodations could be obtained, and there the carriers might place such passenger in the waiting room for the purpose of awaiting the connecting train, and then turn her out at night in the dark, regardless of the weather, to await the coming train as best she could. When sued, the first company could reply that she had ceased to be its passenger after reaching the junction, and that no duty rested on it to keep open the station; and the other could reply that it was only required to keep open its station for a reasonable time before its train arrived; and so the passenger could be turned adrift at night, and nobody would be responsible. In the absence of any privilege to stop along the way, a through passenger on a single ticket, good for one continuous trip, cannot at his pleasure, stop and take other trains, but must continue the trip. On the other hand, can the connecting carriers, during a short interval of a few hours between connecting trains, place the through passenger in a room to await the next train, and then turn him out before it arrives, thus severing and renewing their relation and duty to him at will? This was not a question of whether the carriers were required to provide a waiting room at that point, or whether, as to persons seeking to become passengers there, the companies could make reasonable regulations, within certain limits, as to the time for opening the waiting room; but the allegation here was that they did jointly provide and use a waiting room for through passengers waiting at that point for connecting trains of the two roads, in view of the situation there;

that the agents and employees of both companies told her to enter such room; that, after so doing, the employee in charge of the room forced her to leave it before the connecting train arrived, at night and in the dark, though there was no place where the passengers could obtain accommodations; and she was thus subjected to cold and rain." And it was held that, as against a general demurrer, a petition in an action against both companies, setting out the facts substantially as recited in the quotation, stated a cause of action in tort against both defendants.

The case of *Knight v. Portland S. & P. R. Co.* (1868) 56 Me. 234, 96 Am. Dec. 449, where plaintiff was injured by having her foot go through the boards of a wharf on her way from the defendants' train to the boat, was decided upon the theory that each connecting carrier is liable for injuries occurring on its own line, when the initial carrier sells the through ticket in such form as to make it merely the agent of the others. Plaintiff was traveling on such a ticket, part of the journey being by boat. The defendants owned the wharf, however, and the court said: "If the defendants had carried the plaintiff over the wharf, as heretofore, in their cars, and she had been injured in consequence of the neglect of the defendants, she would have been entitled to recover. Her rights are none the less because she walks over the wharf to reach the steamboat, than if she had been borne over it, if, on the way, she is injured through the negligence of the defendants by leaving the wharf in an unsafe and dangerous condition. The defendants are not released from liability because, for their convenience, she used her own limbs, when she might be entitled to the use of their cars. Their liability did not cease the moment the cars reached the depot. It continued, equally as if at the depot, while she was on her way over the defendants' wharf, and, by their direction, to the steamboat, and until, in the ordinary course of her passage, she should reach the point where the liability of the steamboat company commences. The passage contracted for was from Lawrence to Belfast. The plaintiff was in itinere from the point of departure to the destined point of arrival. The defendants must, at any rate, be deemed liable, from the place where they received the passenger to the place where she was to be transferred to the next agent, in the course of transmission to the place of her destination."

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In *St. Louis Southwestern R. Co. v. Griffith* (1896) 12 Tex. Civ. App. 631, 35 S. W. 741, the plaintiff was traveling upon a coupon ticket covering a portion of two railroads and all of a transfer route between them, and had been transported over one road and the transfer route and placed in the depot of the defendant, the last road over which she could travel, where she was assaulted by defendant's night agent. There were ten hours between the time of her arrival at defendant's depot and the time of its first train on which she could complete her journey. The company was held liable, on the theory that she was defendant's passenger upon her arrival at its depot, the court saying: "Appellant further insists that appellee, at the time the assault was made upon her by appellant's agent, was a mere licensee, and that appellant did not owe her the duty of protection. It is admitted that, if she was then a passenger, the appellant would be liable. She had purchased her ticket, and the railroad company had contracted with her to safely transport her from Greenville to Mt. Vernon; she went to the depot with the purpose of taking passage upon the first train: was received in the depot and, by the express assent of the company, through its agents, remained in the depot to await the departure of the train; the railway company's agents having full knowledge of the fact that she had a ticket for passage, and of her intention to await in the depot the departure of the train to take passage upon it. This course of treatment of persons intending to take passage upon appellant's trains was usual, and this was not a special and exceptional accommodation accorded this lady by the agent, which could be said to be without the authority of the company, and out of the line of the agent's duty. It may be, as contended by the appellant, that the company was not compelled to open its depot to receive passengers, so long a time in advance of the departure of its trains; but for reasons, presumably to its own advantage, it chose to receive passengers in that way, and having so received the plaintiff, it certainly cannot be said that it owed her no duty of protection. If it owed her any duty of protection, it was grossly violated. We are of opinion that the relation of carrier and passenger existed, and that the company is liable for the violation of its duty by its agents. *Hutchinson, Carr.* §§ 556, 557a; *Dillingham v. Anthony* (1889) 73 Tex. 50, 1 L.R.A. 634,

15 Am. St. Rep. 753, 11 S. W. 139; *Craker v. Chicago & N. W. R. Co.* (1874) 36 Wis. 657, 17 Am. Rep. 504, 8 Am. Neg. Cas. 665."

In *Chicago, R. I. & P. R. Co. v. Stephens* (1914) 134 C. C. A. 263, 218 Fed. 535, the action was against the second of the two connecting carriers, over whose line plaintiff had purchased transportation from the first, and the question decided was almost the same as the one treated in the note in 1 L.R.A. (N.S.) 851, cited *supra*, the fact that plaintiff had arrived over a connecting road that was acting as defendant's agent in the sale of tickets being a circumstance considered in passing upon reasonableness of a requirement in respect to protection afforded at the station. The defendant had been prevented by floods from running the train on which plaintiff expected to complete her journey. The court said: "Thus plaintiff reached defendant's depot at midnight, in possession of a through ticket purchased at the beginning of her trip, with the implied consent of defendant, and we are asked to hold, as matter of law merely, that she was not a passenger when she entered the depot; and, if she was, that she lost her rights in that respect by staying there too long. We are not disposed to believe that the law is so extreme and harsh as to sanction any such rule. That would deny to plaintiff, as also to defendant, the right to have the jury pass upon the facts and circumstances which brought about the conditions prevailing at the Wheatley depot. Was plaintiff in fault, or was defendant, for the confusing plight in which plaintiff evidently found herself upon her arrival at this depot? In view of the court's charge and the verdict, we are not called upon to determine whether plaintiff was a passenger of the Rock Island when she entered the waiting room of the depot. Her intent in that behalf is manifest, and, with her rightful purchase and possession of the Memphis railroad ticket, her right to treatment as a passenger would, as a matter of law, be difficult to refute. Whether the conditions justified her in remaining in the waiting room the rest of the night was clearly a question for the jury, under appropriate instructions. Counsel for defendant frankly admit that after diligent search they have been unable to find apposite authority to sustain their contention. The ultimate and controlling issue submitted to the jury in substance was whether, in

view of the scheduled departure of the Memphis train, the time when plaintiff entered the depot and the length of time she subsequently remained there were or were not, under the facts and circumstances of the case, reasonable. The trial court made plaintiff's relation as a passenger of defendant at the time she entered the depot depend upon the jury's finding on this issue; charging the jury that if she then was a passenger the company was under duty to exercise 'reasonable care and diligence in furnishing her with a reasonably safe and comfortable depot . . . until the departure of the train for which she was waiting.' These views met with no exception, and certainly were as favorable to defendant as, on any rational theory, it was entitled to."

In *Texas & P. R. Co. v. Bigger* (1915) 239 U. S. 330, 60 L. ed. 310, 36 Sup. Ct. Rep. 127, there was a car in the train destined to go through to plaintiff's destination, but he knew nothing of this car, and was put off at the point or junction between the roads, to await the train on the connecting carrier's road. The court said: "Finally, it is said that the Texas & Pacific owed him no further duty when he left its train. The latter contention can be immediately rejected. The company accepted him as a passenger for a destination beyond Longview, and its duty was not discharged by delivering him to a storm, protected from its inclemency only by the shelter afforded by a 'switch shanty,' so-called by an employee of the road, . . . but the court instructed the jury, at the request of plaintiff, that the railway company 'owed its passengers the duty to exercise that high degree of care that would be exercised by every prudent person under the same or similar circumstances, and a failure to exercise such degree of care would be negligence.' This instruction is attacked as error only because it imposed a high degree of care on the company after Bigger had left the train, 'and was, therefore, in a position to use care in taking care of himself.' The ground of the objection seems to be that the duty of the company ceased upon the arrival of its train at Longview. To this, as we have already said, we cannot assent. The same care was necessary to be observed for Bigger's protection at that place, under the circumstances presented by the record, as was necessary to be observed in his transportation, and the charge of the court

correctly expressed it. *Pennsylvania Co. v. Roy* (1880) 102 U. S. 451, 26 L. ed. 141, 10 Am. Neg. Cas. 593; *Indianapolis & St. L. R. Co. v. Horst* (1876) 93 U. S. 201, 23 L. ed. 898, 7 Am. Neg. Cas. 331."

In *Watkins v. Pennsylvania R. Co.* (1892) 21 D. C. 1, affirmed on rehearing in (1892) 52 Am. & Eng. R. Cas. 159, a passenger on a through ticket recovered from the company that sold him the ticket, for an assault committed upon him by a gatekeeper at a point of transfer; but the holding rests upon the theory that the initial carrier is liable for injuries caused the employees of any road over which the passenger is entitled to travel.

In *International & G. N. R. Co. v. Duncan* (1909) 55 Tex. Civ. App. 440, 121 S. W. 362, it was held that persons traveling over connecting roads on coupon tickets, who are compelled by sickness to leave the depot of the first road at the place of transfer, the depot of the second road being near, and to defer the remainder of the journey for nine days, are not passengers of the first road upon their return to its depot where they get other tickets, and are permitted to remain in the waiting room, awaiting the arrival of the train on the second road; so the first road owes to them only ordinary care in respect to the healthful and comfortable condition of its waiting room.

The holding in *Wabash, St. L. & P. R. Co. v. Wolff* (1883) 13 Ill. App. 437, as set out in the syllabus, was that, "if a railroad company sets a passenger down upon a platform used by it in common with another company at their intersection, and, while such passenger is preparing to take passage on the other road, he receives an injury by reason of some carelessness in providing proper safeguards or lights, he is not bound to inquire into the ownership of the platform, but may proceed against the company that brought him there and set him down upon the platform." But this holding is not based upon the theory that the relation of carrier and passenger existed. The plaintiff had arrived over defendant's road, and had made some effort to purchase a ticket from the connecting carrier for the remaining portion of the journey. It was distinctly held that the defendant was bound to exercise only reasonable care in constructing and maintaining the platform in a safe condition, which duty did not arise out of the fact that

plaintiff was or had been its passenger. That fact was referred to only to show that he was not a trespasser. As the plaintiff was not traveling upon a through ticket this case is not, in principle, within the scope of the present annotation.

In *Gray v. Colorado Southern R. Co.* (1918) — Tex. Civ. App. —, 204 S. W. 347, where a passenger purchased a ticket from a point in Colorado to a point in Texas, which included a coupon for transportation by a bus between the stations of an intermediate carrier and of the final carrier, the bus line being owned and operated by the individual, it was held that, while the initial carrier was liable for an injury to the passenger in consequence of the defective condition of the bus, the intermediate carrier was not liable under the Carmack Amendment.

In *Boyle v. Waters* (1917) — Mich. —, 166 N. W. 114, where a passenger with through transportation was struck by a train at a junction point as she was passing in the nighttime, according to directions, from the station agent between the depots of the two roads, which were connected by a board walk leading across the track of the connecting road, it was held that if, in the circumstances, it was negligent not to light the walk, the initial as well as the connecting carrier was responsible for the omission, although at the time of the injury the plaintiff had just stepped off from the former's premises. The court observed that if the two companies had any arrangement between themselves that the connecting carrier should light the way, and it neglected to do so, that was a matter to be disposed of by the companies between themselves. It was further held, in this case, that there was no error in submitting to the jury the question whether the initial carrier was guilty of negligence in failing to notify plaintiff of the fact that she would be obliged to cross a railroad track before reaching the station of the other company, and in failing to warn her of the approaching train which was then due, it appearing that she asked for and received directions as to how to reach the other depot. The court was also of the opinion that the question was properly submitted to the jury whether the connecting road was negligent in approaching the crosswalk with its train, without a proper lookout and without giving due and timely warning of its approach. So far as appears,

there was no suggestion in the case that the initial carrier, by selling through transportation, had assumed responsibility for any breach of duty on the part of the connecting carrier, its

liability being predicated upon the proposition that, in the circumstances, it was guilty of a breach of duty on its own part.  
J. W. M.

IDAHO SUPREME COURT.

MARY A. MOSER, Resp't.,  
v.

PUGH-JENKINS FURNITURE COMPANY, Appt.

(— Idaho, —, 173 Pac. 639.)

**Pleading — fraud — money had and received.**

Common counts for money had and received are not sufficient to support a recovery of money obtained by fraud.  
*For other cases, see Pleading, I. 1, in Dig. 1-52 N. 8.*

(June 22, 1918.)

**APPEAL** by defendant from a judgment of the District Court for Ada County in favor of plaintiff and from an order denying a motion for a new trial in an action for money had and received. Reversed.

The facts are stated in the opinion.

Mr. Charles M. Kahn, for appellant:

Plaintiff's complaint was not sufficient to establish an action of fraud and to permit evidence of fraud to be introduced.

*Bates v. Capital State Bank*, 21 Idaho, 148, 141 Pac. 561; *Abbott, Tr. Ev.* 335; *Pom. Rem. & Rem. Rights*, 2d ed. § 554, p. 611; *Pom. Code Rem.* §§ 438, 544, pp. 372, 588; *St. Louis Sanitary Co. v. Reed*, 179 Mo. App. 164, 161 S. W. 315.

Fraud when relied upon must be pleaded.

*Sutherland*, Code Pl. & Pr. § 6890; *Bates Code Pl. & Pr.* p. 1453; 9 Enc. Pl. & Pr. pp. 684, 685; 20 Cyc. 104; *Estes*, Code Pl. § 3278; *Virginia F. & M. Ins. Co. v. Cottrell*, 55 Va. 857, 17 Am. St. Rep. 108, 9 S. E. 132; *Millhiser v. McKinley*, 98 Va. 207, 35 S. E. 446; *Southall v. Farish*, 85 Va. 403, 1 L.R.A. 641, 7 S. E. 534; *Monongahela Tie & Lumber Co. v. Flannigan*, 77 W. Va. 162, 87 S. E. 161; *Strong v. Whybark*, 204 Mo. 341, 12 L.R.A. (N.S.) 240, 120 Am. St. Rep. 710, 102 S. W. 968; *Chase v. Rusk*, 90 Mo. App. 25; *Fankboner v. Fankboner*, 20 Ind. 62; *Wolford v. Powers*, 85 Ind. 294, 44 Am. Rep. 16; *McClinton v. Chapin*, 54 Fla. 510,

**Note.**—As to whether a common-law count for money had and received affords a basis for proof that money or property was obtained by the defendant from the plaintiff by fraud, see annotation following this case, post, 439, and references therein to annotations on related questions.

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45 So. 35, 14 Ann. Cas. 365; *Hillsborough Grocery Co. v. Leman*, 62 Fla. 208, 56 So. 684; *Houser v. Smith*, 19 Utah, 150, 56 Pac. 683; *Wilson v. Sullivan*, 17 Utah, 341, 53 Pac. 994; *United States v. Barber Lumber Co.* 172 Fed. 948; *Patton v. Taylor*, 7 How. 132-160, 12 L. ed. 637-650; *Noonan v. Lee (Noonan v. Braley)* 2 Black, 509, 17 L. ed. 281; *Smith v. Anderson*, 74 Or. 90, 144 Pac. 1158; *Wetherly v. Straus*, 93 Cal. 283, 28 Pac. 1045; *Duncan v. Duncan*, 6 Cal. App. 404, 92 Pac. 312; *Nash v. Rosesteel*, 7 Cal. App. 504, 94 Pac. 850; *Hammond v. McCollough*, 159 Cal. 639, 115 Pac. 216; *Re Yoell*, 164 Cal. 540, 129 Pac. 999; *Bacon v. Soule*, 19 Cal. App. 428, 126 Pac. 384; *Bretthauer v. Foley*, 15 Cal. App. 19, 113 Pac. 356; *Black v. Irvin*, 76 Or. 561, 149 Pac. 540; *Crandall v. Lee*, 89 Wash. 115, 154 Pac. 190; *Brown v. Bledsoe*, 1 Idaho, 746; *Abrams v. White*, 11 Idaho, 497, 83 Pac. 602; *Kemmerer v. Pollard*, 15 Idaho, 34, 96 Pac. 206; *Kerns v. Washington Water Power Co.* 24 Idaho, 526, 135 Pac. 70; *Leavengood v. McGee*, 50 Or. 233, 91 Pac. 453; *Wilson v. Baker Clothing Co.* 25 Idaho, 378, 50 L.R.A. (N.S.) 239, 137 Pac. 896; *Breshears v. Callender*, 23 Idaho, 348, 131 Pac. 15; *Truro v. Passmore*, 38 Mont. 544, 100 Pac. 966; *Galvin v. Mac Min. & Mill. Co.* 14 Mont. 508, 37 Pac. 366; *Davidson Grocery Co. v. Johnston*, 24 Idaho, 336, 133 Pac. 929, Ann. Cas. 1915C, 1129.

Messrs. S. L. Tipton and D. A. Dunning, for respondent:

The common-law form for money had and received is the proper action to recover money obtained under a contract induced by fraud, or where there has been a rescission of contract.

*Lockwood v. Kelsea*, 41 N. H. 185; *Johansen v. Looney*, 30 Idaho, 123, 163 Pac. 303; 2 Enc. Pl. & Pr. 1016; 3 Elliott, Ev. § 1729; *Stout v. Caruthersville Hardware Co.* 131 Mo. App. 520, 110 S. W. 619; *Humbird v. Davis*, 210 Pa. 311, 59 Atl. 1082; *Miller v. Abrahamson*, 9 Cal. App. 390, 99 Pac. 534; *Grannis v. Hooker*, 29 Wis. 65; *Keene v. Eldriedge*, 47 Or. 179, 82 Pac. 803; *Waite v. Willis*, 42 Or. 288, 70 Pac. 1034; *Allen v. Patterson*, 7 N. Y. 476, 57 Am. Dec. 542; *Meagher v. Morgan*, 3 Kan. 372, 87 Am. Dec. 476; *Emslie v. Leavenworth*, 20 Kan. 562; *Jennings County v. Verbar*, 63 Ind. 107; *Jones v. Mial*, 82 N. C. 252; *Ball v. Fulton County*, 31 Ark. 379; *Hosley v.*

Black, 28 N. Y. 438; Carroll v. Paul, 16 Mo. 226; Winkler v. Jerrue, 20 Cal. App. 555, 129 Pac. 804; Minor v. Baldrige, 123 Cal. 187, 55 Pac. 783; Rand v. Columbian Realty Co. 13 Cal. App. 444, 110 Pac. 322; Davidson Grocery Co. v. Johnston, 24 Idaho, 336, 133 Pac. 929, Ann. Cas. 1915C, 1129.

Plaintiff had a right to assume that she could prove fraudulent representations in sustaining her claim for relief.

1 Page, Contr. § 816; Burton v. Driggs, 20 Wall. 125, 22 L. ed. 299; Martin v. Hutton, 90 Neb. 34, 36 L.R.A.(N.S.) 602, 132 N. W. 727.

The contract of conditional sale was rescinded by mutual consent, and the plaintiff had the right to rescind and did rescind the contract for fraudulent representations.

2 Parsons, Contr. 7th ed. p. 812; Well-den v. Witt, 145 Ala. 605, 40 So. 126; Dougherty v. Neville, 108 App. Div. 89, 95 N. Y. Supp. 806; Carpenter v. Chase, 64 N. H. 438, 38 L.R.A.(N.S.) 891, 14 Atl. 76; Groot v. Story, 41 Vt. 533; Sloan v. Van Wyck, 4 Abb. App. Dec. 250; Simmons v. Putnam, 11 Wis. 193; Hanrahan v. National Bldg. Loan & Provident Asso. 67 N. J. L. 526, 51 Atl. 480.

Budge, Ch. J., delivered the opinion of the court:

The complaint in this action sets forth merely the usual form of common-law count for money had and received without alleging any of the specific facts upon which the claim is predicated. The answer consists of certain denials, coupled with a separate answer and affirmative defense, wherein it is alleged that the parties entered into a contract for the sale of certain furniture and fixtures located in what is known as the "Angus Rooming House" located in Boise, for \$4,380; that \$1,000 was paid upon the purchase price, and the balance was to be paid in instalments; and that this \$1,000 was the only money received from respondent. The cause was tried to a jury, and a verdict returned in favor of respondent for the amount claimed with interest, and judgment entered thereon. This appeal is from the judgment and from an order denying a motion for a new trial.

Many errors are assigned, but the decisive question to be determined may be broadly stated as follows: Is a complaint which simply alleges a common-law count for money had and received sufficient to permit the admission of evidence to prove that plaintiff was induced, by fraud, deceit, and fraudulent representations, to part with the money sought to be recovered?

The general rule is well settled that, where a party seeks to recover on the ground of fraud, the particular facts con-

stituting the fraud must be definitely and positively alleged. Brown v. Bledsoe, 1 Idaho, 746; Abrams v. White, 11 Idaho, 497, 83 Pac. 602; Kemmerer v. Pollard, 15 Idaho, 34, 96 Pac. 206; Breshears v. Callender, 23 Idaho, 348, 131 Pac. 15; Kerns v. Washington Water Power Co. 24 Idaho, 525, 135 Pac. 70; Wilson v. Baker Clothing Co. 25 Idaho, 378, 50 L.R.A.(N.S.) 239, 137 Pac. 896.

The right, if any, of respondent to recover, is predicated upon fraud which she failed to allege. But it is contended that the above rule has no application to this form of action, and that proof that the money was obtained by fraud is admissible under a simple common-law count for money had and received. Two of the cases relied upon by respondent, while containing some language that seems to bear this construction, are not in point, for in those cases the facts constituting the fraud were set forth in the complaint. Stout v. Caruthersville Hardware Co. 131 Mo. App. 520, 110 S. W. 619; Humbird v. Davis, 210 Pa. 311, 59 Atl. 1082.

The case of Grannis v. Hooker, 29 Wis. 65, also relied upon by respondent and which appears to be in point, has been ably criticized by the supreme court of Montana in the case of Truro v. Passmore, 38 Mont. 544, 100 Pac. 966. The California decisions sustaining causes of action set forth by the common-law counts are also criticized in the latter case, wherein it is pointed out that some of the most able judges of the California court, while feeling bound by the precedents established in that court, have not hesitated to criticize the reasoning of the precedents. The following language, used by the supreme court of Montana, is particularly in point: "The common counts have been superseded by our system of Code pleading. A complaint, under this latter system, must contain a statement of the facts constituting the cause of action in ordinary and concise language. Rev. Codes, § 6532. If the phraseology of any common count is adequate in the particular case to bring the pleader within the Code rule, then his pleading is sufficient; otherwise, it is not. Where a pleader elects to employ the language of a common count, he subjects himself to the rules governing the construction and sufficiency of complaints under the Codes; that is to say, if a common count will, in fact, state his cause of action in ordinary and concise language, it is good. If it will not, it is bad. Truro v. Passmore, supra.

It should be noticed that § 6532, Revised Codes of Montana, referred to in the latter case, contains the same requirement as our own Revised Codes, § 4168, namely, that the complaint must contain "a statement of

the facts constituting the cause of action, in ordinary and concise language."

In the case at bar, from the evidence, it appears that the respondent's right, if any, to recover, depends wholly upon proof of fraudulent representations. The particular facts constituting the fraud should have been specifically alleged. A defendant who is to be called upon to meet a cause of action based upon his alleged fraud has a right to know in advance the particular acts and things giving rise to the fraud. A common count for money had and re-

ceived is silent as to every such fact, and cannot operate to put a defendant upon notice as to what he is expected to meet, and is not sufficient to state a cause of action based wholly upon the defendant's alleged fraud.

The judgment is reversed, and a new trial granted, with permission to respondent to amend her complaint. Costs awarded to appellant.

Morgan and Rice, JJ., concur.

### **Annotation—Admissibility of proof that money or property was obtained by fraud, under the common-law count for money had and received.**

As to sufficiency of the common counts under the Code, see note in 34 L.R.A. (N.S.) 364.

Under the common-law system of pleading, it is well settled that money or property obtained by fraud may be recovered under the common count in an action for money had and received, without specially pleading the fraud; but there is a difference of opinion as to whether this rule is altered by the Code systems of pleading.

In *Moses v. Macfarlan* (1760) 2 Burr. 1005, 97 Eng. Reprint, 676, 1 W. Bl. 219, 96 Eng. Reprint, 120, it was said by Lord Mansfield that an action for money had and received lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition, express or implied, or extortion, or suppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.

In *Prichard v. Sweeney* (1895) 109 Ala. 651, 19 So. 730, it was held that the common count for money had and received may be supported by evidence that the defendant has obtained money from the plaintiff by duress, extortion, imposition, or taking any undue advantage of his situation.

In *Lyon v. Annable* (1822) 4 Conn. 350, it is said that, where the money is paid through mistake or the deceit of another, an action for money had and received is sustainable to recover it back.

In *Cory v. Somerset County* (1885) 47 N. J. L. 181, it was held that money fraudulently obtained from the defendant by the plaintiff could be recovered on the common count for money had and received, which does not set out the particulars of the fraud.

In *Johnson v. Continental Ins. Co.*

(1878) 39 Mich. 33, it was held that a cause of action by an assurance company to recover a sum of money paid upon a claim of loss, based upon the fraud of the insured, was fully covered by a general count for money had and received in the declaration.

But in *Evertson v. Miles* (1810) 6 Johns. (N. Y.) 138, it was held that, where the plaintiff in an action of assumpsit grounds his action on deceit or fraud in a sale to him by the defendant, the fraud must be averred and charged as a substantive allegation.

In *Minor v. Baldridge* (1898) 123 Cal. 187, 55 Pac. 783, it was held that, notwithstanding the Code requirement that the plaintiff state the facts constituting his cause of action, the common count for money had and received is sufficient, in the absence of a special demurrer (which is like a motion to make a pleader make his pleadings more definite, which practice prevails in some states), to justify the court in receiving evidence of fraud, against the objection that the facts constituting the alleged fraud are not set out.

In *Grannis v. Hooker* (1871) 29 Wis. 65, the court in holding that proof that plaintiff was induced to pay over to the defendant the money sued for, by means of certain false and fraudulent representations, was admissible under a complaint containing what, under the common-law system of pleading, would be called a count for money had and received, said: "We are inclined to sanction this latter view, and to hold that the facts which, in the judgment of the law, create the indebtedness or liability, need not be set forth in the complaint. If the complaint does not state with sufficient certainty the facts in respect to the defendant's obtaining the money from the plaintiff, the better practice is

to move to have the pleading made more definite and certain. But we really do not see any more reason for requiring the complaint to state all the facts and circumstances about the manner the defendant received or obtained possession of money, which in equity and good conscience he ought to pay over to the plaintiff, than, in case of a payment or loan of money, to require the pleading to contain all the facts in respect to such loan or payment."

And the above case was cited with approval in *Burke v. Milwaukee, L. S. & W. R. Co.* (1892) 83 Wis. 410, 53 N. W. 692.

On the other hand, *Truro v. Passmore* (1909) 38 Mont. 544, 100 Pac. 966, it was held, in view of the Code requirement that the complaint must contain a statement of the facts constituting the cause of action in ordinary and concise

language, that the plaintiff could not, under the common-law count for money had and received, show fraud on the part of the defendants.

And in *Buchanan v. Beck* (1888) 15 Or. 563, 16 Pac. 422, it was held that, under the Code system of pleading, an action for money had and received was not maintainable for fraud on the part of the seller of a horse, without alleging the facts on which recovery was sought.

In *Hall v. Prudential Ins. Co.* (1911) 72 Misc. 525, 130 N. Y. Supp. 355, affirmed in (1912) 148 App. Div. 934, 133 N. Y. Supp. 1125, it was said that, in actions for money had and received, the complaint must set forth the actual transaction between the parties, so that the court can see that the defendant has money which belongs to the plaintiff.

E. S. O.

#### MINNESOTA SUPREME COURT.

NATIONAL SURETY COMPANY, Resp't.,  
v.

JOSEPH A. HURLEY,

and

LUTHER S. CUSHING et al., Trustees,  
Garnishees.

CHARLES A. BETTINGEN, Trustee, etc.,  
of Joseph A. Hurley, Bankrupt, Intervener, Appt.

(130 Minn. 392, 153 N. W. 740.)

#### Assignment for creditors — interest conferred.

1. Where a debtor, by trust deed assented to by all his creditors, conveyed his property to trustees to be converted into money and the proceeds thereof to be distributed to his creditors, the creditors took a vested and not a contingent interest in the trust estate.

For other cases, see *Assignment for Creditors*, II. in *Dig. 1-52 N. S.*

#### Garnishment — Interest in assignment for creditors.

2. The interest of a creditor in such trust estate is subject to garnishment; and, if it cannot be determined at the time of the disclosure whether the amount to which such creditor is entitled will be sufficient to satisfy the claim of the plaintiff in the garnishment proceeding, the garnishment pro-

ceeding should be continued until the amount applicable to such claim can be determined.

For other cases, see *Garnishment*, I. c, in *Dig. 1-52 N. S.*

#### Same — effect of service.

3. By service of the garnishee summons, plaintiff impounded the interest of defendant Hurley in the trust estate in the hands of the garnishees, and it sufficiently appeared at all times that Hurley's interest in such estate was more than sufficient to satisfy plaintiff's claim.

For other cases, see *Garnishment*, II. a. in *Dig. 1-52 N. S.*

(July 16, 1915.)

**A**PPEAL by intervener from an order of the District Court for Ramsey County denying a new trial of an action brought to recover certain sums paid by plaintiff upon bonds executed by it as surety for defendant. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. Walter L. Chapin, for appellant:

The liability of the trustees as to any one tract, whether by specific lien or otherwise, was involved in a general accounting, as to which all the beneficiaries of the trust were entitled to be heard, and defendant could not enforce such a lien, or such rights, in any proceeding in which the beneficiaries of the trust were not parties.

*Cushing v. Hurley*, 112 Minn. 83, 127 N. W. 441.

The liability garnishable must be a legal liability for which an action at law in assumpsit or in debt will lie.

Headnotes by TAYLOR, C.

Note. — As to garnishable character of claim of creditor in estate created by voluntary assignment of debtor, see annotation following this case, post, 443, and references therein to annotations on related questions.



Toomer v. Randolph, 60 Ala. 360; Webster v. Steele, 75 Ill. 544; Lackland v. Garesche, 56 Mo. 267; Galveston H. & S. A. R. Co. v. McDonald, 53 Tex. 510; Harris v. Miller, 71 Ala. 26; Massachusetts Nat. Bank v. Bullock, 120 Mass. 86; Swann v. Summers, 19 W. Va. 115; Perry v. Thornton, 7 R. I. 15; Hoyt v. Swift, 13 Vt. 129, 37 Am. Dec. 586.

Mr. Russell L. Moore, for respondent:

The unrecorded assignment for the benefit of creditors, from defendant to C. A. Bettingen, was void as to the plaintiff, because the same contained a clause, requiring all creditors to file releases of their claims as a condition of participating in any proceeds thereof.

Moore v. Bettingen, 116 Minn. 142, 133 N. W. 561, Ann. Cas. 1913A, 816; McConnell v. Rakness, 41 Minn. 3, 42 N. W. 539; May v. Walker, 35 Minn. 194, 28 N. W. 252.

Liens obtained more than four months preceding the filing of a petition in bankruptcy are not invalidated nor affected thereby.

Marah v. Wilson Bros. 124 Minn. 254, 144 N. W. 959; Krupp v. Tabor, 31 Mich. 174; Pickens v. Roy, 187 U. S. 180, 47 L. ed. 129, 23 Sup. Ct. Rep. 78; Metcalf Bros. v. Barker, 187 U. S. 165, 177, 47 L. ed. 122, 128, 23 Sup. Ct. Rep. 67.

Any right, title, or interest of the defendant, either legal or equitable, in or to any species of real or personal property, money, or effects, except those specified in General Statutes 1913, § 7864, can be attached and bound by the service of a garnishee summons, to abide and satisfy such judgment as may be recovered against him.

Becker v. Dunham, 27 Minn. 32, 6 N. W. 406; Banning v. Sibley, 3 Minn. 389, Gil. 282; Greengard v. Fretz, 64 Minn. 13, 65 N. W. 949; Weibeler v. Ford, 61 Minn. 398, 63 N. W. 1075; Aultman v. Markley, 61 Minn. 408, 63 N. W. 1078; Mechanics' Sav. Bank v. White, 150 Mass. 234, 22 N. E. 915; May v. Walker, 35 Minn. 194, 28 N. W. 252; McConnell v. Rakness, 41 Minn. 3, 42 N. W. 539; Williams v. Hill, 19 How. 246, 250, 15 L. ed. 570, 572.

The principle that contingent liabilities are not garnishable has no application to cases in which only the amount of the liability is unascertained or controverted.

Rood, Garnishment, § 123; Downer v. Topliff, 19 Vt. 399; Buchanan County Bank v. Cedar Rapids, I. F. & N. W. R. Co. 62 Iowa, 494, 17 N. W. 737; Rowell v. Felker, 54 Vt. 526; Dwinel v. Stone, 30 Me. 384; Ware v. Gowen, 65 Me. 534; Harvey v. Great Northern R. Co. 50 Minn. 405, 17 L.R.A. 84, 52 N. W. 905; Blair v.

Hilgedick, 45 Minn. 23, 47 N. W. 310; McPherson v. Snowden, 19 Md. 197; Downer v. Topliff, 19 Vt. 399; Carter Bros. v. Bush, 79 Tex. 29, 15 S. W. 167; Moody v. Carroll, 71 Tex. 148, 10 Am. St. Rep. 734, 8 S. W. 510; Webb v. Peele, 7 Pick. 247, 19 Am. Dec. 284.

The fact that the defendant had an interest in the trust property and its proceeds, jointly with others, does not affect the liability of the same to be reached by means of attachment, garnishment, or levy.

Caldwell v. Auger, 4 Minn. 223, Gil. 162, 77 Am. Dec. 515; Piper v. Hanley, 48 Vt. 479; Miller v. Richardson, 1 Mo. 310; Thorndike v. De Wolfe, 6 Pick. 120; Simmons v. Carmichael, — Tex. Civ. App. —, 28 S. W. 690; Perry v. Blatch, 2 Kan. App. 522, 43 Pac. 989; Bolter v. Girtton, 94 Iowa, 721, 61 N. W. 919.

Taylor, C., filed the following opinion:

The firm of Thomas Fitzpatrick and son became financially embarrassed, and on March 12, 1908, conveyed their property to Luther S. Cushing, Fred S. Berry, and William Poppenberger in trust to convert the same into money within two years from that date, and to apply the proceeds thereof in the payment of their debts in the manner prescribed in the trust deed. The property so conveyed included the sum of \$8,000 in money and the real estate herein-after mentioned. By contract in writing, all their creditors became parties to the trust agreement, and bound thereby. The trust deed described twenty-two parcels of real estate, and, after enumerating the encumbrances and lienable claims against each parcel, provided that the proceeds of such parcel should be applied in satisfying the encumbrances and lienable claims against it, and that the surplus, if any, remaining after satisfying such claims, should be placed in the general fund for distribution among the unsecured creditors. It also provided that so much of any secured claim as should not be satisfied out of the security should be considered as an unsecured claim, and be paid pro rata with the other unsecured claims.

Within the two years prescribed by the trust deed, the trustees converted all the property into money, and had the greater portion of the proceeds in their possession in cash. The purchasers of certain parcels of the property, however, required certain things to be done before accepting the title, and deposited the purchase price for such parcels in the bank to be delivered to the trustees as soon as the title appeared clear. The requirements of these purchasers were complied with, and all these amounts were

delivered to the trustees in and prior to August, 1911. In April and May, 1911, the trustees made an apportionment among the creditors of all the funds, including those not then turned over to them by the banks. There was some contention that the trustees had not properly apportioned the funds, and they declined to make any payments until either all the creditors had agreed to the apportionment in writing and directed them to make payments in accordance therewith, or the matter had been determined in court. An agreement approving this apportionment, and directing the distribution of the funds in accordance therewith, was drawn up and dated May 5, 1911. Some of the creditors signed this agreement in May, others in June, and others at later dates. A few did not sign it at all. Some of the larger creditors gave a bond to the trustees, indemnifying them against the claims of the creditors who had not signed the agreement, and thereupon all the funds were distributed according to the apportionment of May 5th.

Joseph A. Hurley was one of the creditors of the Fitzpatricks, and held lienable claims against them amounting to over \$9,000. In the division of funds made by the trustees on May 5, 1911, the sum of \$3,792.38 was apportioned to him. In June, 1911, plaintiff brought suit against Hurley, and subsequently recovered a judgment for the sum of \$1,293.50 therein. On June 21, 1911, plaintiff garnished the above-named trustees. They appeared and disclosed that, according to their books, they had the sum of \$3,792.38 belonging to Hurley. Not satisfied with the disclosure, plaintiff, by leave of court, served and filed a supplemental complaint. While the matter was pending upon this supplemental complaint, and on April 25, 1912, Hurley was adjudged a bankrupt, and C. A. Bettingen was appointed trustee in bankruptcy of his estate. Bettingen, as such trustee, appeared and served and filed a complaint in intervention in which he claimed the fund involved in the garnishment proceedings; and the present controversy is whether he, as trustee in bankruptcy, is entitled to all the money in the hands of the garnishees belonging to Hurley, or whether plaintiff, under its garnishment, is entitled to sufficient thereof to satisfy its judgment. The garnishees disclaiming any interest in the controversy made an application to be permitted to pay into court the money in their hands belonging to Hurley. This application was granted. They had previously paid a small claim against Hurley, and paid the remainder of the money, amounting to the sum of \$3,349.02, into court, and were discharged.

The intervener contends that the amount which Hurley would receive out of the trust property could not be determined, until the trust had been wound up and an accounting had, either in court or by mutual agreement, out of court; and that at the time of the service of the garnishee summons his interest in the property depended upon a contingency, and for that reason could not be reached by garnishment. The statutes provide:

"The service of the summons upon the garnishee shall attach and bind all the property and money in his hands or under his control belonging to the defendant, and all indebtedness owing by him to the defendant at the date of such service, to respond to final judgment in the action." Gen. Stat. 1913, § 7862.

"All moneys and other personal property including such property of any kind due from or in the hands of an executor or administrator, and all written evidences of indebtedness, whether negotiable or not, or under or over due, may be attached by garnishment; and money or any other thing due or belonging to the defendant may be attached by this process before it has become payable, if its payment or delivery does not depend upon any contingency; but the garnishee shall not be compelled to pay or deliver the same before the time appointed by the contract." Gen. Stat. 1913, § 7863.

"No person or corporation shall be adjudged a garnishee in any of the following cases:

"1. By reason of any money or other thing due to the defendant, unless at the time of the service of the summons the same is due absolutely, and without depending on any contingency. . . ." Gen. Stat. 1913, § 7864.

Hurley had valid lienable claims against the Fitzpatricks. He relinquished his right to enforce these liens against their property for the interest in the trust estate, given him by the trust deed. Under the trust deed he was entitled to have his claims satisfied out of the proceeds of the property against which they were lienable. If, after satisfying prior encumbrances, such proceeds were sufficient for that purpose; and, if such proceeds were not sufficient for that purpose, he was entitled to share in the general fund as a common creditor. The trust deed gave him an absolute right to share in the trust estate either as a preferred creditor, or as a common creditor, or as both. His interest in the trust estate, as defined in the trust deed, became fully vested when that deed took effect. He then became entitled to his proportion of the trust property, or of the

proceeds thereof, and his right thereto was absolute, and did not depend upon any condition or contingency within the meaning of the above statutes. It is true that the value of his interest could not be determined accurately until the property had been converted into money; but that it would amount to a substantial sum appeared clearly, and was not disputed. Enough of the property had been converted into money, prior to the service of the garnishee summons, so that Hurley's share thereof was more than sufficient to satisfy plaintiff's claim. If it had appeared that the garnishees were unable to determine whether they had sufficient funds belonging to Hurley to satisfy plaintiff's claim, the court should have continued the garnishment proceeding until the amount ap-

plicable to such claim could be determined. *Duxbury v. Shanahan*, 84 Minn. 353, 87 N. W. 944. The garnishees, however, made no such claim; on the contrary, they admitted at all times that the funds in their possession were ample to pay plaintiff in full. But, aside from this admission, they had completed their trust and determined definitely the amount due Hurley before the trial took place, and at the trial paid the amount due him into court to be disposed of as the court should direct. Plaintiff's lien attached when the garnishee summons was served; the amount impounded thereby was definitely determined at the trial, if not earlier; and the decision of the learned trial judge was clearly correct.

Order affirmed.

**Annotation—Garnishable character of claim of creditor in estate created by voluntary assignment of debtor.**

As to the right to attach or garnish funds in the hands of an officer of the court after an order of distribution has been made, see notes in 13 L.R.A.(N.S.) 758, and 30 L.R.A.(N.S.) 720, and as to the right to garnish funds of a bankrupt estate after order of distribution has been made, see note in 14 L.R.A.(N.S.) 1220.

The courts are not agreed on the question as to whether or not an assignee for the benefit of creditors, under a voluntary assignment, is an officer of the court, so that money in his hands is in *custodia legis*; at least, where the question has been presented in matters not involving the specific point under consideration. Even assuming, however, that, ordinarily, money in the hands of an assignee for the benefit of creditors is in *custodia legis*, the holding in *NATIONAL SURETY CO. v. HURLEY*, ante, 440, may be sustained in view of the status at the time of the garnishment. For it is to be noted that, in this case, the garnishee admitted that he had funds in his possession sufficient to pay the creditor whose claim was garnished, and he actually paid the amount thereof into court, thereby completing his trust.

Where the proceeds of property assigned for the benefit of creditors has been deposited, under order of the court, with the clerk thereof, and an order for distribution of the same among the

creditors has been made, they are subject to garnishment by a creditor of one of the distributees. *Dunsmoor v. Furstenfeldt* (1881) 88 Cal. 522, 12 L.R.A. 508, 22 Am. St. Rep. 331, 26 Pac. 518.

And see upon this point *Stuckey v. McKibbin* (1890) 92 Ala. 622, 8 So. 379, holding that the amount due an assignee for the benefit of creditors, for his services during the time he acted as assignee, may be garnished by his creditor, after he has been removed and another assignee appointed in his stead.

It has been held, however, that, where a trust created by an assignment for creditors is still in the process of administration and no dividend has been declared, the assignee is not subject to garnishment by a creditor of the *cestuis que trustent*, even though, subsequent to the service of the writ of garnishment, a dividend was declared by the trustee. *Cross v. Brown* (1895) 19 B. I. 220, 33 Atl. 147.

It is a general rule that money in the hands of an assignee, under Insolvency Laws, cannot be attached by a writ of foreign attachment as the goods, effects, or credits of the creditor of the insolvent, even though his claim has been allowed against the estate. *Dewing v. Wentworth* (1853) 11 Cush. (Mass.) 499; *Colby v. Coates* (1850) 6 Cush. (Mass.) 558.

A. G. S.

## RHODE ISLAND SUPREME COURT.

PAUL CHASE, Appt.,  
v.  
RACHEL H. CRAM, Respnt.

(39 R. I. 83, 97 Atl. 481.)

**Easement — right to use water — extent.**

A provision in a deed from a father to his daughter of a parcel of the father's real estate granting her "a privilege to take water from the spring on my farm, as occasion may require," conveys no right to sell the water for use off the land conveyed.

*For other cases, see Easements, III. in Dig. 1-52 N. S.*

(May 11, 1916.)

**A**PPEAL by complainant from a decree of the Superior Court for Newport County dismissing a bill filed to restrain respondent from taking water from a spring, for uses alleged to be in excess of the terms of the grant giving her certain rights therein. Reversed.

The facts are stated in the opinion.

Messrs. Nathan W. Littlefield and Waterman & Greenlaw, for appellant:

The easement granted in the deed conveying the 30 acres is an easement appurtenant.

14 Cyc. 1141, 1142; *Evans v. Dana*, 7 R. I. 306; *Cadwalader v. Bailey*, 17 R. I. 495, 14 L.R.A. 300, 23 Atl. 20; *Manning v. Wasdale*, 5 Ad. & El. 758, 111 Eng. Reprint, 1353, 1 Nev. & P. 172, 2 Harr. & W. 431, 6 L. J. K. B. N. S. 59.

Even if the right to take water, in the case at bar, be construed as a profit à prendre, it is nevertheless a profit à prendre appurtenant to the estate in connection with which it is enjoyed.

*Goodrich v. Burbank*, 12 Allen, 459, 90 Am. Dec. 161; *Huntington v. Asher*, 96 N. Y. 604, 48 Am. Rep. 652; *Bingham v. Salene*, 15 Or. 208, 3 Am. St. Rep. 152, 14 Pac. 523; *Grubb v. Grubb*, 74 Pa. 25, 7 Mor. Min. Rep. 226; 14 Cyc. 1144; *Drury v. Kent*, Cro. Jac. 14, 79 Eng. Reprint, 13.

The court erred in decreeing affirmative relief to the respondent.

16 Cyc. 324; *Merwin, Eq. & Eq. Pl.* 536; *Downes v. Worch*, 28 R. I. 100, 65 Atl. 603, 13 Ann. Cas. 647; *Gray v. Taylor*, — N. J. Eq. —, 38 Atl. 951; *Munich Re-Insurance Co. v. United Surety Co.* 113 Md. 200, 77 Atl. 579; *Allen v. Allen*, 14 Ark. 666; *Cox v. Leviston*, 63 N. H. 283; *Klonne v. Bradstreet*, 7 Ohio St.

**Note.** — As to whether an easement for the use of water is appurtenant or in gross, see annotation following this case, post, 447, and references therein to annotations on related questions.

L.R.A.1918F.

322; *Adkins v. Edwards*, 83 Va. 300, 2 S. E. 435; *Mettert v. Hagan*, 18 Gratt. 231; *Keith v. Losier*, 88 Iowa, 649, 55 N. W. 952; *Latimer v. Irish-American Bank*, 119 Ga. 887, 47 S. E. 322; *Book v. Justice Min. Co.* 58 Fed. 827; *Middleton v. Selby*, 19 W. Va. 167; *Low v. Blackburn*, 2 Nev. 70; *Hendrix v. Southern R. Co.* 130 Ala. 205, 89 Am. St. Rep. 27, 30 So. 596; *Greiss v. Noisky*, 82 N. J. Eq. 1, 87 Atl. 155; *McGillis v. Hogan*, 190 Ill. 176, 60 N. E. 91.

Mr. Nathan W. Littlefield for respondent.

Vincent, J., delivered the opinion of the court:

This is a bill in equity brought by the complainant to restrain the respondent from taking water from a spring, for uses alleged to be in excess of the terms of the grant giving her certain rights therein.

Daniel Chase in his lifetime was the owner of a large tract of land upon Prudence island, in the state of Rhode Island, upon which the spring in question is situated. He had three children, Paul Chase, the complainant, Halsey Chase, and Rachel H. Chase, now Rachel H. Cram, the respondent. By deed dated November 26, 1890, Daniel Chase conveyed to his son Halsey Chase a tract of land containing about 2 acres, together with the right to said Halsey Chase, his heirs and assigns, "to take water from my spring for his family use." Daniel Chase conveyed to his daughter Rachel, by deed dated April 5, 1892, another portion of the afore-said tract of land, amounting to about 30 acres. By this last-named deed there was also granted to Rachel H. Chase "a privilege to take water from the spring on my farm, as occasion may require." By deeds dated November 24, 1893, Daniel Chase conveyed the remaining portions of his said farm to his sons, Halsey Chase and Paul Chase. The two last-mentioned deeds reserved to the said Daniel Chase the right to cultivate for his own benefit any part or the whole of the said premises thereby conveyed during the term of his natural life. These reservations are of no importance now, Daniel Chase having long since deceased.

While we do not find among the papers in the case any deed, or a copy of any deed, from Daniel Chase to Paul Chase, such a deed is referred to in the deed of Daniel Chase to Halsey Chase before mentioned, and the existence of such a deed, including the grant of a right to Paul Chase to take water from the spring for family use, being understood and recognized by both parties, we may assume it to be existent.

The spring in question is located upon that portion of the farm which was conveyed by Daniel Chase to his son Paul Chase. The respondent claims that under the grant to her in the deed from her father Daniel Chase, under date of April 5, 1892, she acquired an easement in gross in said spring, and that she has the right to take water therefrom to any extent and for any purpose, including the purpose of sale, provided she does not reduce the supply below the requirements of Paul Chase and Halsey Chase for family use. With this limitation, the respondent contends that she is entitled to bottle and sell broadcast for her individual benefit the water of this spring. The complainant contends that the right conferred upon the respondent does not amount to an easement in gross, but is simply an easement appurtenant to the land conveyed, and that the respondent is therefore restricted to such uses of the water as shall be in some way connected with the use of the land, and that any bottling and sale of the same, beyond the premises conveyed, would be in excess of any right vested in her by the grant.

We now have the precise question which is submitted to us for consideration. At the hearing before the superior court it was claimed by the respondent that the terms of the grant, "privilege to take water from the spring on my farm, as occasion may require," were ambiguous, and therefore that those words might be explained by oral testimony, tending to show the meaning attached to them by the grantor and the intent with which they were used by him. Testimony of that character was admitted, but was afterwards excluded by the court, in the consideration of the case, on the ground that there was no such ambiguity or uncertainty in the words of the grant as would warrant the introduction of such testimony. That oral testimony may be introduced to explain an ambiguity is too well settled to require discussion, and we therefore come directly to the question as to whether the language of the grant is ambiguous. The respondent claims that it was the intention of her father Daniel Chase to give her an easement in gross in the spring, empowering her to take any quantity of water therefrom and for any purpose which she might see fit, including the purpose of sale, subject to the right of her brothers, Paul and Halsey, to take water for family use. On the other hand, the complainant contends that the language of the deed to the respondent clearly indicates an intention to convey an easement, as appurtenant to the land therein

described, and that therefore the respondent is restricted to the use of the water to the 30 acres of land which were conveyed to her by the deed from her father.

The complainant makes no contention that the respondent's use of the water from this spring upon the 30 acres of land covered by the deed from her father, or that her furnishing water therefrom to others who may occupy or acquire any portion or portions of said tract, would be in excess of her rights under the grant. Neither does the complainant claim that the respondent is restricted to such use or uses of the water as she was making at the time of the grant. The respondent is doubtless entitled to use any quantity of water which may be needed for the full enjoyment of said estate. *Willets v. Langhaar*, 212 Mass. 573, 99 N. E. 466; *Crosier v. Shack*, 213 Mass. 253, L.R.A.1918A, 260, 100 N. E. 607. The complainant contends that the use of the water must be restricted to the land conveyed by the deed, and that the sale of the water, as a product to be used entirely apart from the land, is unwarranted, and should be restrained by injunction.

There now appear to be two questions for consideration: (1) Is the grant of the privilege to take water from the spring ambiguous, requiring oral testimony to show the intent of the grantor? (2) If not ambiguous, does the grant create an easement in gross or an easement appurtenant to the land conveyed? These questions may be considered together, because the contention of the respondent is that the terms of the grant are ambiguous, in that it cannot be determined therefrom, with certainty, whether it was the intention of the grantor to give her an easement in gross or an easement appurtenant to the land. In determining the question of ambiguity as well as the question as to the nature and scope of the grant, courts may properly consider not only the terms of the grant itself, but the nature of the right and the surrounding circumstances. *Stovall v. Coggins Granite Co.* 116 Ga. 376, 32 S. E. 723; *Cram v. Chase*, 35 R. I. 98, 43 L.R.A.(N.S.) 824, 85 Atl. 642.

Daniel Chase, the father of the complainant and respondent, was the owner of a large farm, embracing several hundred acres, upon which the spring in question was situated. This spring constituted its most abundant and desirable water supply, furnishing an amount of water sufficient not only for family use, but an amount ample for the purposes of irrigation. This spring appears to have been for many years the dependable water supply for this farm, and the water therefrom to have

been used entirely in connection therewith. Later, Daniel Chase in distributing his property among his children, deeded to them certain portions of this farm, and gave to each of them the right to take water from this spring, the sons the right to take water for family use, and the daughter to take water as "occasion may require." The parceling out of the farm by Daniel Chase among his children in this manner, and the care which it is apparent he exercised in seeing that the separate parcels should participate in the water supply which had theretofore been an important and necessary adjunct of the whole tract, is strongly suggestive if not clearly indicative of an intent on his part that the water of this spring should continue to be devoted to the uses and demands of this land.

Coming now to the particular words of the grant, "a privilege to take water from the spring on my farm, as occasion may require," we find, in the first place, that these words are contained in the deed from Daniel Chase to his daughter, the respondent here, conveying to her 30 acres of land which formed a part of the original tract of the grantor. Under these conditions, it is but reasonable to say that in passing the title of this land to his daughter, coupled as it was with the right to take water from the spring, Daniel Chase must have had in mind and intended that such right should be exercised by his daughter for the benefit of the land which he was conveying to her by the same instrument. If he had no other and further intent, the easement would be appurtenant, and not in gross. *Lidgerding v. Zignego*, 77 Minn. 421, 77 Am. St. Rep. 677, 80 N. W. 360. The deed of Daniel Chase to his daughter and the grant of a right to take water included therein, couched in the language that it was, seems to us to indicate with reasonable certainty, and in the absence of anything to the contrary, either in words or circumstances, an intention to place the land given to his daughter in the same situation regarding the water supply that it had before occupied as a part of the whole tract. *Cram v. Chase*, 35 R. I. 98, 43 L.R.A.(N.S.) 824, 85 Atl. 642. The attitude of Daniel Chase through the whole transaction points to an easement appurtenant to the land. While the conveyance of the land may have been the chief element of the transaction, the supply of water was a most important one, without which the land would be far less desirable and less valuable. The words "as occasion may require," used in connection with the conveyance of a specific tract of land and under all the circumstances

of the present case, may, without any exercise of the imagination, be fairly and reasonably construed to refer to occasions arising out of the enjoyment of the land and consistent with its requirements.

In *Cadwalader v. Bailey*, 17 R. I. 495, 14 L.R.A. 300, 23 Atl. 20, this court said: "Whether an easement in a given case is appurtenant or in gross is to be determined mainly by the nature of the right and the intention of the parties creating it. . . . If it be in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use, and there being nothing to show that the parties intended it to be a mere personal right, it should be held to be an easement appurtenant to the land, and not an easement in gross."

Where there is a doubt as to the real nature of the grant, the presumption must be in favor of the appurtenant easement. *Smith v. Garbe*, 86 Neb. 91, 136 Am. St. Rep. 674, 124 N. W. 921, 20 Ann. Cas. 1209; *Houston v. Zahm*, 44 Or. 610, 65 L.R.A. 799, 76 Pac. 641. Other authorities hold that an easement should never be construed to be in gross when it can fairly be construed to be appurtenant. *Wagner v. Hanna*, 38 Cal. 111, 99 Am. Dec. 354; *Callan v. Hause*, 91 Minn. 270, 97 N. W. 973, 1 Ann. Cas. 680; *Dennis v. Wilson*, 107 Mass. 591; *Willeys v. Langhaar*, 212 Mass. 573, 99 N. E. 466.

In the case of *Hall v. Lawrence*, 2 R. I. 218, 57 Am. Dec. 715, two tenants in common making partition of the land owned between them, the one granted to the other "free liberty of carrying away gravel and seaweed off the beach belonging to his part of said farm, and also stones below high-water mark and liberty to tip the seaweed on the bank of his part of said farm." The court held that this grant created a right of common appurtenant to the land of the grantee, and that said right was not unlimited, but a right in common with the grantor, and restricted in extent to so much seaweed and stone as the grantee might have occasion to use on the land set off to him. The language of the grant, "free liberty of carrying away gravel and seaweed," is fully as broad as the language of the grant now under consideration, "as occasion may require," and yet the court held that the right was restricted to the quantity of seaweed and stone which the grantee might have occasion to use on the specific land conveyed.

An "easement in gross" is defined as a mere personal interest in the real estate of another. *Cadwalader v. Bailey*, *supra*. The principal distinction between an "easement appurtenant" and an "easement in

gross" is found in the fact that in the first there is, and in the second there is not, a dominant tenement. The easement is in gross and personal to the grantee because it is not appurtenant to other premises. *Wagner v. Hanna*, *supra*; *Wooldridge v. Smith*, 243 Mo. 190, 40 L.R.A. (N.S.) 752, 147 S. W. 1019; *Houston v. Zahm*, 44 Or. 610, 65 L.R.A. 799, 76 Pac. 641, 9 R. C. L. 739. This court said in *Cadwalader v. Bailey*, *supra*: "The greater weight of the authorities supports the doctrine . . . that easements in gross, properly so called, are not assignable or inheritable."

In that case our court seems to have found, or at least to have suggested, that there should be a distinction between easements which can properly be called easements in gross, and those which, though sometimes called easements in gross, in fact amount to an interest in the land which is assignable and descendible for the opinion, continuing, says: "If, however, a right to take soil, gravel, minerals, water from a spring, and the like from another's land, may properly be denominated an easement, then it is proper to say that an easement in gross, for such it might doubtless be constituted, might be both assignable and inheritable. For the rights enumerated are so far of the character of an estate or interest in the land itself, that, if granted to one in gross, it is treated as an estate, and may, therefore, be one for life or inheritance."

The respondent argues that the right granted to her is something more than a mere easement appurtenant to the land conveyed; that it is a species of profit à prendre — a species of property which, being both assignable and descendible, is not appurtenant to the land conveyed.

This does not seem to demand extended discussion: for, if we assume it to be a profit à prendre, we must also find it to be

appurtenant to the estate in connection with which it is enjoyed. In *Goodrich v. Burbank*, 12 Allen, 450, 90 Am. Dec. 101, the court said: "In the case of rights of profit à prendre, it seems to be held uniformly that, if enjoyed in connection with a certain estate, they are regarded as easements appurtenant thereto, but, if granted to one in gross, they are treated as an estate or interest in land, and may be assignable or inheritable."

And it was also held in *Bingham v. Salene*, 15 Or. 208, 3 Am. St. Rep. 152, 14 Pac. 523, the court quoting from *Washburn*: "This right of a profit à prendre, if enjoyed by reason of holding a certain other estate, is regarded in the light of an easement appurtenant to such estate; whereas, if it belongs to an individual, distinct from any ownership of other lands, it takes the character of an interest or estate in the land itself, rather than that of a proper easement in or out of the same."

While we concur with the superior court in its conclusion that the grant in the deed to the respondent is not ambiguous, and that therefore oral testimony tending to show the intent of the grantor was properly excluded, we think that under the grant contained in the deed from her father, Daniel Chase, of April 5, 1892, the respondent has an easement in the spring appurtenant to the land therein conveyed, enabling her to use and to furnish to others to be used thereon such quantity of the water of said spring as she may see fit, subject, of course, to the rights of the said Paul Chase and Halsey Chase to take water for family use.

The complainant's appeal is sustained, the decree of the Superior Court is reversed, and complainant may present to this court a form of decree in accordance with this opinion.

### Annotation—Easement for use of water as appurtenant or in gross.

It is not intended to include cases relating to water power nor to rights of flowage. For the general subject of grant of water powers, see the note to *Merrifield v. Canal Comrs.* 67 L.R.A. 369.

For change in exercising right to take water from another's premises, see the note to *Cram v. Chase*, 43 L.R.A. (N.S.) 824.

For easements created by severance of tract of land with apparent benefit existing, see the notes to *Rollo v. Nelson*, 26 L.R.A. (N.S.) 315, and *Duvall v. Ridout*, L.R.A. 1915C, 345.

While it is still said, even in *Massachusetts*, that easements appurtenant are preferred over those in gross, the cases often seem to be decided upon the view the judges happen to take of the particular case rather than upon any clearly defined principles. The subject hardly admits of further treatment than setting out the cases. The reader will remember that in some jurisdictions easements in gross are assignable and descendible, and that in other jurisdictions they are not.

**Easements appurtenant.**  
(See also *infra*, under "Limits of Use.")  
An easement appurtenant is created

where the owner of two lots of land, separated by a highway, conveys one of them, containing a well, by deed, containing the following reservation: "It is especially agreed and understood by the parties hereto that one half of the well is excepted, with the privilege of the right of way over said lot to and from said well, by the parties of the first part." *Witt v. Jefferson* (1892) 13 Ky. L. Rep. 746, 18 S. W. 229.

An easement-appurtenant to the land conveyed was created, where the owner of two tracts of land about a quarter of a mile apart sold one of the tracts, with the right to take the water of the spring on the other tract through a trench ditch pipe, with the right to a trench ditch; and a subsequent part owner of it could not convey the easement as an easement in gross, and thus deprive his co-owners of the right to the water. *Blood v. Millard* (1898) 172 Mass. 65, 51 N. E. 527.

A deed of the right to the use of the water from two springs, and the privilege of carrying the water as now carried, etc., to the grantee's house and tannery, with the privilege of the right to repair the same, was construed as an easement appurtenant to the house and tannery, the court stating that an easement is not presumed to be personal unless it cannot be construed fairly as appurtenant to some estate. *Willets v. Langhaar* (1912) 212 Mass. 573, 99 N. E. 466.

In *Cady v. Springfield Waterworks Co.* (1892) 134 N. Y. 118, 31 N. E. 245, it was held that an easement, and not a right in gross, was created by a grant by the owner of a spring to the owner of a lot across the street, of the right and privilege of taking, and conveying by a  $\frac{1}{4}$ -inch pipe from the main pipe leading from the spring, all the water that may be necessary for the family use of the grantee, or the heirs or assigns of the grantee, holding and occupying the said lot, to have and to hold the said right and privilege to the said grantee, his said heirs and assigns forever.

A contract by two parties that they would apply to the state for the title to certain tidelands of which they were in possession, and that they would keep a certain part of their respective lands open for a waterway, runs with the land, the court stating that it is well settled in law that easements in gross are not favored, and that a very strong presumption exists in favor of construing easements as appurtenant. *Pioneer Sand & Gravel Co. v. Seattle Constr. & Dry*

*Dock Co.* (1918) — Wash. —, 173 Pac. 508.

A covenant restricting erections on a strip of beach retained by the grantor, but overlooked by the land conveyed, which was obviously intended to preserve an unobstructed view of the sea, creates a negative easement appurtenant which cannot be reserved on conveyance of such premises, but is extinguished if severed therefrom by an attempted reservation. *Cadwalader v. Bailey* (1891) 17 R. I. 495, 14 L.R.A. 300, 23 Atl. 20. For effect of attempt to sever appurtenant easement from the premises for the benefit of which it exists, see the note in 14 L.R.A. 300.

#### —limits of use in easements appurtenant.

It will be seen that in *CHASE v. CRAM*, ante, 444, the court held that the privilege to take water from a spring, "as occasion may require," conveyed no right to sell the water for use off the land conveyed, the right being granted in a deed to the grantor's daughter, of a part of his farm.

In *Evans v. Dana* (1862) 7 R. I. 306, an owner of land, on selling a piece of it, declared that "the grantee, his heirs and assigns, shall and may, at all times forever hereafter, enjoy the privileges of passing and repassing to and from the well on the land of the grantor, and of taking water from the same, at all times." It was held that this right was a right appurtenant to the land granted, and that the grantee could not use the water for other adjoining lands belonging to his wife.

A reservation of the right of using the water of granted premises for stock purposes is an easement appurtenant to the land, and the grantor's successor cannot make use of the water for stock, which is being kept and maintained on lands other than those to which the right is appurtenant. *McCoy v. Chicago, M. & St. P. R. Co.* (1916) 176 Iowa, 139, 155 N. W. 995.

In *McCartney v. Londonderry & L. S. R. Co.* [1904] A. C. (Eng.) 304, 73 L. J. P. C. N. S. 73, 91 L. T. N. S. 105, 53 Week. Rep. 385, it was held that a railway company had no right to take water from a stream, where it crossed a river, and use it at a distance for the purposes of its railway, as the right to use the water was riparian, and appurtenant to the land along the stream, the court, overruling. *Sandwich v. Great Northern R. Co.* (1878) L. R. 10 Ch. Div. (Eng.) 707, 27 Week. Rep. 616.



But where, in a deed, the parties of the first part reserved to themselves, their heirs and assigns, out of the premises conveyed,  $1\frac{1}{2}$  acres of land on which a tannery was erected, and also reserved to themselves and their use a "certain well and waterworks laid down for the purpose of supplying the tannery aforesaid with water," while it was held that thereby an easement was created appurtenant to the land reserved, it was held also that the use of the water was not restricted to the use of the tannery; and that, after that was discontinued, it might be used for any purpose. *Borst v. Empie* (1851) 5 N. Y. 33.

Where the heirs, in dividing an estate of lands along a seashore, granted to the owners of various parcels that were not part of the home field "a privilege of getting what is called sea dung on the beach below the home field," it was held that this right was appurtenant to the particular estate, and was not in gross; but the owner was not compelled to use it on the particular estate, and might dispose of the seaweed from time to time, or at least her share of the privilege, to others, while she remained an owner of the particular estate. *Phillips v. Rhodes* (1843) 7 Met. (Mass.) 322.

The court did not seem impressed with the authority of the case of *Phillips v. Rhodes* (Mass.) supra, in a Rhode Island case, where a deed of partition between two brothers granted to one of the brothers, his heirs and assigns, "free liberty of carrying away gravel and seaweed off the beach belonging to his part of said farm, and also stones below high-water mark on said beach, . . . also the liberty to tip the seaweed on the bank on his part of said land." It was held that this was a right appurtenant to the land, and should be limited in extent to the uses of the land set off to the grantee of the right. *Hall v. Lawrence* (1852) 2 R. I. 218, 57 Am. Dec. 715.

It may be noted that in *Richmond v. Richmond Sand & Gravel Co.* (1918) — Va. —, 96 S. E. 204, it was held that a grant of land, together with a grant to run a sewer through certain other land of the grantor, which indicated that the sewer might be used for drainage from other lands, either constituted the right an easement in gross, or else extended the area of the land to which it was appurtenant so as to include land naturally drained by the channel; and if it was to be regarded as an easement in gross it was still an interest "in land," and therefore might be disposed of, either

by deed or will, under the statute of the state of Virginia.

#### Easements in gross.

In *Goodrich v. Burbank* (1866) 12 Allen (Mass.) 459, 90 Am. Dec. 161, it was held that one selling premises might retain for himself, his heirs and assigns, a right, the enjoyment of which was limited to no particular premises, capable of being used upon any land which he or they might at any time acquire, assignable and inheritable, and not annexed to any parcel of land. In that case, the reservation was as follows: "Also reserving to myself, my heirs and assigns, the right of taking so much water forever from the spring situate on the lot last above described, and from which water is now taken in a pipe to supply the grounds of W. H. Tyler, as now runs in said pipe, so long as said pipe lasts, together with the right to replace the same with a pipe of  $1\frac{1}{4}$  inches inside caliber, and also the right of taking so much water from said spring as will run in said pipe of  $1\frac{1}{4}$  inches caliber, when thus substituted for the present pipe, together with the right to enter and repair said aqueduct at all times," etc. In reaching the conclusion that the parties intended to create an easement in gross, the court observed that the right was reserved to the grantor, his heirs and assigns, and not to the assigns of his remaining estate, that no part of the grantor's remaining estate had ever been supplied with water from the aqueduct, and it was therefore improbable that the reservation was intended for the exclusive benefit thereof, that "Tyler" had only a revocable license to the use of the aqueduct, and there was no reason to suppose that the grantor intended to annex the reservation to the estate of a stranger, if that were possible.

The doctrine of *Goodrich v. Burbank* (Mass.) supra, was reiterated, after a further trial, in (1867) 97 Mass. 22.

In *Poull v. Mockley* (1873) 33 Wis. 482, where there was a conveyance of the right and privilege to take water for the use of the grantee's family, and for any other purposes, out of a well, etc., it was held that there was some ground for claiming that the privilege was appurtenant to the lot of the grantee, but that if it was an easement in gross it was assignable, following *Goodrich v. Burbank* (Mass.) supra.

It may be noted in this connection that in *New York v. Law* (1891) 125 N. Y. 380, 26 N. E. 471, a case relating to a

right of wharfage, the court said: "It is quite true that easements must generally be appurtenant to some land or estate, and that there must be a dominant estate to which the easement appertains, and a servient estate upon which it is imposed. But that is not true of all easements. There may be easements in gross which are not appurtenant to any land, and which the owner may enjoy, although he does not own or possess a dominant estate or any land whatever. Here, the intention was to create an interest in this wharf by this grant, which the grantee could enjoy himself or convey to any other person. (*Goodrich v. Burbank* (1866) 12 Allen (Mass.) 459, 90 Am. Dec. 161.

So, in *Owen v. Field* (1869) 102 Mass. 90, it was held that there can be an easement without any dominant tenement, as the right to take the water of springs to supply a village. In that case it was held that an owner might convey a right to use the water of the springs in gross, and thereafter sell the locus to a third party, reserving nothing in himself, and that such grantee of the locus, on a sale by him, might reserve the right to control the water of the springs on the abandonment of the easement, which right would be in gross, transferable and descendible, and not annexed to any particular estate.

One owning a spring with a pipe running therefrom to premises occupied by him covenanted and agreed that the covenantee, his heirs and assigns, might at any and all times thereafter, and so long as water shall run from certain springs through said pipe as aforesaid, draw from the pipe, at a point to be agreed upon, so much water as should be necessary for the supply of the family or families resident in a house described as owned by the covenantee, but in which he had no interest except as tenant by the curtesy initiate. It was contended that the indenture conveyed an easement appurtenant to the estate of the covenantee in the premises and that, as his estate expired with his life, so did the easement; but it was held that this was an "easement in gross" to take a certain amount of water by pipe, assignable and inheritable, and the use was restricted to the particular house in question, and that a conveyance by the heirs of the covenantee to his widow who owned the house carried the right. *Amidon v. Harris* (1873) 113 Mass. 59.

Where the owner of land on which there is water gives B. the right to erect a pump and use the water, and to per-

mit C also to use it, this creates no servitude on the land in favor of C, but a mere personal obligation in his favor. *Christin v. Péloquin* (1904) Rap. Jud. Quebec 28 C. S. 299, reversing 7 Quebec Pr. Rep. 13.

A lease for ninety-nine years of the right to take water from a spring, and to use  $\frac{1}{2}$  inch at the lessee's house, contained the privilege also of drawing  $\frac{1}{2}$  inch at any point between the houses of the parties; between those houses was a house, owned by a third person, to which the lessee laid a  $\frac{1}{2}$  inch pipe, as allowed by the lease. It was held that the privilege of drawing water at a point between the two houses of the parties was a right in gross, not appurtenant to the house of the third person, and that, the lessee having acquired the title to that house, and having conveyed it with the appurtenances, the privilege did not pass to her grantee. *Coatsworth v. Hayward* (1912) 78 Misc. 194, 139 N. Y. Supp. 331.

Where a deed contained the following words: "And it is further agreed to have the privilege to fch wathar at the spring of" the grantor at all times, it was held that this created merely a personal privilege, or right in gross, which did not pass by a subsequent conveyance by the grantee of the land covered by the deed in which the easement was created. The court noted that there were no words of inheritance in the clause. *Com. v. Zimmerman* (1914) 56 Pa. Super. Ct. 311, where the court said: "When the easement is in gross, it cannot be assigned to any other person nor transmitted by descent."

A company owning a tract of land conveyed a part thereof, on which there was a dwelling house and well of water, by deed which contained the following words: "Reserving nevertheless to said company, their successors and assigns, the right of free access at any and all times to the well now on the premises to take and use the water thereof; provided that this right shall be held subject to the right of the grantee to use water from the same well for the dwelling house or houses built or owned by him on the premises aforesaid in preference to the grantors or their assigns, whenever there shall be a deficiency;" and thereafter conveyed other lots by deeds containing the following provisions: "Together with the right of free access at any and all times to the well now on said" land, referring to the first deed, to take and use the water thereof for domestic purposes, subject to the

rights of the grantee in the first deed, as secured to him thereby. It was held that, in the conveyance by the company, "the manifest intent of the grantors was, after granting the right to the water of the well for the reasonable use of the occupants of the dwelling houses on the granted premises, to reserve the remaining water to the grantors and their assigns in gross," and that such a reservation was valid as to the assigns of the grantors, and it was divisible among the many licensees or grantees. *French v. Morris* (1869) 101 Mass. 68.

A reservation, in a deed of one half of mills, dam, and slip to a third party, of the right to the grantor of slipping his own mill logs through said dam, free of toll, is a personal right, to be executed by the grantor only, and not assignable, and has no reference to the place where the logs are cut, but simply to the person who owns them at the time they are slipped. *Wadsworth v. Smith* (1834) 11 Ma. 278, 26 Am. Dec. 525. The case, however, was decided on other grounds.

In *Naegele v. Oke* (1916) — Ont. —, 31 D. L. R. 501, it was held that a non-assignable personal license was all that was given by a writing by a proprietor to his adjoining proprietor, stating that he agrees to lease hydraulic water privilege on part of a certain lot for forty nine years to the licensee, "and also privilege of making any repairs on such privilege without damage to crop, and that undersigned to have privilege of using waste water, to be taken by him to his property."

Where a father having two sons, Jones and Tucker, conveyed one part of his land to Jones by a deed containing the words: "A privilege of two leading ditches to Tucker Spencer excepted," and on the following day conveyed another portion of his land to Tucker, saying nothing about any easement, it was held that there was nothing to annex the grant to the land afterwards conveyed to Tucker, and so transmit it, with the land, to an assignee; and any grant was therefore personal to Tucker, expired at all events with his life, and did not pass to his son and heir. *Spencer v. Spencer* (1841) 24 N. C. (2 Ired. L.) 96. The decision was reached reluctantly, and notwithstanding the moral certainty that the deeds, though bearing dates of successive days, were both executed together, and were designed by the father as one instrument, settling different parts of his land on his two sons as a family arrangement. The court observed that it could take notice of nothing of

that kind, but must look to the terms of the deeds.

#### **Profits à prendre.**

In *Bingham v. Salene* (1887) 15 Or. 208, 3 Am. St. Rep. 152, 14 Pac. 523, it was held that an assignable profit à prendre, and not a mere license, was created by a deed conveying to the plaintiffs, their heirs and assigns forever, the sole and exclusive right, privilege, and easement to shoot, take, and kill any and all wild ducks and other wild fowl upon and in any and all lakes and sloughs and waters situate, lying, or upon our lands," giving them also the right of ingress and egress, etc.

#### **—ice.**

It has been held that the right to take ice is a profit à prendre.

In *Huntington v. Asher* (1884) 96 N. Y. 604, 48 Am. Rep. 652, the owner of land on which there was an artificial pond sold a half acre of land on the pond, the deed further providing: "And the party of the first part, as incident to this conveyance, also grants and conveys to the party of the second part, his heirs and assigns, the exclusive right to take ice from the pond of the party of the first part, with the right and privilege of access, for that purpose, to and from the pond to the ice house to be erected on the lot hereby conveyed. In consideration of which said grant, as aforesaid, the party of the second part hereby covenants and agrees for himself, and his heirs and assigns, to furnish and deliver to the party of the first part (so long as he shall continue to occupy his present residence), free of charge, all the ice which he shall require for his own family use, and also to furnish and deliver to the purchaser or purchasers of the pond and mill privilege, and their heirs and assigns, free of charge, all the ice which they shall require for their own family use, so long as they continue to reside in the village of Rhinebeck." It was held that this right to take ice was a profit à prendre, appurtenant to the land conveyed, and that the grantee's successor had the right to enter upon the land of the grantor's successor, repair the dam, and take ice from the pond.

A deed of conveyance, from the owner of a lake and shore surrounding it, of property with a frontage upon the lake, contained a clause hereinafter given; it was held that the rights and privileges in the lake were granted, not in gross, but as an appurtenance of the land conveyed, the court stating that the right

to cut ice was a profit à prendre, and that it was appurtenant to the land as an easement would have been. The clause in question was as follows: "Together with the right to the said party of the second part, her heirs and assigns, to traverse the said lake or pond in boats for pleasure or amusement only, and to fish in the waters thereof for pleasure and not for profit, and to gather ice therefrom for her own or their own private and domestic use, but not for sale; said right and privilege to be exercised and enjoyed by the said party of the second part, her heirs and assigns, in common with the said party of the first part, his heirs and assigns." *Mitchell v. D'Olier* (1902) 68 N. J. L. 375, 59 L.R.A. 949, 53 Atl. 467.

It is said in *Carville v. Com.* (1906) 192 Mass. 570, 78 N. E. 735, that the right to take ice was "an easement in gross, or a profit à prendre, which was an easement in the real estate."

#### Miscellaneous.

A grant by the owner of a parcel of land on a river, expressly prohibiting the grantees, their heirs and assigns, from opening across the premises any public river landing, or having or erecting thereon a public warehouse, but reserving this right to the grantor, his heirs and assigns, to be exercised in such manner as not to materially interfere with the mill business of the original grantees or their assigns, was intended by the contracting parties to be appurtenant to the adjacent land of the grantor, to protect the proprietor, for all time to come, against competition in the warehouse business. *McMahon v. Williams* (1885) 79 Ala. 288.

But where the owners of a lot across the street from a wharf conveyed the lot by deed, with its appurtenances, granting to the grantees, "their heirs and assigns, the privileges and rights

of using the wharf built" by the grantors, "free of all expense, for the purpose, from time to time, of mooring their ships or vessels, and for loading and unloading the same," and for all goods imported or exported by them, was held that the right to use the wharf was not made appurtenant to the lot, that it was in no way connected with the enjoyment or use of it, that it was not attached as an incident to any estate, but passed by a grant in gross, and was necessarily limited in duration by the existence of the wharf with which it was connected. *Linthicum v. Ray* (1869) 9 Wall. (U. S.) 241, 19 L. ed. 657.

In *Jones v. Deardorff* (1906) 4 Cal. App. 18, 87 Pac. 213, there was a conveyance of a right of way for a water ditch, not to be used by the grantee, except for the conveying of water to land in section 8 for use thereon, "without the consent of myself or grantee, nor for conveying water to any other person without my consent." The grantee was acting in the matter for his wife, who was the owner of the land in section 8, and they constructed a ditch along the right of way so conveyed, and they and their grantees continued to maintain it in good order for a number of years. It was held that the grant created an easement, and that the evidence showed that it became an appurtenance to the land in section 8, which land had passed to the defendants.

In the case of *Haithcock v. Swift Island Mfg. Co.* (1875) 72 N. C. 410, the court considered that the right to a public ferry might be either annexed to a tract of land as appurtenant thereto, or might be a right in gross.

In *Richardson v. International Pottery Co.* (1899) 63 N. J. L. 248, 43 Atl. 692, the description of the property is not sufficiently clear. B. B. B.

#### IOWA SUPREME COURT.

JOHN E. TUSANT et al.

v.

GRAND LODGE ANCIENT ORDER OF UNITED WORKMEN et al., Appts.

(— Iowa, —, 163 N. W. 690.)

Statute — later enactment on same subject — subsequent codification.

1. The passage of a statute relating to

Note. — The question of the right of a mutual benefit association to increase rates is discussed in the annotations to Reynolds

L.R.A.1918F.

mutual benefit societies which does not prevent the insurer from proving an application which it does not attach to the policy. subsequently to another statute which does prevent such proof, does not repeal the earlier statute if both are subsequently reenacted as part of the same codification. For other cases, see *Statutes*, III. in Dig. 1-52 N. S.

Insurance — mutual benefit — power to change contract.

2. The grand lodge of a mutual benefit

v. Supreme Council, R. A. 7 L.R.A.(N.S.) 1154; *Dowdall v. Supreme Council*, C. M. B. A. 31 L.R.A.(N.S.) 417; and *Thomas v.*

society has no power, for the purpose of rendering the association solvent, to divide the membership into two classes, one to be composed of existing members, who shall pay their own losses until they are extinct or transfer to the other class, which can only be done at the rate of assessment applicable to their attained age, which is practically prohibitive, or by a scaling down of their benefits, which renders their contracts of no value.

*For other cases, see Insurance, III. a, in Dig. 1-52 N. S.*

(May 14, 1917.)

**A**PPEAL by defendants from a decree of the District Court for Polk County in favor of plaintiffs in a suit brought to enjoin defendants from carrying into effect a new plan of insurance. Modified and affirmed.

Statement by Evans, J.:

Suit in equity by the plaintiffs as members of the defendant association, asking to enjoin the enforcement against them of certain by-laws and amendments purported to have been adopted by the defendant association, whereby the rights of the plaintiffs as certificate holders of life insurance will be greatly depreciated in value. There was a decree for the plaintiffs, and the defendants have appealed.

Messrs. Dowell, McLennan, & Zeuch and E. B. Evans for appellants.

Messrs. Miller & Wallingford and Roy E. Curray, for appellees:

The applications not being attached to the certificates, plaintiffs are not bound by anything therein contained.

Grimes v. Northwestern Legion of Honor, 97 Iowa, 315, 64 N. W. 806, 66 N. W. 183; Newman v. Covenant Mut. Ins. Asso. 76 Iowa, 56, 1 L.R.A. 659, 14 Am. St. Rep. 196, 40 N. W. 87; McConnell v. Iowa Mut. Aid Asso. 79 Iowa, 757, 43 N. W. 188; Stork v. Supreme Lodge, K. P. 113 Iowa, 724, 84 N. W. 721.

Knights of Maccabees, L.R.A.1916A, 762; and see the later cases of Neuman v. Supreme Lodge, K. P. L.R.A.1916C, 1051, and Supreme Lodge, R. P. v. Mims, L.R.A.1916F, 919. The annotations referred to include cases involving the right to discriminate against old members in making changes of rates.

As to the right of a mutual benefit society to decrease benefits, see annotation to Wright v. Knights of Maccabees, 31 L.R.A.(N.S.) 423, and Mahen v. L'Union Lafayette, L.R.A.1917C, 625.

The question of the right of an assessment company to change the plan or class of policies is considered in the annotation

The present suit is an action upon the policies within the contemplation of § 1741.

Langan v. Supreme Council, A. L. H. 174 N. Y. 266, 66 N. E. 932; Frick v. Hartford L. Ins. Co. 179 Iowa, 149, 159 N. W. 247; McConnell v. Iowa Mut. Aid Asso. 79 Iowa, 757, 43 N. W. 188; Blakeney v. Wyland, 115 Iowa, 607, 89 N. W. 16; Cook v. Federal Life Asso. 74 Iowa, 746, 35 N. W. 500; United States Fidelity & G. Co. v. Egg Shippers' Strawboard & Filler Co. 78 C. C. A. 345, 148 Fed. 353.

In proper actions Code § 1741 protects against any and all statements and provisions in unattached applications.

Gibson v. Iowa Legion of Honor, — Iowa, —, 159 N. W. 639; Supreme Council, C. K. A. v. Logsdon, 183 Ind. 183, 108 N. E. 587; Supreme Council, C. K. A. v. Fenwick, 169 Ky. 269, 183 S. W. 906; Lewis v. Burlington Ins. Co. 71 Iowa, 97, 32 N. W. 190, 80 Iowa, 259, 45 N. W. 749; Summers v. Des Moines Ins. Co. 116 Iowa, 593, 88 N. W. 326; Robey v. State Ins. Co. 146 Iowa, 23, 124 N. W. 775; Johnson v. Des Moines L. Ins. Co. 105 Iowa, 273, 75 N. W. 101; Provident Sav. Life Assur. Soc. v. Puryear, 109 Ky. 381, 59 S. W. 15; Hunziker v. Supreme Lodge, K. P. 117 Ky. 418, 78 S. W. 201; Supreme Lodge, K. P. v. Hunziker, 121 Ky. 33, 87 S. W. 1134.

An agreement to comply with the laws of an order means those in existence at the time.

Sieverts v. National Benev. Asso. 95 Iowa, 710, 64 N. W. 671; Hobbs v. Iowa Mut. Ben. Asso. 82 Iowa, 107, 11 L.R.A. 299, 31 Am. St. Rep. 466, 47 N. W. 983; Courtney v. United States Masonic Ben. Asso. — Iowa, —, 53 N. W. 238; Field v. Eastern Bldg. & L. Asso. 117 Iowa, 185, 90 N. W. 717.

A general reservation of power to amend the constitution and by-laws does not authorize a mutual association to bind members by after-enacted by-laws.

Farmers Mut. Hail Ins. Asso. v. Slattery, 115 Iowa, 410, 88 N. W. 949; Carnes v. Iowa State Traveling Men's Asso. 106 Iowa,

to Green v. Hartford L. Ins. Co. 1 L.R.A.(N.S.) 623.

For annotations dealing with necessity and sufficiency of attaching application to policy, see the L.R.A. Indexes, title, "Insurance," subtitle, "Attaching or referring to application."

As a result of the decision in TUSANT v. GRAND LODGE, A. O. U. W. that the attempted change in the basis of assessment and the discrimination against the old members amounted to a breach of contract, the question arose in Barlow v. Grand Lodge, A. O. U. W. L.R.A.1917E, 1032, as to the damages recoverable by a member on account of such breach; and see note to that case.

281, 68 Am. St. Rep. 306, 76 N. W. 683; *Jordan v. Iowa Mut. Tornado Ins. Co.* 151 Iowa, 73, 130 N. W. 177, Ann. Cas. 1913A, 266.

Defendant had no power, as against plaintiffs, to establish the new plan and new rates of insurance, which it attempted in February, 1916.

*Covenant Mut. Life Asso. v. Kentner*, 188 Ill. 431, 58 N. E. 966; *Dowdall v. Supreme Council*, C. M. B. A. 196 N. Y. 405, 31 L.R.A.(N.S.) 417, 89 N. E. 1075; *Wright v. Knights of Maccabees*, 196 N. Y. 391, 31 L.R.A.(N.S.) 423, 134 Am. St. Rep. 838, 89 N. E. 1078; *Poople v. Supreme Circle*, B. A. — N. J. Eq. —, 85 Atl. 821, 87 Atl. 1118; *Margesson v. Massachusetts Ben. Asso.* 165 Mass. 262, 42 N. E. 1132; *Smythe v. Supreme Lodge*, K. P. 198 Fed. 967, affirmed in 137 C. C. A. 32, 220 Fed. 438; *Ericson v. Supreme Ruling*, F. M. C. 105 Tex. 170, 146 S. W. 160; *Pearson v. Knight Templars' & M. Life Indemnity Ins. Co.* 114 Mo. App. 283, 89 S. W. 588; *Green v. Supreme Council*, R. A. 206 N. Y. 591, 100 N. E. 411.

Plaintiffs were not estopped from objecting to the increase in rates made in February, 1916, by the fact that they had acquiesced in prior increases in rates.

*Fort v. Iowa Legion of Honor*, 146 Iowa, 183, 123 N. W. 224; *Gibson v. Iowa Legion of Honor*, — Iowa, —, 159 N. W. 639; *Benjamin v. Mutual Reserve Fund Life Asso.* 146 Cal. 34, 79 Pac. 517; *Schultz v. Citizens Mut. L. Ins. Co.* 59 Minn. 308, 61 N. W. 331; *Covenant Mut. Life Asso. v. Kentner*, 188 Ill. 431, 58 N. E. 966; *Supreme Council, C. K. A. v. Logsdon*, 183 Ind. 183, 108 N. E. 587; *Supreme Council, C. K. A. v. Fenwick*, 169 Ky. 269, 183 S. W. 906; *Rockwell v. Knights Templars & M. Mut. Aid Asso.* 134 App. Div. 736, 119 N. Y. Supp. 515.

Evans, J., delivered the opinion of the court:

The defendant is a fraternal beneficiary association organized under the provisions of §§ 1822 and 1823 of the Code. It was originally organized about fifty years ago as a voluntary association, and was formally incorporated in 1911 as a voluntary association not for profit. It is essentially a life association which purports to pay its death losses by appropriate assessments upon the surviving members. Its maximum insurance is \$2,000, for which it issues its certificate to a member. For many years and up to the year 1901 monthly assessments of \$1 upon every member were made for the purpose of paying death losses. In 1901 a change was made which appears

to have been generally acquiesced in. This change increased and classified the rates of assessment so as to impose a somewhat heavier rate upon the older men than upon the younger. A minimum rate of \$1.30 and a maximum rate of \$3.85 per assessment were adopted. The maximum rate applied to men fifty years of age and over. Monthly assessments at this rate were thereafter made. In 1911 certain changes were made which greatly affected the plan of insurance theretofore in force, and this change was further intensified by certain action had in 1916. The controversy centers upon these latter changes, and these will be dealt with more in detail. The plaintiffs are four members of the defendant order who have been such for many years, and have brought this suit in their own behalf as certificate holders and in behalf of other members similarly situated. Up to a time shortly prior to the bringing of this suit the defendant order had a membership in Iowa of about 15,000. Since that time its membership has been somewhat reduced, and its life may be at stake in this proceeding. Leading up to the action of which complaint is made it may be said first that the officials of the defendant order claim that for many years they had collected from their members less than the cost of their insurance; that the company had been organized and operated in a haphazard sort of way without any reference to mortality tables; that the computations of actuaries showed it to be in fact insolvent in the sense that its certificates or policies were ultimately greater in sum total than could possibly be realized by the collection of assessments at the rate then in force; that the older members of the order were furnishing practically all the mortality and were therefore a liability rather than an asset; that the assessments collected from members over fifty years of age were not sufficient to pay the death losses of members above such age; that if these older members could be eliminated or could be required as a separate class to pay a rate which would of itself pay the death losses in their ranks, then the order would become automatically solvent in the actuarial sense. The separation of these older members as a class from the remaining body of the order became the objective of the officials, and their acts to that end are the occasion of this controversy. By methods to be further stated, the older members were put into a separate class and were required to pay the death losses of such class; the great body of the younger membership being wholly exempted from

any liability for such death losses. The result of such classification was to increase the rates of assessment of this class to a prohibitive degree, being an increase of 350 to 450 per cent. The class into which the older men were gathered is known in this record as division A. This class now contains 115 members. The 115 members are assessed at a rate fixed by the computations of an actuary which will be sufficient to pay the earlier death losses as they occur and to build up a reserve sufficient to pay the beneficiary of the last man to succumb. By this plan the problem of insolvency has been rendered exceedingly simple. If the older members pay the rates of assessment imposed solvency will thereby be accomplished. If they fail to pay, they must lapse, and thereby solvency will be likewise accomplished. In other words, the alleged insolvency of the order was gathered into this one place and was charged up to these older members on the theory that they were responsible for it. But they were allowed the generous option of taking it or letting it alone. It was enough that the body of the younger membership was wholly exempted from its obligations. The method adopted for bringing about this result impresses us as somewhat original. In 1911 a by-law was adopted creating a new class into which future membership would be received. This class is known in the record as division B. The following rate of assessment per \$1,000 was provided for such new class:

Age.	Rate.	Age.	Rate.	Age.	Rate.
18 ....	\$1.00	36 ....	\$1.74	54 ....	\$3.94
19 ....	1.03	37 ....	1.81	55 ....	4.20
20 ....	1.05	38 ....	1.88	56 ....	4.39
21 ....	1.08	39 ....	1.95	57 ....	4.66
22 ....	1.10	40 ....	2.03	58 ....	4.95
23 ....	1.13	41 ....	2.12	59 ....	5.29
24 ....	1.17	42 ....	2.21	60 ....	5.64
25 ....	1.21	43 ....	2.31	61 ....	6.02
26 ....	1.24	44 ....	2.41	62 ....	6.43
27 ....	1.28	45 ....	2.52	63 ....	6.85
28 ....	1.32	46 ....	2.63	64 ....	7.30
29 ....	1.37	47 ....	2.75	65 ....	7.94
30 ....	1.41	48 ....	2.89	66 ....	8.29
31 ....	1.45	49 ....	3.04	67 ....	8.82
32 ....	1.50	50 ....	3.20	68 ....	9.81
33 ....	1.55	51 ....	3.36	69 ....	10.00
34 ....	1.62	52 ....	3.54	70 ....	10.64
35 ....	1.68	53 ....	3.73	Over 70 at 70.	

The existing membership was thereafter known as division A, and continued to pay assessments according to the rates established in 1901, which were as follows:

Ages.	Assessment Rates.
	\$1,000    \$2,000
Class 1, 18 to 24 years, inclusive	\$.65    \$ 1.30
Class 2, 25 to 29 years, inclusive	.75    1.45
Class 3, 30 to 34 years, inclusive	.80    1.65
Class 4, 35 to 39 years, inclusive	.95    1.90
Class 5, 40 to 44 years, inclusive	1.15    2.25
Class 6, 45 to 49 years, inclusive	1.45    2.90
Class 7, 50 and over	1.95    3.85

The table of rates adopted for the new class was what is known as the level rate plan. The rate of assessment of a member

was determined therein by the age attained by him at the time he became a member, and such rate would continue unchanged thereafter; whereas the rate of assessment for a member in division A increased with advancing age, and was determined by the age of the member at the time of the assessment. Theoretically, at first, any proposed member had the option of joining either division. As a matter of fact, the officials favored division B. They invited all new membership into such division. The division was also open to a transfer by the membership of division A. The table of level rates for division B was naturally more attractive to younger members than to the older. In 1912 division A was closed entirely to new membership, and new members were received only in division B. This of itself not only throttled division A by the cutting off of its new membership, but it increased the pressure upon the younger members to transfer to division B. And such was the result as we have already indicated. By a system of blood transfusion, division B took all the strong blood of the original association, and absorbed all its solvency, and left it nothing but its former liabilities.

From 1911 to February, 1916, the officials of the order in effect operated two independent companies side by side. The death losses in division A were charged against that division alone, and those of division B were charged against it alone. The 1901 tables of assessment rates was applied to division A, and the 1911 table was applied to division B. The monthly assessments in division A were not sufficient to pay all the death losses therein, so that the reserve was encroached upon and the insolvency of the division increased. In division B, only ten monthly assessments were made each year, and the amount thereof paid all death losses and built up a reserve fund of more than \$350,000. In February, 1916, further amendments were adopted at a special session of the Grand Lodge which were intended to end pretense and to heal the dripping wound by removing the seat thereof. By these amendments the members of division A were peremptorily required to transfer to division B. Upon such transfer they were given the option of two courses: (1) They could maintain their insurance by paying the division B rate which we have above set forth; (2) or they could continue to pay their assessments according to the 1901 table of rates of division A and submit to a scaling of their certificates down to an amount commensurate with such rate of assessment as shown by the mortality tables of the actuaries.

The table of scaling thus presented as an alternative was as follows:

	Rate \$1.00.	Rate \$1.95.	Rate \$2.95.	Rate \$3.85.
50 .....	\$305.00	\$410.00	\$515.00	\$1,220.00
51 .....	280.00	380.00	470.00	1,160.00
52 .....	275.00	361.00	426.00	1,102.00
53 .....	261.00	323.00	384.00	1,046.00
54 .....	247.00	295.00	342.00	990.00
55 .....	232.00	264.00	306.00	928.00
56 .....	222.00	244.00	286.00	888.00
57 .....	209.00	218.00	267.00	836.00
58 .....	197.00	204.00	254.00	788.00
59 .....	185.00	189.00	234.00	738.00
60 .....	173.00	168.00	219.00	692.00
61 .....	162.00	154.00	206.00	648.00
62 .....	152.00	140.00	193.00	606.00
63 .....	143.00	128.00	180.00	570.00
64 .....	134.00	117.00	168.00	534.00
65 .....	124.00	106.00	156.00	492.00
66 .....	118.00	100.00	146.00	470.00
67 .....	111.00	94.00	137.00	442.00
68 .....	105.00	89.00	129.00	418.00
69 .....	98.00	84.00	121.00	390.00
70 or over	92.00	79.00	113.00	366.00

Under the first option a member seventy years of age, though he had been such member for forty years, would be required to pay upon transferring to division B precisely the same rate as a new member of such age, namely, \$10.64 per assessment for \$1,000 insurance. For the holder of a \$2,000 certificate, this would be \$21.28 per month. Under the second option such member must consent to a scaling down of his certificate from \$2,000 to \$366. It will be seen, therefore, that the options presented to the member of division A were not options, but alternatives. It mattered little to the member which way he faced; he was confronted with menace either way.

In the pioneer days of this state there was extant a boy story of two hunters, Caucasian and Indian. In the division of game, the Caucasian said to the other, "I'll take the turkey and you take the buzzard; or, if you would rather, you take the buzzard and I'll take the turkey." The Indian grunted his reply, "You never said turkey to me." This resembles the situation of the members of division A as they see it. They see nothing but "buzzard" in either alternative.

At the time of the adoption of this last amendment, 7,000 members remained in division A. The immediate result was that thousands of them lapsed and other thousands of them submitted to the compulsion of a transfer so that now, as already indicated, only 115 remain. In order to accomplish this amendment, which was an amendment of the constitution, a two-thirds vote of the representatives at the special session was required. This was accomplished only by counting the votes representing division B. The only questions litigated herein are those involving the rights of the 115 remaining members. Four of them are the plaintiffs herein. These have been members of the order in good standing for from

twenty-five to thirty years. They challenge the legality of the purported amendments of 1911 and 1916; they challenge the power of the Grand Lodge to establish two so-called divisions to occupy the same field of insurance; they challenge its power to charge the mortality of the order against the older membership; they challenge its power to make an amendment so fundamental as to change the essential character of the order by converting it from a mutual assessment company paying death losses when they occur, to what in practical effect is an old line investment company; they challenge the new rate proposed as being unreasonable and inequitable and the proposed scaling of certificates as illegal. These propositions are reducible to the one ultimate proposition: Were the acts done and proposed by the order so beyond the bounds of reasonableness in a legal sense that they should be held ineffective?

I. Preliminary to the ultimate question, a question of evidence is presented. On the trial below the defendant offered in evidence the respective applications of the plaintiffs when they applied for membership to the order. By these applications the applicants agreed to be bound by future amendments to the by-laws. Plaintiffs' objection to this offer was sustained on the ground that such applications were not attached to the certificates, as required by § 1741. Appellants' first complaint is directed to this ruling. Its contention is that § 1741 has no application because of the provisions of § 1826. These two sections are as follows:

"Sec. 1741. Copy of application.—All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy, or indorse thereon, a true copy of any application or representation of the assured which, by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy. The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of this section it shall forever be precluded from pleading, alleging or proving any such application or representations, or any part thereof, or falsity thereof, or any parts thereof, in any action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option."

"Sec. 1826. Copy of application.—All such associations shall, upon the issue or renewal of any beneficiary certificate, attach to such certificate or indorse thereon a



true copy of any application or representation of the member which by the terms of such certificate are made a part thereof. The omission so to do shall not render the certificate invalid, but if any such association neglects to comply with the requirements of this section it shall not plead or prove the falsity of any such certificate or representation or any part thereof in any action upon such certificate, and the plaintiff in any such action, in order to recover against such association, shall not be required to either plead or prove such application or representation."

The original adoption of § 1741 antedated the original adoption of § 1826. The former was adopted in 1880, and is somewhat general in its application. The latter is a part of chapter 9, and has special reference to fraternal beneficiary associations. It will be observed that they are not identical in their provisions. If § 1741 is applicable here, the ruling of the trial court was right. If it was not applicable, the ruling was wrong. The argument for appellant is that because § 1826 was adopted subsequent to § 1741, and because it was made a part of the special chapter under which the defendant order was organized, it was intended to supersede the operation of 1741 so far as applicable to such an organization. As an original proposition the argument is not without its force. But the question thus presented has heretofore received our consideration, and it is not longer open to debate. So far as the fact of subsequent adoption is concerned, both sections have been adopted simultaneously by subsequent codification. The point now urged by appellant has been ruled adversely to it in the following cases: *Grimes v. Northwestern Legion of Honor*, 97 Iowa, 315, 64 N. W. 806, 66 N. W. 183; *Stork v. Supreme Lodge*, K. P. 113 Iowa, 724, 84 N. W. 721. See also *Corson v. Iowa Mut. F. Ins. Asso.* 115 Iowa, 485, 88 N. W. 1086; *McConnell v. Iowa Mut. Aid. Asso.* 79 Iowa, 757, 43 N. W. 188. The ruling of the trial court was in accord with the foregoing.

II. We come to the ultimate question whether the amendments promulgated by the Grand Lodge in 1911 and 1916 were in a legal sense unreasonable, and therefore ineffective. In reaching a general conclusion upon this question three particular features of these amendments stand out prominently. They are: (1) The separation of the membership of the order into two distinct divisions. (2) The alleged change of the fundamental nature of the insurance. (3) The discrimination made against the older members in the adoption of the 1911 table of rates by refusing them recognition of their existing membership, and by applying the

rate to them as of the age attained by them when they should transfer to division B, instead of as of the age attained by them when they joined the order.

(1) We think there was no power in the Grand Lodge, by amendment or otherwise, to divide the membership of the order into two divisions upon the basis which was actually adopted. There was no legitimate reason for such division. The two divisions thus created occupied the same field of insurance and were necessarily competitive and hostile. No set of officials could consistently serve both of them. To serve one was to neglect the other. The law is deep written in the nature of things and in human nature that "no man can serve two masters, . . . else he will hold to the one and despise the other." This law has had its exemplification in the history of these two divisions. The amendment of 1911 purported to create division B for the purpose of new members, the entire existing membership of the order being left as division A. This was pure indirection. Though indirection it was, it had the paradoxical merit of frankness, and took no cover of concealment. Its purpose is frankly explained by the officials as an effort to put the order upon a solvent basis. They reasoned that if they raised the rates upon the younger members they might lose them, and the life of the order would thereby be threatened. If they raised the rates upon the older members they might lose them also, but such a loss would be welcomed as a salvation of the order. It would be the equivalent of a discharge of its greatest liabilities. Such was the conceded purpose of the creation of division B. If it were not conceded, such purpose would be no less plain. Division B, therefore, was a mere name. Division A was a mere name. The entity of the order was not affected. It was one, and not two. By the use of these names, it was intended both to extinguish and to keep alive the old order. As division A it was to die, and as division B it was to be born again. By the death of division A, the old members would lose their membership. They could come into division B only as new members coming into a new order. Their rates of assessment, therefore, would be determined by the age attained by them at such time, and not by the age attained by them when they joined the order originally. It should be borne in mind that these old members never joined division A. That name was simply applied to them. They joined the defendant order many, many years ago. They are still members of it. Does the order which the plaintiffs joined still live? Are they members of it? If members, are they old members, or simply new ones? If we treat divisions A

and B as separate entities, or as distinct parts of defendant's entity, could both of them at any time have had a prospect of life? When the divisions were created, division A was made to include the entire existing order. Has division A been dying a natural death, or have its past officials been an aid to its demise? If they have held to one division and despised the other, which have they despised?

(2) Turning now to another phase of the discussion, much is said in the argument for the defendant as to the alleged insolvency of the defendant and the necessity of adopting some means to save its existence. We are by no means satisfied that the question of solvency or insolvency of the defendant order has much pertinency to the case, if indeed it can be said in any case that a strictly mutual assessment company is either solvent or insolvent. This company existed originally as a purely voluntary association without even the formality of incorporating. It was formally incorporated in 1911, as already indicated. It was purely a mutual assessment company, imposing and collecting assessments from its surviving members for the payment of death losses after they had occurred. It gave no guaranties. It came into being nearly fifty years ago. It has always paid its death losses. The claim as to solvency is based upon the figures of the actuaries, from which it is deduced that, with the prospect of future mortality, it cannot continue forever to pay its death losses upon the rate of assessments obtaining prior to 1911. Up to 1901 a uniform assessment of \$1 per month had been made upon all members, regardless of age. In 1901 the differential rate was adopted which we have hereinbefore set forth, wherein a heavier rate was charged upon older members than upon the younger. This rate has always been acquiesced in by the membership, and we assume its reasonableness for the purpose of this discussion. While the by-laws prior to 1911 fixed a rate of assessment, there never was any limitation in the by-laws as to the number of assessments which might be levied at such rate. So far as the constitution and by-laws were concerned, the only limitation upon the number of assessments was determined by the number of deaths. The power of the order, therefore, to make sufficient assessments to cover the death losses, was ample under the by-laws. The difficulty with the exercise of this power was a practical one. It was that the making of assessments more frequently than once a month had a manifest tendency to materially reduce the membership of the order. The question involved in this litigation, therefore, is not so much the power of the order

to make sufficient assessments to pay all death losses; it is rather whether the methods adopted by it are unreasonable as being discriminatory, and therefore unfair. If the order had the power to make assessments sufficient to pay all losses, then surely it was not insolvent, unless it may be said that all assessment companies are in that sense insolvent from their very inception. If the order was simply confronted with the practical difficulty of inducing its membership to submit to the necessary assessments to pay all losses, that was a contingency which inhered in the very nature and plan of the association. Mutual insurance has its own natural limitations. It is not the equivalent of what is usually known as "old-line" insurance. It can give no guaranty. It has no assets, and is entitled to none. Whatever it collects belongs to some beneficiary of a death loss. It has the merit of cheapness and the demerit of uncertainty. It is something less than absolute insurance. Its cheapness is attractive, and the real value of it is often more than commensurate with its cost. The defendant order is one of the time-honored orders of that kind. It has been a real boon to thousands, and ought to so continue for many years to come. We are told that when it first came into being it was simply an undertaking by approximately 2,000 persons, that, while his membership continued, each would pay a dollar to the beneficiary of every death loss. Such an undertaking could hardly be called insurance in the "old-line" sense; but mutual insurance nevertheless it was. Was the association at that time solvent or insolvent? It had neither assets nor liabilities. Could it be said that these 2,000 men each had secured insurance upon his life in the sense for which defendants' officials now contend? The first man died, and the surviving 1,999 paid their dollars. This proved to be insurance at least for the first man. It later proved to be substantial insurance for the second man. If this membership were to remain stationary, surely the last man could not hope for any benefits to his beneficiary. His only hope would rest upon the continuing increase of the association and the taking in of new members. Without pursuing further the illustration, it is sufficient to say that it is of the very essence of mutual insurance and of the efficiency thereof that it shall grow, and that it shall continue to receive new and younger blood. This is the only chance for the two thousandth man. When growth sickens or dies, mutual insurance depreciates accordingly. Continual growth has been the life of the defendant order. No natural reason appears in this record why it should not have so continued, if it had been

heroic enough to face its liabilities without subterfuge. That a member should live beyond the natural expectancy of his life ought not to be deemed an offense against an insurance company. It is argued by defendant that it is costing more to carry the insurance on these old men than they are paying in the way of premiums. This argument is a deduction from another fact,—that the older men have furnished all the mortality of the order, and that these men must, in the course of time create similar liabilities. Granting that these men must soon die, the death loss will be no greater than if death had occurred twenty years ago. If they are a loss to the company now, they were not such twenty years ago. They have been paying members ever since, and have cost nothing so far. The fact that other men of their age have died is no more chargeable to them than to any other member of the order. That was the risk that all took. When these men joined the order it was with the professed purpose of continuing in it to the end. Can it be said that a member who lives beyond his expectancy is a greater loss to the company than the one who died prematurely? When these men joined the order, they joined themselves to a membership many of whom had already reached their expectancy. These plaintiffs began at once to pay death losses on such. When they paid such losses they had nothing to expect in return from those whose membership had ceased by death. Their only way of compensation was from those who should come after. They relied and had a right to rely for the security of their insurance upon the new blood which was to come. And yet we find that in 1912 the past officials of this order closed division A against all new membership. Was that an act of life or of death? It not only closed the door to new membership, but it opened the door of exit from A into B for all the younger membership of the order. Having thus separated the young from the old, it then said to the older men: "You shall constitute a little company of your own. You shall pay your own death losses. We shall assess you sufficiently to pay such death losses and to accumulate a reserve sufficient to pay the loss of the last man. Be thou faithful unto death and we will give you a reward of life."

The net result is a little insurance company of 115 old men who exhibit staying qualities comparable to those of some distinguished creatures in the animal world. This result has been brought about intentionally, though circuitously. The creation of the divisions A and B had no other function or purpose than to accomplish just this result. Is it a fair observance of the

obligation implied by this order to its membership? Cheap insurance is a pressing inducement to a young man. But what is cheap insurance worth even to a young man if, after he has carried it all his life, he may be walled off in old age with a few other old men and thereby separated from all the benefits of the growing order? True, old age is a liability, but it is the very liability against which youth insures. When such liability is about to mature, shall it be deemed an insolvency, and as such shall it be gathered into a little pocket, as nature gathers her pus? Shall an old membership which has paid dues for thirty years be deemed the equivalent of a mere carbuncle, to be lanced and discharged for the saving of the life of the order?

We are not unmindful of the warning contained in the briefs that an affirmance of this case will take the life of the defendant. We would fain believe otherwise. If, however, such be the result, it will be not because of the conclusions herein, but because its life has already been taken. If it may by this process become rid of its liabilities by the overthrow of its old membership, it has made a great discovery. It may adopt the same course five years hence, and every four or five years thereafter. True it promises otherwise henceforth, but new promises are no better than old ones. These plaintiffs had promises. Future plaintiffs will have nothing more. This course furnishes a sure door of escape from the very substance of insurance liability. It is the door of repudiation and nothing less. What is the life of the order worth if its insurance fails? When a human being makes the saving of his life the chief end of his existence, he has already lost it. "Whoso will save his life shall lose it." If the past officials of this order had directed their solicitude less to the saving of the life of the order and more to the faithful performance of its obligations, the life of the order would have been probably secure. No reason is apparent in this record why it should not have prospered indefinitely. The life-saving proceedings which are herein considered form the greatest menace which it has ever confronted. If they shall prove fatal, it must be charged up as a life-saving fatality. If the order can be saved, its honor must be reasserted and redeemed. No insurance company can live in the dishonor of any form of repudiation.

(3) Much of the contention of the defendant order is based upon the alleged inadequacy of rates paid by division A. This was the 1901 tables which we have hereinbefore set forth. It is urged that the 1911 table adopted for division B, and which we have hereinbefore set forth, is a correct and

scientific table, based upon the mortality experience. We shall have no occasion in this discussion to find any fault with the 1911 table. What has not been explained to us in the briefs is why the longtime membership of these plaintiffs in this order should be ignored in applying to them the 1911 rates. As already explained, this table presents a level-rate plan based upon the age attained by the member when he joins. This is the advantage given to early joining. For instance, the plaintiff Tusan joined this order at twenty-eight years of age. According to the 1911 table a monthly assessment of \$2.64, limited to ten assessments a year, would not only have paid every death loss occurring during his lifetime, but would create a reserve large enough to mature every outstanding certificate regardless of any new membership. Notwithstanding his long-time membership at all times in good standing, the only alternative that is now presented Tusan is to rejoin the order of which he has always been a member and to assume a rate of assessment according to the age now attained by him. In other words, he is put upon precisely the same basis as any new member of his present age would be put. Take the case of Barlow, who is plaintiff in a companion case submitted herewith. He was a paying member for more than thirty years. The sum total of his assessments and dues paid amounted to \$998. He was expelled for failure to accept either of the alternatives presented. If, instead of becoming a member of the order in the first instance he had proceeded to create a fund of his own by successive payments equal to his assessments and dues, such fund, including accruing interest, would now amount to a sum approximately sufficient to purchase for him at his age of seventy-four a paid-up insurance policy for \$2,000 upon the basis of the 1911 table. The expert for the defendant in his case testified that a paid-up policy on that basis would cost Barlow something over \$1,500 present payment, and that the present value of payments to be made by him in accordance with the 1911 table would total, with accruing interest, something over \$1,600. Yet Barlow is told by the officials of the defendant order that he has at all times been a charge upon the charity of the order, and that the cost of his insurance has been largely carried by other members.

Putting together the plan heretofore in operation and the new plan to be in operation hereafter, it would cost Barlow more than \$3,000 to mature his \$2,000 policy. Consistently enough, the experts of the defendant testified to Barlow's case that his present policy had no value because the future payments neces-

sary to mature it would, with interest, amount to its full face value. This furnishes a concrete illustration of the defendant's theory that old men who have outlived their expectancy have already cost the defendant order more than the value of their insurance. Such theory is manifestly unsound, and it devolves upon the order to find some other cause or source of its trouble. Barlow's membership has cost nothing so far to the defendant order, nor will it ever cost anything if his expulsion is to stand. He has paid out \$998, for which, as yet, he himself has received nothing. True, the money so paid has been expended by the defendant order for the purposes for which it was paid. But the only possible consideration for Barlow was that similar expenditures would be made in behalf of his beneficiary at the maturity of his certificate. This consideration being repudiated, he has nothing. The rates tendered to him are precisely the same as they would be if he were joining as a new member. Surely a correct theory of insurance ought to find some present value in a certificate fully maintained for thirty years which had cost \$998. If this be so, then no new rate could well be reasonable if it ignored such fact. This is not saying that such certificate should be worth \$998. It may well be conceded that the fact of existing insurance for thirty years had of itself a substantial value, in that the contingency of death would have matured the certificate at any moment. We think it quite clear, however, that if this order was justified at all in changing the fundamental character of this insurance and in adopting an old-line standard and a level rate, then it should be such for all its membership, old as well as young. The essence of the level rate is that the age attained at the time of membership fixes the unchanging rate. We have held frequently that the right of an association to amend its by-laws does not carry the right to make material reduction in benefits promised, nor to materially increase the consideration if fixed. We need not cite authorities to these propositions. None of our previous cases have a controlling bearing upon the case at bar. In view of the fact that there was no limitation upon the power of the order as to the sum total of assessments which it might collect, the amount of the particular assessment is not a controlling question except as bearing upon the question of discrimination among members. The following authorities from other jurisdictions bear upon some of the important features of our case: *Ebert v. Mutual Reserve Fund Life Assn.* 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457; *Strauss v. Mutual Reserve Fund Life Assn.* 126 N. C. 971, 54 L.R.A. 605, 83 Am. St.

Rep. 699, 36 S. E. 352; Benjamin v. Mutual Reserve Fund Life Asso. 146 Cal. 34, 79 Pac. 517; Williams v. Supreme Conclave I. O. H. 172 N. C. 787, 90 S. E. 888.

We quote from the Ebert Case as follows: "It is evident that the contract contemplated an unsteady and varying death fund from which to pay death claims, and that the amount of the assessments would vary according to the number of deaths, the growth of the association in membership, and earning capacity of the reserve fund. It is also clear that the law of self-preservation applied, and if, at any time, in order to meet maturing claims, it should become necessary to levy a larger amount than that stipulated as the maximum rate of the table, the power so to do was inherent in the association, and the directors would have authority to pass suitable rules and regulations for that purpose. But it is equally clear that neither by the contract of insurance, in contemplation of the laws of New York, the constitution and by-laws, nor from the natural, inherent power of the association, based upon the doctrine of the general good, does there exist authority to arbitrarily discriminate in favor of one class of members and against another class."

We quote also from the same case as follows: "The old members joined the association upon the theory that it was to be a living institution,—as old members dropped out and were paid off, new ones come in, younger in years; thus adding strength, and keeping up the vitality of the association. The new members entered upon the same basis and with the same expectation, yet they continue to be assessed as of the age of entry on the 1889 table. There has been shown no reason for drawing an arbitrary line as of January 1, 1890. If the board of directors could advance the age of all members who joined prior to 1890, they can keep on setting out classes according to some certain year of entry, and advance its members, also, as to age. And, if the board can advance the members who joined prior to 1890 to the current rates of the 1889 table, they can for the same reason advance them to years ahead of the current age. The board of directors had no authority to levy such an assessment as call No. 86, and the act of the defendant in canceling plaintiff's policy for nonpayment of the call made upon such basis was void."

We quote also from the Benjamin Case as follows: "The essential principle upon which co-operative associations like that of the defendant is based is that there will be a constant invigoration of the association by the accession of new members; that it shall be in fact a going concern for the advantage of all, and that every member of the

association will be given the benefit of the average mortality of the entire membership in force at the last death prior to an assessment, resulting from this constant addition of new members. And it was necessarily upon this theory that the earlier members of the association joined it. They anticipated the benefit which would result from a lower average mortality through the constant accession of these new members, and it was this benefit which was secured to Benjamin as one of the earliest members, by the provision in his contract which called for an assessment 'upon the entire membership in force at the date of the last death claim, the same to be apportioned among the members according to the age of each member.' He was entitled to this benefit which would accrue from the constant accession of such members. This accession would naturally create a lower average mortality among the entire membership, and consequently a smaller cost would have to be sustained by each member, where the assessment to meet death claims was distributed over the entire membership, equally apportioned as to amount according to the respective ages of the members."

Authorities are brought to our attention by the defendant holding contrary to the views herein expressed. Practically all of such decisions, however, are based either upon statutory provisions of the respective states or upon by-laws of the order, none of which are applicable here.

(4) It must be recognized that, in the long run, the actual cost of carrying insurance must be paid in some way. The only way open to a mutual assessment association to meet such cost is by assessment of its members. Section 1822 and 1823 in effect require such an association to make provision for the payment of death losses by sufficient assessment. This implies authority in the association to increase rates in a fair and reasonable way when reasonably necessary. This is certainly so in the absence of a contract limiting authority. Whether the association organized under the section above cited has any power to limit by advance contract the assessment to an amount less than is reasonably necessary to comply with the mandates of such sections, we do not now determine. What is a reasonable rate in a given case must be determined in the light of generally recognized mortality tables and actuary computations. By § 1839j the legislature has promulgated a mortality table which is obligatory upon all associations organized subsequently to such enactment. It is not retroactive, and therefore is not obligatory upon the defendant association. Nevertheless it may be properly considered on the question of reasonable-

ness in the fixing of rates, as carrying some presumption in favor of its practical correctness. So far as appears in this record, the 1911 table of rates is consistent with such legislative mortality table. We do not denounce this 1911 table of rates as such. It is not necessary for us now to hold that such table could or could not be applied to the existing membership if done without unreasonable discrimination and with recognition of the previous duration of such membership. The uncertain element at this point is whether the 1911 table is based upon a plan or form of insurance which in its nature is fundamentally different and more expensive than the merely mutual assessment insurance contemplated by chapter 9 of title 9 of the Code. If yea, then in order to be reasonable the 1911 table should be scaled down to the requirements of cheaper insurance. We have already stated that this table contemplates not only the current payment of current death losses, but also the creation of a large reserve fund which shall be sufficient to mature all certificates many years hence, regardless of the future acquisition of any new members. The soundness of such a plan of insurance is not questioned. But the question is whether it is not fundamentally different from the plan of mutual insurance contemplated by above chapter 9. If it is, the defendant order had no power to adopt it or to impose increased rates for its maintenance. If the mutual insurance contemplated by the statute may be carried with reasonable safety at a substantially less cost both to the association and to the insured without the creation of reserves, and in reliance upon the maintenance of the membership by the acquisition of new members sufficient to make up all losses of membership by death or lapse, then it may well be urged that the statutory plan must be adhered to. The question of reserve and the profitable use and safe care thereof presents a great problem of its own. Such a trust fund calls for statutory safeguards both for its custody and for its proper and profitable utilization. In the absence of statutory safeguards, reserve funds have heretofore proved too often to be a treasure laid up "where moth and rust doth corrupt and where thieves break through and steal." No such safeguards are provided in the cited chapter. We do not find it now necessary to decide this question. Argument has been directed to it only incidentally, and we reserve decision thereon.

By way of recapitulation what we do hold is that the creation of classes A and B was a mere fiction, and was ulterior in its purpose and unreasonable in its result; that the purported partition wall between such divisions must be ignored; that the entity

of the defendant is one, and not two; that the plaintiffs are members of the defendant order, and that the members of class B are nothing else than members thereof; that the creation of such classes to occupy the same field of insurance and for the purposes indicated was inherently inconsistent with the organization of the defendant, and that therefore it was without power to create them; that the action of the order in purporting to deny to the plaintiff as class A the benefit of a going concern and of new membership was a violation of their substantial rights; that the same is to be said as to its refusal to recognize their continuing membership in the order; that if a level rate is to be applied to the plaintiffs it must take account of the date of their membership; that whatever the rates applied to new members, such difference of rate afforded no justification for the separation of the new members into an independent or separate class to be exempt from the ordinary liabilities of the order; that as members of the defendant under the members of the so-called class B became necessarily liable for the ordinary liabilities of the order for death losses; that such new members could not be organized into a separate class or association within the defendant order and be permitted thereby to appropriate the livery and the life of the defendant as a going concern, and yet be exempt from its obligations—the performance of which furnished the only reason for the organization and existence of the defendant order.

III. One other question remains. The defendant order had accumulated a fund known as the emergency fund. This amounted to about \$120,000. The general plan that had been adopted was to apportion this fund in a way to equalize certain inequalities in the table of rates. For instance the 1901 table of rates was based upon what is called the step rate plan. A classification of seven classes was adopted. The same rate was applied to each member of a class regardless of the difference in age, there being a range of difference from four to six years. Class 7 included all persons fifty years old or over. Assuming the rate of assessment for class 7 to be a proper rate for a man fifty years of age, it necessarily became deficient as a rate for a man of seventy. The emergency fund was applied to this deficiency and ultimately to the benefit of the older men. The new members becoming such after 1911 had no part in the creation of this fund. It was at all times thereafter treated as belonging to division A as representing the existing membership antedating 1911. The plaintiffs, for themselves and for the 115 members of division A, now claim the exclusive right to this

fund. Because certain of the older members who would have been entitled to share in this fund transferred to division B under the alternatives presented to them, the trial court apportioned this fund and awarded about \$71,000 thereof to be set aside to the benefit of such old members who have so transferred to division B. Both parties complain of this action of the court, and both appeal from it. The plaintiffs contend that the entire fund should have been awarded to them without any apportionment. The defendant contends that the court should have made no order whatever on the subject because the pleadings raised no issue pertaining thereto. For the plaintiffs also it is contended that there was no competent evidence before the court to sustain the apportionment made. The only evidence we find in the record to sustain the apportionment are certain telegrams to and from the actuary which were put in evidence over the objections of the plaintiff. The defendant does not defend the competency of this evidence. It is also true that there is

nothing in the pleadings that tenders or raises any issue concerning this fund, unless it can be said that the question of its apportionment necessarily inhered in the controversy. If there ought to be an apportionment of this fund, the state of the record is not such as to enable us to determine as to what would be a proper apportionment. In view of the conclusion which we have reached that the pretended creation of classes was ineffective, and that all the members of the order are members of the same order and the same class, it would seem to render the question of apportionment quite immaterial. The entire fund still belongs to the defendant order. The question of apportionment will be reserved from the adjudication. To the extent herein indicated, the decree of the trial court will be modified. In all other respects it is affirmed.

Modified and affirmed.

All the Justices concur.

Petition for rehearing denied.

#### WASHINGTON SUPREME COURT. (Department No. 1.)

FRANK CUSHING et al., Appts.,

v.

JOHN B. WHITE, Prosecuting Attorney of  
Spokane County, et al., Respts.

(— Wash. —, 172 Pac. 229.)

#### Carrier — automobile — common carrier.

1. One maintaining an automobile for hire at a stand where it may be found by prospective customers during many hours of the day and night is within the operation of a statute regulating common carriers of passengers on the public streets, although he has no fixed rates or schedule of charges, reserves the right to refuse to transport any applicant at his pleasure, and makes exclusive contracts with single hirers, whether the capacity of his vehicle is exhausted or not.

*For other cases, see Carriers, I. in Dig. 1-52 N. S.*

#### Definition — common carrier.

2. A common carrier is one whose occupation is the transportation of persons or things from place to place for hire or reward, and who holds himself out to the world as ready and willing to serve the pub-

lic, indifferently, in the particular line or department in which he is engaged.

*For other cases, see Carriers, I. in Dig. 1-52 N. S.*

(April 16, 1918.)

**A**PPEAL by plaintiffs from a judgment of the Superior Court for Spokane County in favor of defendants in an action brought to enjoin them from enforcing the provisions of an act regulating common carriers of passengers on the public streets. Affirmed.

The facts are stated in the opinion.

Messrs. McCarthy & Edge, for appellants:

Plaintiffs are not common carriers within the meaning of the act.

State ex rel. Case v. Howell, 85 Wash. 294, 147 Pac. 1159, Ann. Cas. 1916A, 1231; Gillingham v. Ohio River R. Co. 35 W. Va. 588, 14 L.R.A. 798, 29 Am. St. Rep. 827, 14 S. E. 243; Georgia L. Ins. Co. v. Easter, 189 Ala. 472, L.R.A.1915C, 458, 66 So. 514; 4 R. C. L. 1000; Brown v. New York C. & H. R. R. Co. 75 Hun, 355, 27 N. Y. Supp. 69; Richmond v. Southern P. Co. 41 Or. 54, 57 L.R.A. 617, 93 Am. St. Rep. 694, 67 Pac. 947; 2 Redf. Railways, 6th ed. p. 303; Godbout v. St. Paul Union Depot Co. 79 Minn. 188, 47 L.R.A. 532, 81 N. W. 835; Thomson Houston-Electric Co. v. Simon, 20 Or. 60, 10 L.R.A. 251, 23 Am. St. Rep. 86, 25 Pac. 147; McGregor v. Gill,

**Note.** — The question whether a person or company operating a passenger automobile for hire is a common carrier is considered in the annotation following this case, post, 468.

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114 Tenn. 521, 108 Am. St. Rep. 919, 80 S. W. 318; *New Orleans v. Le Blanc*, 139 La. 113, 71 So. 248; *Fonsler v. Atlantic City*, 70 N. J. L. 125, 56 Atl. 119; *Hinds v. Steere*, 209 Mass. 442, 35 L.R.A.(N.S.) 658, 95 N. E. 844, 1 N. C. C. A. 134; *Pearson v. Duane*, 4 Wall. 605, 18 L. ed. 447; *State v. Ferry Line Auto Bus Co.* 93 Wash. 614, 161 Pac. 467.

Messrs. **John B. White** and **William C. Meyer**, for respondents:

Plaintiffs are carriers of passengers for hire within the meaning of the statute.

*State v. Seattle Taxicab & Transfer Co.* 90 Wash. 416, 156 Pac. 837; *Spokane Taxicab Co. v. White*, — Wash. —, 172 Pac. 233; *State ex rel. Case v. Howell*, 85 Wash. 294, 147 Pac. 1159, Ann. Cas. 1916A, 1231; *State v. Ferry Line Auto Bus Co.* 93 Wash. 614, 161 Pac. 467; *Allen v. Bellingham*, 95 Wash. 12, 163 Pac. 18.

**Webster, J.**, delivered the opinion of the court:

This action was brought by appellants to enjoin respondents from enforcing as against them the provisions of chapter 57, Laws 1915, entitled: "An Act Relating to and Regulating Common Carriers of Passengers upon Public Streets, Roads and Highways, Providing for the Issuance of Permits; Prescribing Penalties for Violations; and Providing When This Act Shall Take Effect."

The trial court found the following facts: That appellants are engaged in what is known as the automobile rent business; that each of them is the owner of an automobile which he drives for hire, either at a charge of so much per trip or so much per hour; that each of them has a fixed stand where, when not engaged with customers, or not otherwise using the car, they are available to prospective customers during many hours of the day and night; that none of them has a fixed route or routes over which they operate their motor cars; that they do not, when engaged by one person for a trip or trips, ever carry any passenger or passengers other than those directed by the original hirer, whether their automobile capacity is exhausted or not; that none of them has or maintains any fixed schedule of rates for the transportation of passengers, either for a single trip or by the hour; and that each of them "do now and have always reserved the right to transport passengers or refuse to transport them, whether they are occupied or not occupied with other engagements." Upon these facts the trial court concluded that the business conducted by the several appellants falls within the provisions of the act, and is subject to its regulations. A decree

was entered accordingly, from which this appeal is prosecuted.

Appellants insist that, under the facts found by the court, they are not common carriers of passengers, hence, not within the purview of the act. For the purpose of this opinion it will be assumed that the statute applies only to common carriers of passengers in motor-propelled vehicles. *State v. Ferry Line Auto Bus Co.* 93 Wash. 614, 161 Pac. 467. The sole inquiry therefore is whether, under the facts set forth, appellants are such carriers. The precise question thus presented is of first impression in this court, and its importance seems to justify an extended discussion of the authorities.

"Carriers" may be defined as persons or corporations who undertake to transport or convey goods, property, or persons, from one place to another, gratuitously or for hire, and are classified as private or special carriers, and common or public carriers; the class to which a particular carrier is to be assigned depending upon the nature of his business, the character in which he holds himself out to the public, the terms of his contract, and his relations generally to the parties with whom he deals and the public. 1 Moore, Carr. 2d ed. §§ 1 and 2. The books abound with definitions of both common and private carriers, from which the distinguishing features may be gathered. Judge Thompson submits the following: "A common carrier of passengers is one who undertakes for hire, to carry all persons, indifferently, who may apply for passage. To constitute one a common carrier it is necessary that he should hold himself out as such. This may be done not only by advertising, but by actually engaging in the business and pursuing the occupation as an employment." Thomp. Carr. Pass. p. 26, note 1.

Redfield in his treatise says: "It is generally considered that where the carrier undertakes to carry only for the particular occasion, *pro hac vice*, as it is called, he cannot be held responsible as a common carrier. So, also, if the carrier be employed in carrying for one or a definite number of persons, by way of special undertaking, he is only a private carrier. To constitute one a common carrier, he must make that a regular and constant business, or at all events, he must, for the time, hold himself ready to carry for all persons, indifferently, who choose to employ him." Redf. Carr. & Bailees, § 19.

In *Dobie on Bailments and Carriers*, at §§ 106 and 107, the author says:

"The private carrier is one who, without engaging in such business as a public employment, undertakes by special contract to



transport goods in particular instances from one place to another. . . .

"The common carrier of goods is one who holds himself out, in the exercise of a public calling, to carry goods, for hire, for whomsoever may employ him."

This author at § 164 states: "The same considerations that distinguish the common from the private carrier of goods apply to set apart the common and the private carrier of passengers."

Hutchinson announces the rule in this language: "Private carriers for hire are such as make no public profession that they will carry for all who apply, but who occasionally, or upon the particular occasion, undertake for compensation to carry the goods of others upon such terms as may be agreed upon. They are not common carriers because they do not make the carriage of goods for others a business, and do not hold themselves out to the public as ready and willing to carry, indifferently for all persons, any particular class of goods or goods of any kind whatever." 1 Hutchinson, Carr. 3d ed. § 35.

Judge Story observes: "To bring a person within the description of a common carrier he must exercise it as a public employment; he must undertake to carry goods for persons generally, and he must hold himself out as ready to engage in the transportation of goods for hire, as a business, not as a casual occupation *pro hac vice*. A common carrier has therefore been defined to be one who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place." Story, Bailm. § 495.

Chancellor Kent says: "Common carriers undertake generally, and not as a casual occupation, and for all people indifferently, to convey goods and deliver them at a place appointed, for hire, as a business, and with or without a special agreement as to price." 2 Kent, Com. 598.

In vol. 1, at page 3, Michie on Carriers, it is said: "A common carrier of passengers is one who undertakes, for hire, to carry all persons indifferently who may apply for passage."

In 1 Moore on Carriers, § 4, the author says: "A private carrier is one who agrees, by special agreement or contract, to transport persons or property from one place to another, either gratuitously or for hire; one who undertakes for the transportation in a particular instance only, not making it a vocation, nor holding himself out to the public ready to act for all who desire his services. Common carriers, however, hold themselves out to carry for all persons indiscriminately."

In 10 C. J. § 1, we find: "A carrier is

one that undertakes the transportation of persons or movable property, and the authorities, both elementary and judicial, recognize two kinds or classes of carriers, namely, private carriers and common carriers. A private carrier is one who, without being engaged in such business as a public employment, undertakes to deliver goods in a particular case for hire or reward. While a common carrier has been defined as one that holds itself out to the public to carry persons or freight for hire."

Passing from the definitions given by the text-writers to a few of the pertinent cases, we find the following, in which the distinguishing features are applied:

In *McHenry v. Philadelphia, W. & B. R. Co.* 4 Harr. (Del.) 448, it was held that the owners of stage wagons, stagecoaches, and railroad cars, who carry goods, as well as passengers, for hire; wagoners, teamsters, and cartmen, who undertake, as a common employment, to carry goods for hire from one town to another; the masters and owners of ships, vessels, steamboats, barge owners, canal boatmen, and ferrymen, employed in the like business, are all "common carriers;" the test applied being: "A common carrier is one who undertakes and exercises, as a public employment, the transportation or carriage of goods for persons generally, from place to place, whether by land or by water, and to deliver them at the place appointed, for hire or reward, and with or without a special agreement as to price."

In *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393, it was held: To render one a common carrier, his undertaking must be general and for all people indifferently. The undertaking may be evidenced by the carrier's own notice or practically by a series of acts, by his known habitual continuance in this line of business. He must assume to be the servant of the public; he must undertake for all people. A special undertaking for one man does not render a person a common carrier. One who follows carrying for a livelihood or who gives out to the world in any intelligible way that he will take goods or other things for transportation from place to place, whether for a year, a season, or less time, is a common carrier, and subject to all the liabilities of such.

In *Varble v. Bigley*, 14 Bush, 698, 29 Am. Rep. 435, it is said: "When a person has assumed the character of a common carrier, either by expressly offering his services to all who will hire him, or by so conducting his business as to justify the belief on the part of the public that he means to become the servant of the public, and to carry for all, he may be safely pre-

sumed to have intended to assume the liabilities of a common carrier, for he was bound to know that the law would so charge him, and knowing, must have intended it."

In *Parmelee v. Lowitz*, 74 Ill. 116, 24 Am. Rep. 276, the proprietor of a line of omnibuses and baggage wagons, engaged in carrying, for hire, passengers and baggage for all persons choosing to hire, from, to, and between depots, hotels, and different parts of the city of Chicago, was held to be a common carrier. The doctrine of this case is expressly reaffirmed in the recent case of *Hinchliffe v. Wenig Teaming Co.* 274 Ill. 417, 113 N. E. 707.

In *McGregor v. Gill*, 114 Tenn. 521, 108 Am. St. Rep. 919, 86 S. W. 318, where it was held that a livery stable keeper who had hired a team and conveyance to a customer for a special occasion was not a common carrier, the distinction between the two classes is aptly stated in this language: "The present case bears no likeness to that of *Lawrence v. Hudson*, 12 Heisk. 671, relied on as authority by the plaintiff in error. In that case the defendant was the owner of a line of omnibuses running from Nashville to Edgefield, holding himself out to the public as ready and willing to carry for hire all persons who offered themselves as passengers. This owner was, upon all the authorities, a common carrier, and was properly held to the full limit imposed upon one so engaged."

In that case the court approved this definition of a "common carrier:" "A common carrier of passengers is one who undertakes, for hire, to carry all persons, indifferently, who may apply for passage. . . . To constitute one a common carrier it is necessary that he should hold himself out to the community as such."

In *Robertson v. Kennedy*, 2 Dana, 430, 26 Am. Dec. 466, the court of appeals of Kentucky had before it this state of facts: The defendant had been in the habit of hauling for hire, in the town of Brandenburg, for everyone who applied to him, with an ox team, driven by his slave. He undertook to haul for plaintiffs a hogshead of sugar, and in the course of transporting it the slide slipped into the river, whereby the sugar was spoiled. In an action to recover against the defendant upon the theory that he was a common carrier, the court held: "Everyone who pursues the business of transporting goods for hire, for the public generally, is a common carrier. According to the most approved definition, a common carrier is one who undertakes, for hire or reward, to transport the goods of all such as choose to employ him, from place to place. Draymen, cartmen, and

porters, who undertake to carry goods for hire, as a common employment, from one part of a town to another, come within the definition. So, also, does the driver of a slide with an ox team. The mode of transporting is immaterial."

The case of *Lloyd v. Haugh & K. Storage & Transfer Co.* 223 Pa. 148, 21 L.R.A. (N.S.) 188, 72 Atl. 516, is peculiarly applicable here, for the reason that its facts are strikingly similar to those found by the trial court. From the opinion it appears: "The defendant, an incorporated company, though chartered to do a general warehouse and storage business, does not confine itself strictly to the particular business for which it was chartered, but engages as well in the business of moving household goods in the city of Pittsburgh and vicinity. The president of the company, speaking to this point, says, in his testimony, that general hauling of household goods is one of the particular lines of business in which the company engages, and that it solicits business of this kind by public advertisements in various ways, by signs upon its wagons, upon fences, when that is allowed, by cards intended for general distribution, and by the bills and tags used in the course of the business. These advertisements speak for themselves, and unquestionably establish the fact, independent of everything else in the case, that the defendant does hold itself out to the public as engaged in the moving of household goods, thereby inviting employment along this line. None of these advertisements contain a suggestion of limited liability, or that the company will render such service only as it may select its patrons. Notwithstanding this public commitment of the company to a general and indiscriminating service, it is argued that inasmuch as the company claims the right to select those whom it will serve, and because its custom has been and is to discriminate, accepting some and rejecting others, as it may choose, this circumstance makes it a private as distinguished from a common carrier, and exempts it from the obligations and liability which the law imposes on the latter relation. . . . Conceding, however, that such a duty (to carry indiscriminately at established prices) rests upon a common carrier, to claim that one is not a common carrier because he has persistently disregarded this duty and has arbitrarily chosen whom he would serve, notwithstanding he has invited the public generally to apply, is to make a public duty determinable by the pleasure of the individual, and not by principle or law. We express a doctrine universally sanctioned when we say that anyone who holds him-

self out to the public as ready to undertake, for hire or reward, the transportation of goods from place to place, and so invites custom of the public, is, in the estimation of the law, a common carrier. . . . We are dealing with a case where the carrier made the transportation of household goods part of its regular business, advertised that business in a way to solicit custom from the general public. An unavoidable implication arises that it holds itself in readiness to engage with anyone who might apply."

In *Vandalia R. Co. v. Stevens*, — Ind. App. —, 114 N. E. 1001, the appellate court of Indiana observed: "On the other hand, we cannot agree with the appellant's contention that the common carrier may, by the words of its contract, convert itself into a private carrier, where the transportation undertaken and the duties and responsibilities incident thereto are such as are ordinarily incident to a common carrier."

In *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872, Mr. Justice Strong said: "We have already remarked the defendants were common carriers. They were not the less such because they had stipulated for a more restricted liability than would have been theirs had their receipt contained only a contract to carry and deliver. What they were is to be determined by the nature of their business, not by the contract they made respecting the liabilities which should attend it. Having taken up the occupation, its fixed legal character could not be thrown off by any declaration or stipulation that they should not be considered such carriers."

In 1 *Michie on Carriers*, at page 3, the author says: "Persons carrying on a transportation business under circumstances which, in law, constitute them common carriers, cannot divest themselves of that character, nor secure an exemption from its liabilities, by declaring in their bills of lading, etc., that they are not to be deemed common carriers. What they are is to be determined by the nature of their business."

Authorities to the same effect may be cited indefinitely; but from the foregoing it is manifest that a "common carrier" is one whose occupation is the transportation of persons or things from place to place for hire or reward, and who holds himself out to the world as ready and willing to serve the public, indifferently, in the particular line or department in which he is engaged; the true test being whether the given undertaking is a part of the business engaged in by the carrier, which he has held out to the general public as his occupation, rather than the quantity or extent of the business actually transacted, or the

number and character of the conveyances used in the employment. On the other hand, if the undertaking be a single transaction, not a part of the general business or occupation engaged in, as advertised and held out to the general public, then the individual or company furnishing such service is a private and not a common carrier. In either case the question must be determined by the character of the business actually carried on by the carrier, and not by any secret intention or mental reservation it may entertain or assert when charged with the duties and obligations which the law imposes.

An analysis of the findings of the lower court discloses that appellants' calling is characterized by the following features: (a) They are engaged in what is known as the automobile rent business; (b) each of them owns and operates a motor-propelled vehicle for hire, either at a charge of so much a trip or so much per hour; (c) each has a fixed stand or place where his car is available to prospective customers during many hours of the day and night; and (d) they transport passengers from place to place. Here, we have carriers engaged in transporting persons for hire as a business or occupation, and impliedly and practically holding themselves out to the public as ready and willing to serve, indiscriminately, all who may desire the use of their facilities. The fact that they have no fixed schedule of charges, do not operate over definite routes, do not upon all occasions load the car to its full capacity, and reserve the right to refuse to transport passengers whether their automobile is engaged or not, is wholly immaterial; their character is determined by their public profession, not by undisclosed reservations or secret intentions.

The advent of the automobile as a mode of conveyance has in no wise marked a departure from or modification of the principles of the law of carriers as theretofore defined and applied by the courts. The automobile is but a modern method of transportation, to which the settled rules have been extended. Babbitt, in his work, the *Law Applied to Motor Vehicles*, at § 620, observes: "The motor vehicle is daily coming into increasing use in a commercial capacity. It is already found in nearly every line of business. Associations and corporations have been organized with the motor car as a means of transporting both passengers and property as common carriers. . . . The distinction between such carriers and private carriers is that the former holds himself out to all persons who choose to employ him, as ready to carry for hire, while the latter agrees in some

special case with some private individual to carry for hire. The common carrier employment is public, and is bound to carry the goods and persons of all who demand carriage and who comply with his reasonable terms. . . . The essence of the distinction between the two classes of carriers is that, in order to constitute one a 'common carrier,' it is necessary that he hold himself out to the public as such. . . . And one may hold himself out as a carrier not only by advertising, but by actually engaging in the business and pursuing the occupation as an employment."

Huddy on Automobiles, 4th ed. § 39, says: "An automobile may be used as a common carrier, a private carrier, or a personal private conveyance. Public motor vehicles, such as sight-seeing cars, taxicabs, and others which are employed in carrying all persons applying for transportation, come within the definition that a common carrier of passengers is one who undertakes for hire to carry all persons who may apply for passage. But to constitute one a common carrier it is necessary that he should hold himself out as one."

A person or company engaged in the operation of a jitney bus is a common carrier. *Desser v. Wichita*, 96 Kan. 820, L.R.A. 1916D, 246, 153 Pac. 1194; *Memphis v. State*, 133 Tenn. 99, L.R.A. 1916B, 1143, P.U.R. 1916A, 834, 179 S. W. 635, Ann. Cas. 1917C, 1045; *Berry, Automobiles*, 2d

ed. § 874; *Huddy, Automobiles*, 4th ed. § 372. A taxicab company, following the business of transporting persons for hire and holding itself out as ready to carry one and all indiscriminately, is a common carrier and subject to all the responsibilities of such a carrier. *Public Service Commission v. Hurtgan*, 91 Misc. 432, P.U.R. 1916A, 547, 154 N. Y. Supp. 897; *Donnelly v. Philadelphia & R. R. Co.* 53 Pa. Super. Ct. 78; *Van Hoeffen v. Columbia Taxicab Co.* 179 Mo. App. 591, 162 S. W. 694; *Carlton v. Boudar*, 118 Va. 521, 88 S. E. 174; *State v. Seattle Taxicab & Transfer Co.* 90 Wash. 416, 156 Pac. 837; *Berry, Automobiles*, 2d ed. § 887; *Huddy, Automobiles*, 4th ed. § 303; *Babbitt, Motor Vehicles*, § 621.

There is no essential difference in the character of service furnished by the taxicab and that supplied by appellants. They afford similar accommodations, are operated in practically the same manner, and are necessarily governed by the same principles. We conclude that appellants come within the act in question and are subject to its provisions.

The judgment is affirmed.

Ellis, Ch. J., and Mount, Holcomb, and Chadwick, JJ., concur.

Petition for rehearing denied, June 27, 1918.

### Annotation—Person or company operating passenger automobile for hire as a common carrier.

A common carrier of passengers is one who undertakes, for hire, to carry all persons, indifferently, who may apply for passage, so long as there is room and there is no legal excuse for refusing. A public common carrier of passengers is distinguished from private carriers by the franchises conferred upon it, and the obligations, restrictions, and liabilities with which it is charged, all flowing from considerations of public policy. It must carry all alike, and for a reasonable compensation furnish reasonable accommodations, must continuously operate its line, and must submit to reasonable regulation. 4 R. C. L. § 468.

Within this definition, one who occasionally lets out his automobile to certain friends is not engaged in the business of common carrier. *Velez v. Llavina* (1912) 18 P. R. R. 634.

And one who lets out to another an automobile and driver, to be used by the hirer and his guests in driving around

the city, is a private carrier for hire. *Forbes v. Reinman* (1914) 112 Ark. 417, 51 L.R.A. (N.S.) 1164, 166 S. W. 563.

So, too, an undertaker, maintaining automobiles for the carriage of people to funerals, does not, by letting them out to others for hire, become a carrier of passengers by land, within the operation of a Workmen's Compensation Act. *F. W. Hochspeier v. Industrial Bd.* (Ill.) ante, 227.

Upon the other hand, within the same definition, an automobile company that holds itself out to the public as ready to transport, for hire, persons from one point to another, is a common carrier. *Primrose v. Casualty Co. of America* (1909) 19 Pa. Dist. R. 471, affirmed in (1911) 232 Pa. 210, 37 L.R.A. (N.S.) 618, 81 Atl. 212.

And a taxicab company which follows the business of transporting persons for hire from one part of the city to another, and holds itself out to serve one and all who apply to it for trans-

portation, upon the payment of the usual or agreed fare, is a common carrier of passengers. *Van Hoeffen v. Columbia Taxicab Co.* (1913) 179 Mo. App. 591, 162 S. W. 694; *Carlton v. Bondar* (1916) 118 Va. 521, 88 S. E. 174.

A taxicab company was held, in *Terminal Taxicab Co. v. Kutz* (1916) 241 U. S. 252, 60 L. ed. 984, P.U.R.1916D, 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916D, 765, to be a common carrier, within the meaning of § 8 of the Act of March 4, 1913 (37 Stat. at L. 938, chap. 150), which declares that a "public utility" embraces every common carrier, which phrase included "express companies and every corporation . . . controlling or managing any agency or agencies for public use for the conveyance of persons or property within the District of Columbia for hire," and, hence, was subject to the jurisdiction of the Public Utilities Commission of the District of Columbia as a "public utility," in respect of its exercise of exclusive right under a lease from the Washington Terminal Company, the owner of the Washington Union Railway Station, to solicit livery and taxicab business from persons passing to or from trains, and in respect of its exclusive rights, under contract with certain Washington hotels, to solicit taxicab business from guests. But it was held that that part of its business which consists in furnishing automobiles from its central garage, on individual orders, generally by telephone, cannot be regarded as a public utility.

And in *Donnelly v. Philadelphia & R. R. Co.* (1913) 53 Pa. Super. Ct. 78, it was said that taxicabs are now so generally in use that they are included in the class of common carriers.

However, taxicabs not operated over a specified route, under schedule, or between definite points, were held in *Newcomb v. Yellow Cab. Co.* (1916; Cal.) P.U.R.1916B, 983, not to be a public utility within the meaning of the Public Utility Act, so as to require a specific and convenient necessity.

Consistently with the definition at the beginning of this annotation, the authorities are unanimous in classing jitneys as common carriers. *Nolen v. Riechman* (1915) 225 Fed. 812; *Huston v. Des Moines* (1916) 176 Iowa, 455, 156 N. W. 883; *Desser v. Wichita* (1915) 96 Kan. 820, L.R.A.1916D, 246, 153 Pac. 1194; *Public Service Commission v. Booth* (1915) 170 App. Div. 590, P.U.R. 1916A, 955, 156 N. Y. Supp. 140; *State v. Ferry Line Auto Bus Co.* 93 Wash. 614, 161 Pac. 467; *Re Jurisdiction of Commissions over Motor Bus Lines* (1915; D. C.) P.U.R.1915E, 642; *Seranton R. Co. v. Walsh* (1915; Pa.) P.U.R. 1916D, 18; *Smith v. Nunnely* (1915; W. Va.) P.U.R.1915E, 177; *Georgia R. & Power Co. v. Jitney Bus Co.* (1915; Ga.) P.U.R.1915C, 928; *Allegheny Valley Street R. Co. v. Greco* (1916; Pa.) P.U.R.1917A, 723. And see *United R. Co. v. Peninsular Rapid Transit Co.* (1915; Cal.) P.U.R.1915F, 1012.

An operator of a motorbus line which carries passengers from or to any point in a city to or from a point without the city is a common carrier of passengers for hire within the city, although no separate fare is exacted for any part of the transportation that is within the city. *Public Service Commission v. Hurtgan* (1915) 91 Misc. 432, P.U.R. 1916A, 547, 154 N. Y. Supp. 897.

J. H. B.

#### WASHINGTON SUPREME COURT. (Department No. 2.)

PUGET SOUND TRACTION, LIGHT, &  
POWER CO., Appt.,  
v.

J. H. GRASSMEYER et al., Respts.

(— Wash. —, 173 Pac. 504.)

Injunction — against operation of jitney bus — right of street car company.

1. A street car company having a franchise to operate cars on a city street may enjoin the operation of jitney busses thereon

Note. — As to regulation of jitney busses, see annotation following this case, post, 475.

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in violation of statute and ordinance, although its franchise is not exclusive.

For other cases, see *Parties, I. a, 4, in Dig.* 1-52 N. S.

Municipal corporation — authority — violation of statute.

2. A municipal corporation cannot permit a motor propelled vehicle to carry passengers within its limits without giving the bond required by statute.

For other cases, see *Municipal Corporations, II. a, in Dig.* 1-52 N. S.

Jitney bus — requirement of bond — application.

3. A statute requiring a bond as a condition to carrying passengers in a motor propelled vehicle in a city applies although the vehicles have no fixed rates, and charge different fares for different distances, and

sometimes carry passengers across the boundary lines of the city.

*For other cases, see **Jitney Busses**, in **Dig.** 1-52 N. 8.*

**Same — inability to procure bond — effect.**

4. Inability to procure a bond does not relieve the operator of a jitney bus from the provisions of a statute requiring a bond as a condition to the operation of such vehicle. *For other cases, see **Jitney Busses**, in **Dig.** 1-52 N. 8.*

**Injunction — special damages — what are.**

5. Loss of revenue by a street car company by the unlawful operation of a motor vehicle for hire within the city is within the rule that special damages are necessary to entitle one to injunction against the maintenance of a nuisance.

*For other cases, see **Nuisances, II.** in **Dig.** 1-52 N. 8.*

(May 23, 1918.)

**A** PPEAL by complainant from a decree of the Superior Court for Whatcom County dismissing a suit to enjoin the operation of jitney busses on the streets of the city of Bellingham. Reversed.

The facts are stated in the opinion.

Messrs. Newman & Kindall and Clinton W. Howard, for appellant:

Defendant was operating contrary to law, which constitutes a public nuisance which the appellant shows is specially injurious to it, and which it is entitled to enjoin.

*State v. Seattle Taxicab & Transfer Co.* 90 Wash. 416, 156 Pac. 837; *State v. Ferry Line Auto Bus Co.* 93 Wash. 614, 161 Pac. 467.

Injunction lies against unlawful competition.

*Smith v. Nunnally* (W. Va.) P.U.R. 1915E, 177; *Allen v. Bellingham*, 95 Wash. 12, 163 Pac. 18; *Memphis v. State*, 133 Tenn. 83, L.R.A.1916B, 1151, P.U.R. 1916A, 825, 179 S. W. 631, Ann. Cas. 1917C, 1056; *Bartlesville Electric Light & P. Co. v. Bartlesville Interurban R. Co.* 26 Okla. 453, 29 L.R.A. (N.S.) 77, 109 Pac. 228; *Tulsa Street R. Co. v. Oklahoma Union Traction Co.* 27 Okla. 339, 113 Pac. 180; *McInnis v. Pace*, 78 Miss. 550, 29 So. 835; *Memphis Street R. Co. v. Rapid Transit Co.* 133 Tenn. 99, L.R.A.1916B, 1143, P.U.R. 1916A, 834, 179 S. W. 635, Ann. Cas. 1917C, 1045; *McQuillin, Mun. Corp.* § 1771; *Ashley Tri-County Mut. Teleph. Co. v. New Ashley Teleph. Co.* 92 Ohio St. 336, P.U.R.1916B, 401, 110 N. E. 959; *Public Service Commission v. Booth*, 170 App. Div. 590, P.U.R.1916A, 955, 156 N. Y. Supp. 140.

The respondents, in prosecuting their

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business in the streets of the city of Bellingham in violation of both an act of the legislature and an ordinance of the city of Bellingham, have thereby created a public nuisance per se. Equity has jurisdiction to enjoin a public nuisance at the suit of a private party specially injured thereby.

*Carl v. West Aberdeen Land & Improv. Co.* 13 Wash. 616, 43 Pac. 890; *Ingersoll v. Rousseau*, 35 Wash. 92, 76 Pac. 513, 1 Ann. Cas. 35; *Sholin v. Skamania Boom Co.* 56 Wash. 303, 28 L.R.A. (N.S.) 1053, 105 Pac. 632; *Ingalls v. Eastman*, 61 Wash. 289, 112 Pac. 372; *Cunningham v. Weedon*, 81 Wash. 96, 142 Pac. 453; *Hulet v. Wishkah Boom Co.* 54 Wash. 510, 132 Am. St. Rep. 1127, 103 Pac. 814; *Fidalgo Island Canning Co. v. Womer*, 29 Wash. 503, 69 Pac. 1121; *State ex rel. Sylvester v. Superior Ct.* 60 Wash. 279, 111 Pac. 19.

The state had the power to absolutely prohibit employing motor vehicles in the occupation in question.

*People v. Rosenheimer*, 209 N. Y. 115, 46 L.R.A. (N.S.) 977, 102 N. E. 530, Ann. Cas. 1915A, 161; *Commonwealth v. Kingsbury*, 199 Mass. 542, L.R.A.1915E, 264, 127 Am. St. Rep. 513, 85 N. E. 848; *State v. Mayo*, 106 Me. 62, 26 L.R.A. (N.S.) 502, 75 Atl. 295, 20 Ann. Cas. 512; *Huston v. Des Moines*, 176 Iowa, 455, 156 N. W. 883; *Cummins v. Jones*, 79 Or. 276, 155 Pac. 171; *Le Blanc v. New Orleans*, 138 La. 243, 70 So. 212; *Ex parte Dickey*, 76 W. Va. 576, L.R.A.1915F, 840, P.U.R.1915E, 93, 85 S. E. 781; *Re Lee*, 28 Cal. App. 719, 153 Pac. 992; *Public Service Commission v. Booth*, 170 App. Div. 590, P.U.R. 1916A, 955, 156 N. Y. Supp. 140; *Memphis Street R. Co. v. Rapid Transit Co.* 133 Tenn. 99, L.R.A.1916B, 1143, P.U.R. 1916A, 834, 179 S. W. 635, Ann. Cas. 1917C, 1045; *Desser v. Wichita*, 96 Kan. 820, L.R.A.1916D, 246, 153 Pac. 1194; *State v. Pitney*, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A, 209.

Messrs. R. W. Greene and Morris J. Schwartz, for respondents:

The state bond does not cover injury to property.

3 *Sutherland, Damages*, p. 2754; *Armour & Co. v. Western Constr. Co.* 36 Wash. 529, 78 Pac. 1106; *Simpson Logging Co. v. American Bonding Co.* 76 Wash. 533, 137 Pac. 127; *Salo v. Pacific Coast Casualty Co.* 95 Wash. 110, L.R.A.1917D, 613, 163 Pac. 384; *Bartlett v. Lanphier*, 94 Wash. 354, 162 Pac. 532; *Bogdan v. Pappas*, 95 Wash. 579, 164 Pac. 208.

One competitor cannot, in an injunction proceeding, test the rights of a rival acting under a license or franchise.

*Franklin Trust Co. v. Peninsular Pure Water Co.* 89 C. C. A. 49, 161 Fed. 855;

Market Street R. Co. v. Central R. Co. 51 Cal. 583; Coffeyville Min. & Gas Co. v. Citizens' Natural Gas & Min. Co. 55 Kan. 326, 40 Pac. 326; Memphis Street R. Co. v. Rapid Transit Co. 133 Tenn. 99, L.R.A.1916B, 1150, P.U.R.1916A, 834, 179 S. W. 635, Ann. Cas. 1917C, 1045; Geneva-Seneca Electric Co. v. Economic Power & Constr. Co. 136 App. Div. 219, 120 N. Y. Supp. 926; New Hartford Water Co. v. Village Water Co. 87 Conn. 183, 87 Atl. 358; Amusement Syndicate Co. v. Topeka, 68 Kan. 801, 74 Pac. 606; Baxter Teleph. Co. v. Cherokee County Mut. Teleph. Asso. 94 Kan. 159, L.R.A.1916B, 1083, 146 Pac. 324; Atchison, T. & S. F. R. Co. v. General Electric R. Co. 50 C. C. A. 424, 112 Fed. 689; Doane v. Lake Street Elev. R. Co. 165 Ill. 510, 36 L.R.A. 97, 56 Am. St. Rep. 265, 46 N. E. 520; Atty. Gen. v. Utica Ins. Co. 2 Johns. Ch. 370; Cumberland Gaslight Co. v. West Virginia & M. Gas Co. 182 Fed. 667; Chicago Teleph. Co. v. Northwestern Teleph. Co. 199 Ill. 324, 65 N. E. 329; 1 High. Inj. 4th ed. 861; American Teleph. & Teleg. Co. v. Morgan County Teleph. Co. 138 Ala. 597, 100 Am. St. Rep. 53, 36 So. 178.

A public service corporation cannot, in protection of its own treasury, seek to act as guardian of the public good by eliminating competition from the field.

Christopher & T. Street R. Co. v. Central Crosstown R. Co. 67 Barb. 315; Watson v. Fairmont & Suburban R. Co. 49 W. Va. 528, 39 S. E. 193.

A suit by the prosecuting attorney was the proper remedy.

State ex rel. Atty. Gen. v. Seattle Gas & Electric Co. 28 Wash. 488, 68 Pac. 946, 70 Pac. 114; State ex rel. White v. Point Roberts Reef Fish Co. 42 Wash. 400, 85 Pac. 22.

Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.

Jacobs v. Seattle, 93 Wash. 171, L.R.A.1917B, 329, 160 Pac. 299; Burbank v. Bethel Steam Mill Co. 75 Me. 373, 46 Am. Rep. 400; Brightman v. Bristol, 65 Me. 426, 20 Am. Rep. 711; Whitmore v. Brown, 102 Me. 47, 9 L.R.A.(N.S.) 868, 120 Am. St. Rep. 454, 65 Atl. 516; St. Johns v. McFarlan, 33 Mich. 72, 20 Am. Rep. 671; Manchester v. Smyth, 64 N. H. 380, 10 Atl. 700; Coffeyville Min. & Gas Co. v. Citizens' Natural Gas & Min. Co. 55 Kan. 173, 40 Pac. 326.

If an individual claims damages for injuries caused by a public nuisance, he has a cause of action only when he is specially injured by it as a public nuisance.

Bowden v. Lewis, 13 R. I. 189, 43 Am.

Rep. 21; Macomber v. Nichols, 34 Mich. 212, 22 Am. Rep. 522; Amusement Syndicate Co. v. Topeka, 68 Kan. 801, 74 Pac. 606; Fort Plain Bridge Co. v. Smith, 30 N. Y. 44; American Teleph. & Teleg. Co. v. Morgan County Teleph. Co. 138 Ala. 597, 100 Am. St. Rep. 53, 36 So. 178; Louisville Athletic Club v. Nolan, 134 Ky. 220, 23 L.R.A.(N.S.) 1019, 119 S. W. 800; Church of Jesus Christ of L. D. S. v. Oregon Short Line R. Co. 36 Utah, 238, 23 L.R.A.(N.S.) 860, 140 Am. St. Rep. 819, 103 Pac. 243; Galveston, H. & S. A. R. Co. v. De Groff, 102 Tex. 433, 21 L.R.A.(N.S.) 749, 118 S. W. 134.

Such an action cannot be maintained by a private individual.

People ex rel. L'Abbe v. District Ct. 26 Colo. 386, 46 L.R.A. 850, 58 Pac. 604; State ex rel. Reynolds v. Capital City Dairy Co. 62 Ohio St. 123, 56 N. E. 651; State v. O'Leary, 155 Ind. 526, 52 L.R.A. 299, 58 N. E. 703; State ex rel. Vance v. Crawford, 28 Kan. 726, 42 Am. Rep. 182; Remington v. Foster, 42 Wis. 608.

Fullerton, J., delivered the opinion of the court:

The appellant, as plaintiff, began this action in the court below, seeking injunctive relief. It divided its complaint into two causes of action. In the first it alleged in substance that it now is, and that it and its predecessor in interest for many years past have been, operating, under valid franchises having many years yet to run, a system of street railways for carrying passengers in the city of Bellingham, which it has constructed and equipped at a cost exceeding \$1,000,000; that it operates its street cars on convenient schedules, in compliance with its franchises and the laws of the city of Bellingham as expressed in its ordinances and the laws of the state of Washington as expressed in its statutes, and will continue to do so unless compelled to cease operations through losses caused it by the action of the defendants; that the city of Bellingham enacted an ordinance which, among other things, defines jitney bus operation, prescribes an occupation tax for each bus and each driver thereof, and makes it unlawful to engage in that business without obtaining a license and permit so to do; that none of the defendants have complied with the requirements of the ordinances; that they have been, for many months prior to the filing of the complaint, using, operating, and driving motor propelled vehicles as jitney busses in violation of the ordinance, and in disregard of its provisions, and in such manner as to constitute a nuisance; that their action is specially injurious to the plain-

tiff, in that they run at excessive rates of speed and dart in front of the plaintiff's cars, thus compelling them to stop suddenly to avoid collisions; that they run dangerously close to the cars when stopped to receive and discharge passengers, thus endangering the lives of such passengers; that they pick up and carry passengers who would otherwise ride on the plaintiff's cars, thus causing a loss of revenue from \$75 to \$100 per day; that if the operation of the defendants is permitted to continue the losses suffered by the plaintiff will compel it to cease operating its street cars, to its irreparable loss and damage and to the damage of the people of the city of Bellingham. The second cause of action sets forth the same state of facts as the first, with the exception that the law alleged to be violated by the defendants is chapter 57 of the acts of the legislature of the state of Washington for the year 1915, in that they have not procured and filed the bond therein required as a condition precedent to the operation of motor propelled vehicles in cities of the first class. On filing its complaint the plaintiff sought a temporary injunction, which was granted upon its second cause of action and denied as to the first. The defendants then demurred to the complaint, which demurrer being overruled they answered, making certain denials and setting up four affirmative defenses.

In the first affirmative defense it is alleged that the defendants operate their motor propelled vehicles as automobiles for hire, and not as jitney busses or auto stages; that they operate both within and without the city of Bellingham and in part on streets and highways not covered by the plaintiff's railway tracks; that they have procured and operate under "For Hire" licenses from the state of Washington issued pursuant to chapter 142 of the Session Laws of 1915, and have obtained and hold "taxi" licenses from the city of Bellingham; that to confine their business within the scope of the ordinance set forth in the plaintiff's complaint would render the business unprofitable; and "allege and aver that plaintiff well knows that the business of the defendants and each of them would be utterly and totally destroyed if defendants entered into the contract and agreement with the city of Bellingham prescribed in said alleged ordinance;" and that the sole object and purpose of plaintiff in prosecuting this action is to attempt to compel the defendants, through litigation, to abandon their business. In the second defense the matters set forth in the first are adopted and made a part thereof by reference. It is then al-

leged that the nature of the business carried on by the defendants is a public service in the line of transportation for hire to the public generally; that the defendants and each of them, in rendering such service, use the public highways of the city of Bellingham and Whatcom county generally; that pursuant to the Constitution and the laws of the state of Washington municipal corporations, including cities of the first class, are prohibited from granting exclusive franchises and monopolies; and that the ordinance set forth in the plaintiff's complaint grants an exclusive franchise and monopoly, and was not otherwise passed pursuant to the charter of the city. The third defense refers to and adopts by reference the allegations of the first and second defenses, and sets up as new matter the inability of the defendants at any reasonable cost to produce the bonds required by chapter 57 of the Laws of 1915. The fourth affirmative defense adopts and incorporates therein by reference the allegations of the three preceding defenses, and further sets up that the plaintiff itself operates motor propelled vehicles in the city of Bellingham in violation of law; that it entered into agreements with certain of the respondents under which the differences between them concerning their several rights might be tested in the courts, which the plaintiff violated, and avers that for these reasons it is not in court in its present action with clean hands.

Demurrers were interposed by the plaintiff to the several affirmative defenses. These were sustained in part and overruled in part, whereupon the plaintiff filed a reply containing admissions and denials and new matter in explanation and avoidance. A demurrer to much of the new matter was interposed by the defendants, on which no separate ruling was made by the court. The parties thereupon entered into the following stipulation:

"It is stipulated between the parties hereto by their respective attorneys as follows:

"(1) It is the contention of the defendants that the bond required to be filed with the secretary of state by chapter 57 of the legislative acts of the state of Washington for the year 1915 is to secure against personal injury only, and that the plaintiff is not a beneficiary in any bond required to be filed by such act, and (a) that by reason thereof the plaintiff is not entitled to maintain the second cause of action set forth in its complaint, as the facts therein alleged are insufficient to constitute a cause of action, and (b) that for the same reason, since Ordinance 2543 makes it a



condition precedent to the issuance of a jitney bus license, as well as to the issuance of a driver's permit, that the applicant must have first filed the bond and obtained the permit required by such act of the legislature, the plaintiff is not entitled to maintain the first cause of action set forth in its complaint, as the facts therein alleged are insufficient to constitute a cause of action.

"(2) It is the contention of the plaintiff that, irrespective of whether such bond is to secure against personal injury only, and irrespective of whether the plaintiff is or is not a beneficiary in any bond required to be filed with the secretary of state by chapter 57 of the legislative acts of the state of Washington for the year 1916, the plaintiff is entitled as a matter of law upon the facts alleged in its complaint and in its reply to the defendants' amended answer to maintain each of the causes of action set forth in its complaint, and that the facts alleged in each are sufficient to constitute respectively a first and second cause of action as set forth in such complaint.

"(3) Should the court be of the opinion that the contentions of the defendants as set forth in ¶ 1 hereof are well founded in law, it may treat the demurrers of the defendants to the 'Reply to Amended Answer' (filed under one cover October 5, 1916) as a demurrer to the complaint and reply, and in the event such contentions of the defendants and such demurrers are sustained, that the plaintiff be allowed an exception as to each contention and each demurrer sustained, as well as an exception to the court's failure to sustain the contention of the plaintiff set forth in ¶ 2 hereof.

"(4) Should the court be of the opinion that the contentions of the defendants as set forth in ¶ 1 hereof are not well founded in law, but that the contention of the plaintiff as set forth in ¶ 2 hereof is well founded in law, and should the court overrule such contentions of the defendants and such demurrers, an exception is to be allowed to the defendants as to each contention and each demurrer so overruled, as well as an exception to the court's failure to sustain the contentions of the defendants as set forth in ¶ 1 hereof.

"(5) This stipulation is entered into in order to furnish to the defendants the opportunity of speedily presenting to the trial court the disposition of this case independent of technicalities on what defendants contend to be a controlling question of law, with the right in either party to except and timely appeal to the supreme court."

The cause was then submitted to the

judge of the superior court on the pleadings as supplemented by the stipulation, and the following judgment entered: "On this, the 14th day of October, 1916, this cause coming on for the entry of this order, plaintiff appearing by Newman & Kindall and C. W. Howard, its attorneys, and all of the defendants, excepting the defendant A. L. Allen, appearing by Morris J. Schwartz and Craven & Greene, their attorneys, and the court having examined the stipulation between the plaintiff and all of the defendants, excepting the defendant A. L. Allen, which stipulation was filed herein on the 14th day of October, 1916, and the court being of the opinion that the contentions of such defendants as set forth in ¶ 1 of such stipulation are well founded in law, sustains the same, and pursuant to the third paragraph of such stipulation treats the demurrers of such defendants to the 'Reply to Amended Answer' (filed under one cover October 5, 1916) as a demurrer to the complaint and reply and hereby sustains such demurrers and each of the same, to all of which the plaintiff asks and is severally allowed an exception, including a separate exception to the failure of the court to sustain the plaintiff's contention set forth in ¶ 2 of such stipulation, and including a separate exception to the sustaining of such contentions of such defendants, and a separate exception to the sustaining of each separate demurrer considered as addressed to both the complaint and reply. The plaintiff now electing in open court to stand on such complaint and reply and declining to further plead, it is by the court ordered that plaintiff's action be and the same is hereby dismissed at plaintiff's costs in the sum of \$—— to be taxed by the clerk of this court."

The plaintiff appeals.

From the recitals in the stipulation and judgment it is gathered that the trial court rested its conclusion on the ground that neither of the causes of action set out in the plaintiff's complaint stated a cause of action because the plaintiff was not a beneficiary of the bond required by statute to be given by operators of motor propelled vehicles carrying passengers for hire in cities of the first class as a condition precedent to such operation. The reasoning seems to be that, since the bond required to be executed by the operators of jitney busses in the class of cities named is only for the protection against personal injuries of passengers carried, the plaintiff, as an operator of a different mode of carriage, has no interest therein, and cannot for that reason complain of a violation of the statute or ordinance. But it has

seemed to us that this reasoning does not meet the actual cause of action set forth in the complaint. In substance the cause of action set forth is that the plaintiff has a franchise authorizing it to operate a street car system in the city of Bellingham by which it carries passengers for hire; that the defendants engage in the business of carrying passengers for hire in the same city in violation of both the ordinances of the city and the state statutes; and that such operation is specially injurious to the plaintiff as it deprives it of revenues which it would otherwise receive. The actual question presented, therefore, is, Do these facts entitle the plaintiff to injunctive relief?

It is our opinion that a cause of action is stated in each of the separate causes of action set forth in the complaint, and this for at least two reasons: First, the plaintiff has a franchise granted it by the sovereign power, authorizing it to carry passengers for hire on the streets of the city of Bellingham. This franchise is property, and any unlawful interference therewith is actionable. It is true the franchise is not exclusive in the sense that the sovereign power may not grant a similar right to another, but it is exclusive against anyone who assumes to exercise the privilege of carrying passengers in the absence of authority or in defiance of the laws regulating the privilege. To do so is unlawful, and since the plaintiff is injuriously affected thereby, it is entitled to injunctive relief. *Memphis Street R. Co. v. Rapid Transit Co.* 133 Tenn. 99, L.R.A. 1916B, 1143, P.U.R.1916A, 834, 179 S. W. 635, Ann. Cas. 1917C, 1045; *Walker v. Armstrong*, 2 Kan. 198; *Patterson v. Wollmann*, 5 N. D. 608, 33 L.R.A. 536, 67 N. W. 1040; *Boston & L. R. Corp. v. Salem & L. R. Co.* 2 Gray, 1; *Tulsa Street R. Co. v. Oklahoma Union Traction Co.* 27 Okla. 339, 113 Pac. 180; *Memphis Street R. Co. v. Rapid Transit Co.* 138 Tenn. 594, 198 S. W. 890; *McQuillin, Mun. Corp.* § 1771; 6 Pom. Eq. Jur. §§ 583, 584.

Again, to engage in any form of business in defiance of laws regulating or prohibiting the business is a nuisance per se, and a person so engaging therein may, in this jurisdiction, be enjoined from so doing by anyone suffering a special injury thereby. *Rem. Code*, §§ 943, 944, 8316; *Carl v. West Aberdeen Land & Improv. Co.* 13 Wash. 616, 43 Pac. 890; *Ingersoll v. Rousseau*, 35 Wash. 92, 76 Pac. 513, 1 Ann. Cas. 35; *Sholin v. Skamania Boom Co.* 56 Wash. 303, 28 L.R.A.(N.S.) 1053, 105 Pac. 632; *Ingalls v. Eastman*, 61 Wash. 289, 112 Pac. 372; *Cunningham v. Weedon*, 81 Wash. 96, 142 Pac. 453. And such an action will lie

even though there may be for the wrong committed the legal remedy of arrest and punishment. *City Cab, Carriage & Transfer Co. v. Hayden*, 73 Wash. 24, L.R.A. 1915F, 726, 131 Pac. 472, Ann. Cas. 1914D, 731; *Huntworth v. Tanner*, 87 Wash. 670, 152 Pac. 523, Ann. Cas. 1917D, 676; *State ex rel. Berry v. Superior Ct.* 92 Wash. 16, 159 Pac. 92.

These conclusions, it is plain, require a reversal of the judgment in so far as it is founded upon the insufficiency of the facts stated in the complaint. The respondents, however, suggest other matters appearing on the face of the pleadings which are thought to require an affirmative, and these it is proper to briefly notice. It is said that the respondents are operating lawfully within the city of Bellingham in virtue of having taken out "For Hire" licenses under chapter 142 of the Laws of 1915, and of having obtained a permit to operate in the city of Bellingham under an ordinance of that city. But the "For Hire" license alone does not permit the carrying of passengers in motor propelled vehicles in cities of the first class. Before that privilege is authorized a bond must be furnished and a permit obtained pursuant to chapter 57 of the statutes of the same year. Nor is the latter statute inapplicable because the respondents do not operate on fixed routes, or because they charge different rates of fare for different distances, or because they sometimes carry passengers across the boundary lines of the city. The prohibition is against carrying passengers within a city of the first class in the vehicles named, and is operative so long as the passenger is being carried therein in the prohibited vehicles, no matter over what route, for what fare, or to what destination. Nor does the permit obtained from the city authorize such carriage. If it purports so to do, it is not only in violation of the statute last referred to, but is in violation of the later ordinance upheld by this court in the case of *Allen v. Bellingham*, 95 Wash. 12, 163 Pac. 18.

Again, it is said that the bond required by the statute is impossible of procurement. This, however, is not an admitted fact in the record. While it is so alleged in one of the affirmative answers, it is denied in the reply, and as the case now stands is not to be taken as true. But, conceding it to be true, it would not constitute a defense. This we have held in the recent case of *Hadfield v. Lundin*, 98 Wash. 657, 168 Pac. 516.

Finally, it is said that the damages alleged are not special within the meaning of the rule permitting injunctive relief against one who unlawfully interferes with the

property rights of another. If we have correctly caught the respondents' meaning, the objection is that losses inflicted upon the plaintiff are incidental rather than direct, since there is no actual injury to its physical property. But the rule is not so narrow as the objection assumes. The sole income of the plaintiff's business is derived from the fares collected of passengers whom it carries, and any deprivation of these fares is an interference with its property, wrongful and subject to be restrained by injunction if the interference is in violation of positive law or otherwise without legal right. Such is the effect of our decisions in *Cherry Point Fish Co. v. Nelson*, 25 Wash. 558, 66 Pac. 55, and *Ingersoll v. Rousseau*, 35 Wash. 92, 76 Pac. 513, 1 Ann. Cas. 35, and the point was directly so ruled in the case cited from the Tennessee reports.

Since there must be a reversal, it remains to inquire what form of judgment shall be directed. As to the second cause of action it is plain that the affirmative matter in the answer constitutes no defense, since it is admitted that the bond required by the statute therein set forth has not been

procured by the defendants, and since such a bond is required by carriers of passengers in cities of the first class in motor propelled vehicles, whatsoever may be the form of such carriage. As to the cause of action founded upon the city ordinance, a defense is stated, since the ordinance is directed against jitney bus operation, and the respondents have denied that they operate their vehicles as jitney busses, as such operation is defined in the ordinance. Our conclusion, therefore, is that the temporary injunction issued should be kept in force until such time as the defendants comply with the bonding statute and make a showing of such compliance to the trial court. As to the first cause of action, the issue of fact suggested may be tried out and a judgment entered in accordance with the fact as it may be then determined.

The judgment entered is reversed, and the cause remanded, with instructions to proceed as herein directed.

Mount, Parker, and Holcomb, JJ., concur.

Petition for rehearing denied July 17, 1918.

### Annotation—Regulation of jitney busses.

Earlier cases covering the question under annotation will be found in notes to *Dickey v. Davis*, L.R.A.1915F, 840; *Memphis v. State*, L.R.A.1916B, 1151, and *Hadfield v. Lundin*, L.R.A.1918B, 909.

#### Discrimination and classification.

Supplementing note in L.R.A.1918B, 913.

An ordinance which discriminates against aliens by refusing licenses to run jitneys through its streets for the carriage of passengers is constitutional. *Morin v. Nunan* (1918) — N. J. L. —, 103 Atl. 378.

#### Necessity of license to operate jitney.

Supplementing notes in L.R.A.1916B, 1157, and L.R.A.1918B, 914.

A corporation operating a motor car for transportation of passengers for hire in and between several towns may be required to take out a license to operate in the streets of one of such towns, although a license has been taken out at its principal place of business. *Opdyke v. Anniston* (1918) — Ala. App. —, 78 So. 634.

#### Regulations as to license fees.

Supplementing notes in L.R.A.1916B, 1157, and L.R.A.1918B, 914.

The requirement of the payment of L.R.A.1918F.

\$5 for each license issued is not, as a matter of law, a tax on property rather than a fee. *Com. v. Slocum* (Mass.) *infra*.

Nor is such a fee excessive in view of the normal expenses incidental to the system of registration and inspection established by the ordinance. *Ibid*.

A license fee required of the operator of a jitney bus is not an occupation tax. *Ex parte Parr* (1918) — Tex. Crim. Rep. —, 200 S. W. 404.

An ordinance regulating jitney busses is not invalid because of the authority therein given to revoke a license to operate a jitney, granted in accordance with its provisions. *Ibid*.

#### Regulation as to bonds.

Supplementing notes in L.R.A.1916B, 1158, and L.R.A.1918B, 914.

The requirement of a municipal ordinance that the licensee of a motor vehicle used for the transportation of passengers for hire shall furnish a bond in the penal sum of \$1,000 for the benefit of those who may be injured by the carelessness of the licensee or his employees is not unreasonable. *Com. v. Slocum* (1918) 230 Mass. 180, 119 N. E. 687.

Nor is the requirement that an applicant for a license to operate a jitney

shall furnish a bond in the sum of \$10,000 unreasonable. *Ex parte Parr (Tex.) supra.*

Nor is the power vested in the city treasurer to require a further surety or sureties upon the bond, after determining that the existing sureties are insufficient, open to sound objection. *Com. v. Slocum (Mass.) supra.*

See also *PUGET SOUND TRACTION, LIGHT, & P. Co. v. GRASSMEYER*, ante, 469, as to validity of regulation requiring bond and effect of inability to procure bond.

**Regulations, routes, schedules, and fares.**

Supplementing notes in L.R.A.1916B, 1159, and L.R.A.1918B, 915.

An ordinance which prohibits the

operator of a jitney bus to take on or discharge any passenger within 700 feet of a street upon which street car service is maintained is not within the statutory power given to a city "to pass all ordinances necessary to the health, convenience, comfort, and safety of the citizens," and is invalid as arbitrary and unreasonable. *Curry v. Osborne (1918) — Fla. —, — A.L.R. —, 79 So. 293.*

An ordinance regulating jitneys, passed under the initiative and referendum clause of a city charter, is invalid where, by express provision of the charter, the regulation of vehicles is conferred upon a board of commissioners. *Lindsley v. Dallas Consol. Street R. Co. (1917) — Tex. Civ. App. —, 200 S. W. 207.* J. H. B.

**WISCONSIN SUPREME COURT.**

ETTA KUETBACH, Resp't.,

v.

INDUSTRIAL COMMISSION OF WISCONSIN et al., Appts.

FERDINAND KUETBACH, by Guardian ad Litem, Appt.,

v.

INDUSTRIAL COMMISSION OF WISCONSIN et al., Respts.

(166 Wis. 378, 165 N. W. 302.)

**Workmen's Compensation — time of ascertaining dependence — child conceived before accident.**

A dependent father with whom a son was living when injured is entitled to the compensation awarded for the injury, under a statute providing that persons who constitute dependents shall be determined as of the date of the accident, rather than one whom the injured person marries between the date of injury and that of death, or a child conceived before the accident but born after and legitimized by the marriage.

*For other cases, see Master and Servant, II, a, 1, in Dig. 1-52 N. S.*

(December 4, 1917.)

**A** PPEALS by the Industrial Commission and the minor plaintiff from a judgment of the Circuit Court for Dane County setting aside an award of the Commission to defendant Kuetbach, for the death of his son, and denying compensation to the minor

**Note.** — As to who may be "dependents" within the meaning of the Compensation Statutes, see annotation following *Parson v. Murphy*, post, 483, and references therein to annotations on related questions.

L.R.A.1918F.

plaintiff, in consolidated actions brought under the Workmen's Compensation Act for his accidental death. Reversed on appeal of the Commission.

**Statement by Rosenberry, J.:**

Both of the above-entitled actions arise out of the same accident, and they will therefore be treated together. Claim for compensation for accidental death. The deceased, Ferdinand Kuetbach, Jr., on and prior to December 18, 1915, the date of the accident, was in the employ of the defendant Washington Cutlery Company, and living with his father Ferdinand Kuetbach, Sr., who was dependent upon him for support. Prior to this time, as a result of illicit intimate relations between the deceased and the respondent Etta Kuetbach, she was pregnant by the deceased. On May 18, 1916, the deceased and Etta Kuetbach were married. On June 5, 1916, as a result of accidental injuries, the death of Ferdinand Kuetbach, Jr., occurred, and on June 21, 1916, Ferdinand Edward Kuetbach, the minor, was born. The widow, Etta Kuetbach, was living with her husband, Ferdinand Kuetbach, Jr., at the time of his death. The matter was presented to the Industrial Commission and issue joined, and, upon the hearing, the Commission made an award, giving compensation to the father, Ferdinand Kuetbach, Sr. Etta Kuetbach, the widow, brought an action in the circuit court for Dane county to review the award of the Commission, and Ferdinand Edward Kuetbach, minor, by his guardian, brought a like action to review the award. Upon the trial, the circuit court reversed the award of the Commission as to the father, awarded compensation to the widow, and denied compensation to the

minor child. From the judgment of the circuit court Ferdinand Edward Kuetbach, minor, appeals in the one case, and the Industrial Commission, Washington Cutlery Company, and Ferdinand Edward Kuetbach, minor, appeal in the other case.

Mr. Emmet Horan, Jr., guardian ad litem, for appellant Kuetbach:

Plaintiff is entitled to an award as provided by law, as the minor son of the deceased, for the reason that, even at the time of the accident, he was a dependent of the deceased within the terms of the act.

Zachmann v. Zachmann, 201 Ill. 380, 94 Am. St. Rep. 180, 66 N. E. 256; Wallace v. Wallace, 137 Iowa, 37, 14 L.R.A.(N.S.) 544, 126 Am. St. Rep. 253, 114 N. W. 527, 15 Ann. Cas. 761; Watts v. Owens, 62 Wis. 512, 22 N. W. 720; Muhl v. Michigan Southern R. Co. 10 Ohio St. 276; Hall v. Hancock, 15 Pick. 255, 26 Am. Dec. 598; Williams v. Ocean Coal Co. [1907] 2 K. B. N. S. 422, 76 L. J. K. B. N. S. 1073, 97 L. T. N. S. 150, 23 Times L. R. 584, 9 W. C. C. 50; Day v. Markham, 6 W. C. C. 115; Galveston, H. & S. A. R. Co. v. Contreras, 31 Tex. Civ. App. 489, 72 S. W. 1051; Harness v. Harness, 50 Ind. App. 364, 98 N. E. 358; Miller v. Pennington, 218 Ill. 220, 1 L.R.A.(N.S.) 773, 75 N. E. 919; Brewer v. Hamor, 83 Me. 251, 22 Atl. 161.

Messrs. W. C. Owen, Attorney General, and Winfield W. Gilman, Assistant Attorney General, for the Industrial Commission:

Etta Kuetbach was not dependent upon deceased for support.

Borgnis v. Falk Co. 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; Hite v. Keene, 137 Wis. 625, 119 N. W. 303; Woodman v. Clapp, 31 Wis. 355; Crockett v. International R. Co. 176 App. Div. 45, 162 N. Y. Supp. 357; Milwaukee v. Ritzow, 158 Wis. 376, 149 N. W. 480, 7 N. C. C. A. 498; O'Connell v. Simms Magnet Co. 85 N. J. L. 64, 89 Atl. 922, 4 N. C. C. A. 590.

At the date of the accident the minor plaintiff was in no way dependent upon deceased for support, and was not at the time a child of deceased, within the meaning of the statute; the conclusive presumption of dependency arises only as to one who was a child of the injured employee at the time of the accident.

Zachmann v. Zachmann, 201 Ill. 380, 94 Am. St. Rep. 180, 66 N. E. 256; Wallace v. Wallace, 137 Iowa, 37, 14 L.R.A.(N.S.) 544, 126 Am. St. Rep. 253, 114 N. W. 527, 15 Ann. Cas. 761; Watts v. Owens, 62 Wis. 512, 22 N. W. 720; Briggs v. Mitchell [1911] S. C. 705, 48 Scot. L. R. 606, 4 B. W. C. C. 400.

Messrs. Bloodgood, Kemper, & Bloodgood, for respondent Etta Kuetbach:

Etta Kuetbach is entitled to an award as provided by law.

Crockett v. International R. Co. 176 App. Div. 45, 162 N. Y. Supp. 357.

Messrs. Brown, Pradt, & Genrich for respondent Washington Cutlery Company.

Mr. August C. Moeller for respondent Ferdinand Kuetbach.

Rosenberry, J., delivered the opinion of the court:

By stipulation of the parties, the issue in the cases, which it was agreed should be tried and heard together, both in this and in the circuit court, is narrowed so as to present one question, to wit, the construction of subsections 3, 4, and 5 of § 2394—10, Stat., which are as follows:

"(3) The following shall be conclusively presumed to be solely and wholly dependent for support upon a deceased employee: (a) A wife upon a husband with whom she is living at the time of his death; (b) a husband upon a wife with whom he is living at the time of her death; (c) a child or children under the age of eighteen years (or over said age, but physically or mentally incapacitated from earning), upon the parent with whom he or they are living at the time of the death of such parent, there being no surviving dependent parent. . . .

"In all other cases questions of entire or partial dependency shall be determined in accordance with the fact, as the fact may be at the time of the accident to the employee; and in such other cases, if there is more than one person wholly dependent, the death benefit shall be divided equally among them, and persons partially dependent, if any, shall receive no part thereof; and if there is more than one person partially dependent, the death benefit shall be divided among them according to the relative extent of their dependency.

"(4) No person shall be considered a dependent unless a member of the family of the deceased employee, or a divorced spouse who has not remarried, or one who bears to him the relation of husband or widow, or lineal descendant, or ancestor, or brother, or sister.

"(5) Questions as to who constitute dependents and the extent of their dependency shall be determined as of the date of the accident to the employee, and their right to any death benefit shall become fixed as of such time irrespective of any subsequent change in conditions, and the death benefit shall be directly recoverable by and payable to the dependent or dependents entitled thereto or their legal guardians or trustees; provided that in case of the death of a dependent whose right to a death bene-

fit has thus become fixed, so much of the same as is then unpaid shall be recoverable by and payable to his personal representatives in gross. No person shall be excluded as a dependent who is a nonresident alien."

The claims of the respective parties may be stated as follows: The Industrial Commission claims that all questions as to who constitute dependents and the extent of their dependency must be determined as of the date of the accident to the employee; that Etta Kuetsch was not the wife of the deceased at the time of the injury, and therefore not a dependent within the meaning of the statute, although she was his wife and living with him at the time of his death; that as to the minor, Ferdinand Edward Kuetsch, he was not, at the time of the accident, a legitimate child en ventre sa mère; that no actual dependency could be proven on the date of the accident nor at the time of the death of the deceased, and that subsequent changes, such as the marriage of the deceased and Etta Kuetsch, could not enlarge the rights of the unborn child, inasmuch as the rights of all parties are to be determined, in accordance with subsection 5, as of the date of the accident. The claim of the employer company coincides with that of the Industrial Commission.

On behalf of Etta Kuetsch it is claimed that she was a wife dependent upon the husband with whom she was living at the time of his death, and therefore entitled to compensation under the provisions of subdivision (a) of subsection 3; that the infant, Ferdinand Edward Kuetsch, is not entitled to compensation because Etta Kuetsch was a surviving dependent parent, and therefore Ferdinand Edward is not within the terms of subdivision (c), subsection 3.

On behalf of Ferdinand Edward Kuetsch it is claimed that the widow, Etta Kuetsch, is not entitled to compensation because she was not the wife of the deceased on the date of the injury, as of which date all questions of dependency should be determined; that Ferdinand Edward Kuetsch was conceived between September 13 and September 21, 1915, and was, therefore, on the date of the accident, en ventre sa mère, and while not legitimate on that date he was legitimized by the subsequent marriage of the deceased and Etta Kuetsch, that, when so legitimized, his rights relate back to the date of the conception, and that Ferdinand Edward therefore is a lawful descendant and entitled to compensation as such, under subsection 4 of § 2394—10 and wholly dependent in fact.

It must be admitted that the situation presented is a puzzling one, and one probably not in contemplation of the legislature

at the time of the enactment of the statute in question.

Section 2394—10 relates to the method of computing the compensation to be awarded the injured employee. As one of the factors in such computation there must be determined the degree of dependency, whether entire or partial, and, if partial, the compensation must be determined in accordance with the fact. Having in mind, no doubt, that many perplexing questions would be presented, the exact nature of which could not be foreseen, the legislature, by subsection 5, provided that all questions as to *who constitute dependents and the extent of their dependency shall be determined as of the date of the accident to the employee*, and their right to any death benefit shall become fixed as of such time, irrespective of any change in conditions, and makes the death benefit payable directly to the dependent, his guardian or trustee, and, in case of his death, to his personal representatives. By subdivisions (a), (b), and (c), subsection 3, the degree of dependency in the cases falling within the terms of these subdivisions is not to be inquired into, but is to be conclusively presumed. But, before any person may be solely and wholly dependent, he must be first brought within the class of those who constitute dependents, and whether or not a person is one of a class of dependents is to be determined as of the date of the accident, and not as of the date of the death of the injured employee. Therefore, a wife living with her husband at the date of his death, who was not his wife at the time of the accident, is not a dependent within the meaning of the statute. If the injured party has a wife on the date of the accident and if thereafter, and before his death, she deserts him, she would still be a dependent, but she would not be presumed to be solely and wholly dependent upon the deceased, and the degree of her dependency would be determined in accordance with the fact under the provisions of subdivision (c). Upon the date of the accident, the date as of which the question of who are dependents and the extent of their dependency must be determined, the father was the sole dependent, and, in accordance with the express language of the statute, he cannot be deprived of the death benefit by any subsequent change in conditions, such as the marrying of the injured son. So, as between Etta Kuetsch and the father, Ferdinand Kuetsch, it must be held that he is entitled to the compensation.

We are not called upon in this case to determine what the result would be in case a man were lawfully married, his wife pregnant and living with him when he was in-

jured, thereafter the child should be born, the wife should die, and later the husband should die. The question presented by this record is entirely different. Here there was no valid marriage at the time of the conception of the child, and at the time of the accident the status of the child was not fixed. It might thereafter be made the legitimate child of the deceased by his subsequent marriage to Etta Kuetsbach, but it certainly was not such on the day on which the accident occurred, as of which date all questions of dependency must be determined. In this case there was a subsequent change, to wit, the intermarriage of the deceased and Etta Kuetsbach, and the statute expressly says that any subsequent change shall not alter the rights of parties, which are to be determined as of the date of the accident. To place any other construction upon this statute is to ignore and construe away the plain language of subsection 5. If this case and other cases indicate to the legislative mind that there is a class of cases which should be excepted from the provisions of subsection 5, then the remedy should be by legislative enactment, and not by ignoring the clear language of the law.

It is strongly urged that subdivision (a) of subsection 3 creates a separate class of dependents, and fixes the degree of their dependency, and that, when the fact is established that the wife was living with her husband at the time of his death, the fact of dependency and the degree of dependency are conclusively established in accordance with the provisions of subdivision (a).

Such a construction ignores the plain language of subsection 5. So construed, subdivisions (a), (b), and (c), subsection 3, would be in the nature of exceptions to the provisions of subsection 5, and to that

extent in conflict with it. Subsection 3 prescribes the method of determining the degree of dependency. Subsection 4 limits the dependents to the classes of persons therein described, and subsection 5 prescribes the time as of which all questions relating to dependency and to the degree of dependency are to be determined. No claimant can bring himself within the provisions of the act, except by establishing that he was, on the date of the accident, within the class of persons described in subsection 4. Having established that fact, if it further appears that he was within the provisions of subdivisions (a), (b), or (c), subsection 3, the degree of dependency is conclusively established, and in all other cases it must be proven and found in accordance with the fact as of the date of the accident. Such, we think, was clearly the legislative intent. The legislature may, with good reason, have come to the conclusion that parents who have reared a child are quite as much entitled to the benefits of compensation as a woman who, after a man is injured, marries him with full knowledge of all the facts. She lost nothing by the accident. The parents or other dependents may have lost their sole means of support. We are not concerned here with the policy of the law; the law is clear, and the legislative intent is plain, and it is our duty to give it effect.

On the appeal of Ferdinand Edward Kuetsbach the judgment of the Circuit Court is affirmed. On the appeal of the Industrial Commission et al. the judgment of the Circuit Court is reversed and the cause remanded, with directions to the Circuit Court to enter judgment affirming the award of the Industrial Commission. No costs on either appeal.

## NEBRASKA SUPREME COURT.

EMALINE CLARA PARSON, Appt.,  
v.

JOSEPH F. MURPHY et al., Guardians,  
etc.

(101 Neb. 542, 163 N. W. 847.)

### Workmen's compensation — Liability Act — dependency.

1. In the meaning of the Workmen's Compensation Act, "dependency" is not based

Headnotes by DEAN, J.

Note. — As to who may be "dependents" within the meaning of the Compensation Statutes, see annotation following this case, post, 483, and references therein to annotations on related questions.

solely upon a present legal obligation to support.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

### Evidence — sufficiency.

2. Evidence examined, discussed in the opinion, and held, that plaintiff is a dependent within the meaning of the act.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

### Workmen's compensation — dependency — how determined.

3. Under the Workmen's Compensation Act, the question of dependency is not determined by the fact that a decedent had or had not actually contributed to the support of a parent before the date of the accident.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(July 10, 1917.)

**A**PP<sup>EAL</sup> by plaintiff from a judgment of the District Court for Douglas County in defendants' favor in a proceeding to secure compensation, under the Workmen's Compensation Act, for the alleged wrongful death of plaintiff's son. Reversed.

The facts are stated in the opinion.

Mr. Henry J. Beal for appellant.

Messrs. Mahoney & Kennedy and Guy C. Kiddoo, for appellees:

The legal liability of a son to support his parent does not make the parent dependent under the Workmen's Compensation Law, where the son is not, in fact, discharging his legal obligation, and is not actually contributing to the support of the parent.

*Pinel v. Rapid City R. System*, 184 Mich. 169, 150 N. W. 897; *Roberts v. Whaley*, 192 Mich. 133, L.R.A.1918A, 189, 158 N. W. 209; *Milwaukee v. Miller*, L.R.A.1916A, 122, note; *New Monckton Collieries v. Keeling* [1911] A. C. 648, 80 L. J. K. B. N. S. 1205, 105 L. T. N. S. 337, 27 Times L. R. 551, 55 Sol. Jo. 687, 4 B. W. C. C. 332, 6 N. C. C. A. 240.

The fact that a parent may be a public charge does not make her dependent.

1 *Bradbury*, Workmen's Compensation, p. 582; *Boyd*, Workmen's Compensation, § 501; *Milwaukee v. Miller*, L.R.A.1916A, 125, note; *New Monckton Collieries v. Keeling*, [1911] A. C. 648, 80 L. J. K. B. N. S. 1205, 105 L. T. N. S. 337, 27 Times L. R. 551, 55 Sol. Jo. 687, 4 B. W. C. C. 332, 6 N. C. C. A. 268.

A promise of a son to support his mother is not enough to make her dependent.

*Re Britten* (1912) Mass. W. C. C. 9.

If there is no pecuniary loss, no compensation is due.

*State ex rel. Gaylord Farmers Co-op. Creamery Asso. v. District Ct.* 128 Minn. 486, 151 N. W. 182, 9 N. C. C. A. 86; *New Monckton Collieries v. Keeling* [1911] A. C. 648, 80 L. J. K. B. N. S. 1205, 105 L. T. N. S. 337, 27 Times L. R. 551, 55 Sol. Jo. 687, 4 B. W. C. C. 332, 6 N. C. C. A. 240.

**Dean, J.**, delivered the opinion of the court:

On January 29, 1917, Emaline C. Parson, plaintiff and appellant, began this action in the district court for Douglas county against defendants, in pursuance of the provisions of the Workmen's Compensation Act (Rev. Stat. 1913, §§ 3642-3696), alleging, generally, that on March 23, 1916, her son Nels Parson, now deceased, while in the employ of Edward Carr, one of the defendants, was kicked by a vicious mule that he was driving, and that was owned by Mr. Carr, and that, as a result of the

injuries so received, her son died two days thereafter. Plaintiff alleged that her son was her only support, and that she is the only surviving relative who sustained to Nels Parson the relation of dependent. She prays for judgment for the amount of one half of her son's wages for 350 weeks, together with \$100 expenses and \$90 hospital and physician's expenses, and for costs.

For answer defendants admit the employment of plaintiff's son, but allege it was only casual, and that the dependents of Nels Parson, if any, are therefore not entitled to the benefits of the Workmen's Compensation Law; deny that Nels Parson's death was caused by or contributed to by any personal injury by accident arising in the course of his employment by the defendants, and that his death was due to other causes, separate from any injury sustained while in defendants' employ, and that the injuries were due to wilful negligence and to intoxication, and that plaintiff's son never contributed to her support, so as to entitle her to claim benefits as a dependent under the Workmen's Compensation Act.

The trial court found generally in favor of defendants, and rendered a judgment against plaintiff for costs. Mrs. Parson has brought the case here for review.

The Employers' Liability Act, in § 3665, Rev. Stat. 1913, among other things, provides: "Dependents.—The following persons shall be conclusively presumed to be wholly dependent for support upon a deceased employee: (a) A wife upon a husband with whom she is living at the time of his death; (b) husband upon a wife with whom he is living at the time of her death; (c) child or children under the age of sixteen years (or over said age, if physically or mentally incapacitated from earning) upon the parent with whom he is or they are living at the time of death of such parent, there being no surviving parent.

... (e) In all other cases, questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury.

... (f) No person shall be considered a dependent, unless he or she be a member of the family of the deceased employee, or bears to him the relation of widow or widower, or lineal descendant, or ancestor, or brother, or sister. (g) Questions as to who constitute dependents and the extent of their dependency shall be determined as of the date of the accident to the employee, and the death benefit shall be directly recoverable by and payable to the dependent or dependents entitled thereto, or their legal guardians or trustees."

Defendants insist that the injury sus-



tained by Nels Parson was due to his wilful negligence and to intoxication. The act expressly provides that the burden of proof to establish wilful negligence on the part of an injured employee is on the defendant. In the present case defendants introduced no testimony, and there is no proof of such negligence before us. Some testimony was brought out on cross-examination, showing that plaintiff's son was intoxicated to some extent when he was injured; but it is nowhere shown that his intoxication in any way contributed to his injury, and, without proof, we will not assume that it did.

Mrs. Parson is a widow about seventy-seven years of age, and unable to work on account of illness and extreme old age. For her sole support she has \$300 or \$400 deposited in a bank, which draws 4 per cent interest. When this sum is expended, she will be reduced to penury and will become a public charge. Her son was a single man when injured, about forty years of age, without any other person dependent upon him. She testified that in November, 1915, about five months before the injury, she received a letter from him in which he promised to come and live with her and to support her, but that soon thereafter he became ill and could not do so.

Defendants argue in their brief that "the question of the right of the plaintiff to compensation must be determined by whether or not the deceased was actually contributing to her support. If he was not, she incurred no pecuniary loss by reason of his death, and consequently is entitled to no compensation. . . . The plaintiff has not lost one iota of the support upon which she was dependent prior to Nels Parson's death."

Elsewhere in their brief, defendants concede that "If, in the case at bar, Mrs. Parson had been living with her deceased son, and had been supported by him, there would be no question as to her right to compensation."

Defendants' argument on this point cannot be sustained. We believe the statute is susceptible of an interpretation that more nearly accords with the main purpose of its enactment. The act is one of general interest, not only to the workman and to his employer, but as well to the state, and it should be so construed that technical refinements of interpretation will not be permitted to defeat it. Among its objects are these: That the cost of the injury may be charged to the industry in which it occurs; the prevention of tedious and costly litigation; a speedy settlement between employer and employee; and to prevent dependent persons from becoming a

public burden. To adopt defendants' argument would require us to announce a rule that is not warranted by the act, nor by common experience. It is not shown that the widow's son made any contributions to her support. But in any event this feature is not important, in view of our holding that the question of contribution, as it is contended for by defendants, is not controlling.

To illustrate: For its daily bread a family is ordinarily dependent upon the daily labor of the head of the household. The breadwinner, a day laborer with little means, is stricken. There remain surviving a widow, who, by reason of age, is unable to support herself, and a wage-earning son who is without dependents, and who has not recently lived with his parents, nor has he ever contributed to the support of either. In such case, would it be seriously contended that the mother was not a dependent of her son in the ordinary and everyday meaning of the word, even though, when her husband died, she may have been provided with a small store of food and raiment to supply her every present need, sufficient for a few weeks or months, at most? Will it be argued that a supply of food that would sustain life for a day or a week would take plaintiff out of the dependent class? We cannot hold that the legislature contemplated a construction at once so literal, so restricted, and so unreasonable.

That plaintiff's son was capable of earning the wages usual to his employment affirmatively appears, and is not challenged in the record. But for the accident, he would now, in human probability, be a wage-earner, and thus be in position to support plaintiff in pursuance of his promise. It is always presumed, until overcome by proof, that a man will do his duty. It cannot be known, and it will not be presumed, that Nels Parson, if living, would be unmindful of his filial duty, with or without promise, to support his aged and dependent parent. The question of legal liability to support does not, of itself, determine the question at issue; nor, in the present case, will the fact that Nels Parson was only occasionally employed by defendants defeat plaintiff's action, as argued by them.

The statute nowhere undertakes to define dependency. Its language is that "dependency shall be determined as of the date of the accident to the employee." If, then, plaintiff was not a dependent of her son Nels, upon whom was she dependent? Surely, in view of the facts, she could look to him for support. So far as the record and plaintiff's argument shows, her son fulfilled every statutory requirement, unless

such requirement makes it imperative that, at "the date of the accident," he should have been living with and at the time actually supporting his mother. This we think is too technical, and we cannot adopt defendants' reasoning on this point. Dependency, under the statute, may perhaps be held to mean such food, clothing, and shelter as may be necessary for the living of a person in his class and station, as distinguished from provision for the bare wants of existence. It is substantially the same principle that is involved in determining, in a proper case, what would be necessities for a minor. In view of the record and of the law, we decline to hold that because a portion of plaintiff's meager store remains unused, and because she neither lived with nor was supported by her son, she was not therefore his dependent at the time of the injury.

Defendants cite *Pinel v. Rapid R. System*, 184 Mich. 169, 150 N. W. 897; but it does not seem to be applicable to the case at bar, for the reason, among others, that the claimant had a life lease on a farm of 87 acres in Macomb county and another son resided with her. *Crockett v. International R. Co.* 176 App. Div. 45, 162 N. Y. Supp. 357, is a case where the employee married within six days after sustaining the injury from which he subsequently died. Suit was commenced by his widow, and it was held that she was his dependent at the date of the accident, notwithstanding the statute provided that "all questions of dependency shall be determined as of the time of the accident." In that case the rule was relaxed, and the decision based on the ground that plaintiff was the "surviving wife," and as such was entitled to compensation under the statute, because, at the time of her husband's death, she came within a class that the statute conclusively fixed as dependent. *Sweet v. Sherwood Ice Co.* — R. I. —, 100 Atl. 316, reviews some of the cases on the question of dependency and says: "They do not baldly hold that the legal obligation determines the question of dependency, but that such legal obligation must be coupled with a reasonable probability that such obligation will be fulfilled."

See *Purdy v. Watts*, 91 Conn. 214, 99 Atl. 496; 1 *Bradbury, Workmen's Compensation*, 2d ed. 575 et seq; *Dobbies v. Egypt & L. S. S. Co.* [1913] S. C. 364, 50 Scot. L. R. 222, 6 B. W. C. C. 348; *Indsay v. M'Glashen & Son* [1908] S. C. 762, 45 Scot. L. R. 559, 1 B. W. C. C. 85.

The word "dependent" should not be given its narrowest nor its most literal meaning, when considered in connection with the act in question, its aims and objects. 1 *Bradbury, Workmen's Compensation*, 2d ed. 571,

gives this definition: "The expression 'dependent' means dependent for the ordinary necessities of life for a person of that class and position in life, taking into account the financial and social position of the recipient."

In *Powers v. Hotel Bond Co.* 89 Conn. 143, 93 Atl. 245, in which is involved a like act, it is aptly said that: "The act, by eliminating the proof of negligence, by minimizing the delay in the award, and by making it reasonably certain, seeks to avoid the great waste of the tort action, and to promote better feeling between workmen and employer, and accepts, as an inevitable condition of industry, the happening of the accident, and charges its cost to the industry."

*Kennerson v. Thomas Towboat Co.* 89 Conn. 367, L.R.A.1916A, 436, 94 Atl. 372: "George Marsdale left surviving him two brothers, a sister, and a mother, claimant herein. He had, during the illness of his father, sent his mother, from July until his father's death, November 10, 1913, \$10 a week of his weekly wages of \$15. After her husband's death, the mother went to live with her son Charles, temporarily, and on December 9, 1913, the decedent engaged in said employment with the respondent for \$30 a month and his board, worth 50 cents a day. Out of his earnings the decedent gave his mother from \$20 to \$25 a month, which sums were to pay the funeral expenses of her husband. These were just paid prior to George's death. The mother and decedent had arranged that, as soon as the funeral expenses were paid, her residence with her son Charles should cease, and they should then live together, and the decedent should support his mother. Except as stated, none of the children contributed to the support of their mother."

In that case it was held: "That Mrs. Marsdale, the mother of George Marsdale, was a total dependent of her son George."

It will be noted that George Marsdale did not contribute anything toward the support of his mother after his father's death, but that the money that he sent to her after that event was all devoted to the payment of the funeral expenses attendant upon the death of his parent, an item that was perhaps not chargeable to his mother in any event, though the record is silent on this point.

*Medler v. Medler*, 124 L. T. Jo. 410, 1 B. W. C. C. 332, holds: "A wife, who had been turned out of her home by her husband, and had not been living with or supported by him for eleven years before his death, but who had made endeavors to obtain support, was held to be in part dependent upon her husband's earnings at the

time of his death, within the meaning of Schedule I. (1) (a) (ii) of the act of 1906."

Speaking generally, it may be borne in mind that a dependent who avails himself of the act is deprived of having a jury pass upon any of the questions that pertain to the injury or the cause of death of the person upon whom he may be dependent for support, and for this reason, among others, the statute, which is remedial in its nature, should be liberally construed. If our statute means that, unless the son is actually contributing to the support of his mother at the time of the accident, she is not a dependent within its meaning, and, if this doctrine is established as a general rule, it would lead to strange conclusions. If such construction is proper, it is a very unfortunate statute, because, prior to its enactment, the mother could plainly recover damages for the death of a son who sustained to her the same relation as a dependent that Nels Parson sustained to plaintiff. That we have decided many times, and to now hold otherwise is to hold that the statute has done away with the plainest dictate of humanity. Under the law, the mother could compel her son to contribute to her support, and yet because he does not do so, and because she can live a month or so without his doing so, we construe the statute to mean that he need not support her, and that it was no advantage to her to have him in a position to do so. Under such circumstances, the facts existed at the time of the accident which would make her dependent upon her son, although he failed to perform his duty and failed to contribute anything towards her support. One may be at the present time dependent upon his growing crop of wheat for his daily bread, and yet a drouth may destroy the crop and deprive him entirely of that support. Can it be said that at the time that the wheat was in the process of maturing he was not dependent upon that crop? And so one may give any number of illustrations, all showing that the fact exists at the present time that we depend upon something for our support, although that particular thing may not be actually supporting us at the present time.

Boyd v. Pratt, 72 Wash. 306, 130 Pac. 371, construes a statute containing this language: "If the workman is under the age of twenty-one years and unmarried at the time of his death, the parents or parent of the workman shall receive \$20 per month for each month after his death until the time at which he would have arrived at the age of twenty-one years." Wash Laws, 1911, chap. 74, § 5, subd. 3.

It was there held that a parent, who is also a dependent, is entitled to the monthly payment during the continuance of dependency, and not merely to the time of majority.

Pittsburgh, C. C. & St. L. R. Co. v. Col-lard, 170 Ky. 239, L.R.A.1918E, 273, 185 S. W. 1108, is a recent case which construes the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L. chap. 149, p. 65, Comp. Stat. 1916, §§ 8657-8665). It is there held that "it is not necessary to prove that a decedent has made actual contributions to the support of his parents in order to establish a reasonable expectancy of pecuniary benefit from the continuance of his life."

The same case holds that declarations made by decedent that he intended to support his father were sufficient to sustain a verdict in behalf of the father. To the same effect is the following: Tobin v. Bruce, 39 S. D. 64, 162 N. W. 933. See also Garrett v. Louisville & N. R. Co. 117 C. C. A. 109, 197 Fed. 716, 8 N. C. C. A. 769; Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176.

The Employers' Liability Act is new to our state. The questions involved in its construction are not without difficulty. Adjudicated cases are not numerous, and there is some conflict among them, due in part to slight differences in the wording of the statutes of the different states. On the points in dispute we have adopted the rule that appears to us to harmonize with the true intent of the legislature. The judgment of the District Court is therefore reversed, and the cause remanded for further proceedings.

## Annotation—Who are "dependents" within the meaning of the Compensation Statutes.

### I. Introductory, 484.

#### II. Who may be dependents:

- a. In general, 484.
- b. Common-law wife, 484.
- c. Adopted children, 484.
- d. Illegitimate children, 485.
- e. Members of family, 485.

### II.—continued.

#### f. Next of kin, 485.

#### g. Legal beneficiaries, 485.

#### III. What constitutes dependency:

- a. In general, 486.
- b. Extent of dependency necessary, 486.

*III.—continued.*

*c. Effect of legal liability of employee to support claimant, 487.*

*d. Total or partial dependency, 488.*

*e. Facts showing dependency, 488.*

*I. Introductory.*

The general subject of Workmen's Compensation Acts is treated in annotations in L.R.A.1916A, 23, and L.R.A.1917D, 80. For later cases and annotations on Workmen's Compensation Statutes, consult the L.R.A. Indexes for volumes subsequent to L.R.A.1917D, under the title, "Workmen's compensation."

The question, "Who are dependents," is treated in the annotation in L.R.A.1916A, at pages 121 and 248, and in the annotation in L.R.A.1917D, at page 157, and the present annotation is supplementary thereto.

As to whether nonresident aliens may be dependents within the meaning of the Compensation Statutes, see annotation to *Re McDonald*, post, 493.

The question, "Who are dependents," naturally divides itself into two branches: First, who may be dependents; second, what constitutes dependency. No person is entitled to compensation under the statute unless he falls within one of the classes designated in the statute; nor can a member of one of the designated classes recover, unless, as a matter of fact, he is a dependent upon the deceased employee. Most of the statutes, however, provide that certain persons, such as a wife and infant children, shall, under specified circumstances, be presumed to be dependent upon the husband and father, so that, in these cases, proof of the relationship being established, the presumption operates to remove the necessity of proof of fact of actual dependency.

*II. Who may be dependents.**a. In general.*

Although the statutes, for the most part, define the classes of persons to whom compensation may be awarded, nevertheless a number of cases have arisen which pass upon the question whether or not the claimant falls within one of the statutory classes.

*b. Common-law wife.*

An award of compensation to a common-law wife has been sustained, under the New York statute. *Ziegler v. P. Cas-*

L.R.A.1918F.

*III.—continued.*

*f. Conclusive presumption of dependency, 491.*

*IV. As of what time question of dependency must be determined, 492.*

*V. Practice and procedure, 493.*

*sidy's Sons* (1917) 220 N. Y. 98, 115 N. E. 471, Ann. Cas. 1917E, 248.

A finding by the industrial commission that a so-called common-law marriage, which had existed between the deceased employee and the applicant, was valid, and the announcement by the counsel for the defendant, then and there, that he intended to appeal from said determination, present a question of law, which survives the unanimous affirmation by the appellate division, for consideration by the court of appeals. *Ibid.*

But a woman is not entitled to compensation as the wife of a deceased workman, where the evidence shows that at the time during which she claimed to be his wife he had another wife living. *Meehan v. Edward Valve & Mfg. Co.* (1917) — Ind. App. —, 117 N. E. 265. To the same effect, *Armstrong v. Industrial Commission* (1915) 161 Wis. 530, 154 N. W. 844; *Hall v. Industrial Commission* (1917) 165 Wis. 364, L.R.A.1917D, 829, 162 N. W. 312.

*c. Adopted children.*

The term "legal adoption," as found in the provision of the Kansas act, that "children and parents include that relation by legal adoption," means adoption according to the statute governing that subject, and does not extend to a child taken into a family and treated as a natural offspring, under an agreement to adopt, which was not performed. *Ellis v. Nevius Coal Co.* (1917) 100 Kan. 187, 163 Pac. 654.

And an adopted child of a daughter of a deceased workman cannot be awarded compensation under the New York act. *Winkler v. New York Car Wheel Co.* (1917) 181 App. Div. 239, 168 N. Y. Supp. 826. The statute expressly provides that the word "child" shall include children legally adopted prior to the injury to the employee. The court held, however, that the question must be determined by the provisions of the Domestic Relations Law, and, under that law, the adoption did not change the Law of Descent and Distribution as to the property of the ancestors of the foster parents. The opinion is not entirely

clear as to why the Domestic Relations Law must be consulted to determine the question, since the Compensation Statute is apparently clear in its terms; and it is to be noted that John M. Kellogg, P. J., dissented from the majority opinion.

But a minor may be found to be a dependent upon her grandfather, where she had lived in his home for over fifteen years from the time she was a few days old, and there had been some writing made, giving the child to the grandparents, although the father and mother of the child were living together and apparently desired the daughter to return to them, and the father was earning higher wages than was the grandfather at the time of his death. *Re Yeople* (1918) 182 App. Div. 438, 169 N. Y. Supp. 584. This decision, also by a divided court, is based upon the ground that the minor's real home was with her grandfather and, under all the facts, she was a dependent upon the grandfather, and had been supported by him.

#### *d. Illegitimate children.*

The New York statute, by declaring that the word "child" shall include posthumous children and children legally adopted prior to the injury of the employee, must be understood to have excluded any other child or children than such as would be included at common law, and under the statutory definition, as, for instance, illegitimate children. *Bell v. Terry & T. Co.* (1917) 177 App. Div. 123, 163 N. Y. Supp. 733. The court said: "Whatever may have been held in other jurisdictions, under ever varying language and differing conceptions of public policy, there is no justification for reading into the statute a provision which shall permit illegitimate children to share in the benefits provided for the lawful issue of one suffering through an industrial accident. If the legislature wants to assume this responsibility, it should do so in plain and unequivocal language; it ought not to be done through strained and unnatural construction on the part of the courts."

An illegitimate grandchild is not a dependent under the New Jersey act, since the word "grandchildren," as used in that statute, must be considered as used in its ordinary sense, and as applicable only to persons who stood legally in that relation to the deceased workman, particularly as the statute had made provision for illegitimate children under certain circumstances. *Splitdorf Elec-*

*trical Co. v. King* (1917) 90 N. J. L. 421, 103 Atl. 674.

In *Perry v. Industrial Acci. Commission* (1917) — Cal. —, 169 Pac. 353, an award of compensation to illegitimate children was upheld, but the only contested point was whether the wife of decedent was entitled to a portion of the award, as an actual dependent upon him.

For the earlier cases on the right of illegitimate children to recover compensation, see the annotations in L.R.A. 1916A, at page 124, notes 44 et seq., and in L.R.A. 1917D, at page 158, notes 79 et seq., which show that illegitimate children may recover under the English and Michigan statutes.

#### *e. Members of family.*

A woman who is living with a man as his wife, but to whom she is not legally married, is not a member of his family within the meaning of the Wisconsin statute, so as to be entitled to compensation. *Armstrong v. Industrial Commission* (1915) 161 Wis. 530, 154 N. W. 844; *Hall v. Industrial Commission* (1917) 165 Wis. 364, L.R.A. 1917D, 829, 162 N. W. 312.

Weekly payments of an employee, contributed for the support of a household consisting of himself, his sister, and her minor son, whenever the employee could obtain employment, and the purchase of some incidental household furnishings and supplies, as well as the cultivation of the garden, did not make him the head of a family of which his sister and his nephew could be deemed members, where it appeared that the sister had the exclusive management of the household affairs. *Re Mahoney* (1917) 228 Mass. 555, 117 N. E. 794.

#### *f. Next of kin.*

The Massachusetts statutes provide that there can be no compensation unless the claimant is a next of kin or a member of the family of the deceased workman.

So, where a deceased employee left a minor daughter, his sister is not the next of kin, and can have no claim for compensation unless she was a member of his family, partly dependent for support upon his earnings at the time of his death. *Re Mahoney* (1917) 228 Mass. 555, 117 N. E. 794.

#### *g. Legal beneficiaries.*

The Texas act, which provides compensation for "legal beneficiaries" of a

deceased employee, does not define the term as used, but, in construing the act, the court of civil appeals has determined that such legal beneficiaries as are provided for under the Texas Death Injury Act, namely, "surviving husband, wife, children, and parents," only, shall be considered, and that the Statute of Descent and Distribution does not control, except as a basis for apportionment among beneficiaries otherwise determined.

Consequently, brothers and sisters of a deceased employee are not "legal beneficiaries," under the Texas act. *Vaughan v. Southwestern Surety Ins. Co.* (1917) — *Tex. Civ. App.* —, 195 S. W. 261.

And the mother alone of a deceased workman can recover compensation, where he left, besides his mother, only brothers and sisters. *Southern Surety Co. v. Moore* (1917) — *Tex. Civ. App.* —, 196 S. W. 187. The court said: "We infer from the language used by the trial court in his conclusions of law that liability to the sisters and brothers was denied by the court, on the ground that the deceased was a minor, and that his earnings belonged to his mother. This court holds, however, that a recovery was properly denied the brothers and sisters of the deceased, for the reason that, under proper construction of the act above mentioned, said brothers and sisters were not beneficiaries of deceased, and therefore were not entitled to recover against defendants in any event."

### III. What constitutes dependency.

#### a. In general.

Compensation Statutes ordinarily do not undertake to define the term "dependency." The meaning of the phrase has been frequently considered by various courts, but the definitions given and applications made have not always been uniform, and authorities may be found that support various and different meanings.

Under the earlier Illinois Act of 1917, if contributions to the support of applicants for compensation were actually made within four years prior to the death of the employee, the fact that the beneficiaries were not in such circumstances as to need the support of the deceased is immaterial. *Peabody Coal Co. v. Industrial Bd.* (1917) 281 Ill. 579, 117 N. E. 983.

It was sufficient that the deceased left a widow, child, parent, grandparent, or

other lineal heir, to whose support he had contributed within four years previous to the time of the injury. *Mallers v. Industrial Bd.* (1917) 281 Ill. 418, 117 N. E. 1056; *Commonwealth Edison Co. v. Industrial Bd.* (1917) 277 Ill. 74, 115 N. E. 158; *Mechanics Furniture Co. v. Industrial Bd.* (1917) 281 Ill. 530, 117 N. E. 986.

And if a deceased husband was under legal obligation to support his wife, neither proof of dependency nor proof of contributions made to her was essential to a recovery of compensation. *American Mill Co. v. Industrial Bd.* (1917) 279 Ill. 560, 117 N. E. 147.

The act based the right of a widow to compensation upon the husband's legal obligation, at the time of his death, to support her, and did not require that they be living together at the time, or that she be dependent upon him for support. *H. G. Goelitz Co. v. Industrial Bd.* (1917) 278 Ill. 164, 115 N. E. 855.

But, under the Illinois Act of 1917, dependency is a condition of compensation. *Peabody Coal Co. v. Industrial Bd.* (1917) 281 Ill. 579, 117 N. E. 983.

Under the Nebraska act, the question of dependency of a parent is not determined by the fact that the decedent had or had not actually contributed to the support of the parent before the date of the accident. *PARSON v. MURPHY*, ante, 479.

The Massachusetts act awards compensation to those dependent upon the "earnings" of the deceased employee, and not to those supported by him. *Derinza's Case* (1918) 229 *Mass.* 435, 118 N. E. 942. The court said: "The terms of our act award compensation to those dependent upon the 'earnings' of the deceased employee, and not to those supported by him, differing thus from the statutes of some other jurisdictions. See, for example, *State ex rel. Crookston Lumber Co. v. District Ct.* (1915) 131 *Minn.* 27, 154 N. W. 509." In the latter case, the mother of the deceased workman was supported in part by the yield of his land.

#### b. Extent of dependency necessary.

It has been uniformly held that want or distress need not exist before it can be said that the condition of dependency arises, and that a parent or his family need not reduce the expense of living below a reasonable standard in order to escape dependency, and thereby absolve an employer from the payment of compensation, who would otherwise be lia-

ble for the payment thereof. *Re Peters* (1917) — *Ind. App.* —, 116 N. E. 848.

The word "dependent," in the West Virginia act, means dependent for the ordinary necessities of life for one of his station in life, taking into account the financial and social position of the recipient; in determining whether or not an applicant for compensation is a dependent, the question is not whether the claimant could have maintained himself and family with the bare necessities of life, without the assistance of the earnings of the injured or deceased employee, but whether he was actually dependent upon such earnings for his support and maintenance. *Poccardi v. State Compensation Comr.* (1917) 79 W. Va. 684, 91 S. E. 663.

To confine the inquiry to the question whether the family of the deceased workman could have supported life without any contributions from him, or whether such contributions were absolutely necessary in order that the family might be reasonably maintained, is not a fair test of dependency, but rather the inquiry should include the question whether contributions from the workman were looked to, or depended and relied on, in whole or in part, by the family, for means of reasonable support. *Re Carroll* (1917) — *Ind. App.* —, 116 N. E. 844. The court said: "Among the elements that are indicia of a state of dependency are an obligation to support, the fact that contributions have been made to that end, that the claimant in any case is shown to have relied on such contributions and their continuing, and the existence of some reasonable grounds as a basis for a probability of their continuance, or of a renewal thereof, if interrupted. We would not be understood as indicating that all these elements must exist in each case, in order that there may be a state of dependency. As a rule, to which there are exceptions, however, the fact that contributions have been made is an essential element of a state of dependency within the meaning of the act. See L.R.A.1916A, notes at pages 121 and 248."

A fair and reasonable construction of the Indiana act does not require that a person, in order to be adjudged a dependent, must be incapable of supporting herself by reason of physical or mental afflictions. *Re Lanman* (1917) — *Ind. App.* —, 117 N. E. 671.

While dependency implies that the claimant relied upon the employee for

support or help to a substantial degree, partial dependency, within the meaning of the statute, may be found to exist, even though the claimant could have subsisted without any aid from the employee, and the latter was under no real obligation to furnish it. *McMahon's Case* (1918) 229 Mass. 48, 118 N. E. 189.

In *Gherardi v. Connecticut Co.* (1918) 92 Conn. 454, 103 Atl. 668, the court said: "This much may be said, broadly and generally, that no one not belonging to the enumerated classes of persons, conclusively presumed to be dependent, is entitled to be regarded as a dependent or partial dependent, whose financial resources at his command, or within his power to command by the exercise of such efforts on his part as he reasonably ought to exert in view of the existing conditions, are sufficient to sustain himself and family in a manner befitting his class and position in life, without being supplemented by the outside assistance which has been received, or some measure of it." The court went on to say that, of course, a claim for dependency is not to be defeated by mere proof that the claimant can, by the exercise of his best endeavors, support himself and family by his own unaided efforts; but, as it is no purpose of the law to give aid and comfort to slackers in respect of their obligations as members of society, so it is that a claim for dependency will meet defeat, if it appears that the claimant, by the expenditure of such efforts as, under all the circumstances, are fairly and reasonably to be expected of him, is of ability to be self and family supporting, according to the proper measure of such support.

*c. Effect of legal liability of employee to support claimant.*

The mere fact that an employee is legally bound to support his wife has no bearing upon the question of actual dependency, within the meaning of the Rhode Island statute. *Sweet v. Sherwood Ice Co.* (1917) — *R. I.* —, 100 Atl. 316.

Nor is dependency under the Nebraska act based solely upon a present legal obligation to support. *PARSON v. MURPHY*, ante, 479.

But a widow and children of a deceased employee may be found to be partially dependent upon him, where he rested under both a common-law and statutory obligation to support them, and the wife had shown a disposition to require her husband to discharge his le-

gal obligation to his family, and he continued irregular contributions for the support of the children up to the time of his decease. *Re Carroll* (1917) — *Ind. App.* —, 116 N. E. 844.

Under the Illinois Act of 1913, compensation was recoverable in cases in which the employee left any children, whom he was under legal obligation to support, or whom he had supported, in whole or in part, within four years previous to the time of his injury; the act was amended, however, in 1917, so as to make dependency a condition of compensation. *Peabody Coal Co. v. Industrial Bd.* (1917) 281 Ill. 579, 117 N. E. 983.

#### *d. Total or partial dependency.*

Partial dependents, as well as those who are totally dependent upon a deceased employee, are entitled to compensation, although not to the same extent. Consequently, the question frequently arises whether or not the claimant was a total or only a partial dependent.

A sister who received her entire support from the earnings of her deceased brother, and has no independent means of her own, is, if a dependent at all, a total dependent. *Re Lanman* (1917) — *Ind. App.* —, 117 N. E. 671.

Total dependency exists where the dependents rely entirely on the earnings of the workman; but, in applying this rule, courts have not deprived a claimant of the right to total dependency, who was otherwise entitled thereto, on account of occasional financial assistance received from other sources. *Bloomington-Bedford Stone Co. v. Phillips* (1917) — *Ind. App.* —, 116 N. E. 850.

But a father can be found only partially dependent upon the contributions made by a deceased son, where the evidence shows that the father was working and receiving a weekly wage, at the time of the injury and death of the son. *Re Peters* (1917) — *Ind. App.* —, 116 N. E. 848.

So, findings that a widow was totally dependent upon the wages of the husband for her support cannot be supported, where there was evidence that the deceased husband owned the house in which she was living. *Derinza's Case* (1918) 229 *Mass.* 435, 118 N. E. 942. The court said: "There was no evidence to show how valuable the house was in which the widow lived, the nature of the deceased's title to it, what its rental

value was, what was its condition or state of repair, whether it was encumbered by mortgage or otherwise, the character of the neighborhood, city, or town in which it was located, or anything further than the bald fact that the family lived in his house. Nevertheless, it was the house in which the family of the deceased lived. It was their home. Payment of rent, as matter of common knowledge, is the material part of the support of every family whose home is hired. If the housing is provided from some other source than the 'earnings' of the employee, it cannot, with due regard to the force of words, be said that the wife is totally dependent upon those 'earnings.' That element of support is a matter of substance. It is not so insignificant as to be negligible."

And it cannot rightly be said that a wife is totally dependent for support upon the wages of her husband, where she owns a lot of land, with an eight-room house in good repair, in which the family live, since payment of rent is an essential factor in the support of every family, which does not have its housing supplied from sources other than the wages of the husband. *Re McDonald (Mass.)* post, 493.

Where the deceased employee at no time either fully or substantially supported his wife or children, and, for the most part, the wife, by her own labor, throughout her entire married life, maintained both herself and children, and for a number of years immediately preceding his death the workman contributed very irregularly, and in amounts comparatively trivial, to such support, it cannot be found that the wife and children were wholly dependent upon the deceased husband and father for support. *Re Carroll* (1917) — *Ind. App.* —, 116 N. E. 844.

#### *e. Facts showing dependency.*

The question of dependency under the West Virginia act is one of fact and not of law, to be determined by the evidence of each particular case; but where the evidence is all certified, and there is no conflict, a question of law, and not of fact, is thus presented. *Poccardi v. State Compensation Comr.* (1917) 79 *W. Va.* 684, 91 S. E. 663.

Whether one person is dependent on another, within the meaning of the Compensation Act, is usually held to be a question of fact. *Re Carroll* (1917) — *Ind. App.* —, 116 N. E. 844. The court went on to say: "It is perhaps more ac-



curate to say that questions of dependency are mixed questions of fact and law, since the ultimate question of what constitutes a dependency is a law question. It is the exclusive province of the board to determine the facts and to draw legitimate inferences therefrom. It is the province of the board also, in the first instance, to determine from such facts and inferences whether dependency exists; but, as such latter process involves a law question, the action of the board in such respect is reviewable by this court when an appeal is taken under § 61 of the Workmen's Compensation Act. In each case, the burden is on the claimant to establish by evidence, direct, circumstantial, or both, the facts showing dependency."

Since the question of dependency is primarily a question of fact, cases passing upon the question as to what evidence is sufficient to show a state of dependency differ materially, and it is difficult to arrange them in any logical manner. The cases below are set out in as concise a form as possible, to show what the courts have considered sufficient or necessary to establish the fact of dependency.

A sum of money given by a son to a father for the purchase of certain articles of furniture may be considered as given in support of the father, so as to make him a partial dependent upon the son, where it appeared that the son lived with the father, continually brought home various things, including fruit, and wearing apparel for different members of the family, worked around the premises, did work for his father while the latter was away, and also worked in the cemetery in which his father was employed, and the money he earned in so working was turned into the house. *McMahon's Case* (1918) 229 *Mass.* 48, 118 N. E. 189. But payment of board by the deceased employee, and the purchase by him of various articles of clothing and fruit, and gifts of money for car fare to alleged dependents, cannot be considered by the Massachusetts court in passing upon the question of dependency, where the industrial accident board found that these were not contributions to the support of the family, and the claimant did not appeal from that decision.

A son living with his parents, and paying the price for his board and lodging that is ordinarily paid at boarding houses, may be said to be contributing to their support, so as to render them

partially dependent upon him. *Erickson v. American Well Works* (1915) 196 *Ill. App.* 346.

A finding of partial dependency on the part of the parents is sustained by evidence that they did in fact depend, in part, on the son's earnings, so that they suffered injury by being deprived of what they had relied upon; this is true, although the father owned his home, owned land from which he derived an income of \$400 or \$500 a year, owned shares of stock in a corporation, on which he had paid \$5,000, and was employed at a salary of \$125 per month. *Fennimore v. Pittsburg-Seammon Coal Co.* (1917) 100 *Kan.* 372, 164 *Pac.* 265. The court said: "Accepting the statute just as it came from the legislature, the court is of the opinion that the question before the district court was not one of how the domestic economies of the Fennimore family might have been arranged or ought to have been arranged, but how they were arranged; and if the father and mother did in fact depend, in part, on the son's earnings so that they suffered injury by being deprived of what they had relied on, they were entitled to recover. This being true, the finding of partial dependency is abundantly sustained."

A son may be found to have contributed to the support of the father, where he and the other children paid the father more than all the household expenses, aside from the rent, and the deceased contributed one-fifth of the amount. *Mallors v. Industrial Bd.* (1917) 281 *Ill.* 418, 117 N. E. 1056.

In *PARSON v. MURPHY*, ante, 479, it was held that a mother may be found to be dependent upon a deceased son, although she had a few hundred dollars in deposit in a bank, and the son was, in fact, not contributing to her at the time of his death, where it appeared that he had no one else to support, and had promised to come and live with her and support her.

Where the wages of a deceased son were given to the father, and were used and required by him for the support of his family, the father may be found to be a dependent upon such deceased son. *Re Peters* (1917) — *Ind. App.* —, 116 N. E. 848.

Where the deceased employee left his mother and four half brothers and sisters, aged respectively, fifteen, twelve, nine, and six years of age, and it appeared that at times his contribution to the support of the family represented

his whole earnings, less such sum as was necessary for his own support, the court will not disturb the finding of the commission that the mother and brothers and sisters were dependent upon him. *Bylow v. St. Regis Paper Co.* (1917) 174 App. Div. 555, 166 N. Y. Supp. 874.

Where the evidence showed that a brother told his sister, upon the death of their mother, not to worry over her condition, and promised to furnish her a home as long as he was able, and that thereafter, until his death, he did furnish a home in which they lived, and turned over to his sister his entire earnings out of which the expenses of maintaining the home were paid, including her entire support, a condition of dependency is created, and the sister may be found to be a total dependent upon the brother. *Re Lanman* (1917) — Ind. App. —, 117 N. E. 671. The court said: "The fact that the sister remained in the home of her brother after the death of their mother, as a housekeeper, under an arrangement or understanding that the deceased was to furnish the home and provide for his sister, and in return therefor she was to act as his housekeeper, does not show such a contractual relation as to deprive her of compensation as a dependent. Such fact does not show a contractual rather than a family relation."

A father contributes to the support of an adult daughter within the meaning of the Illinois statute, when, upon her becoming incapacitated from pursuing her employment by reason of illness, he takes her into his home and cares for her. *Mechanics Furniture Co. v. Industrial Bd.* (1917) 281 Ill. 530, 117 N. E. 986.

But, in *Gherardi v. Connecticut Co.* (1918) 92 Conn. 454, 103 Atl. 668, it was held that a single man past his majority, who for three months immediately prior to his father's death had been working steadily at a living wage, in a mechanical establishment, and was so working when the hearing was had some twelve months later, could not be considered a dependent, although the evidence showed that previously he had worked intermittently, but the finding supplied no details as to where, when, or how long-continued such previous employments were, or why they became terminated, save that he had attempted to work as a lineman, as his father was doing, and had given up that employment, as not suited to his health and strength. The court staid that it would seem that

his fourteen months of continued shop experience had furnished a fair degree of demonstration that he was not laboring under a serious physical handicap, and there was nothing in the finding to indicate that he was.

In a proceeding for compensation for the death of an adult son, where the average weekly expenses of the family, including the support of the son, amounted to \$18.78, out of which the father earned \$16, and the cost of the maintenance of the deceased son would be \$4 a week, it cannot be found that the father was dependent upon the wages of the son. *Moll v. City Bakery* (1917) — Mich. —, 165 N. W. 649.

A mother cannot be said to be dependent upon the wages of the deceased son, where he and his wife had lived with his parents, and the son was contributing from \$12 to \$17 per week to the mother, which was a fair equivalent of what he received in behalf of himself and wife, and the father was earning sufficient wages to support his wife in as good a style as she was maintaining, if it had not been for the presence in the family of other relatives, who had no legal claim upon the family for support. *Birmingham v. Westinghouse Electric & Mfg. Co.* (1917) 180 App. Div. 48, 167 N. Y. Supp. 520.

A niece of a deceased workman, who was sixteen years old and not emancipated, and whose home was with her mother and stepfather, but who stayed with her uncle five days of each week for several years, when school was in session, as a matter of convenience, is not a dependent upon the uncle, although he did not charge her for board, and gratuitously furnished her some clothing and school supplies. *Re Lanman* (Ind.) supra.

The commission is justified in finding as a fact that a wife is not actually dependent upon her husband, where the evidence showed that she had received nothing from him in years, apparently had not sought anything, and was not relying upon receiving anything from him, and was pressing a claim for divorce from him, without seeking any provision for support. *Perry v. Industrial Acci. Commission* (1917) — Cal. —, 169 Pac. 353.

A father cannot recover compensation for the death of an adult son, although he is in indigent circumstances, where there is no evidence whatever to show any recognition of his needs on the part of the son. *Western Indemnity Co. v.*

Industrial Acci. Commission (1917) — Cal. App. —, 169 Pac. 261.

A widow is not shown by the facts to be a dependent upon her husband, where he had left her in Poland seven months before his death, and he had since resided in this country, and, on two occasions after coming to this country, he had sent home money received by him from his minor son, but the amounts of which are not shown. *Gorski's Case* (1917) 227 *Mass.* 456, 116 N. E. 811.

The dependency of a wife as a matter of fact is not established, where the husband lived in this country, and she lived in Austria, and the record failed to disclose that he ever supported her in either place. *Ludwig v. American Car & Foundry Co.* (1917) 194 *Mich.* 613, 161 N. W. 835.

*f. Conclusive presumption of dependency.*

Many of the statutes, in order to simplify the procedure, provide that a conclusive presumption of dependency shall exist in certain designated cases. Some statutes provide that a wife is conclusively presumed to be dependent upon the earnings of her husband; other statutes make the indulgence of the presumption depend upon the fact that the wife was living with her husband at the time of the accident, while other statutes provide that the presumption shall operate, although the wife is living apart from her husband, provided such living apart is for a justifiable ground. A review of the earlier cases, construing these provisions of the statute, will be found in an annotation annexed to *Northwestern Iron Co. v. Industrial Commission*, L.R.A.1916A, 366, and in the annotation in L.R.A.1917D, at page 162. A number of the more recent cases have also passed upon the provisions of this character.

It has been said that the legislature, in declaring that the dependency of the wife shall be conclusively presumed, does not establish a presumption, in the ordinary sense of the term, but rather a rule of law to the effect that, in the case specified, the nonexistence of the fact presumed is immaterial. *State ex rel. London & L. Indemnity Co. v. District Ct.* (1918) — *Minn.* —, 166 N. W. 772. The Minnesota court also held that this statutory presumption does not violate any constitutional provision.

A wife is totally dependent upon a husband for support as a matter of law, L.R.A.1918F.

providing she is living with him at the time of his death. *Muncie Foundry & Mach. Co. v. Coffee* (1917) — *Ind. App.* —, 117 N. E. 524.

The Indiana statute simply provides that the presumption shall prevail, provided the wife is living with her husband at the time of the accident; consequently, the presumption does not prevail, if the wife is living apart from her husband, although she may be so living apart from him for a justifiable cause. *Re Carroll* (1917) — *Ind. App.* —, 116 N. E. 844.

The Minnesota statute, however, provides that the wife shall be conclusively presumed to be wholly dependent upon her husband, "unless it is shown that she was voluntarily living apart from her husband at the time of his injury or death." It has been held that the expression, "voluntarily living apart from her husband," should be construed to mean the free and intentional act of the wife, uninfluenced by extraneous causes, or, as it might be otherwise expressed, her choice, deliberately made and acted upon. *State ex rel. George J. Grant Constr. Co. v. District Ct.* (1917) 157 *Minn.* 283, 163 N. W. 509.

Consequently, a wife is not voluntarily living apart from her husband, with- ing the meaning of the Minnesota statute, where the accident showed that she had lived apart from him for about twelve years, but that she left him because he not only threatened her life, but ordered her to leave, and drove her away with a gun, and that she was living apart from him solely because she was in fear of personal violence. *State ex rel. London & L. Indemnity Co. v. District Ct.* (*Minn.*) *supra*.

So, a finding that a wife was not voluntarily living apart from her husband will be sustained, in a case in which it appears that, upon the marriage of the parties, she owned her own home, which was equipped with all necessary household goods and furniture, and the employee made his home with her, and there he continued to reside until about six months prior to his death, and the plaintiff denied that she drove deedent away, and testified that he left of his own accord and without her consent, and subsequent to his departure she proceeded against him in the court to compel a discharge of his marital obligations. *State ex rel. George J. Grant Constr. Co. v. District Ct.* (*Minn.*) *supra*.

The phrase, "living together," or similar phrases used in the different stat-

utes, does not necessarily mean an actual physical existence under the same roof.

Thus, the board may find that a husband and wife are living together, within the meaning of the statute, although they are physically apart, where he sends home money each alternate week, and she still maintains the home, and he corresponds with her constantly, his letters expressing affection and solicitude for her welfare. *Muncie Foundry & Mach. Co. v. Coffee* (1917) — *Ind. App.* —, 117 N. E. 524.

But a wife who was not living with her husband at the time of his death, and who had secured a divorce from him upon the ground of non-support, and was supporting herself, is not conclusively presumed to be dependent, within the meaning of the Rhode Island statute. *Sweet v. Sherwood Ice Co.* (1917) — *R. I.* —, 100 Atl. 316.

If the physical separation of husband and wife has been continued for some time for reasons of mere business expediency, they are not living together within the meaning of the Massachusetts statute, even though there may be a genuine purpose to resume cohabitation.

Thus, an alien wife living in Nova Scotia, while the husband worked in Massachusetts for the greater part of the year, cannot be said to be living with her husband, so that the presumption of total dependency may be indulged. *Re McDonald* (*Mass.*) post, 493.

So, the finding that the wife of a deceased was living with him at the time of his death, and, hence, conclusively presumed to be totally dependent upon his earnings for support, cannot stand, where the evidence shows that the employee came to this country from Armenia three and one-half years before his death, and has since worked and lived here continuously, and that his wife remained in Armenia, and lived there at the time of his death. *Mooradjian's Case* (1918) 229 *Mass.* 521, 118 N. E. 951.

And where the employee left his wife in Poland and came to this country, seven months before his death, and she still resides in that country, the husband and wife are not living together, nor is she living apart from her husband for a justifiable cause, so that she may be conclusively presumed, to be dependent upon him, within the meaning of the

L.R.A.1918F.

Massachusetts act. *Gorski's Case* (1917) 227 *Mass.* 456, 116 N. E. 811.

Similar decisions have been handed down by the Michigan court.

Thus, a wife cannot be held to have been living with her husband so as to be entitled to the conclusive presumption of dependency, where he left her in Austria about seven years before his death, and came to this country, and had made but one visit to Austria during that time, although he contributed substantially to her support there, and expected to have her join him in this country as soon as she had money enough. *Kalcie v. Newport Min. Co.* (1917) — *Mich.* —, 163 N. W. 962.

And the conclusive presumption that a wife is dependent upon her husband when she is living with him at the date of the accident cannot be indulged, where he was in this country and the wife was living in Austria, and there was not enough in the evidence to furnish a fair inference that she was living apart from him in pursuance of some arrangement by which she had a right to and did expect assistance from him. *Ludwig v. American Car & Foundry Co.* (1917) 194 *Mich.* 613, 161 N. W. 835.

Whether the wife was living with her husband at the time of his death is a question of fact, and the finding of the industrial board will not be disturbed, merely because the evidence is conflicting. *Muncie Foundry & Mach. Co. v. Coffee* (1917) — *Ind. App.* —, 117 N. E. 524.

#### IV. *As of what time question of dependency must be determined.*

The statutes usually contain a provision to the effect that the dependency of the claimant is to be determined as of the time of the accident, and any prior or subsequent conditions are not to be taken into consideration.

Thus, under the New York statute all questions of dependency shall be determined as of the time of the accident. *Birmingham v. Westinghouse Electric & Mfg. Co.* (1917) 180 App. Div. 48, 167 N. Y. Supp. 520.

So, the question of dependency is determined by the conditions existing at the time of the accident, and the right of a minor to compensation is not affected by the fact that, subsequent to the accident, he went to work and was earning a few dollars a week. *Re Yeople* (1918) 182 App. Div. 438, 169 N. Y. Supp. 584.

And the Indiana act does not include,

in any of the classes in which dependency is conclusively presumed, sisters and nieces; consequently the fact of their dependency and the degree thereof must be determined in accordance with the existing facts at the time of the death of the employee. *Re Lanman* (1917) — *Ind. App.* —, 117 N. E. 671.

The Maryland statute expressly provides that upon the marriage of a dependent widow without children, all compensation shall cease, but no such provision is made as to any other class of dependents. The statute also provides that dependency shall be determined as of the time of the injury.

Consequently, the subsequent marriage of a partly dependent sister of a deceased employee does not determine her right to compensation, nor authorize the commission to abate it. *Adleman v. Ocean Acci. & G. Corp.* (1917) 130 Md. 572, 101 Atl. 529, Ann. Cas. 1918B, 730.

Nor does the remarriage of a dependent wife, to whom compensation was being paid, terminate her right to such payment. *Bott's Case* (1918) 230 Mass. 152, 119 N. E. 755.

A dependent father, with whom a son was living when injured, is entitled to the compensation awarded for the injury, under a statute providing that persons who constitute dependents shall be determined as of the day of the accident, rather than one whom the injured person marries between the dates of the injury and of death, or a child conceived before the accident, born after, and legitimized by the marriage. *KUFTRACH v. INDUSTRIAL COMMISSION*, ante, 476.

#### *V. Practice and procedure.*

A number of cases have been found which deal with general questions as to practice and procedure among those passing upon the question, Who are dependents under the Compensation Statutes.

The mother of a minor deceased workman is the proper party to bring proceedings to recover compensation for his death, where all of his wages were turned over to her, although they were placed by her in a common fund, out of which her other minor dependent children were supported. *People's Hardware Co. v. Croke* (1918) — *Ind. App.* —, 118 N. E. 314.

The industrial commission may properly accept in evidence an affidavit, bearing on the question of dependency of the father, mother, and other residents

of Ireland, taken before a commissioner of oaths of the state of New York. *Moran v. Rodgers & Haggerty* (1917) 180 App. Div. 821, 169 N. Y. Supp. 410.

The burden is on the claimant to establish by evidence direct, circumstantial, or both, the facts showing dependency. *Re Carroll* (1917) — *Ind. App.* —, 116 N. E. 844.

It is the province of the industrial board primarily to determine the question whether dependency exists in a given case. *Ibid.*

Under the West Virginia act the findings of the court or commissioner on the question of dependency are not conclusive, but, on appeal to the supreme court, the findings of the commissioner may be reviewed on the evidence before him. *Poccardi v. State Compensation Comr.* (1917) — 79 W. Va. 684, 91 S. E. 663.

A finding of dependency on the part of the parents of a deceased workman will be sustained, if there is some evidence to support it, although such evidence is not satisfactory. *State ex rel. Kuehner v. District Ct.* (1917) 137 Minn. 467, 163 N. W. 1070.

The finding of the industrial accident board, that the father of a deceased employee was partially dependent for support upon his son, must stand, if there is any evidence to warrant it. *McMahon's Case* (1918) 229 Mass. 48, 118 N. E. 189.

Where there is evidence to support a finding that a deceased son contributed to the support of his father and other members of the family, it is not within the province of the court to pass upon the sufficiency of such evidence. *Commonwealth Edison Co. v. Industrial Bd.* (1917) 277 Ill. 77, 115 N. E. 158.

W. M. G.

#### MASSACHUSETTS SUPREME JUDICIAL COURT.

RE ALICE A. McDONALD.

RE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, Limited, Appt.

(229 Mass. 454, 118 N. E. 949.)

Workmen's compensation — right of aliens.

1. Subjects of a friendly foreign nation

Note. — As to recovery of compensation by nonresident alien dependents, see annotation following this case, post, 496, and references therein to annotations on related questions.

are not excluded from the benefits of the Workmen's Compensation Act.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

**Same — living together — absence on business.**

2. There is not a living together or living apart for justifiable cause of husband and wife which, under the Workmen's Compensation Act, will raise a conclusive presumption of dependency, where, for reasons of mere business expediency, the husband has been absent from home for more than a year, although there is a genuine purpose to resume cohabitation.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

**Same — total dependency — value of house rent.**

3. A woman cannot be found to have been totally dependent upon the earnings of her husband for support within the meaning of the Workmen's Compensation Act, if she owns a house in which she lives with her children, since he is relieved from contributing the value of the rent.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(March 4, 1918.)

**A**PPEAL by the insurer from a decree of the Superior Court for Suffolk County affirming an award of the Industrial Accident Board to claimant, in a proceeding by her under the Workmen's Compensation Act, to recover compensation for the death of her husband. Reversed.

The facts are stated in the opinion.

Messrs. G. Gleason and Sawyer, Hardy, Stone, & Morrison for appellant.

Mr. James J. McCarthy for appellee.

Rugg, Ch. J., delivered the opinion of the court:

The deceased received mortal injury in the course of and arising out of his employment by a subscriber under the Workmen's Compensation Act. Stat. 1911, chap. 751.

His dependents, although aliens, are subjects of a friendly foreign nation, and are not excluded from the benefits of the act. *Derinza's Case*, 229 Mass. 435, 118 N. E. 942.

The first point to be decided is whether the finding of the industrial accident board that the wife of the deceased was living with him at the time of his death can be supported. The facts are that the deceased had a wife and five minor children, who lived in a house built by the husband upon land then or later owned by the wife, in a small country settlement called Havre Voucher, in Nova Scotia. The only industry there is a lobster factory. The husband had worked in the United States more or

less since marriage. He went away every spring and came home in the fall. He sent money home every month, and clothing to the wife and children. The relations of the deceased with his family always were pleasant. He left home in December, 1914, his wife remaining in Nova Scotia. It does not appear precisely where he went, but so far as his wife knew he was either in Rhode Island or Massachusetts. He was a carpenter by trade, and died on January 6, 1916, from injuries received on that date. Seemingly, he had stayed away from home on this occasion considerably longer than on his previous trips to this state.

The words of the act, as amended, are that there shall be a conclusive presumption of the total dependency of "a wife upon a husband with whom she lives at the time of his death." Part 2, § 7(a). The meaning of these words, as used in the act, was discussed in *Nelson's Case*, 217 Mass. 467, 105 N. E. 357, 5 N. C. C. A. 694. They have been interpreted and applied in *Gallagher's Case*, 219 Mass. 140, 106 N. E. 558; *Newman's Case*, 222 Mass. 563, L.R.A. 1916C, 1145, 111 N. E. 359; *Fierro's Case*, 223 Mass. 378, 111 N. E. 957, 13 N. C. C. A. 544, and *Gorski's Case*, 227 Mass. 456, 116 N. E. 811. What there has been said need not be repeated. A living together, with reference to husband and wife, imports actual enjoyment of the marriage relation under a common roof. It cannot be stretched to include prolonged absences, even though one of the two may remain at home and the other may expect to return. In reason it seems to us that when the physical separation has been continued for more than a year, as in the case at bar, for reasons of mere business expediency, there is not a living together at the time of the death, even though there is a genuine purpose to resume cohabitation. It would have been simple for the legislature to have said that the wife should be conclusively presumed to be totally dependent upon the husband, unless, through her fault, she is living apart from him, if that had been its intent. This clause, as originally enacted, was amended by Stat. 1914, chap. 708, § 3. No such simple change as that then was made, but another of quite different meaning, to the effect that a wife might recover as a total dependent, if living apart from the husband for justifiable cause. This does not mean that a wife not living with her husband, by reason of mutual agreement to that end, shall be regarded as a total dependent. *Veber's Case*, 224 Mass. 86, 112 N. E. 485. The words actually used by the legislature express a purpose to declare total dependency in those cases, only, where there is such living with refer-

ence to a home as to make it clear that there has been no suspension of the marriage relation, but to leave the question of dependency, and its extent, to be ascertained as a fact in each case where there has been a physical separation between husband and wife for a considerable period of time, for any reason except desertion of the wife by the husband, or a living apart from the husband by the wife for justifiable cause. As applied to citizens of a state of the size of Massachusetts, with its present high standard of marital morality among those defined as employees by the act, there would appear to be ground for a law of that tenor. Actual physical separation for more than a year between a citizen husband and wife might be thought to require an examination of the facts as to dependency. As applied to cases like the present, the legislature may have thought that whether the support of aliens residing in foreign countries should be a burden upon Massachusetts industries ought to depend upon the actual extent of contribution to the support of his wife or family during the life of the employee. That is the meaning which the words of the statute express. Other decisions like *Ex parte Gilmore*, 3 C. B. 967, 136 Eng. Reprint, 388; *Walton v. Walton*, 76 Miss. 662, 71 Am. St. Rep. 540, 25 So. 166, and *Potts v. Davenport*, 79 Ill. 455, where the kind of separation or desertion was raised, are so different in the issue presented as to afford no aid in the interpretation of the words used in the present statute. As was said in *Nelson's Case*, *ubi supra*, if there is anything inconsistent with this conclusion in *Northwestern Iron Co. v. Industrial Commission*, 154 Wis. 97, L.R.A.1916A, 366, 142 N. W. 271, Ann. Cas. 1915B, 877, we are constrained not to follow it. The finding that the wife in the case at bar was totally dependent upon the husband, because living with him at the time of his death, cannot be supported.

The board found, as a fact, that the wife was wholly dependent upon the earnings of the deceased for her support. The facts upon this point are that the wife and children lived in a house of eight rooms, built by the husband upon land owned by an uncle of the wife, who, when he died, left a will. There was about an acre of land used as a yard. No vegetables were raised on it. There was a barn. A cow owned by the husband was kept, whose milk was used entirely by the family, none being sold. The tax bills were made out in the name of the husband, and were paid out of his earnings. No insurance was carried on the house. The wife testified that she did not know what was a fair rental value of the house, because all the people in *Havre Voucher* owned their own houses. There

was no evidence as to the value of the house, and it yielded no income. There was evidence that the house was freshly painted, and was a better looking house than the others near by. The evidence as to the title to the house and land need not be recited. The board found, on appeal, that it was in the wife. There was evidence in the testimony of a searcher of land titles and the will of the uncle of the widow to support that finding.

Upon these facts a finding of total dependency was not warranted. Where a wife owns a lot of land with an eight-room house in good repair upon it, in which the family live, it cannot rightly be said that she is totally dependent for support upon the wages of the husband. Payment of rent is an essential factor in the support of every family which does not have its housing supplied from sources other than the wages of the husband. Where the housing is provided from some other source, that is a substantial matter. Ownership of a house of the size and condition here shown is not so insignificant as to be negligible, as was the independent property in *Carter's Case*, 221 Mass. 105, 108 N. E. 911, 9 N. C. C. A. 579, *Buckley's Case*, 218 Mass. 354, 105 N. E. 979, Ann. Cas. 1916B, 474, 5 N. C. C. A. 613, and *Caliendo's Case*, 219 Mass. 498, 107 N. E. 370, but is too material to be ignored, as in *Kenney's Case*, 222 Mass. 401, 404, 111 N. E. 47. The case upon this point is indistinguishable from *Derinza's Case*, 229 Mass. 435, 118 N. E. 942, just decided. It follows that the inference of total dependency of the wife, as a matter of fact standing alone, would be unwarranted by the other facts found.

The case is thrown open to be decided under the final paragraph of part 2, § 7, as amended by Acts 1914, chap. 708, § 3, which provides that "in all other cases questions of dependency, in whole or in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury," and part 5, § 2, as amended (Acts 1914, chap. 708, § 13). *Newman's Case*, 222 Mass. 563, 568, L.R.A.1916C, 1145, 111 N. E. 359, *Fierro's Case*, 223 Mass. 378, 380, 111 N. E. 957, 13 N. C. C. A. 544.

There is a further finding that the minor children of the deceased were totally dependent upon him for support. For the reasons stated at length in *Derinza's Case*, *supra*, this finding cannot be supported.

It follows that there are such substantial errors on this record as to require a reversal of the decision. The case must be remanded to the Industrial Accident Board for further hearing, upon the question of the extent of actual dependency.

So ordered.

**Annotation—Recovery of compensation by nonresident alien dependents.**

The general subject of Workmen's Compensation Acts is treated in annotations in L.R.A.1916A, 23, and in L.R.A. 1917D, 80. For later cases and annotations on Workmen's Compensation Statutes, consult the L.R.A. Indexes for volumes subsequent to L.R.A.1917D, under the title, "Workmen's Compensation."

Upon the general question, Who are dependents within the meaning of the Compensation Statutes, see annotation to *PARSON V. MURPHY*, ante, 479.

The New Jersey statute expressly provides that nonresident alien dependents are not entitled to compensation. *Gregutis v. Waclark Wire Works* (1914) — N. J. L. —, 91 Atl. 98; *Bjorstad v. Pacific Coast S. S. Co.* (1917) 244 Fed. 634.

This provision of the New Jersey statute is not in conflict with the Treaty of 1871, between the United States and Italy. *DeBiasi v. Normandy Water Co.* (1915) 228 Fed. 234.

And this provision takes away any cause of action for the death of the workman, where the employer has elected to come under the New Jersey act. *Gregutis v. Waclark Wire Works* (N. J.) supra. The court said: "The power of the legislature to give or withhold a right of action in such a case, and to declare to whom and in what amount compensation shall be paid, cannot be doubted."

Other statutes expressly provide for compensation to such dependents.

Under the New York statute, as amended in 1916, compensation to nonresident aliens or persons about to become nonresidents of the United States or Canada shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or, if there be no surviving wife or child or children, the surviving father or mother, or grandfather or grandmother, whom the employee had supported, either wholly or in part, for the period of one year prior to the date of the accident, and except that the commission may, at its option, or upon application of the insurance carrier, shall, commute all future instalments of compensation to be paid to such alien by paying or causing to be paid to him one half of the commuted amount of such future instalments of compensation, as determined by the commission.

Under this provision an award of 25 per cent of the average wages of the decedent to each of the nonresident alien parents of the deceased employee is justified. *Casella v. McCormick* (1917) 180 App. Div. 94, 167 N. Y. Supp. 564. John M. Kellogg, P. J., in speaking of this section of the statute, said: "It omits any provisions for brothers and sisters, and does not provide for all dependent fathers, mothers, grandfathers, or grandmothers. The compensation is limited to those who, for the period of one year prior to the accident, have been supported in whole or in part by the employee. Here, 'support,' in whole or in part for the year, is the controlling feature. I cannot feel that the use of the word 'or' is intended to restrict the compensation to one parent, if both have been supported for the time stated. The 'or' is probably used to cover the same grounds as the word 'either' in the previous section; that is, the compensation of 25 per cent is not for both parents, but for each one. Otherwise, it is difficult to tell which one is to receive the award, and if the award is to the grandfather, and he dies, apparently the dependent grandmother is left without support."

An award to each alien dependent parent was also sustained, in *Moran v. Rodgers & Haggerty* (1917) 180 App. Div. 821, 168 N. Y. Supp. 410.

Other statutes have been construed to apply to nonresident alien dependents.

Under the Massachusetts act, it has been repeatedly held that alien nonresident dependents may be entitled to compensation. *Re Pagnoni* (1918) 230 Mass. 9, 118 N. E. 949; *Re McDONALD*, ante, 493; *Re Nooradjian* (1918) 229 Mass. 521, 118 N. E. 951; *Re Derinza* (1918) 229 Mass. 435, 118 N. E. 942; *Caliendo's Case* (1914) 219 Mass. 498, 107 N. E. 370.

In the *Derinza Case* (Mass.) cited supra, the court said: "The theory of the Workmen's Compensation Act is a kind of insurance against accident. The Massachusetts Compensation Law has been characterized as 'an elective compensation insurance law, giving compensation for all injuries arising out of employment,' with exceptions not now pertinent. Report of Commission on Compensation for Industrial Accidents, 1912, p. 46. Insurance money naturally goes to the beneficiary, regardless of geographical boundaries of resi-



dence. The deceased employee, although an alien, if he had lived, manifestly would have been entitled to the benefits of the act. The quasi accident insurance goes, by the act, to those to whom naturally the deceased would have made real accident insurance payable, if he had contracted for it, namely, to those dependent upon his earnings for support. It would be difficult to read into the act by construction an exception adverse to the claims of non-residents who are not alien enemies. This is quite a different question from holding that the act does not, by its terms, have force as to injuries received beyond the territorial limits of the state, as in *Gould's Case* (1913) 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60. The result is that aliens who are residents of friendly nations, and who are dependents and otherwise within the terms of the act, are not barred from compensation solely by reason of alienage. This conclusion is in accord with other decisions upon statutes which do not expressly exclude nonresident aliens from their operation, and are thus, in this respect, like our act."

The Illinois act has also been held to be applicable to nonresident alien dependents. *Victor Chemical Works v. Industrial Bd.* (1916) 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B, 627. It was contended that the words in the title of the act, "to Promote the General Welfare of the People of This State," confine the operation of the statute to citizens of the state, but the court said: "The general welfare of the people of the state or citizens of the state might well be promoted by providing compensation for accidental injuries or death suffered by aliens, as well as citizens, in the course of employment within the state. There are many alien employees within the state to whom the act should apply, and we can perceive no reason why it should not apply to them as well as to citizens. In many cases those depending upon them reside within the state, and the people and citizens of the state would be interested in not having aliens, as well as citizens, become charges upon the community by reason of injuries received in the course of employment." The court also called attention to the fact that the term "employee," as used in the act, was defined as including, among others, aliens.

The court of appeal of British Columbia has held that alien dependents,

residing abroad, are not within the purview of the provincial act, but the English House of Lords, to which an appeal was taken, upheld the right of alien dependents to recover, as they were not within the express exceptions contained in the act. *Krzus v. Crow's Nest Pass Coal Co.* [1912] A. C. (Eng.) 590, 81 L. J. P. C. N. S. 227, [1913] W. C. & Ins. Rep. 38, 107 L. T. N. S. 77, 28 Times L. R. 418, 56 Sol. Jo. 632, 6 B. W. C. C. 270, Ann. Cas. 1912D, 859.

Under the Texas statute, it has been held that nonresident alien dependents may recover compensation under the act, since the right of compensation constitutes personal property, and, under the rule in Texas, the right of aliens, residents or nonresidents, to inherit under the Statute of Descent and Distribution, has been recognized and upheld as to personal property. *Southwestern Surety Ins. Co. v. Vickstrom* (1918) — Tex. Civ. App. —, 203 S. W. 389. The court quoted with approval from the opinion of the trial judge, as follows: "The general law of the state regulating and governing the payment of compensation, under the Workmen's Compensation Act, contains no limitation or provision, whatever, denying to aliens the benefits of such act. It is, moreover, a matter of common knowledge, and a part of the judicial history of the state, that the right of aliens, resident and nonresident, to inherit under the Statutes of Descent and Distribution, as well as those regulating wills, has been recognized and upheld as to personal property, without question."

In *Western Metal Supply Co. v. Pillsbury* (1916) 172 Cal. 407, 156 Pac. 491, Ann. Cas. 1917E, 390, it was contended that the statute was unconstitutional because, under it, payments might have to be made to nonalien dependents. The court, however, rejected this contention, and said: "It is argued that under the statute the employer may be required to make payments to alien and nonresident dependents, and that no public purpose cognizable by the legislature of this state is to be served by requiring payments to such aliens and nonresidents. But this argument is based upon altogether too narrow a view of the constitutional limitations upon legislative action. If it may reasonably be thought that the best interests of the state, of the employers of labor, and of those employed, as well as of the public generally, are promoted by imposing upon the industry or the public the burden of industrial accident, and some such the-

ory lies at the bottom of all Workmen's Compensation Statutes, . . . the residence and citizenship of the injured workman, or (if he shall have met death) of his dependents, are factors entirely foreign to the discussion. The legislature has determined that the employment of labor in given pursuits entails upon the employer certain responsibilities toward the persons performing the labor and those dependent upon them. There is no constitutional or rational ground for limiting the benefits of this legislative scheme to citizens or residents of this state. If the employment was such as to fall within the state's lawmaking jurisdiction, the legislature certainly had the power to pass laws operating uniformly upon all persons affected by such employment."

In the following cases, compensation was awarded to nonresident aliens, without discussion of the fact that they were such aliens: *State ex rel. Crookston Lumber Co. v. District Ct.* (1915) 131 Minn. 27, 154 N. W. 509; *Vujic v. Youngstown Sheet & Tube Co.* (1914) 220 Fed. 390 (Ohio statute); *Moran v. Rodgers & Hagerty* (1917) 180 App. Div. 821, 168 N. Y. Supp. 410; *Poccardi v. State Compensation Comr.* (1917) 79 W. Va. 684, 91 S. E. 663.

In the following cases compensation to nonresident alien dependents was denied, but for reasons other than the fact that they were nonresident aliens. *Ludwig v. American Car & Foundry Co.* (1917) 194 Mich. 613, 161 N. W. 835; *Culurides v. Ott* (1916) 78 W. Va. 696, 90 S. E. 270. W. M. G.

#### NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA EX REL. CORPORATION COMMISSION et al.,  
App't.,

v.

R. A. DUNN et al., Exrs., etc., of P. M. Brown, Deceased, et al.

(174 N. C. 679, 94 S. E. 481.)

#### Tax — succession — dower.

Dower and the widow's yearly statutory allowance are within a statute imposing a succession tax on all property which shall pass by the intestate laws from any person who shall die seised or possessed of the same while a resident of the state, where the statute provides an exemption of a certain amount in case of the estate passing to the widow.

*For other cases, see Taxes, V. c, in Dig. 1-52 N. S.*

(Walker and Hoke, JJ., dissent.)

(December 5, 1917.)

**A**PPEAL by the state from a judgment of nonsuit of the Superior Court for Mecklenburg County in an action brought to recover an inheritance tax on the dower of the defendant widow. Reversed.

Statement by Clark, Ch. J.:

Peter Marshall Brown died in May, 1913. His widow, Daisybel P. Brown, dissented from her husband's will, and was allotted for her dower lands valued at \$65,850, besides \$2,000 cash as her year's allowance.

**Note.**—The question of succession tax upon dower is discussed in the annotation following *Re Bullen*, L.R.A.1916C, 675.

L.R.A.1918F.

She was married to Peter Marshall Brown in 1905, and was thirty-four years old at the time of his death. The present value of her dower, based on the tables of expectancy, is \$56,222.78. The inheritance tax on all the other property of the said P. M. Brown, deceased, including the remainder after the dower has been paid by the executors, but no tax has been paid on said \$56,222.78, nor on the \$2,000 year's allowance, and this action is to recover the 1 per cent inheritance tax on said sums, less \$10,000 exemption allowed to the widow by the statute. By consent, the court found the facts as above stated, and directed a nonsuit. From this judgment, the state appealed.

Messrs. James S. Manning, Attorney General, R. H. Sykes, Assistant Attorney General, and George W. Wilson, for the State:

The dower is subject to the tax.

*Billings v. People*, 189 Ill. 472, 59 L.R.A. 807, 59 N. E. 798, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; *People v. Field*, 248 Ill. 147, 33 L.R.A. (N.S.) 230, 93 N. E. 721; *Norris v. Durfey*, 168 N. C. 323, 84 S. E. 687; *State v. Scales*, 172 N. C. 915, 90 S. E. 439.

Messrs. Pharr & Bell, for appellee widow:

An inheritance tax is not a tax on the property or the real estate of a deceased person, but is a tax laid upon the privilege or right of succession to that property.

*McDaniel v. Byrket*, 120 Ark. 295, 179 S. W. 491.

A widow's dower is not liable for inheritance tax.

37 Cyc. 1565; *Crenshaw v. Moore*, 124

Tenn. 523, 34 L.R.A.(N.S.) 1101, 137 S. W. 924, Ann. Cas. 1913A, 165; Ross, Inheritance Taxn. § 56; McDaniel v. Byrnett, supra; Re Bullen, 47 Utah, 96, L.R.A.1916C, 670, 151 Pac. 533; Re Strahan, 93 Neb. 828, 142 N. W. 678; Re Weiler, 122 N. Y. Supp. 608; Avery's Estate, 34 Pa. 204; Marsal's Succession, 118 La. 212, 42 So. 778; Re Kennedy, 157 Cal. 516, 29 L.R.A.(N.S.) 428, 108 Pac. 280; Kohny v. Dunbar, 21 Idaho, 258, 39 L.R.A.(N.S.) 1107, 121 Pac. 544, Ann. Cas. 1913D, 492; Ro Williams, 40 Nev. 241, L.R.A.1917C, 602, 161 Pac. 741; People v. Fields, 248 Ill. 147, 33 L.R.A.(N.S.) 230, 93 N. E. 721.

Clark, Ch. J., delivered the opinion of the court:

The case presents the single question whether the dower and year's allowance which, under our statute, accrue to a widow upon her husband's death intestate, or upon dissent to his will, are subject to the inheritance tax under § 6, chap. 201, Laws 1913. That section reads as follows: "From and after the passage of this act all real and personal property of whatever kind and nature *which shall pass by will or by the intestate laws of this state* from any person who may die seised or possessed of the same while a resident of this state . . . shall be and hereby is made subject to a tax for the benefit of the state as follows: [Here follow the details]."

Whether an inheritance tax shall be laid or not, and the rate thereof, and the exemptions allowed, are matters which rest in the power and discretion of the lawmaking department. "Laws imposing an inheritance tax must be liberally construed to effectuate the intention of the legislature." Norris v. Durfey, 168 N. C. 321, 84 S. E. 687. This statute allows an exemption from the inheritance tax, in favor of adult children, of \$2,000; in favor of minor children, \$5,000; and in favor of the widow, \$10,000. Prior to this act, it would seem that the widow's dower was exempt from taxation. The insertion in this statute of the following: "Provided, a widow shall be entitled to an exemption of \$10,000, and each child under twenty-one years of age to an exemption of \$5,000," is a clearly expressed intention that all above \$10,000 of the property which passes to the widow, whether by will or on intestacy, shall be subject to the inheritance tax. The intent of the legislature is as clear as its power. No property of which the husband was seised and possessed can pass to the widow, except by will or under the intestate laws of the state.

The suggestion that dower is vested in the widow by virtue of the contract of

marriage, and passes by such contract and not by law, cannot be sustained. The authorities may be said to be uniform against this position. In 9 R. C. L. p. 563, it is said, under the head of Dower, § 5: "Positive Law, Not Contract, as Basis. —In our law the right to dower is not regarded as springing from contract, although the contract of marriage is a prerequisite to its existence, but from the positive terms of the common law or statute law. Its existence and incidents are therefore determined by the law of the state in which the real estate lies, not by that of the place of the marriage or the domicile of the parties; and, likewise, by the law existing when the estate becomes consummate by the husband's death, instead of by that in force at the time of the marriage, or at the time of the acquisition of the real estate by the husband. The constitutional questions raised by changes of law made while rights of dower are inchoate are discussed elsewhere."

The reference "elsewhere" is to § 8, which states that "it is also the rule that the wife's expectation of dower, that is, her inchoate right of dower, even after her husband has become seised of particular real estate, is not a vested right within the protection of the constitutional provision," citing numerous authorities.

In 14 Cyc. 882, it is said: "Dower is inchoate after seisen of the husband and during coverture; consummate after the death of the husband."

On page 885 it is said: Although there is early authority to the contrary, it must now be regarded as settled that dower is not the result of any contract between husband and wife, either express or implied, but is an institution of the state, founded upon public policy, and made by positive law an incident of the marriage relation."

On page 925 it is said: "An inchoate right of dower is not an estate, nor is it an interest in real estate."

In Norwood v. Marrow, 20 N. C. 578, (4 Dev. & B. L. 442.) Ruffin, Ch. J., says: "There is no contract between husband and wife for curtesy or dower. The interest the one gets in the property of the other, the law gives for the encouragement of matrimony. . . . It is certain that, such as her estate [dower] is, the law makes it without any act of the husband, and even against his will."

To same purport Rose v. Rose, 63 N. C. 391. That dower is not a part of the contract of marriage, but is an estate arising and passing by operation of law, is well settled both in this country and in England. In 2 Scribner on Dower, p. 2, the

result of the English authorities is thus given: "It will be observed that this estate arises solely by operation of law, and not by force of any contract, express or implied, between the parties; it is the silent effect of the relation entered into by them, not as in itself incidental to that relation, or as implied by the marriage contract, but merely as that contract calls into operation the positive institutions of the municipal law."

Blackstone and Littleton speak of five species of dower, which had been gradually evolved from the variant customs as to dower prevailing in different parts of England, but these from time to time have been dropped or abolished, except what is known as "dower by the common law," which is defined as "one-third part of all the lands and tenements of which the husband was seised in fee simple or fee tail at any time during the coverture, and of which any issue which she might have had might, by possibility, have been heir, to be held by the wife for the term of her natural life."

This was abolished in this state in 1784, and was not restored till 1868. It is not so generally known that it was abolished, and more completely, in England, in 1834, and has remained so the only dower there existent for the last eighty-three years has been dower in one third of the real estate of which the husband died seised and possessed, subject, however, to the right of the husband, by will, to bar even this. In fact, dower at common law has not only been thus abolished in England, but it exists unchanged by statute hardly anywhere. 14 Cyc. 883 says: "In many of the United States dower, exactly or substantially as it existed at common law, has been recognized as in force or adopted by judicial declaration or by express constitutional or statutory provisions, while in others it has been very materially changed by statute. In other states dower has been abolished altogether, and a different right or interest substituted, as, for example, a certain portion of the husband's real property in fee simple, or a certain portion of community property, or both."

Common-law dower was not only abolished in this state in 1784, and remained so till 1868, but there are many cases in which it can be defeated, which would not be the case if it was based upon an implied contract between husband and wife. It may be defeated by divorce, or by felonious slaying of the husband by the wife (Revisal, § 2109); by elopement or abandonment (Revisal § 2110); by dissent of widow (Revisal, § 3081); the dower of an insane wife may be conveyed by the hus-

band alone (Revisal, § 959); and dower may be defeated by mortgage of the husband alone when for part of purchase money (Revisal, §§ 958 and 3085).

It must be seen that while dower is a provision for the widow, by virtue of the statute, out of the property left at her husband's death, it is not a vested right, nor an estate in land, nor is it in any sense based upon an implied contract arising out of the marriage. It is purely statutory like the laws of devolution of all property upon death; such property being disposed of by the law as to dower, or descent, or by will, according to the statute in force at the time of death of the owner. As has been repeatedly said by this and other courts, when a man dies he has no natural or inherent right to dispose of the property that he leaves behind him. The lawmaking body, as to wills and as to descent, whether to children or widow by way of dower, controls. In *Sutton v. Askew*, 66 N. C. 172, 8 Am. Rep. 500, it was held that the legislature could increase the inchoate right of dower by restoring the common-law right of dower which gave her dower in all the lands of which the husband was seised and possessed during coverture, but that the legislature could not thus restrict his power of alienation of lands which he had acquired prior to the passage of the act. There were two dissenting opinions, and the authorities elsewhere are in accord with that view. But the majority opinion rested not upon the vested right of the wife, but an assumed vested right of the husband in the *jus disponendi* which an extension of the dower right would impair, and because it might deprive creditors of their rights. The majority of the court evidently did not approve the legislative policy of restoring common-law dower. They criticize it as a violation of the husband's rights of property, and say that theretofore there had been but few questions as to dower rights and none as to inchoate dower rights, but that Act 1868-69, chap. 93, "involves the subject in much uncertainty and will breed much litigation." Judges Dick and Rodman in their dissenting opinion say correctly: "The history of the common law shows that dower was always regarded as a municipal institution, and was not the result of a contract."

Dower, as known to the common law, was purely an English regulation, which has been abolished there since 1834, and was abolished here for nearly 100 years. Dower is now hardly the same in any two jurisdictions. In biblical times "dowry"—as when Shechem solicited Jacob for his daughter Dinah in marriage: "Ask me

never so much dowry, and I will give it." Gen. xxiv. 12—bore no resemblance to the "dower" of the common law, but was a gift made by the suitor to the father or other near relatives of the intended bride. A similar custom prevailed among the Greeks, but Aristotle states that it had come to be looked upon as a relic of barbarism in their ancestors, as it was virtually a purchase of their wives. Neither is it like the dower, called "doe" of the Roman law (or the "dot" still in France), which was the marriage portion which the wife brought to her husband, in land or money. 1 Scribner Dower, 2, 3. It may be noted that the French "dot" (pronounced "doe"), with its attraction to foreign suitors of American heiresses, is the origin of the slang word "dough" for property.

The Chief Justiciar Glanville, in the first English law book, about 1775, said that if no dower was announced at the church door the wife took one third, subject, however, to the disposal of the husband by deed or will later, for, said he: "Since the wife herself is in a legal sense under the absolute power of her husband, it is not singular if the dower as well as the woman herself should be considered fully at the disposal of the husband, who may give away or alienate the dower in his lifetime."

He adds that if the promise at the church door is of more than a third, though the husband does not alienate it, the wife cannot take more, but if he promises less she gets only that. The second English law book, by Bracton, about a century later, repeats this, and gives as the reason because the woman has no vested interest in the dower before it is assigned, and because she cannot gainsay her husband.

Law books in those days came about a century apart, and were in manuscript, for it was some centuries yet before printing was invented. Indeed, Littleton, in his work on Tenures, doubts if the first work named was written by Chief Justiciar Glanville, because he was "not in orders," and attributes it to Glanville's nephew Hubert Walter (who was a bishop, and later Archbishop of Canterbury and Chief Justiciar), for in those days very few could read or write, except those who were in orders, and there were no lawyers till more than 100 years after Glanville's time. Consequently, most of the judges were bishops or priests with a few laymen.

Dower in fact and in law is neither a vested right in the wife, nor is the husband or wife beyond the power of the legislature to change it at will. It is simply the provision which the law makes for the support of the widow out of the husband's

estate after his death, and is controlled like all the other laws of descent and distribution, by the statute in force at the time of his death.

Dower, therefore, being a provision out of the husband's estate, which is allotted to her for her support in case of intestacy, or when she dissents from the provision made for her in her husband's will, is necessarily "property which passes by will or by the intestate laws of this state." Revisal, § 3081. In this case, if the widow had been content with the provision made for her in her husband's will, it would have been subject to the inheritance tax. It is none the less so because, dissatisfied with the amount thereof, she dissented, and, under proceedings provided by law, she has received a larger sum in lieu thereof. Whether she took it by will or under the dissent, which gave her the same share "as if he had died intestate," it is property which passed to her from her husband "by will or by the intestate laws of the state." The legislature has seen fit to tax it in either event, subject to an exemption of \$10,000. It cannot be that if she took by will it was taxable, but if, dissenting, she took an allotment of the same amount which she would have received if he "had died intestate," that the property is exempt from taxation. Revisal, § 3081, provides that, upon a dissent, "the widow shall have the same rights and estate in the real and personal property of the husband as if he had died intestate." There are numerous decisions that the words "dying intestate" are not limited to the ordinary meaning of one dying without making a will, but include death of a person without effectually disposing of the property. In *Re Cameron*, 47 App. Div. 120, 62 N. Y. Supp. 187, and many other cases.

The identical question here presented was passed upon in a very able opinion (*Billings v. People*, 189 Ill. 472, 59 L.R.A. 807, 59 N. E. 798), which holds: "The words 'intestate laws', in a statute imposing a transfer tax upon property passing by the intestate laws of the state, refer to the laws which govern the devolution of estates of persons dying intestate, including applicable rules of the common law which are in force, so that the tax will be applicable to a widow's dower interest and her award under the Administration Laws."

It was again presented in the same state in a recent case (1910) in the settlement of the estate of Marshall Field (*People v. Field*, 248 Ill. 147, 33 L.R.A.(N.S.) 230, 93 N. E. 721), where it was held: "A sum provided by antenuptial agreement to be paid the wife in case of her surviving the

husband, in lieu of all claims and rights which she might otherwise have upon her husband's estate as his widow, is subject to succession tax."

The Billings Case, *supra*, was taken on writ of error to the United States Supreme Court (188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272), and was affirmed; the court holding: "Inheritance Tax Laws are based upon the power of a state over testate and intestate dispositions of property, to limit and create estates, and to impose conditions upon their transfer or devolution. This court has already decided in regard to this law that such power could be exercised by distinguishing between the lineal and collateral relatives of a testator. Whether the amount of tax depends upon him who immediately receives, or upon him who ultimately receives, makes no difference with the power of the state."

In short, the court sustained the legislative power to tax inheritances, whether testate or intestate, and at different rates on the passage of the inheritance to different classes of devisees or distributees, including, in that case, the widow. To same purport, in *Re Morris*, 138 N. C. 260, 50 S. E. 682, a very interesting and learned opinion by Mr. Justice Brown. In *State v. Scales*, 172 N. C. 915, 90 S. E. 439, Allen, J., says: Our Inheritance Tax Laws show an advancing tendency to include all property, and to decrease exemptions, and should be liberally construed to the end that all property coming within their provisions may fairly and reasonably be taxed.

Walker, J., says in *Re Inheritance Tax* 172 N. C. 176, 90 S. E. 206, that "the obvious intent of the statute is to tax every interest passing by will to persons not exempt."

And though that case held that an annuity bequeathed to a widow was exempt from taxation, it was because of the language of the Act of 1909 (Laws 1909, chap. 438), which did not extend to the taxation of widows. This has now been changed, as we have seen, by the Act of 1913, which, after taxing all property, of every kind, of a decedent, passing by will or by law to another, exempts, as to the widow, \$10,000 only. The Inheritance Tax Law of 1911, chap. 46, § 6, subd. 5, contains this exemption: "Provided that all legacies and property passing by will or by law of this state to a husband or wife of the person who died possessed as aforesaid . . . shall be exempt from tax or tax duty."

In 1913 the legislature changed this by substituting for it a tax on all property of a decedent of every kind, whether passing by will or intestacy, "provided, the widow shall be entitled to an exemption

of \$10,000." The whole subject of inheritance taxation has been discussed in the admirable opinion by Brown, J., in *Re Morris*, 138 N. C. 259, 50 S. E. 682, where he says: "The statute must be given a liberal construction to effectuate the intention of the legislature." And, to the same effect, *Norris v. Durfey*, 168 N. C. 321, 84 S. E. 687; *State v. Scales*, 172 N. C. 915, 90 S. E. 439, in which Allen, J., gives a valuable synopsis and history of the Inheritance Tax Law in this state. The legislature necessarily intended to tax the widow's share from the estate of the deceased because, after taxing all property of every kind, it gives, among the exemptions, one of \$10,000 to widows. It would be manifestly unjust to tax them if they take under the will, but to exempt them entirely if they take contrary to the will by dissenting.

The taxing power is the life of the state. The existence of all governments depends upon its exercise, and all property and all rights of devolution or transfer of property are liable to be taxed at the will of the lawmaking body, and subject to change by it, except where there is a prohibition in that respect in the state Constitution; and there is nothing in the Constitution of North Carolina which forbids the legislature to tax the transfer of the property of the decedent, whether it goes by will or in case of intestacy, or, upon dissent of the widow, she receives her share under proceedings at law for its allotment in such cases, "as in cases of intestacy." Revisal, § 3081.

Reversed.

Allen, J., concurring:

The Laws of 1917 (Laws 1917, chap. 231), provide that all real and personal property "which should pass by will or by the intestate laws of this state" shall be subject to the Inheritance Tax. The dower of the widow does not pass by will, and is not therefore taxable under the statute, unless it comes within the meaning of the phrase, "intestate laws of this state." The authorities from other states hold almost unanimously that dower does not pass by the intestate laws, but the decisions are based on the language and history of the statutes in the several states, and in each the court was endeavoring to perform the duty, now imposed on us, of determining the intent and purpose of the general assembly, when it laid the tax on property passing by the intestate laws. The history of inheritance taxes is outlined in *State v. Scales*, 172 N. C. 916, 90 S. E. 440, and we then adopted a liberal construction of the statutes, "to the end of

taxing all property fairly and reasonably coming within their provisions," and we also said, after giving a statement of legislation on the subject: "This statement of legislation upon the subject in this state shows an advancing tendency to include all property, to decrease exemptions, and to maintain a distinct classification of persons, the lineal descendant, lineal ancestor, husband and wife, being in the most favored class, and the stranger and the corporation in the class subject to the highest tax."

Having in view these principles, what did the general assembly of this state mean when it said, "which shall pass by will or by the Intestate Laws of this state?" When a man dies, he leaves a will, or dies intestate, and, as ordinarily understood, stripped of technicality, all of his property must pass, either by will or by the Intestate Laws; the latter expression being used as the equivalent of "or as in case of intestacy." The history of legislation on the subject, and the changes made by the Act of 1913, which have since been retained in the statutes, sustain this construction.

In the Act of 1911, after saying that all real and personal property passing by will or by the Intestate Laws of the state shall be subject to the inheritance tax, there is provision that all legacies or property "passing by will or laws of this state to husband or wife" shall be exempt, which clearly exempted dower, because it passes by the "laws of this state." This provision was omitted from the Act of 1913, and in lieu thereof the widow is given an exemption of \$10,000. Why did the general assembly of 1911 insert a proviso having the effect to exempt dower, if the legislature thought dower was already exempt, because not passing by the Intestate Laws of the state? Why make the change in the Act of 1913, and strike down a section in the Act of 1911, which exempted dower, if the legislature still intended dower to be exempt? Why give the widow an exemption of \$10,000, and no more, if, in addition, she was to have her dower free from taxation? It is not dower that is the favorite of the law, but the widow, and under the construction we give the statute, she has an exemption of \$10,000 when a child's exemption, if under twenty-one is \$5,000, and if over, \$2,000, and the husband's nothing, showing that she retains her favored position.

I concur in the opinion of the Chief Justice.

Walker, J., dissenting:

I am unable to agree with my brethern

of the majority in this case. I think that much of what has been said by the court is irrelevant to the question presented in the record. It is unquestionably true that the state has the power to tax all kinds of property and estates therein, because one kind receives as much protection from it as another, and it is just, therefore, that this power should exist to be exercised when it is expedient to do so, or the interests of the state may require that it should be done. But this is not the question here, but quite another, which is, Has the state exercised its sovereign power to tax with respect to dower? I contend that it has not, and did not intend to do so, for if it did, the language we find in the statute would not have been employed, but something very different. If dower does not pass "by the husband's will or under the intestate laws," it is not taxable, because these are the very words of the statute.

The estate of dower is one of great antiquity, and so much so that it has been difficult to trace its origin, and even Coke and Blackstone, and writers of even an earlier period, have been baffled in their efforts to find its original source. Coke said that it was certainly the law of England before the Norman conquest that a widow should continue forty days in her husband's mansion, after his death, within which time (called her quarantine) her dower was to be assigned her. 2 Bl. Com. p. 135; 1 Co. Litt. 32b. And one among our greatest commentators—if not entitled to the first place—has said that it is possible that it might be, with us, the relic of a Danish custom since, according to the historians of that country, dower was introduced into Denmark by Swein, "the father of our Canute the Great," out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandala. 2 Bl. Com. 129. It has been described as a legal, equitable, and moral right, favored by the law, in a high degree, and, with life and liberty, held to be sacred. 1 Co. Litt. 124b. "Dower was, indeed proverbially, the foster child of the law, and so highly was it rated in the catalogue of social rights as to be placed in the same scale of importance with liberty and life. Favorabilia in lege sunt, vita, fides, dos, libertas, was the maxim in the courts, and is frequently cited by the old text-writers and reporters." Park, Dower, 2; 1 Co. Litt. 124b. It is an institution of the state existing by reason of public policy (14 Cyc. 885), and is not dependent upon the husband's will for its efficacy, but becomes the property of the wife, as his widow, in spite of anything he may say or do. He has no hand in its

making. It grows out of the marriage, it is true, and is one of its incidents, but it is not derived from the husband, by descent or devolution of any kind, nor does it come to the widow by his intestacy—that is the occasion, but not the cause, of it. It derives its existence from a law of its own, and not from any laws of intestacy. The latter apply when there is devolution or succession from him who dies, the decedent; but dower vests in the widow not in either way, as it is the creation of the law, and does not emanate from the husband, nor is it dependent upon his intestacy, except in the sense that it vests in possession and enjoyment at his death, as a vested remainder does when, under a will, it takes effect at the expiration of the particular estate. It may well be doubted, upon high authority, whether any intestate laws existed at the time when dower originated in the very ancient past. But, whatever may be said, it is no part of the husband's succession, for she comes into this estate, neither as his heir by inheritance, nor as his distributee by succession or devolution, and does not, in any sense, take from him, but against his will. He may devise her a part of his property, in lieu of dower, but this is not dower, and she does not take as his widow, but as his devisee. If she does not dissent, she takes under the will, not dower, but something else which is a part of his estate, and which is taxable, because she then comes within the letter of the law, as she takes by the will. But she may have dower when he dies testate, instead of intestate, as when he makes a will and ignores her entirely. If this was the case here, could she be taxable? She takes not under the will, because she was left out in the disposition of her husband's property, and she takes not her dower under any intestate law, because there is no intestacy. Where the husband wills her property, expressly in lieu of dower, if she does not dissent from the will, she is deprived of dower by her election to take under the will, for neither justice nor the law will permit her to take both under and against the will, in consistent benefits. Again, a person always takes, under intestate laws, something that the intestate, if so minded, could have devised or bequeathed, but he could not have devised her dower, and it follows, both logically and conclusively, that she does not acquire her dower under any such law. Counsel were asked in the argument: "If the husband had conveyed all of his real property, and every interest he had therein, would the dower pass? The answer, of course, was in the negative, as it had to be. If he cannot pass her dower by

his deed (even if he specially and by express words included it), how can it pass from him to her if he died intestate? He had no estate or interest in it to pass. It is as separate and distinct from his estate as if he had never owned the land itself from which it is allotted.

We do not agree with the proposition that all property passes either by will or under the Intestate Laws, for there are cases where this cannot be said correctly. The interest of the wife in an estate by entirety does not so pass at the death of the husband, for she does not take her interest from him by will or otherwise, and there are other instances. There is a wide difference between an interest vesting in another at the death of a person, which merely fixes the time and the taking of that interest under or through him. It may be derived altogether independently of him, and whether technically considered or not, it is not passed by will, nor by the laws of intestacy. The law is a technical science, and its principles should be applied to all cases where applicable, and the legislature is presumed to have acted in view of the established law and the accepted meaning of words when it passes a statute.

A statute should be interpreted according to its language. We cannot go beyond its four corners for aid in its construction. The intent must be found in its words. Nor can we substitute our opinion of what is right or just for the declared or expressed intention of the legislature, but must presume, absolutely and conclusively, that what was meant is what was said. This is the cardinal rule, and is never departed from. It may be that a widow's dower should be taxed, but she has a perfect right to shield herself from a burden which has not been imposed, by insisting upon the application of the simple and familiar rule we have stated. She says to us: "The power to tax is conceded, but has not been exercised, from some motive of benevolence or consideration for her, but, whatever the motive, the legislature has not declared its will that the widow's dower should be taxed, and you have no right to do what the legislature has not done."

If we need any authority to back our conclusion, we have it most abundantly. The courts of this country are quite unanimous in holding that, under similar statutes, the dower is not taxable, as an inheritance, or "under laws of intestacy." The Illinois cases are the solitary exceptions, and have been severely criticised as giving the wrong rule in such cases, and, while paying due deference to the court, they are said to be illogical; being wrong in their premises, reasoning, and conclusion. Some of the



cases which sustain our view are the following, among the many:

This "is a special tax, and the rule is that laws imposing such taxes are to be construed strictly against the government, and favorably to the taxpayer." *Crenshaw v. Moore*, 124 Tenn. 528, 34 L.R.A.(N.S.) 1161, 137 S. W. 924, Ann. Cas. 1913A, 165.

It has been uniformly held that an inheritance tax "is not a tax on the property of the estate of the deceased person, but is a tax laid upon the privilege or right of succession to that property." *McDaniel v. Byrnett*, 120 Ark. 295, 179 S. W. 491.

"This right [right of dower] originates with the marriage. It is an encumbrance upon the title of the heir at law, and is superior to the claims of the husband's creditors. Its origin is so ancient that neither Coke nor Blackstone can trace it, and it is as 'widespread as the Christian religion, and enters into the contract of marriage among all Christians.' . . . Whether it be considered that the widow holds her dower in the nature of a purchaser from her husband by virtue of the marriage contract, or whether it be merely a provision of the law made for her benefit, it cannot be considered that her right is in succession, to that of her husband upon his death, or that the husband bestows it upon her in contemplation of his death. While it is true that her right to dower is not consummated until the death of the husband, and that it is carved out of only such reality as he owned at his death, it does not follow from this premise that the widow succeeds to his title by the Intestate Laws. She derives it by virtue of the marriage, and in her right as wife, to be consummated in severalty to her upon the death of her husband." *Crenshaw v. Moore*, supra.

"It is true that dower had its origin and continuance by force of the law, and depends upon the husband's death for its consummation. But it is quite another thing to suppose that the estate is dependent upon the law of succession, or owes its existence to any such transfer as the Inheritance Tax Statutes contemplate. Dower comes to a wife by virtue of the marriage; and the death of the husband serves only to consummate, not to transmit, it. The law that confers dower on a widow is not the law that appoints the inheritance property of a decedent to designated heirs." *Ross, Inheritance Taxn.* § 56.

The courts of Pennsylvania have held that a widow's dower is not liable for inheritance tax. *Avery's Estate*, 34 Pa. 204. The courts of Louisiana have held the same. *Marsa's Succession*, 118 La. 212, 42 So. 778. "We conclude, therefore, that the widow of a deceased person does not take

dower as the heir of her husband, or by virtue of the Intestate Laws, but that this estate is inimical to the claim of the heir, and is carved out of the estate of the deceased in spite of and in derogation to the rights of the heirs under the intestate laws." *McDaniel v. Byrnett*, supra.

What the wife receives . . . she receives, not as an heir of her husband, but in her own right, something which belongs to her absolutely, and of which she could not have been deprived by will or by any other voluntary act of her husband without her consent. Under that section, she is not an heir within the meaning of our Intestate or Succession Statutes. *Re Bullen*, 47 Utah, 90, L.R.A.1916C, 670, 151 Pac. 533.

"Strictly speaking, the widow's share should be considered as immune rather than exempt from an inheritance tax. It is free, rather than freed, from such tax. It is not excepted from the taxable class, because it never was in such class. Like all debts, taxes, costs, expenses, and other similar items, it is deducted before any inheritance tax is assessed. The share of the realty and personalty, which under our law go to the widow, independent of any will or act of the husband, is not, so to speak, a part of his estate, and is no more liable to a succession tax at his death than is her individual property." *Re Strahan*, 93 Neb. 828, 142 N. W. 678.

"A widow's dower estate in lands of her deceased husband, which became vested on her marriage, and consummated on the death of her husband, independent of the husband's will, and not by virtue thereof, was not subject to transfer tax." *Re Weiler* (Surr.) 122 N. Y. Supp. 608.

The supreme court of Idaho, where the doctrine of community property exists, held that such property was not liable for inheritance tax. *Kohny v. Dunbar*, 21 Idaho, 258, 39 L.R.A.(N.S.) 1107, 121 Pac. 544, Ann. Cas. 1913D, 492. The supreme court of Arkansas, in discussing the case of *Billings v. People*, 189 Ill. 472, 59 L.R.A. 807, 59 N. E. 798, said: "The opinion in the *Billings Case* . . . set out the statute of that state upon the subject of dower, from which it appears that the estate of curtesy has been given . . . alike to the husband and wife, and each being given a certain fixed interest in the lands . . . upon the death of either spouse. This estate is called dower, but it is not the dower of the common law, as the term 'dower' at common law relates exclusively to the interest the widow had in the real estate of inheritance." *McDaniel v. Byrnett*, supra.

While the report shows that the *Billings Case* was carried to the Supreme Court of the United States, a reading of the report

of the case there will show that the widow did not appeal from the decision of the lower court, and the question of the liability of the widow's dower for taxation was not discussed in that court. *Billings v. Illinois*, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272.

The question of the liability of a widow's dower to an inheritance tax has been passed upon by the courts—upon statutes practically the same as that of North Carolina—of Arkansas, Illinois, Louisiana, Nebraska, New York, Utah, and Tennessee; and the courts of all those states, except that of Illinois, have held that a widow's dower was not subject to taxation. While the supreme court of Illinois has held to the contrary, it will be noticed that this court cited no decisions on this subject except its own. The decision in the *Billings* Case has been discussed by nearly all the courts in which this matter has arisen since its rendition, and they have all refused to follow the decision of that court. The question of the liability for inheritance tax of community property, held by the wife as survivor, has been passed upon by the courts of Idaho and Nevada, and they hold that the community property is not liable to inheritance taxes, because it is not derived by one of the spouses from the other, and there is, therefore, no succession of it. It may be added that the Illinois decision was to a great extent influenced by the peculiar wording of the statute of that state in regard to dower. It is not, as we have said, the common-law dower, but an estate with its name, without its legal characteristics. It is a maxim that three things be favored in law; Life, liberty, and dower. *Thomas's Co. Inst.* 14, 4 *Bacon's Works*, 345.

We learn in 2 *Blackstone*, pp. 131 et seq., that there were five species of dower: (1) *De la plus belle*, where the widow was endowed of the fairest of the lands held by her in socage, which discharged that held by the lord in chivalry. This disappeared when military tenures were abolished. (2) Dower by particular custom, where she received the whole, the half, or one quarter of her husband's lands. (3) Dower *ad ostium ecclesie*, or dower at the door or porch of the church, when tenant in fee simple endows the wife the whole or any part of his lands, as he shall please to give her, which, in certain circumstances, she might reject, and resort to her dower at common law. (4) Dower *ex assensu patris* was a species of that last kind of dower mentioned, and derived its name from the fact that the dower was taken from the lands of the husband's father

with the latter's consent. (5) Dower by the common law, which gave her one-third part of all the lands and tenements in which her husband had an estate of inheritance, and of which he was seised at any time during the coverture, to hold for the time of her natural life.

None of these forms of dower, except that of the common law, or dower allotted from the lands of which the husband died seised, ever was known to our law in regard to estates. Formerly, when the widow was endowed of lands only of which her husband died seised, it was like dower in copyhold lands, which was governed by custom as to her title and the quantity and proportion she would take, also called free bench, and contradistinguished from dower, which is the estate of the widow in all lands of which the husband was seised at any time during the coverture. *Blackstone* says that dower *ad ostium ecclesie* has long since fallen into total disuse, because of its uncertainty, and for the reason, too, that she might receive from the law, independently of the husband's volition a fixed part of his estate of lands of which he was seised at any time during the marriage. This brief review of the subject, based upon the authority of *Coke* and *Blackstone*, shows very clearly that we can derive no aid in the construction of our law from old and obsolete rules and customs, which have been ignored and finally repealed long ago, and no writer, ancient or modern, even intimates that the husband could, of his will, alien or impair the wife's common-law estate of dower, or that she acquire her right or title from him, by his intestacy or otherwise and this is true, whether the dower was allotted by the law of this state from lands of which the husband was seised at any time during the coverture, or only of those of which he died seised. In neither case was there any descent or devolution from him which would bring it within the meaning of an inheritance or succession for the purpose of taxation. It is for this reason that the courts have held with practical unanimity, as we have shown, that the wife's dower does not come within the reach of inheritance or succession taxes.

The fact that the widow is allowed an exemption of \$10,000 under the last act, whereas no such exemption was allowed before, does not affect the question, so as to show that her dower is taxable, as she may derive property, both real and personal from her husband by will, and the latter kind of property under the Intestacy Law as one of his distributees, and from these the exemptions would be taken, as they

come within the meaning of the provision taxing property acquired from her husband by will or the Intestacy Laws, and are, therefore, taxable, and to them the exemption of \$10,000 would apply, and not to property already not taxable by the language of the statute. You cannot take an

exemption from something not taxable, or an exemption from an exemption.

Hoke, J., concurs in the dissenting opinion.

Petition for rehearing denied.

## OKLAHOMA SUPREME COURT.

W. F. WEVER et al., Plffs. in Err.,  
v.  
PIONEER FIRE INSURANCE COMPANY.

(49 Okla. 546, 153 Pac. 1146.)

### Insurance — enforcement of provisions.

1. The provision in the standard form of fire insurance policy, provided for in § 3481, and contained in § 3482, Rev. Laws 1910, that "no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing requirements, nor unless commenced within twelve months next after the fire," is unambiguous, and, in an action on the policy, commenced more than twelve months after the date of the fire, will be enforced in accordance with the plain meaning of its terms, where no extrinsic facts are alleged excusing delay in instituting the action.

For other cases, see *Insurance*, VI. h, 3, in Dig. 1-52 N. S.

### Same — limitation period — when runs.

2. Where a standard form of policy of fire insurance contains the provision that no suit or action shall be sustainable in any court of law or equity unless commenced within twelve months next after the fire, the period of limitation begins to run from the date of the fire, notwithstanding the policy also contains a provision that "the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

For other cases, see *Insurance*, VI. h, 3, in Dig. 1-52 N. S.

(December 14, 1915.)

**ERROR** to the County Court for Coal County to review a judgment in favor of defendant in an action brought to recover

Headnotes by SHARP, J.

Note. — As to when stipulation limiting time for suit on insurance policy begins to run, see annotation following this case, post, 510, and references therein to annotations on related questions.

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the amount alleged to be due on a fire insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. William H. Fuller, George M. Porter, and C. E. B. Cutler for plaintiffs in error.

Messrs. Scothorn, Caldwell, & McRill, for defendant in error:

The contractual limitation of actions, as set out in the policy of insurance, which is the Oklahoma standard form, commences to run from the date of the fire, and not from the time a cause of action actually accrues upon the policy.

*Travelers' Ins. Co. v. California Ins. Co.* 1 N. D. 151, 8 L.R.A. 769, 45 N. W. 703; *McElroy v. Continental Ins. Co.* 48 Kan. 200, 29 Pac. 478; *State Ins. Co. v. Stoffels*, 48 Kan. 205, 29 Pac. 479; *Thompson v. Phoenix Ins. Co.* 11 Sawy. 276, 25 Fed. 296; *Johnson v. Humboldt Ins. Co.* 91 Ill. 92, 33 Am. Rep. 47; *Chambers v. Atlas Ins. Co.* 51 Conn. 17, 50 Am. Rep. 1; *Virginia F. & M. Ins. Co. v. Wells*, 83 Va. 736, 3 S. E. 349; *Bradley v. Phoenix Ins. Co.* 28 Mo. App. 7; *Steel v. Phoenix Ins. Co.* 2 C. C. A. 463, 7 U. S. App. 325, 51 Fed. 717; *Hart v. Citizens' Ins. Co.* 86 Wis. 77, 21 L. R. A. 743, 39 Am. St. Rep. 880, 56 N. W. 332; *Cooper v. United States Mut. Ben. Asso.* 132 N. Y. 334, 16 L.R.A. 138, 28 Am. St. Rep. 581, 30 N. E. 833; *Taylor v. Insurance Co. of N. A.* 25 Okla. 92, 138 Am. St. Rep. 906, 105 Pac. 354; *Daly v. Concordia F. Ins. Co.* 16 Colo. App. 349, 65 Pac. 416; *Egan v. Oakland Ins. Co.* 29 Or. 403, 54 Am. St. Rep. 798, 42 Pac. 991; *Fitzpatrick v. North American Accf. Ins. Co.* 18 Cal. App. 264, 123 Pac. 209; *Tebbetts v. Fidelity & C. Co.* 155 Cal. 137, 99 Pac. 501.

Sharp, J., delivered the opinion of the court:

Plaintiffs' action was brought July 29, 1911, to recover on an Oklahoma standard form fire insurance policy, issued by the Pioneer Fire Insurance Company to the plaintiff W. F. Wever, October 16, 1909. The amended petition alleged the total destruction of the property insured on April 5, 1910, on which date, it was said, the insurance policy was in full force and effect. To both the original and amended petitions,

the defendant filed a general demurrer, and also a special demurrer, on the ground that both petitions disclosed that plaintiff's cause of action was barred by limitation.

Section 3481, Rev. Laws 1910, provides that no fire insurance company shall issue fire insurance policies on property in this state, other than those of the standard form therein set forth, with certain enumerated exceptions not involved in this appeal. Section 3482 contains a standard form of policy, and in which is the following provision: "No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

The policy contains additional provisions to the effect that if fire occur, the insured shall give immediate notice in writing of any loss thereby, and within sixty days after the fire, unless such time is extended in writing by the insurer, shall render a statement to the company, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the time and origin of the fire, together with other requirements not here necessary to enumerate; and further provides, in effect, that the policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proofs of the loss have been received by the company, in accordance with the terms of the policy, and not otherwise.

It is the contention of the plaintiffs in error that the Statute of Limitations did not begin to run until the expiration of twelve months from the time the policy was payable by the insurer; while on the part of the insurer it is urged that the Statute of Limitations commenced to run from the time of the fire. It is said, in effect, by plaintiffs in error, that because of the terms of the policy, the company could not be sued until certain conditions were complied with, which would necessarily consume a portion of the time, and, the loss not being payable until sixty days after satisfactory proofs of the loss were received by the company, it might happen, if the limitation clause should be construed according to its language, that the action would be barred before the right to sue actually accrued under other provisions in the policy, and therefore the parties cannot have intended what they expressly said; that the provision in the policy, postponing a right of action until sixty days after proofs of loss are furnished, is in conflict with the provision limiting the time within which an action may be commenced, and that these provisions must be harmonized by judicial

construction. To this view we cannot give our assent. "Twelve months next after the fire" cannot be tortured into meaning "twelve months from the date the loss becomes payable." Plain, unambiguous words which have but one meaning are not subject to construction. "Twelve months next after the fire" has but one meaning. It can have no other. The fact that the policy was not payable until sixty days after proofs were furnished does not tend to make uncertain or ambiguous the language of the policy.

Nor is there any conflict in the several provisions of the statutory form of policy. Giving to the insured the full time allowed him for the submission of the proofs of loss, and to the insurer the time prescribed for payment of the loss, after proofs of loss have been received, there would have remained eight months in which to bring action in the event that liability was denied or payment refused. To so hold gives full force and effect to each of the several provisions of the policy, and does violence to none. *Kansas City Bridge Co. v. Lindsay Bridge Co.* 32 Okla. 31, 121 Pac. 639. Any other view would be not to construe the language of the policy, but to change it. *Oklahoma Nat. L. Ins. Co. v. Norton*, 44 Okla. 783, L.R.A.1915E, 695, 145 Pac. 1138. *United States v. Fisk*, 3 Wall. 445, 18 L. ed. 243. It would substitute another and different policy for the one prescribed by the legislature. Not only are we precluded from changing the provisions of the policy, under the guise of construction,—of making a new contract for the parties,—but the parties themselves could not have made the contract contended for by the insured. They had no volition in the matter. They could have provided no different period of limitation. The limitation in the policy for the bringing of an action was not a part of the policy by virtue of any agreement of the parties, but by command of the statute. *Hamilton v. Royal Ins. Co.* 156 N. Y. 327, 42 L.R.A. 485, 50 N. E. 863; *Temple v. Niagara F. Ins. Co.* 109 Wis. 372, 85 N. W. 861; *Tracy v. Queen City F. Ins. Co.* 132 La. 610, 61 So. 687, Ann. Cas. 1914D, 1145. The legislature having undertaken to fix a special statute of limitations, we cannot say, as a matter of law, that the time allowed is unreasonable. The statutes of some of the states, it appears, allow but six months after loss, or fire, or the doing of a certain act, in which to bring suit. Circumstances might arise, and often do, that would have the effect of delaying the period in which suit could be brought. Such was the case in *Pacific Mut. L. Ins. Co. v. Adams*, 27 Okla. 490, 112 Pac. 1026. No circumstances appear from the plaintiffs'

amended petition by which they were deprived of a reasonable time in which to bring their action. If such were the case, a different question might arise.

When the statute commenced to run presents a question in which there is much conflict of authority. We believe, however, that the weight of authority and the better reasoned cases support our conclusion. The provision of our statute, fixing the time within which suit shall be brought, is identical with that provision of a policy before the court in *Allen v. Dutchess County Mut. Ins. Co.* 95 App. Div. 86, 88 N. Y. Supp. 530, in which it was held that the twelve months' limitation began to run from the date of the fire, citing *King v. Watertown F. Ins. Co.* 47 Hun, 1; *Cooper v. United States Mut. Ben. Asso.* 132 N. Y. 334, 16 L.R.A. 138, 28 Am. St. Rep. 581, 30 N. E. 833. In the latter case, the prior decisions of that court in *New York v. Hamilton F. Ins. Co.* 39 N. Y. 45, 100 Am. Dec. 400; *Hay v. Star F. Ins. Co.* 77 N. Y. 235, 33 Am. Rep. 607; and *Steen v. Niagara F. Ins. Co.* 89 N. Y. 315, 42 Am. Rep. 297, were held not to be controlling, for the reason that there the period of limitation was twelve months "after any loss or damage shall accrue," or "after the loss shall occur," or "next after the loss or damage shall occur." In the latter case the policy limited the time for bringing an action, as already seen, to a term of twelve months "next after the loss or damage shall occur," and it was said, after referring to previous decisions of the court: "No doubt the appellant could have stipulated that the time of the fire should be looked to as the event from the happening of which the limitation should run, but it would require distinct language to show that such was the intention of the parties. It is not used here."

In *Rottier v. German Ins. Co.* 84 Minn. 116, 86 N. W. 888, it was held that a provision in the Minnesota standard policy that no suit to recover for loss under the policy should be sustained unless commenced within two years from the time the loss occurred, as a limitation, applied to and ran from the time of fire or actual destruction of the property, and not from the time when the cause of action accrued. The earlier opinion of the court in *Chandler v. St. Paul F. & M. Ins. Co.* 21 Minn. 85, 18 Am. Rep. 385, was shown to have been rested upon the peculiar language of the policy, making construction permissible. In *State Ins. Co. v. Meesman*, 2 Wash. 459, 26 Am. St. Rep. 870, 27 Pac. 77, in an able opinion, it is said that where a policy of the fire insurance provides that no action upon the policy "shall be sustained unless commenced with-

in six months after the fire," action cannot be brought on the policy after the lapse of six months and three days after the fire, even though the policy also provides that no action shall be begun until certain examinations have been made, and the same were not made or waived by the company until thirteen days after the fire. In *Travelers' Ins. Co. v. California Ins. Co.* 1 N. D. 151, 8 L.R.A. 769, 45 N. W. 703, it was held that where a policy of fire insurance provides that action thereon must be brought within a specified time after the loss occurs, the limitation runs from the date of the fire although, under other provisions of the policy, the cause of action did not accrue until some time after the fire. In *Bradley v. Phoenix Ins. Co.* 28 Mo. App. 7 one of the conditions of the policy of insurance sued on was "that no suit or action against the company should be sustainable . . . unless such suit or action should be commenced within six months next after the loss should occur."

The action was not commenced within the prescribed time, and it was held that the period of limitation began to run from the date of the loss by fire, and not from the date of the furnishing of proofs of loss. In *Johnson v. Humboldt Ins. Co.* 91 Ill. 92, 33 Am. Rep. 47, where a policy of insurance provided that no action should be brought thereon until an award was made fixing the amount of the claim, and no recovery had unless the suit or action should be commenced within twelve months next after the loss should occur, it was held that the suit to recover for a loss must be brought within twelve months after the destruction of the property by fire, and not within twelve months after an award fixing the amount of the loss. In *Chambers v. Atlas Ins. Co.* 51 Conn. 17, 50 Am. Rep. 1, the policy of insurance provided that payment for losses should be due in sixty days after proofs of the loss were received by the company, and that no suit on the policy should be sustainable unless brought within twelve months after the loss occurred. It was held that the twelve months should be reckoned from the day of the fire, and not from the expiration of the sixty days after the proofs were delivered to the company. In *Egan v. Oakland Home Ins. Co.* 29 Or. 403, 54 Am. St. Rep. 798, 42 Pac. 990, it was held that the Statute of Limitations commenced to run, in that case, from the time of the fire, and not from the time the right to sue accrued. The opinion is an able one, and reviews many of the leading authorities supporting the two lines of decisions. Another well-considered case is that of *Hart v. Citizens' Ins. Co.* 86 Wis. 77, 21 L.R.A. 743, 39 Am. St. Rep. 877, 56 N. W. 332,

where it was said that a provision that a suit on a policy must be brought within "twelve months after the fire" requires the time to be computed from the date of the fire, and not from the time the loss is ascertained and established. To the same effect are the decisions of the supreme court of Kansas in *McElroy v. Continental Ins. Co.* 48 Kan. 200, 29 Pac. 478, and *State Ins. Co. v. Stoffels*, 48 Kan. 205, 29 Pac. 479. In *McFarland v. Railway Officials & E. Acci. Asso.* 5 Wyo. 126, 27 L.R.A. 48, 63 Am. St. Rep. 29, 38 Pac. 347, 677, the decisions are reviewed at length, and the conclusion reached that the limitation in a policy of insurance against death resulting from an accident, indicated by a clause that an action thereon must be brought "within one year from the date of the happening of the alleged injury," begins to run at the death of the insured, and not at the time at which the right of action under the policy accrues. In *Appel v. Cooper Ins. Co.* 76 Ohio St. 52, 10 L.R.A.(N.S.) 674, 80 N. E. 955, 10 Ann. Cas. 821, it was held that a provision in a policy of fire insurance that "no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within six months next after the fire," was unambiguous, and, in a suit on the policy, commenced more than six months after the date of the fire, will be enforced in accordance with the plain meaning of its terms, where no extrinsic facts are alleged excusing delay in bringing the suit. It was said: "Where a policy of fire insurance contains the provision that no suit or action shall be sustained thereon unless commenced within six months next after the fire, the period of limitation begins . . . from the date of the fire, notwithstanding the policy also contains the provision 'that the loss shall not be payable until sixty days after the proofs of loss have been received by the company.'"

Other cases announcing the rule adopting this view are *Virginia F. & M. Ins. Co. v. Wells*, 83 Va. 736, 3 S. E. 349; *Tasker v. Ins. Co.* 58 N. H. 469; *Daly v. Concordia F. Ins. Co.* 16 Colo. App. 349, 65 Pac. 416; *Glass v. Walker*, 66 Mo. 32; *Tebbets v. Fidelity & C. Co.* 155 Cal. 137, 99 Pac. 501; *Maxwell Bros. v. Liverpool & L. & G. Ins. Co.* 12 Ga. App. 127, 76 S. E. 1036;

*Kettenring v. Northwestern Masonic Aid Asso. (C. C.)* 96 Fed. 177; *Semmes v. Hartford Ins. Co. (Semmes v. City F. Ins. Co.)* 13 Wall. 158, 20 L. ed. 490; *Peoria Sugar Ref. Co. v. Canada F. & M. Ins. Co.* 12 Ont. App. Rep. 418; *Blair v. Sovereign Ins. Co.* 19 N. S. 372. This rule is also supported by *Richards, Ins.* § 329; *Joyce Ins.* § 3190; *Ostrander, F. Ins.* § 408.

Authorities holding that the Statute of Limitations begins to run from the time that the cause of action accrues under the policy are *Ellis v. Council Bluffs Ins. Co.* 64 Iowa. 507, 20 N. W. 782; *Boston M. Ins. Co. v. Scales*, 101 Tenn. 628, 49 S. W. 743; *Case v. Sun Ins. Co.* 83 Cal. 473, 8 L.R.A. 48, 23 Pac. 534; *Sample v. London & L. F. Ins. Co.* 46 S. C. 401, 48 L.R.A. 696, 713, 57 Am. St. Rep. 701, 24 S. E. 334; *German Ins. Co. v. Davis*, 40 Neb. 700, 59 N. W. 698; *Hong Sling v. Royal Ins. Co.* 8 Utah. 135, 30 Pac. 307; *Murdock v. Franklin Ins. Co.* 33 W. Va. 407, 7 L.R.A. 572, 10 S. E. 777; *Chandler v. St. Paul F. & M. Ins. Co.* 21 Minn. 85, 18 Am. Rep. 385; *Sun Ins. Co. v. Jones*, 54 Ark. 376, 15 S. W. 1034; *Allibone v. Fidelity & C. Co. — Tex. Civ. App. —*, 32 S. W. 569; *Spare v. Home Ins. Co. (C. C.)* 9 Sawy. 142, 17 Fed. 568; *Friezen Fed.* 608; *Steele v. Phenix Ins. Co.* 2 C. C. A. Vette v. Clinton F. Ins. Co. (C. C.) 30 v. *Alemania F. Ins. Co. (C. C.)* 30 Fed. 352; *A. 463*, 7 U. S. App. 325, 51 Fed. 715; *New York v. Hamilton F. Ins. Co.* 39 N. Y. 45, 100 Am. Dec. 400; *Hay v. Star F. Ins. Co.* 77 N. Y. 235, 33 Am. Rep. 607; *Steen v. Niagara F. Ins. Co.* 89 N. Y. 315, 42 Am. Rep. 297. Not all of these cases, however, decide the precise question of limitation here presented. Some of them pertain to the construction of doubtful provisions of the policies, thereby furnishing occasion for a construction favorable to the insured. The early New York, Minnesota, and California cases can be no longer, in view of the more recent expressions of the courts of those states, be said to be authority for the claim of the plaintiffs in error. Plaintiffs, not having brought their action within the time fixed by statute, and such fact appearing upon the face of the amended petition, the court properly sustained the demurrer of the defendant.

The judgment is affirmed.

All the Justices concur.

### Annotation—Stipulation limiting time for suit on insurance policy; when begins to run.

This note supplements the notes to *Sample v. London & L. F. Ins. Co.* 47 L.R.A. 696, and *Dahrooge v. Rochester-L.R.A. 1918F.*

*German Ins. Co.* 48 L.R.A.(N.S.) 906, on the above question.

As to effect of presumption of death

from absence upon payment of life insurance premiums, filing proofs, and operation of Statutes of Limitations, see note to *New York L. Ins. Co. v. Brame*, L.R.A.1918B, 86.

For conflict of laws as to contractual relation, see note to *Northwestern Mut. L. Ins. Co. v. Adams*, 52 L.R.A.(N.S.) at page 285.

The question under consideration is summarized as follows in the earlier annotation: "This question has given rise to an irreconcilable conflict of authority. Perhaps a majority of the courts have adopted the rule that, as the language of the stipulation is that of the insurance company, it is to be construed most favorably to the insured; and that, as the policy also usually contains stipulations postponing the right to sue thereon, the parties are not to be deemed to have intended that the limitation of the time to sue should run during the time that suit is prohibited, but that the two classes of stipulations should be construed together so as to fix the time of the beginning to run of the limitation at the point of time at which suit might be brought on the policy, thus giving the insured the whole period limited, during any moment of which he would be entitled to sue. A large number of well-considered cases, however, have construed stipulations limiting the time to sue on insurance policies literally, giving them full effect without reference to the other stipulations in the policy, holding that in all cases the limitation begins to run at the time of the fire or other casualty insured against. Some of the cases, as, for example, those of New York, have recognized a distinction with reference to fire-insurance policies between limitation of the right to sue to a designated period after loss and to a designated period after the fire, holding in the one case that the time of loss means the time when the loss becomes due and payable and actionable, and in the other case that the time of the fire can mean nothing but the actual date upon which the fire occurred. But most of the courts which have postponed the running of the limitation until the loss becomes due and payable have done so irrespective of whether the limitation was from the time of loss or from the time of the fire, holding that, for the purpose in question, the two expressions mean the same thing, and that either stipulation is to be construed relatively with the other stipulations in the policy. With reference to accident, life, and marine,

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and other insurance policies, while the language of the limitation clause is necessarily somewhat different, and while the cases are not so numerous as with reference to fire insurance, the same conflict exists as between the literal construction of the limitation clause on the one side, and its construction in connection with other stipulations postponing the time when the claim shall become due and payable on the other side, and it would appear generally that the courts adopting one side or the other of the question of literal construction or relative construction with reference to fire insurance have adopted the same side of the controversy with reference to other insurance."

#### **Limitation for fixed period after fire.**

Supplementing notes in 47 L.R.A. 701-704, and 48 L.R.A.(N.S.) 907.

It will be noted that in *WEVER v. PIONEER F. Ins. Co.* ante, 507, it was held that under a standard fire policy providing that no suit should be sustainable unless commenced within twelve months next after the fire, the period of limitations began to run from the date of the fire, notwithstanding another provision that the loss should not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss had been received by the company, the view being taken that to hold otherwise would be to make a new contract for the parties.

#### **Accident insurance policies.**

Supplementing notes in 47 L.R.A. 704, and 48 L.R.A.(N.S.) 908.

In *Kendall v. Travelers' Protective Asso.* (1918) 27 Or. 179, 169 Pac. 751, where an accident policy provided that claims for benefits must be presented to the national board of directors of the insurer, and that "such claims are not divisible, and must be presented after the total recovery of the member," and the possible time limit of reimbursement was two years, and it was further provided that no action should be sustained for any claim unless commenced within six months after the refusal of the insurer to pay the same, it was held that the limitation began to run from the time the insurer refused to pay a claim which had been presented after the insured had regained his health, and an action brought about seven months after the denial of liability by the insurer on a claim for thirty-two weeks' disability was held not barred.

In *Matheson v. Iowa State Traveling Men's Asso.* (1917) — Iowa, —, 164 N.

W. 194, where the accident policy provided that no action of any kind should be commenced to recover any benefit or indemnity provided for unless it was commenced within twelve months after the cause of action accrued, and it was provided by statute that notice and proofs of loss should be given within sixty days after loss, and that no action should be begun until forty days after the filing of notice and proofs of loss, it was held that the cause of action for the total loss of sight of an eye accrued forty days after the denial of liability by the insurer after receipt of notice; and that the insured was not entitled, in computing limitations, to count the full sixty days allowed for giving notice when he had given notice before the expiration of that time, and his action was held barred where it was commenced after one year from the expiration of forty days from the giving of notice and proofs of loss.

#### **Life insurance policies.**

Supplementing notes in 47 L.R.A. (N.S.) 706, and 48 L.R.A. (N.S.) 910.

In *Stewart v. National Council, K. L. S.* (1914) 125 Minn. 512, 147 N. W. 651, where the by-laws of a benefit association provided that no action should be brought on the certificate until proofs of death had been furnished "and passed upon by the national executive committee," nor unless brought within one year from the death of the member, it was held that the limitation of one year did not begin to run until the association had passed upon the claim and notified the insured of its decision, the court holding that the provisions were inconsistent, and that they should be construed in favor of the insured.

And in *Simmons v. Modern Woodmen* (1914) 185 Mo. App. 483, 172 S. W. 492, where the benefit certificate provided that no action should be maintained until after the proofs of death and claimant's right to benefits, as provided for in the by-laws, had been filed and passed upon by the board of directors, nor unless brought within eighteen months from the date of the insured's death, it was held that the eighteen months' limitation did not begin to run on the day the claim was passed upon and rejected by the directors, but on the day that final unequivocal notice of denial of liability was given to the beneficiary. And the same conclusion was reached on a subsequent appeal in (1916) 194 Mo. App. 29, 188 S. W. 933.

In *Madi v. Modern Woodmen* (1917)

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98 Wash. 526, 167 Pac. 1083, however, where a benefit certificate provided that no action should be maintained on the certificate until after proofs of death and claimant's right to benefits had been filed and passed upon by the board of directors, nor unless brought within eighteen months from the date of the insured, it was held that the period of limitations began to run from the date of the insured's death, and not from the date upon which a claim was passed upon by the directors.

In *Bankers' Health & L. Ins. Co. v. August* (1918) — Ga. App. —, 95 S. E. 764, where a policy provided that no suit should be brought on the policy after six months from the time the right of action accrued, and that no claim should be considered until satisfactory proof of death was made, it was held that this proof was made at the time affidavits were submitted showing that the deceased person was the insured, which was about eight months after his death, and recovery was allowed in a suit apparently brought within six months after the making of such proof.

#### **Marine and other miscellaneous insurance policies.**

Supplementing notes in 47 L.R.A. 708, and 48 L.R.A. (N.S.) 911.

In *National Surety Co. v. Williams* (1917) — Fla. —, 77 So. 212, where a fidelity bond provided that upon becoming aware of any act which might be made the basis of a claim on the bond, immediate notice should be given the insurer, and that within ninety days after the date of notice an itemized claim should be filed, and further provided that no action should be brought to recover unless commenced within twelve months "after the date the employer shall have given notice of claim," it was held that the policy should be construed in favor of the insured, and that the limitation for bringing suit meant within twelve months from the time the itemized claim was filed, and not twelve months from the giving of notice of an act which might be the basis of a claim under the policy.

#### **What will prevent or delay the running of the limitations.**

Supplementing notes in 47 L.R.A. 709, and 48 L.R.A. (N.S.) 912.

It has been held that the words "paid and satisfied," as used in an indemnity policy providing that action should be brought within ninety days after the judgment recovered against the insured was paid and satisfied, were synonymous,



and that it was satisfaction in fact, and not the entry of satisfaction upon the record, that was contemplated. *Philadelphia Pickling Co. v. Maryland Casualty Co.* (1915) — *N. J. L.* —, 94 *Atl.* 889, s. c. subsequent appeal in (1916) 98 *N. J. L.* 336, 98 *Atl.* 433. And it was held that the payment of 40 cents to the attorney of the original plaintiff for satisfaction pieces and canceling the judgments would not extend the time for bringing suit on the policy, as such payment was not one that the insured was bound to make, it being the duty of the original plaintiff's attorney to enter satisfaction, and since such payment was not a payment to the plaintiff in the original judgment, but at best merely a payment to the clerk of his fee for entering satisfaction. *Philadelphia Pickling Co. v. Maryland Casualty Co.* (N. J.) supra.

In *Holly v. London Assur. Co.* (1915) 170 *N. C.* 4, 86 *S. E.* 694, a provision in a fire policy that no suit for the recovery of any claim should be sustainable until full compliance of the insured with certain requirements, "nor unless commenced within twelve months after the fire," was held not to be a statute of limitations, but a contractual limitation; and it was held that the insured's failure to bring his action within the time provided by the policy was not excused by the fact that he was continuously imprisoned from the date of the fire until about three years thereafter, the statute providing for the stopping of the running of the Statute of Limitations during imprisonment being inapplicable to a contractual limitation.

It is stated in the abstract of the decision in *Gross v. Globe & R. F. Ins. Co.* (1913) 140 *Ga.* 531, 79 *S. E.* 138, that where it was stipulated in a policy of fire insurance that no suit should be maintainable thereon "unless commenced within twelve months next after the fire," an action brought after the lapse of that period would be barred, although it purported on its face to be a renewal of a previous action which was instituted in a city court having jurisdiction thereof within the time limited, which was dismissed and subsequently renewed in the superior court, after the payment of all costs within six months of such dismissal.

In *Dalzell v. London & L. F. Ins. Co.* (1916) 252 *Pa.* 265, 97 *Atl.* 452, where a fire policy provided that no action on the policy should be maintained unless commenced within twelve months next after the fire, and an action was brought in the court of common pleas and re-

moved to the United States circuit court, and there a judgment for the plaintiff was reversed without prejudice to the right of the plaintiff to bring such other suit as he might be entitled to, it was held that a subsequent suit, instituted more than a year after the loss for which recovery was sought, was barred.

#### **To what actions the limitation applies.**

Supplementing notes in 47 *L.R.A.* 711, and 48 *L.R.A.* (N.S.) 913.

A provision in a benefit certificate that no action should be maintained on the certificate unless brought within one year from the date of the member's death has no application in an action by those entitled to the benefit, to recover the amount from one who fraudulently obtained possession of it from the insurer. *Munroe v. Beggs* (1914) 91 *Kan.* 701, 139 *Pac.* 422.

And a provision in an employers' indemnity policy that no action should be brought against the insurer on the policy after the expiration of a stated period from the date of the accident, within which an action for injuries might be brought against the insured, has no application to an action for damages to recover for the insurer's negligence in defending a suit against the insured. *Attleboro Mfg. Co. v. Frankfort Marine Acci. & Plate Glass Ins. Co.* (1917) 153 *C. C. A.* 377, 240 *Fed.* 573.

And a provision in an employers' indemnity policy, that no action should lie to recover for any loss under the policy unless it should be brought for loss or expense incurred and paid by the assured after trial of the issue, nor unless such action should be brought within ninety-days after the payment of such loss and expense, applies only to actions to enforce the contract of indemnity, and does not apply to an action for damages caused by a breach of the contract to defend an action brought against the insured. *Lawrence v. Massachusetts Bonding & Ins. Co.* (1916) 160 *N. Y. Supp.* 883.

In *Automatic Sprinkler Co. v. Employers' Liability Assur. Corp.* (1914) 163 *App. Div.* 671, 148 *N. Y. Supp.* 1013, an action for damages for failure of the insurer to communicate the offer of settlement of an injured employee to the insured was treated as an action on the contract, and a provision of the policy limiting the time for bringing suit was held applicable.

Where the insurer repudiates its contract before the insured's death, and

thus dispenses with the necessity of giving notice of claim and proofs of loss, a provision that no action shall be maintained until after proofs of loss have been acted upon by the executive committee, nor unless brought within one year from the date of such action, has no application, as the event which was to mark the commencement of limitations could not happen, and the action of the committee, and not the death of

the insured, being the event fixed by the contract to set the period of limitations in motion, such period will not commence running from the insured's death, although, because of the insurer's repudiation of its contract, a cause of action then accrued. *Dechter v. National Council*, K. L. S. (1915) 130 Minn. 329, 153 N. W. 742, Ann. Cas. 1917C, 142. J. T. W.

## FLORIDA SUPREME COURT.

EX PARTE J. J. HARRELL

(— Fla. —, 79 So. 166.)

### Municipal corporations — ordinance — business closing.

An ordinance adopted by the city council of the city of Tallahassee, requiring, under penalties of fine and imprisonment, all places of business to be closed at 6:30 o'clock P. M., where goods, wares, and general merchandise are kept for sale, is void, because the said city has no authority of law, either express or implied, to enact or enforce the same, and because the same is an unreasonable and unwarranted governmental interference with the personal rights of the merchant class of the citizens of the town.

*For other cases, see Municipal Corporations, II. c. 4, d, in Dig. 1-52 N. S.*

(June 15, 1918.)

**P**ETITION for a writ of habeas corpus to secure petitioner's release from custody to which he had been committed for nonpayment of a fine imposed upon him for alleged violation of an ordinance regulating the closing of business places. Petitioner discharged.

The facts are stated in the opinion.

Messrs. William C. Hodges and Fred H. Davis, for petitioner:

A person held in custody under sentence of a municipal court, upon conviction on a charged based on an ordinance alleged to be void, may test the validity of the ordinance in habeas corpus proceedings, and may be discharged from custody if the ordinance is void.

*Kinkaid v. Jackson*, 66 Fla. 378, 63 So. 706.

The city of Tallahassee is a municipal cor-

Headnote by TAYLOR, J.

**Note.** — The validity of a statute or ordinance requiring commercial or mercantile establishments to close at certain hours is treated in the annotation following *Saville v. Corless*, L.R.A.1916A, 654.

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poration existing under and by virtue of chapter 6400, Acts of 1911, Laws of Florida, and the incorporating act does not contain any express authority to prescribe the time of closing of places of business in said city.

*Hardee v. Brown*, 56 Fla. 377, 47 So. 834; *Waller v. Osban*, 60 Fla. 268, 52 So. 970; 1 Dill. Mun. Corp. 237; 28 Cyc. 363 et seq.

The ordinance is unreasonable and oppressive.

28 Cyc. 368, 369; *People ex rel. Wineburgh Advertising Co. v. Murphy*, 195 N. Y. 126, 21 L.R.A.(N.S.) 735, 88 N. E. 17; *Coaticook v. Lothrop*, Rap. Jud. Quebec 22 C. S. 225.

As matters of public policy are not subject to municipal police regulation unless the power is specially delegated, arbitrary ordinances interfering with freedom of trade, or discriminating between residents and nonresidents, or unreasonably limiting the hours of sale are void.

28 Cyc. 733; *State v. Ray*, 131 N. C. 814, 60 L.R.A. 634, 92 Am. St. Rep. 795, 42 S. E. 960; *Coaticook v. Lothrop*, Rap. Jud. Quebec 22 C. S. 225.

Mr. Fred T. Myers, for respondent.

The powers of a municipal corporation are usually classified into those granted in express words, those necessarily or fairly implied in or incident to the powers expressly granted, and those essential to the declared objects and purposes of the corporation,—not simply convenient but indispensable.

28 Cyc. 260; *Porter v. Vinzant*, 49 Fla. 213, 111 Am. St. Rep. 93, 38 So. 607; *Jacksonville Electric Light Co. v. Jacksonville*, 36 Fla. 229, 30 L.R.A. 540, 51 Am. St. Rep. 24, 18 So. 677; *State ex rel. Ellis v. Tampa Waterworks Co.* 56 Fla. 858, 19 L.R.A.(N.S.) 183, 47 So. 358.

The general welfare clause alone amounts to a grant of all usual and necessary municipal powers, and the enumeration of particular powers grants all others therein specified.

28 Cyc. 262; *Porter v. Vinzant*, 49 Fla. 213, 111 Am. St. Rep. 93, 38 So. 607;

Mernaugh v. Orlando, 41 Fla. 433, 27 So. 34; Patterson v. Taylor, 51 Fla. 275, 40 So. 493.

Taylor J., delivered the opinion of the court:

It is shown by the petition for the writ of habeas corpus filed in this court and by the return to the writ, duly issued, that the petitioner, J. J. Harrell, is deprived of his liberty and held in custody for the non-payment of a fine imposed upon him on conviction before the mayor's court of the city of Tallahassee of an alleged violation of § 1 of an ordinance adopted by the city council of said city; said section being as follows:

"That on and after the 20th day of May, 1918, places of business in the city of Tallahassee shall be closed for the transaction of business each week day except Saturday, as follows:

"Automobile supply stores and garages at 9 o'clock P. M.

"Candy stores, cigar stands, drug stores and places where ice cream and soft drinks are dispensed exclusively, at 9:30 P. M.

"Bowling alleys, moving picture shows, pool and billiard rooms, at 10:30 P. M.

"And all other places of business not specifically named, where goods, wares and merchandise are kept for sale, at 6:30 P. M."

The petitioner belongs to the latter class that is required to close his store at 6:30 o'clock P. M. The validity of the ordinance is questioned in this proceeding.

It is conceded that there is no express authority in any statute for the enactment by this city of the ordinance for the infraction of which the petitioner is held in custody. But it is contended that under the general welfare clause of the city's charter, authorizing it to enact all ordinances that tend to conserve the public health, public morals, the public safety, and, generally, the good order and peace of the community,

the city is empowered to adopt and enforce it.

We cannot discover how an ordinance requiring every person conducting a legitimate mercantile business in a town, except a few specially favored classes, to close their places of business at 6:30 o'clock P. M., can in any manner, directly or remotely, even tend to promote public health, public morals, the public safety, or the good order and peace of the community; but, on the contrary, we think that the provision of the ordinance in question, for a violation of which the petitioner is held in custody, is an unwarranted governmental interference with the personal rights of the merchant class of the citizens of the town, and is void, and that the conviction and sentence of the petitioner by the mayor for its infraction is not warranted by law, and is a nullity.

It follows that the petitioner should be, and he is hereby, adjudged and ordered to be discharged from custody at the cost of the city of Tallahassee.

Browne, Ch. J., and Ellis, J., concur.

Whitfield and West, JJ., concurring specially.

If any provision of a municipal ordinance, curtailing the rights of individuals, adopted under general welfare charter powers, is not reasonable in its operation, it is invalid. 19 R. C. L. 803, 867.

Assuming the power of the city to adopt and enforce reasonable regulations in the premises, the provision of the ordinance requiring stores to be closed at 6:30 P. M. is unreasonable, and therefore invalid. See L.R.A.1916A, 651, and note; Johnson v. Philadelphia, 94 Miss. 34, 19 L.R.A.(N.S.) 637, 47 So. 526, 19 Ann. Cas. 103; State v. Ray, 131 N. C. 814, 60 L.R.A. 634, 92 Am. St. Rep. 795, 42 S. E. 960.

## IOWA SUPREME COURT.

GEORGE W. STOKER, Appt.,  
v.

TRI-CITY RAILWAY COMPANY.

(— Iowa, —, 165 N. W. 30.)

Street railway — negligence of motor-man — approaching street intersection without looking.

1. The motorman in charge of a street car may be found to be negligent in approaching a point where a street intersects with that on which his car is running with-

out looking for vehicles which may emerge from that street.

For other cases, see *Street Railways*, III. b. in *Dig. 1-52 N. S.*

Negligence — imputed — driver and employee on truck.

2. A salesman employed by an ice cream manufacturer to deliver the cream upon a truck is not chargeable with the negligence of the driver of the truck, who is employed by the common employer, and over whom

Note.—The question whether the negligence of a driver is to be imputed to a passenger is treated in the notes to *Schultz*

the salesman has no control in driving the truck into collision with a street car.

*For other cases, see Negligence, II. c, 2, in Dig. 1-52 N. S.*

**Trial — jury — negligence.**

3. If reasonable minds might differ as to the negligence of one injured by collision with a street, car, the question of such negligence must be submitted to the jury.

*For other cases, see Trial, II. c, 8, c, (2), (b), in Dig. 1-52 N. S.*

(November 16, 1917.)

**A**PPEAL by plaintiff from a judgment of the District Court for Scott County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

Statement by Stevens, J.:

Action for damages on account of injuries resulting from the collision of a motor truck with one of defendant's street cars. The court directed a verdict for the defendant. Plaintiff appeals.

Messrs. Ely & Bush, for appellant:

Even when the facts are not in dispute, or if reasonable men may honestly differ as to the conclusions to be drawn therefrom, the question of negligence is for the jury, and not for the court.

*Bach v. Iowa C. R. Co.* 112 Iowa, 241, 83 N. W. 959; *Mathews v. Cedar Rapids*, 80 Iowa, 459, 20 Am. St. Rep. 436, 45 N. W. 894; *Tobey v. Burlington, C. R. & N. R. Co.* 94 Iowa, 256, 33 L.R.A. 496, 62 N. W. 761; *Barnhart v. Chicago, M. & St. P. R. Co.* 97 Iowa, 654, 66 N. W. 902; *Moore v. Chicago, St. P. & K. O. R. Co.* 102 Iowa, 595, 71 N. W. 569; *McLeod v. Chicago & N. W. R. Co.* 104 Iowa, 139, 73 N. W. 614; *Clark v. Wallace*, 27 Ann. Cas. 351, note; *Fitter v. Iowa Teleph. Co.* 143 Iowa, 692, 121 N. W. 48; *Hollgren v. Des Moines City R. Co.* 174 Iowa, 568, 156 N. W. 690; *Noyes v. Des Moines Club*, — Iowa, —, 160 N. W. 215.

If the evidence, even though very slender, is sufficient to carry a question into the realm of fact, the question is one for the jury.

*Edwards v. Hasel*, 157 Iowa, 416, 138 N. W. 501.

The preferential right generally accorded to street cars over other vehicles between street crossings does not prevail at street crossings, but the drivers of vehicles and

street car have equal rights at these crossings, and neither has a right superior to that of the other.

*McCarthy v. Consolidated R. Co.* 79 Conn. 73, 63 Atl. 725, 20 Am. Neg. Rep. 31; *Savannah Electric Co. v. Elarbee*, 6 Ga. App. 137, 64 S. E. 570; *Farnsworth v. Tampa Electric Co.* 62 Fla. 166, 57 So. 233; *Fisher v. Chicago City R. Co.* 114 Ill. App. 217; *Seybert v. Sterling, D. & E. Electric R. Co.* 167 Ill. App. 573; *Chicago City R. Co. v. Iverson*, 108 Ill. App. 433; *Chicago City R. Co. v. Martensen*, 100 Ill. App. 306, affirmed on other grounds in 198 Ill. 511, 64 N. E. 1017; *Cole v. Central R. Co.* 103 Ill. App. 160; *Chicago General R. Co. v. Carroll*, 91 Ill. App. 356, affirmed on other grounds in 189 Ill. 273, 59 N. E. 551; *United R. & Electric Co. v. Watkins*, 102 Md. 264, 62 Atl. 234; *McFadden v. Metropolitan Street R. Co.* 161 Mo. App. 652, 143 S. W. 884; *Moore v. Kansas City & I. Rapid Transit R. Co.* 126 Mo. 265, 29 S. W. 9; *Pierce v. Lincoln Traction Co.* 92 Neb. 797, 139 N. W. 666; *Omaha Street R. Co. v. Cameron*, 43 Neb. 297, 61 N. W. 606; *Atlantic Coast Electric R. Co. v. Rennard*, 62 N. J. L. 773, 42 Atl. 1041, 6 Am. Neg. Rep. 125; *Degnan v. Brooklyn City R. Co.* 14 Misc. 388, 35 N. Y. Supp. 1047; *Huther v. Nassau Electric R. Co.* 142 App. Div. 522, 126 N. Y. Supp. 1105; *Huber v. Nassau Electric R. Co.* 22 App. Div. 426, 48 N. Y. Supp. 38; *Kennedy v. Third Ave. R. Co.* 31 App. Div. 30, 52 N. Y. Supp. 551; *Dise v. Metropolitan Street R. Co.* 22 Misc. 97, 48 N. Y. Supp. 551; *Chapman v. Atlantic Ave. R. Co.* 14 Misc. 384, 35 N. Y. Supp. 1045; *O'Neil v. Dry Dock, E. B. & B. R. Co.* 129 N. Y. 125, 26 Am. St. Rep. 512, 29 N. E. 84; *O'Rourke v. Yonkers R. Co.* 32 App. Div. 8, 52 N. Y. Supp. 706; *Hergert v. Union R. Co.* 25 App. Div. 218, 49 N. Y. Supp. 307; *Zimmerman v. Union R. Co.* 3 App. Div. 219, 33 N. Y. Supp. 362; *Buhrens v. Dry Dock, E. B. & B. R. Co.* 53 Hun, 571, 6 N. Y. Supp. 224; *Steubenville & W. Traction Co. v. Brandon*, 87 Ohio St. 187, 100 N. E. 325; *Dell v. Manila Electric R. & Light Co.* 13 Philippine, 585; *Nashville R. Co. v. Norman*, 108 Tenn. 324, 67 S. W. 479; *Citizens' Rapid Transit Co. v. Seigrist*, 96 Tenn. 119, 33 S. W. 920; *Keefe v. Seattle Electric Co.* 55 Wash. 448, 104 Pac. 774; *Traver v. Spokane Street R. Co.* 25 Wash. 225, 65 Pac. 284; *Nappli v. Seattle, R. & S. R. Co.* 61 Wash. 171, 112 Pac. 89; *Helber v. Spokane Street R. Co.* 22 Wash. 319, 61 Pac. 40; *Morris*

*v. Old Colony Street R. Co.* 8 L.R.A. (N.S.) 597, and *Christopherson v. Minneapolis, St. P. & S. Ste. M. R. Co.* L.R.A.1915A, 761; and see later cases, *Bofill v. New Orleans R. & Light Co.* L.R.A.1915C, 419, and *Mid-L.R.A.1918F.*

*land Valley R. Co. v. Toomer*, L.R.A.1917D, 344. The question as regards automobile passengers is specifically treated in the note to *Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co.* L.R.A.1915B, 953.

v. Seattle, R. & S. R. Co. 66 Wash. 691, 120 Pac. 534.

It is negligence on the part of a street car motorman approaching a street intersection to fail to keep careful watch ahead for teams, vehicles, etc.

Engvall v. Des Moines City R. Co. 145 Iowa, 560, 121 N. W. 12; Goff v. St. Louis Transit Co. 199 Mo. 694, 9 L.R.A. (N.S.) 248, 98 S. W. 49; Barry v. Burlington R. & Light Co. 119 Iowa, 62, 93 N. W. 68, 95 N. W. 229; Perjue v. Citizens' Electric Light & Gas Co. 131 Iowa, 710, 109 N. W. 280; Wilfin v. Des Moines City R. Co. 176 Iowa, 642, 156 N. W. 842; Beem v. Tama & T. Electric R. & Light Co. 104 Iowa, 565; Davidson Bros. Co. v. Des Moines City R. Co. 170 Iowa, 467, 153 N. W. 79, Ann. Cas. 1917C, 1226; Welch v. Tri-City R. Co. 148 Iowa, 200, 126 N. W. 1118; Flynn v. Louisville R. Co. 110 Ky. 662, 62 S. W. 490; Fisher v. Cedar Rapids & M. C. R. Co. 177 Iowa, 406, 157 N. W. 863.

It is negligence on the part of a street car motorman to fail to slow up or stop his car and avoid approaching vehicles when he saw or should have seen that such vehicles were in a position to be struck by the car.

Wilfin v. Des Moines City R. Co. 176 Iowa, 642, 156 N. W. 842; Donohoe v. Portland R. Co. 56 Or. 58, 107 Pac. 964; Engvall v. Des Moines City R. Co. 145 Iowa, 560, 121 N. W. 12; Welch v. Tri-City R. Co. 148 Iowa, 200, 126 N. W. 1118; Barry v. Burlington R. & Light Co. 119 Iowa, 62, 93 N. W. 68; Flynn v. Louisville R. Co. 110 Ky. 662, 62 S. W. 492; Louisville & N. R. Co. v. Krey, 16 Ky. L. Rep. 797, 29 S. W. 869; Louisville & N. R. Co. v. Hackman, 17 Ky. L. Rep. 81, 30 S. W. 407; Phillips v. Denver City Tramway Co. 53 Colo. 458, 128 Pac. 460, Ann. Cas. 1914B, 29; Davidson Bros. Co. v. Des Moines City R. Co. 170 Iowa, 467, 153 N. W. 79.

Plaintiff was not negligent.

Thomas v. Illinois C. R. Co. 169 Iowa, 337, 151 N. W. 387; Lundien v. Ft. Dodge, D. M. & S. R. Co. 166 Iowa, 95, 147 N. W. 308; Perjue v. Citizens' Electric Light & Gas Co. 131 Iowa, 710, 109 N. W. 280.

The negligence of the driver of a motor vehicle will not be imputed to any person riding with him unless he is the servant of such person, or such person has authority to control his movements in the management of the vehicle.

Withey v. Fowler Co. 164 Iowa, 377, 145 N. W. 923; Chicago Co. v. Wilcox, 138 Ill. 370, 21 L.R.A. 76, 27 N. E. 899; Donk Bros. Coal & Coke Co. v. Leavitt, 109 Ill. App. 385; 29 Cyc. 542.

Coemployees, carrying on the work of a

common master, are not engaged in a joint enterprise so as to make the negligence of one attributable to the other.

Grace v. Minneapolis & St. L. R. Co. 153 Iowa, 418, 133 N. W. 672.

Messrs. Lane & Waterman and Cook & Balluff, for appellee:

An instructed verdict is proper in negligence cases where reasonable, honest minds could reach but one conclusion upon the facts in evidence.

Dreier v. McDermott, 157 Iowa, 726, 50 L.R.A. (N.S.) 566, 141 N. W. 315; Barnhart v. Chicago, M. & St. P. R. Co. 97 Iowa, 654, 62 N. W. 761.

If the testimony of the party having the burden of proof is in conflict with undisputed facts or the physical facts, or cannot be true, or is inconsistent with any theory other than that the witnesses are mistaken, a verdict is properly directed.

McGlade v. Waterloo, — Iowa, —, 156 N. W. 680.

The testimony of a witness may be so impossible and absurd and self-contradictory that it should be deemed a nullity by the court.

Graham v. Chicago & N. W. R. Co. 143 Iowa, 604, 119 N. W. 708, 122 N. W. 573; Hannestad v. Chicago, M. & St. P. R. Co. — Iowa, —, 118 N. W. 38; Artz v. Chicago, R. I. & P. R. Co. 34 Iowa, 153.

The door of pure speculation is opened to a jury by an instruction which permits the jury to predicate negligence on the failure to perform "acts and things" not shown in the evidence.

Carrigan v. Minneapolis & St. L. R. Co. 171 Iowa, 723, 151 N. W. 1091.

A preferential right is accorded street cars over other vehicles between street crossings.

36 Cyc. 1490, 1491.

If a vehicle and a street car meet at the same time at a crossing, the vehicle must yield precedence to the street car.

Hollgren v. Des Moines City R. Co. 174 Iowa, 568, 156 N. W. 690; Lundien v. Ft. Dodge, D. M. & S. R. Co. 166 Iowa, 86, 147 N. W. 308.

The rule governing the right of way at street crossings is applicable to a vehicle coming out of a street which runs to, but does not cross, the street, provided only it is necessary to cross the tracks in order to proceed along the side the rule of the road requires.

Moore v. Rochester R. Co. 204 N. Y. 309, 49 L.R.A. (N.S.) 505, 97 N. E. 714.

Plaintiff was concluded by his own evidence.

Stearns v. Chicago, R. I. & P. R. Co. 166 Iowa, 566, 148 N. W. 128; United States v. 60 Barrels Wine, 225 Fed. 846;

Guffey v. Harvey, — Mo. App. —, 179 S. W. 729; Louisville Water Co. v. Lally, 168 Ky. 348, L.R.A.1916D, 301, 182 S. W. 186; Foster v. Crisman, 165 Iowa, 189, 144 N. W. 1021; Blake v. Chicago, R. I. & P. R. Co. 171 Iowa, 600, 149 N. W. 880; Bierkamp v. Beuthien, 173 Iowa, 436, 155 N. W. 819; Zellmer v. McTague, 170 Iowa, 534, 153 N. W. 77; Drennen v. Heard, 128 C. C. A. 14, 211 Fed. 335; Farmer v. Davenport, 118 Ga. 289, 45 S. E. 244; Southern R. Co. v. Hobbs, 121 Ga. 428, 49 S. E. 294; Cort v. Benson, 159 Iowa, 218, 140 N. W. 419.

Defendant was not negligent.

Cooley, Torts, 68; Dubuque Wood & Coal Asso. v. Dubuque, 30 Iowa, 176; Ottumwa v. Nicholson, 161 Iowa, 473, L.R.A.1916E, 983, 143 N. W. 439, 6 N. C. C. A. 123; Tibbitts v. Mason City & Ft. D. R. Co. 138 Iowa, 178, 115 N. W. 1021; Reed v. Rex Fuel Co. 160 Iowa, 510, 141 N. W. 1056; Clark v. Weathers, — Iowa, —, 159 N. W. 585; Neal v. Chicago, R. I. & P. R. Co. 129 Iowa, 5, 2 L.R.A.(N.S.) 905, 105 N. W. 197, 19 Am. Neg. Rep. 213; O'Connor v. Chicago, R. I. & P. R. Co. 129 Iowa, 636, 106 N. W. 161; Carrigan v. Minneapolis & St. L. R. Co. 171 Iowa, 723, 151 N. W. 1091; Middleton v. Cedar Falls, 173 Iowa, 619, 153 N. W. 1040; Miller v. Hart-Parr Co. 165 Iowa, 181, 144 N. W. 589; Cook v. Union P. R. Co. — Iowa, —, 158 N. W. 521; Underwood v. Oskaloosa Traction & Light Co. 157 Iowa, 352, 137 N. W. 933; Beem v. Tama & T. Electric R. & Light Co. 104 Iowa, 563, 73 N. W. 1045; Powers v. Iowa C. R. Co. 157 Iowa, 347, 136 N. W. 1049; Hanley v. Ft. Dodge, Light & P. Co. 133 Iowa, 326, 107 N. W. 593, 110 N. W. 579; Landis v. Inter-Urban R. Co. 166 Iowa, 20, 147 N. W. 318; Westcott v. Waterloo, C. F. & N. R. Co. 173 Iowa, 355, 155 N. W. 255, 12 N. C. C. A. 36.

Plaintiff cannot recover, whether the driver's negligence is imputed to him, or whether his failure to try to control the driver amounts to original negligence on his part.

7 Thomp. Neg. Supp. § 503; Hubbard v. Bartholomew, 163 Iowa, 58, 49 L.R.A.(N.S.) 443, 144 N. W. 13; Brommer v. Pennsylvania R. Co. 103 C. C. A. 135, 29 L.R.A.(N.S.) 923, 179 Fed. 577; Rebillard v. Minneapolis, St. P. & S. Ste. M. R. Co. L.R.A.1915B, 953, 133 C. C. A. 9, 216 Fed. 503; Lynn v. Goodwin, 170 Cal. 112, L.R.A. 1915E, 588, 148 Pac. 927, 9 N. C. C. A. 915; Cunningham v. Erie R. Co. 137 App. Div. 506, 121 N. Y. Supp. 706; Clarke v. Connecticut Co. 83 Conn. 219, 76 Atl. 523; Farley v. Wilmington & N. C. Electric R. Co. 3 Penn. (Del.) 581, 52 Atl. 543; Lake

Shore & M. S. R. Co. v. Boyts, 16 Ind. App. 640, 45 N. E. 812; West Chicago Street R. Co. v. Piper, 165 Ill. 325, 46 N. E. 186, 1 Am. Neg. Rep. 406.

Stevens, J., delivered the opinion of the court:

The injuries of which plaintiff complains were received by him as the result of a collision between one of defendant's street cars and a motor truck at the intersection of Farnam and Laurel streets, in the city of Davenport. Farnam street in that city extends north and south, and Laurel street east and west, intersecting with, but not crossing, Farnam street.

On the occasion in question the driver of the auto truck and plaintiff, who were coemployees of the Bell-Jones Company, wholesale dealers in ice cream, were engaged in delivering tubs of ice cream to customers in various parts of the city. The truck was a large, heavy one, loaded with tubs containing cans filled with ice cream, with ice placed around the cans inside the tubs. The ice cream appears to have been covered with a tarpaulin. Plaintiff was the salesman of the Bell-Jones Company, and he informed the driver of the truck where the respective parties to whom cream was to be delivered were located, and perhaps to some extent gave directions as to the route to be followed in arriving at the various places where ice cream was to be left. Plaintiff claims to have had nothing to do with the operation or control of the truck; that his business was to sell and deliver the ice cream to the customers; that both the driver and plaintiff were employed by the Bell-Jones Company, the latter having nothing to do with the selection or employment of the driver, or other control over him than as above stated.

It appears from the evidence that while traveling west on Laurel street, approaching the intersection of Farnam street, plaintiff saw the street car coming from the north some distance from the intersection. The evidence does not show whether the truck was proceeding on the north or south side of Laurel street, but it is claimed by plaintiff that there was not room to turn north from Laurel onto Farnam street without passing upon the track of defendant if the truck was on the north side of Laurel street at the time of making the turn. The curb at the southeast corner of the intersection was curved. The seat upon which the driver of the truck was sitting was elevated, and he was probably prevented, to some extent, from observing the approaching street car by overhanging branches of trees. The driver, upon reaching the intersection, probably partly turned the

truck to the north, but plaintiff's testimony is not quite clear upon this point. From the time plaintiff saw the approaching street car until some time later he was engaged in covering the ice cream with the tarpaulin, and claims not to have further observed the movement of either the street car or the auto truck until immediately before, or about the instant, the driver jumped from the truck on the right-hand side and abandoned the same. At that time plaintiff was upon the seat of the truck. The record is not clear when he got upon the seat, or when he ceased working with the tarpaulin and saw the approach of the street car and realized there was danger of a collision, but plaintiff testified that immediately after the driver jumped from the truck he took hold of the steering wheel and turned it to the right for the purpose of throwing the hind wheel of the truck against the curb and preventing the accident. However, the front left wheel of the truck collided with the front steps of the street car, causing the load in the wagon to be shoved forward onto plaintiff, breaking some of his ribs and otherwise severely injuring him. Plaintiff testified that the motorman on the street car was looking to the west, and evidently did not observe the approach of the truck or know of its presence until the collision actually took place.

The court, upon motion of the defendant, directed a verdict in its favor. The grounds of defendant's motion were: (a) That the evidence failed to show that plaintiff exercised due care; (b) that the evidence showed he was negligent; and (c) that the driver of the truck was negligent, was the agent of plaintiff; that both were negligent in a common employment of which the plaintiff had chief charge, and the driver's negligence should be imputed to plaintiff. The motion was sustained by the court upon the second ground, and upon the further ground, not stated in the motion, that the defendant was not shown to have been negligent.

Four propositions are presented upon this appeal:

(1) Was there sufficient evidence offered of negligence upon the part of the defendant to require submission of that question to the jury?

(2) Did the evidence offered show negligence upon the part of the driver of the auto truck?

(3) If so, was such negligence imputed to the plaintiff?

(4) Was plaintiff guilty of negligence independent of the claimed negligence of the truck driver which contributed to his injury?

There was evidence offered from which the jury might have found that the street car was approaching the intersection at the rate of about 15 miles per hour; that the motorman in charge was not observing the intersection, but was looking in a direction opposite to that from which teams, motor vehicles, or pedestrians would come from Laurel street onto Farnam; that he continued to look to the west, conversing with a passenger, until the collision. The grounds of negligence alleged in plaintiff's petition, among others, were that the motorman was negligent in looking in the opposite direction and in failing to observe the approach of the truck and the peril in which plaintiff was placed by the attempt of the driver of the truck to turn from Laurel onto Farnam street.

It has been repeatedly held by this court that it is the duty of the motorman in charge of a street car, upon approaching an intersection or crossing, to keep a careful lookout ahead and to the right and left in order that he may observe the approach of teams, motor vehicles, or pedestrians in time to prevent collision and injury thereto. The rule as stated in *Wilfin v. Des Moines City R. Co.* 176 Iowa, 642, 156 N. W. 842, is as follows: "The motorman was bound, under the law, to keep a lookout for vehicles on the street. If he sees a vehicle on the track ahead, or, in the exercise of ordinary care, should have done so, it is his duty to bring the car under such control as to avoid a collision if the driver of the vehicle shall not leave the track. The rule is applicable to all vehicles, and whenever overtaking another in its line of progress and a possible obstacle in the way, a proper regard for the rights of others requires that the car be reduced to such control that it may be immediately brought to a standstill, if necessary."

See also *Engvall v. Des Moines City R. Co.* 145 Iowa, 560, 121 N. W. 12; *Fisher v. Cedar Rapids & M. C. R. Co.* 177 Iowa, 406, 157 N. W. 860; *Hollgren v. Des Moines City R. Co.* 174 Iowa, 568, 156 N. W. 690.

Negligence was also predicated upon the alleged failure of the motorman to sound the gong before crossing the intersection and failing to have the street car under proper control. If the driver of the auto truck knew of the presence of the street car before attempting to turn onto Farnam street, and same was in plain view, the failure to sound the gong, even though negligent, could not be said to have been the proximate cause, in that event, of the injury, and it would not, perhaps, be material whether the same was sounded or not. The evidence is not very clear that the street car had reached the point where it was re-

quired by the ordinance to sound the gong, but these questions, together with the alleged negligence of the defendant in failing to keep proper lookout and watch for the auto truck, were questions of fact for the jury, and we think there was sufficient evidence of defendant's negligence to require the submission of this question to the jury.

II. We pass over the question of the claimed negligence of the driver for the reason that we reach the conclusion that his negligence cannot be imputed to the plaintiff, and it is unnecessary to consider the same.

As above stated, plaintiff and the driver of the truck were coemployees of the Bell-Jones Company, each having separate and distinct duties to perform. The motor truck was used as a means of conveying the ice cream to the customers to whom plaintiff, as salesman, had sold it, and in his capacity as salesman he was acting as an employee of the company. The delivery of the ice cream to the customers was for the benefit, and under the direction, of the company. It furnished the auto truck and employed the driver thereof. With these matters plaintiff had nothing to do. He exercised no control over the driver of the auto truck except to advise him upon what streets the customers were located, and perhaps to suggest the route of travel thereto. Plaintiff claims never to have operated the truck or paid any attention to the operation thereof by the driver. They were not engaged in a common enterprise. They were coemployees engaged in performing their respective duties and using the instrumentalities furnished by the employer for that purpose. There was no sense in which the driver of the automobile was the agent of the plaintiff. The alleged negligence of the driver could not, therefore, be imputed to the plaintiff. *Carpenter v. Campbell Automobile Co.* 159 Iowa, 52, 140 N. W. 225, 4 N. C. C. A. 1; *McKernan v. Detroit Citizens' Street R. Co.* 138 Mich. 519, 68 L.R.A. 347, 101 N. W. 812; *Cray v. Philadelphia & R. R. Co.* (C. C.) 23 Blatchf. 263, 24 Fed. 168; *Seaman v. Koehler*, 122 N. Y. 646, 25 N. E. 353; *Shultz v. Old Colony Street R. Co.* 193 Mass. 309, 8 L.R.A. (N.S.) 597, 118 Am. St. Rep. 502, 79 N. E. 873, 9 Ann. Cas. 402; *Lawrence v. Sioux City*, 172 Iowa, 320, 154 N. W. 494; *Withey v. Fowler Co.* 164 Iowa, 377, 145 N. W. 923; *Bailey v. Jourdan*, 18 App. Div. 387, 46 N. Y. Supp. 399; *Grace v. Minneapolis & St. L. R. Co.* 153 Iowa, 418, 133 N. W. 672.

III. The only remaining question necessary for our consideration is: Was plaintiff guilty of negligence independent of the claimed negligence of the truck driver which contributed to his injury? The argument

of counsel for appellee is based not so much upon the doctrine of imputed negligence as the claim that plaintiff was himself guilty of contributory negligence. The basis of this argument is that plaintiff saw the car approaching before the truck had entered the danger zone, and could have insisted upon its being stopped before reaching Farnam street, or he could have requested the driver to slow down and avoid reaching the point where a collision was possible; that he was sitting upon the seat, saw the car, and could have prevented the truck from running into the street car. There is some force in the argument of counsel at this point, but we are not passing upon the ultimate question of fact as to whether the plaintiff was, or was not, negligent, but upon the question whether the evidence of negligence upon his part was so conclusive that this court must say, as a matter of law, that he was negligent.

The plaintiff claims to have been engaged in covering the ice cream with a tarpaulin, and that, as soon as he observed the danger, he sought to do what occurred to him to prevent the collision. After the driver jumped from the truck, plaintiff claims to have caught hold of the steering wheel and endeavored to turn the car to the right, away from the street car, but the collision occurred before he could get it out of the way. The driver's negligence, if shown, did not wholly relieve the plaintiff from responsibility or the duty of using reasonable care to prevent the accident. He was bound, after the emergency arose, to exercise such care and prudence as a reasonably careful person placed under like circumstances and confronting a like emergency would use to prevent the accident, and, to this end, should have employed the means reasonably at hand and available to him for that purpose. *Hubbard v. Bartholomew*, 163 Iowa, 58, 49 L.R.A. (N.S.) 443, 144 N. W. 13; *Thompson v. Los Angeles & S. B. D. R. Co.* 165 Cal. 748, 134 Pac. 709; *United R. & Electric Co. v. Crain*, 123 Md. 332, 91 Atl. 405, 10 N. C. C. A. 571; *Senft v. Western Maryland R. Co.* 246 Pa. 446, 92 Atl. 553; *Wachsmith v. Baltimore & O. R. Co.* 233 Pa. 465, 82 Atl. 755, Ann. Cas. 1913B, 679; *Lynn v. Goodwin*, 170 Cal. 112, L.R.A. 1915E, 588, 148 Pac. 927, 9 N. C. C. A. 915; *Brommer v. Pennsylvania R. Co.* 29 L.R.A. (N.S.) 924, 103 C. C. A. 135, 179 Fed. 577.

The record is a trifle obscure as to exactly when plaintiff discovered the danger of the collision and what transpired thereafter, except the abandonment of the truck by the driver and the claimed attempt by plaintiff to turn the truck away from the street car to avoid the collision. During



this time, according to plaintiff's testimony, the motorman in charge of the street car was not keeping proper watch or lookout ahead, but was looking in an opposite direction from which travel came from Laurel street upon Farnam. The jury might have found that the car was being driven at a speed approximating 15 miles per hour, and was very near, if it had not reached, the north line of the intersection, and that the motorman, had he kept proper lookout ahead, would have seen plaintiff's peril and so far reduced the speed of the car that same could have been stopped in time to prevent the accident.

In our opinion, the evidence falls short of conclusively showing negligence upon the part of plaintiff contributing to the injury, and that reasonable minds, seeking to know

the truth, might differ in regard ~~thereof~~. We cannot say, as a matter of law, ~~that~~ he failed to use all the means ~~available~~ ~~to~~ him to steer the truck away from the ~~street~~ car after the driver left same. ~~or that~~ prior thereto, he did not use reasonable ~~care~~ under the circumstances for his own safety. As we view the record, the learned ~~trial~~ court committed error in directing a verdict for the defendant, and should have submitted the case to the jury.

For the reasons pointed out, the judgment of the lower court is reversed, and cause remanded for new trial.

Gaynor, Ch. J., and Weaver and Preston, JJ., concur.

Petition for rehearing denied.

### CONNECTICUT SUPREME COURT OF ERRORS.

SAMUEL ROSENBAUM, Guardian, etc., of David Rosenbaum, Appt.,  
v.

HARTFORD NEWS COMPANY et al.

(92 Conn. 398, 103 Atl. 120.)

**Workmen's compensation — recovery against joint tort-feasors — credit on compensation allowance.**

A news company whose employee, after injury on a railroad, settled with the railroad company upon its paying him damages for the injury, is entitled to credit for such payment in a proceeding against it under the Workmen's Compensation Act, where the statute gives it a right to reimbursement from the one primarily liable in case it is required to make compensation under the statute.

For other cases, see *Master and Servant*, II, a, 1, in Dig. 1-52 N. S.

(March 12, 1918.)

**A**PPEAL by claimant from a judgment of the Superior Court for Hartford County dismissing his claim in a proceeding under the Workmen's Compensation Act to recover compensation for injuries sustained by his minor ward. **Affirmed.**

Statement by Beach, J.:

On March 12, 1916, the claimant's minor ward, David Rosenbaum, sustained an injury, arising out of and in the course of his

**Note.** — As to rights and liabilities under Compensation Acts where employee was injured by negligence of third person, see annotation following this case, post, 524, and references therein to annotations on related questions.

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employment, "under circumstances apparently creating in the New York, New Haven, & Hartford Railroad Company a legal liability to pay damages in respect thereto." The injury resulted in an amputation of the right leg at the knee joint. On June 24, 1916, the claimant and the railroad company entered into a written agreement whereby the claimant, in consideration of the payment and receipt of \$3,000, released the railroad company from all rights of actions, claims, or demands for or by reason of any injuries sustained by David Rosenbaum at the station at Hartford on March 12, 1916. As a further consideration for this release the railroad company agreed in substance that, if the supreme court of the state of Connecticut should hold that David Rosenbaum was not entitled to compensation under the Workmen's Compensation Act, it would pay to Rosenbaum the further sum of \$1,092 and expenses, that being the amount of compensation payable under the statute for an injury resulting in loss of leg at the knee joint. The commissioner held that the right of the claimant to compensation under the act had been satisfied by the payment made by the railroad company to the claimant of a sum in excess of the statutory compensation, and the superior court sustained the action of the commissioner and dismissed the appeal.

Mr. Madison G. Gonterman, for appellant:

The claimant's right to compensation under the act was a new right created by the act, contractual in its nature, arising out of his contract of employment.

Powers v. Hotel Bond Co. 89 Conn. 143, 93 Atl. 246; Sibley v. State, 89 Conn. 682,

L.R.A.1916C, 1087, 96 Atl. 161; Kennerson v. Thames Towboat Co. 89 Conn. 367, L.R.A.1916A, 436, 94 Atl. 372; Schmidt v. O. K. Baking Co. 90 Conn. 217, 96 Atl. 963; Jacowicz v. Delaware, L. & W. R. Co. 87 N. J. L. 273, 92 Atl. 946, Ann. Cas. 1916B, 1222.

The employer's right to reimbursement, after having paid, or by award having become obligated to pay, compensation under the act, arises solely from the act itself, which also prescribes the employer's remedy for the enforcement of said right; the right thus created is based upon the "legal liability" of a third party to pay damages to the employee, such "legal liability" to be determined in an "action" at law.

Kennerson v. Thames Towboat Co. 89 Conn. 367, L.R.A.1916A, 436, 94 Atl. 372; Interstate Teleph. & Teleg. Co. v. Public Service Electric Co. 86 N. J. L. 26, 90 Atl. 1082, 5 N. C. C. A. 524; Connecticut Mut. L. Ins. Co. v. New York & N. H. R. Co. 25 Conn. 265, 65 Am. Dec. 571; Mobile L. Ins. Co. v. Brame, 95 U. S. 754, 24 L. ed. 580; Aetna L. Ins. Co. v. Parker, 30 Tex. Civ. App. 521, 72 S. W. 621, affirmed 96 Tex. 287, 72 S. W. 168, 580; Gatzweiler v. Milwaukee E. R. & Light Co. 136 Wis. 34, 18 L.R.A.(N.S.) 211, 128 Am. St. Rep. 1067, 116 N. W. 633, 16 Ann. Cas. 633; Wildman v. Wildman, 70 Conn. 700, 41 Atl. 1; Waterbury Blank Book Mfg. Co. v. Hurlburt, 73 Conn. 717, 49 Atl. 198; Wynn v. Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

The plain terms of the act, taken in connection with its legislative history and the nature of the right granted to the employer, indicate a clear intention on the part of the legislature to confine the employer, in the enforcement of any claim for reimbursement, to the specific remedy set forth in the act.

Dwy v. Connecticut Co. 89 Conn. 74, L.R.A.1915E, 800, 92 Atl. 883; Connecticut F. Ins. Co. v. Erie R. Co. 73 N. Y. 399, 29 Am. Rep. 171; Jacowicz v. Delaware, L. & W. R. Co. 89 N. J. L. 273, 92 Atl. 946, Ann. Cas. 1916B, 1222; Cory & Sons v. Fenwick [1911] 1 K. B. 114, 80 L. J. K. B. N. S. 341, 103 L. T. N. S. 649, 27 Times L. R. 18, 55 Sol. Jo. 10, 11 Asp. Mar. L. Cas. 499.

Mr. Charles Welles Gross, for appellees:

The rights of the claimant to the payment of compensation by his employer were satisfied by the settlement made with the railroad company and the release given to it.

Powers v. Hotel Bond Co. 89 Conn. 143, 93 Atl. 246; Kennerson v. Thames Towboat Co. 89 Conn. 367, L.R.A.1916A, 436, 94 L.R.A.1918F.

Atl. 372; Trim Joint Dist. School v. Kelly [1914] A. C. 667, 83 L. J. P. C. N. S. 220, 111 L. T. N. S. 305, 30 Times L. R. 452, 58 So. Jo. 493; Cooper v. Wright [1902] A. C. 302, 71 L. J. K. B. N. S. 642, 51 Week. Rep. 12, 86 L. T. N. S. 776, 18 Times L. R. 622; Nettleingham v. Powell [1912] W. N. 278, 82 L. J. K. B. N. S. 54, 29 Times L. R. 88, 6 B. W. C. C. 262; Grand Rapids Lumber Co. v. Blair, 190 Mich. 518, 157 N. W. 29; Mathison v. Minneapolis Street R. Co. 126 Minn. 286, L.R.A.1916D, 412, 148 N. W. 71, 5 N. C. C. A. 871; Turquist v. Hannon, 219 Mass. 560, 107 N. E. 443; McGarvey v. Independent Oil & Grease Co. 156 Wis. 580, 146 N. W. 895, 5 N. C. C. A. 803; Hart v. Western R. Corp. 13 Met. 99, 46 Am. Dec. 719; Regan v. New York & N. E. R. Co. 60 Conn. 124, 25 Am. St. Rep. 306, 22 Atl. 503; Lankester v. Miller, 4 B. W. C. C. 80; Dickson v. Scott, 7 B. W. C. C. 1007; Kemp v. Dargavil Coal Co. [1909] S. C. 1314, 46 Scot. L. R. 939; Daily News v. McNamara, 7 B. W. C. C. 11; Bradley v. Wallace [1913] 3 K. B. 629, 82 L. J. K. B. N. S. 1074, 109 L. T. N. S. 281, 29 Times L. R. 705, 6 B. W. C. C. 706; Cory & Sons v. France, F. & Co. [1911] 1 K. B. 114, 80 L. J. K. B. N. S. 341, 103 L. T. N. S. 649, 27 Times L. R. 18, 55 Sol. Jo. 10, 11 Asp. Mar. L. Cas. 499.

Beach, J., delivered the opinion of the court:

The question is whether Rosenbaum is entitled to his statutory compensation notwithstanding the fact that he has already received, through his guardian, an amount in excess thereof as the consideration for the release of a claimed right of action against the railroad company, arising out of the same injury for which compensation is demanded. That depends on the construction to be put on § 6 of the Workmen's Compensation Act (Pub. Acts 1913, chap. 138), as amended by Pub. Acts 1915, chap. 288, § 2, relating to injuries arising out of and in course of his employment, "under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto." The commissioner has found that the injury in question was sustained under circumstances "apparently" creating such a liability in the New York, New Haven, & Hartford Railroad Company, and that finding, taken in connection with the contract of release and settlement, is sufficient for the purposes of this appeal. The written contract does not, of course, establish the legal liability of the railroad company. Nor can that be done in a proceeding to which the railroad company is not a party. But so far

as the claimant is concerned, the contract assumes the existence of such a liability, and in this proceeding between the injured employee and the employer, the claimant cannot equitably be permitted to take any other position than that the \$3,000 was received in partial satisfaction of a valid claim for damages.

Section 6 provides in substance that an employee who sustains an injury arising out of and in the course of his employment, by reason of the fault or neglect of a third party, may claim compensation under the act without prejudice to his common-law right to sue the tort-feasor; that an employer who has paid, or by award become obligated to pay, compensation, may sue the tort-feasor in his own name, with a view to reimbursement; and that, if either sue, the other is entitled to notice and an opportunity to join in the action. Then follow the provisions for the apportionment of damages between the injured employee and the employer, which supply the principles on which this case must be decided: "In the event that such employer and employee shall join as parties plaintiff in such action and any damages are recovered, such damages shall be so apportioned that the claim of the employer shall take precedence over that of the injured employee, and if the damages shall not be sufficient, or shall be only sufficient to reimburse him for the compensation he has paid or by award has become obligated to pay, with a reasonable attorney's fee, to be fixed by the court, and his costs, such damages shall be assessed in his favor; but if the damages shall be more than sufficient to reimburse him, damages shall be assessed in his favor sufficient to reimburse him for the money he has paid, with a reasonable allowance for an attorney's fee, to be fixed by the court, and his costs, the excess shall be assessed in favor of the injured employee."

There is nothing in § 6 which requires the injured employee to claim compensation before he sues the tort-feasor, or which prevents the employer from joining in such an action before he has by award become obligated to pay compensation. The injured employee may sue the tort-feasor, and the employer may join in the action before compensation is claimed or awarded, and if, in such a case, damages are recovered in excess of the employer's expenses of litigation, the act directs that such excess "shall be assessed in favor of the injured employee," with the necessary result that the employer is discharged, pro tanto, from his inchoate liability to pay compensation. So if the employer has become obligated to pay compensation, but

has not paid it, and the damages recovered are greater than the employer's expenses of litigation, the entire excess is directed to be assessed in favor of the injured employee, with the consequence of discharging the employer from his ascertained liability under the award. So far as damages paid under compulsion of a judgment are concerned, § 6 plainly makes the tort-feasor primarily liable for the injury, and either reimburses or discharges the employer out of the first moneys available for the payment of damages.

True, the statute states only the rule for the apportionment and application of compulsory payments made by the tort-feasor after his legal liability has been ascertained by a judgment; but the rule is based on the legal relation of the parties as defined by the act; namely, that the tort-feasor is primarily liable, and that, as between the employee and employer, the latter is entitled to precedence for the purpose of reimbursement or discharge. The legal relation of the parties, being thus ascertained, furnishes the principle for the apportionment and application of all payments made by the tort-feasor for the purpose of obtaining a release from his primary liability. Suppose, for example, that a joint action brought before any award of compensation is settled before trial by the payment directly to the injured employee of a sum greater than the expenses of litigation. Evidently the employer is discharged to the same extent and upon the same principle as if the payment had been made after a judgment for a like sum had been rendered. And the same must be true of a settlement made before suit is brought, whether the employer takes part in the negotiations or not. If the settlement is made behind the back of the employer, he will not be bound by it. But, if it is for his advantage to do so, he must be permitted to ratify it, and to assert his right, arising out of the legal position assigned to him by § 6, to be discharged pro tanto by the settlement. Otherwise, the injured employee might first settle with the tort-feasor for a sum in excess of his statutory compensation, on the correct basis that the tort-feasor was primarily liable for the whole damages, and then recover his statutory compensation also.

It is argued that the employer's right to reimbursement does not arise until he has paid, or by award become obligated to pay, compensation, and then not until the legal liability of the tort-feasor has been ascertained in an action at law. But, as already pointed out, the act contemplates, not only the reimbursement of an employer who had paid compensation, but also his discharge

from an ascertained or inchoate obligation to pay compensation, by the payment of damages directly to the injured employee. And since the act expressly provides that the claim of the employer shall take precedence over that of the employee, the employer is entitled to have the first moneys so paid to the employee applied to the discharge of his obligation. The only material question which the language of the statute

does not answer is whether this principle applies to voluntary payments made directly to the injured employee before the legal liability of the tort-feasor has been ascertained by judgment; and for the reasons given we have answered that question in the affirmative.

There is no error.

The other Judges concur.

### **Annotation—Rights and liabilities under Compensation Acts where employee was injured by negligence of third person.**

The general subject of Workmen's Compensation Acts is treated in annotations in L.R.A.1916A, 23, and L.R.A.1917D, 80. For later cases and annotations on Workmen's Compensation Statutes, consult the L.R.A. Indexes for volumes subsequent to L.R.A.1917D, under the title, "Workmen's Compensation."

The rights and remedies under compensation statutes where injuries were caused by the negligence of a third person are treated in the annotation in L.R.A.1916A, at pages 100 and 225, and in the annotation in L.R.A.1917D, at page 98. The earlier cases are briefly reviewed in an annotation to Peet v. Mills L.R.A.1916A, 358. The present annotation is supplementary to the above-mentioned annotations.

Workmen who are injured by the negligence of third persons are given by the provisions in most of the statutes, the right to bring proceedings to recover compensation against their employers, and also a right to bring an action at law against the negligent third person.

As is shown in the annotation in 1917D, at page 98, the Washington statute, as construed by the supreme court of the state, takes away from an employee who is embraced within the act all right of action for damages, not only against a negligent employer, but also against a negligent third person, if he is injured at the plant of the employer.

But even under the Washington statute, an employee of a boiler factory who was injured while engaged at work on a vessel by the negligence of the employees of the owner of the vessel has a right of action against said owner, since the statute does not take away a right of action against a third person where the injury does not occur at the plant of the owner, and, under the circumstances of this case, the vessel could not be consid-

ered the plant of the employer. *Martin v. Matson Nav. Co.* (1917) 244 Fed. 976.

And under the Washington statute, it has also been held that the third person whose negligence caused the injury has the burden of proving that the employer had complied with all the terms of the Compensation Act, so that employee's remedy would be against the employer alone, and not against such negligent third person. *Madden v. Northern P. R. Co.* (1917) 242 Fed. 981.

A negligent coemployee is a third person under the New Jersey act giving injured employees the right of action for damages against third persons whose negligence causes the injury. *Churchill v. Stephens* (1917) — N. J. —, 102 Atl. 657.

The assignment by an employee to his employer of any right of action for damages which he may have against the attending physician for malpractice does not necessarily carry with it his right to compensation under the act, since such right of action is in tort, while his right to compensation rests upon contract. *Brown v. Geo. A. Fuller Co.* (1917) — Mich. —, 163 N. W. 492. For cases discussing the effect of malpractice of physicians upon the right to compensation, see the annotation in L.R.A.1917D, p. 172.

The Illinois act also expressly provides that where the injury to an employee was not caused by the negligence of the employer or his employee, but was caused under circumstances creating a legal liability for damages in some third person, and such third person had also elected to be bound by the act, then the right of the employee or personal representatives to recover against such third person shall be subrogated to the employer, and such employer may bring legal proceedings against such third person to recover the damages sustained in an amount not exceeding the aggregate

amount of compensation payable under the act.

Consequently an injured employee cannot maintain an action against a third person whose negligence caused the injury, where the said third person and himself and his employer are all bound by the provisions of the Compensation Act. *Keeran v. Peoria B. & C. Traction Co.* (1917) 277 Ill. 413, 115 N. E. 636; *Friebel v. Chicago City R. Co.* (1917) 280 Ill. 76, 117 N. E. 467.

But in an action for damages against the third person whose negligence caused the injury, a plea that the said negligent third person had elected to be bound by the act, and consequently that the action for damages would not lie against him, is insufficient on demurrer if it fails to allege facts from which it can be inferred that the employee, when injured, was actually engaged in the course of his employment, in an extra-hazardous occupation within the meaning of the statute. *Keeran v. Peoria B. & C. Traction Co.* (Ill.) supra.

So, under the Minnesota statute, an action for damages against the negligent third person cannot be maintained where the employee and his employer and the negligent third person were all under the Compensation Act. *Mahowald v. Thompson-Starrett Co.* (1916) 134 Minn. 113, 158 N. W. 913.

But the employee may bring an action for damages against such negligent third person where it conclusively appears that the accident causing the injury did not take place during the hours of the plaintiff's service, nor upon the premises where the services were being performed, nor where his service required his presence at the time of the injury. *Otto v. Duluth Street R. Co.* (1917) 138 Minn. 312, 164 N. W. 1020.

Some statutes expressly provide that the employee must elect whether he will proceed against his employer for compensation or against the negligent third person for damages. If he pursues one remedy he is estopped from pursuing the other.

So, where the employee elected to proceed against his employer, assigning to him any rights which he may have had against the negligent third party, and the claim was allowed by the Commission and an award made, and the third party paid the amount of the award to the Commission and received a release from the employer, the employee cannot thereafter have the Commission vacate the award, and sue the third per-

son. *Sabatino v. Thomas Crimmins Constr. Co.* (1918) 102 Misc. 172, 168 N. Y. Supp. 495.

Under the Illinois Act of 1911, an employee, although receiving compensation from his employer, was, nevertheless, entitled to maintain an action against the third person whose negligence caused the injury. *Houlihan v. Sulzberger & Sons Co.* (1917) 282 Ill. 76, 118 N. E. 429.

But an agreement between the widow of an employee who had been killed by the negligence of a third person, and his employer and the insurance carrier, to the effect that the widow should bring an action against the negligent third person, that such action should in nowise prejudice her rights under the statute, that any recovery over the amount of compensation due her would release the employer and the insurance carrier, and that all notices, etc., were waived by the parties, is not an election by her to rely upon the Compensation Act, so as to estop her from bringing an action at law against the negligent third person. *Dettloff v. Hammond, S. & Co.* (1917) 195 Mich. 117, 161 N. W. 949, 14 N. C. C. A. 901.

But under the later Illinois statutes, if an employee is recovering compensation from his employer, he does not have a right of action against the negligent third person, provided such third person is himself operating under the statute. *Cousley v. Chicago & A. R. Co.* (1917) 207 Ill. App. 565.

In *Book v. Henderson* (1917) 176 Ky. 785, 197 S. W. 449, it was held that any award to an employee or any proceeding under the Kentucky act against the employer was wholly immaterial in an action by the injured employee against the third person whose negligence caused the injury, since the employer's liability to the employee does not depend upon the question of negligence; the award of the Compensation Board and payments to the employee thereunder, affected only the judgment to be entered by the court upon the verdict of the jury in the negligence action against the third person, and the right of the parties, growing out of such award or payment thereunder, should be taken care of by the courts in the judgment entered.

Even under statutes which permit proceedings against both the employer and the negligent third person whose negligence caused the injury, it is usually held that there cannot be a double recovery; that is, to the extent that the

employee recovers against one, he cannot recover against the other.

Thus, in *ROSENBAUM v. HARTFORD News Co.* ante, 521, it was held that the employer was entitled to credit for damages paid to the employee by the third company in a proceeding against the employer, where the statute gave the employer a right to reimbursement from the one primarily liable in case it was required to make compensation under the statute.

Under the Kentucky act, an employee who has been injured by the negligence of a third person may proceed for compensation against his employer, and also for damages against such third person; but if he recovers against both, to the extent he collects from one, he may not collect from the other. *Book v. Henderson (Ky.) supra*. The court said: "The act was looking wholly to the rights of the employee and employer, and it was not designed to relieve a negligent third person from the consequences of his act. If it had been the intention of the legislature to require injured employee, as many such acts in other states require, to elect whether or not he could proceed against the employer or the negligent third party, it would have given only the first two options set out in the act. But having given him the option of proceeding against either or both, it is not reasonable to believe that the legislature thereby meant that, in order to avail himself of this right to proceed against both, he must forego until the end of litigation with the negligent third person, which might be protracted the acceptance of the small weekly benefits awarded against the employer under the Workmen's Compensation Act."

It has been held by the circuit court of appeals that, under the Texas act, the receipt of payment from an insurance company, and a release of the company and the employer, has no further effect than to constitute a pro tanto satisfaction of his cause of action against the third person whose negligence caused the injury. *The Emilia F. De Perez* (1918) — C. C. A. —, 248 Fed. 480.

The statutes usually provide that, in case an employee is injured by the negligence of a third person, and the employer is obliged to pay compensation, he is subrogated to any right which the injured employee may have against such third person.

But employers have no right of in-

demnity against a third person who had violated no duty which he owed to the injured employee. *Wilson v. Barry R. Co.* (1916) 10 B. W. C. C. (Eng.) 24.

Section 29 of the Illinois act, which transfers the right of action of the employee against a third person causing the injury to the employer, is valid and constitutional, since the act is optional. *Friebel v. Chicago City R. Co.* (1917) 280 Ill. 76, 117 N. E. 467.

The fact that the employer himself has been negligent does not prevent him from being subrogated to the rights of the employee or his dependents against the third party whose negligence concurred with that of the employer in causing the injury; nor is his right of subrogation in any wise affected by the fact that he suffered no damages, because he had been insured against the payment of compensation. *Otis Elevator Co. v. Miller & Paine* (1917) 153 C. C. A. 302, 240 Fed. 376, 14 N. C. C. A. 1013.

In case an employer is subrogated to the rights of the employee or his personal representative to recover against the negligent third person, the amount of the recovery is limited to the aggregate amount of compensation payable under the act. *Keeran v. Peoria, B. & C. Traction Co.* (1917) 277 Ill. 413, 115 N. E. 636.

So, under the Michigan act, an employer who, having been compelled to pay compensation to an injured employee, seeks to enforce the liability of a third person whose negligence caused the injury, can recover only the amount which he has been compelled to pay as compensation, and cannot recover the sum which the injured employee himself could have recovered had he elected to bring the action himself, since an employer may not be permitted to speculate on the misfortunes of his employees; nor can he recover the amount upon the theory that a trust should be impressed on the excess recovered in favor of the injured party, since the injured party cannot have two remedies, and has elected his remedy under the Compensation Act. *Albert A. Albrecht Co. v. Whitehead & K. Iron Works* (1918) — Mich. —, 166 N. W. 855.

The employer or insurance carrier who is compelled to pay compensation for injuries because of an assault upon an employee is entitled to be subrogated to all of the rights of the employee against the assailants, including the money which they were required to pay him by a

criminal court as a condition of receiving a suspended sentence; in other words, the amount of compensation which they would be compelled to pay would be reduced pro tanto by the amount which the assailants were required to pay him. *Dietz v. Solomon-witz* (1917) 179 App. Div. 560, 166 N. Y. Supp. 849.

On the other hand, under the Nebraska statute, it has been held that, notwithstanding the negligence of the employer concurred with that of a third person to cause the injury, the employer is subrogated to the right of the employee or his dependents against the negligent third person, and the amount of recovery in an action based upon this statutory right of subrogation is not limited by the amount of compensation which the employer may have to pay the employee. *Otis Elevator Co. v. Miller & Paine* (Feil.) supra. The court said: "Under the statute, *Miller & Paine* [the employers] are entitled to deduct from the amount of the recovery in this action the expense of recovering the same and the amount already paid for compensation, and the expense of last sickness and burial, the balance to be paid forthwith to the dependents. The law says this balance should be treated as an advance payment by *Miller & Paine* on account of any future instalments of compensation. We think a fair construction of the law is that this excess, in so far as the unpaid instalments are concerned, shall be considered as an advance payment; but where, as in this case, the recovery exceeds the whole compensation to be paid, the law by its language did not intend to limit the recovery allowed by the first clause of § 109, which specifically provides that the amount of recovery shall not be limited to the amount payable as compensation."

The fact that an employee's right to compensation from his employer may not be covered by the statute is immaterial in a common-law action for negligence, brought by the insurance carrier against the third person whose negligence caused the injury, to recover the amount of compensation paid by the insurance carrier, since the employee, by accepting payment through the Workmen's Compensation Commission, would be estopped from claiming, as against the third person, that the insurance company had not succeeded by way either of subrogation or assignment to all of the employee's rights against the defendant; in other words, the de-

fendant would be protected against having to pay for his negligence a second time because of the action of the employee in accepting compensation. *Royal Indemnity Co. v. Platt & W.* Ref. Co. (1917) 98 Misc. 631, 163 N. Y. Supp. 197.

In a case in which the employee is injured by the negligence of a third person, and the employee elects compensation and assigns his claim against said third person to the employer or insurance carrier, the assignment is effective upon the election being made and before the award. *Sabatino v. Thomas Crimmins Constr. Co.* (1918) 102 Misc. 172, 168 N. Y. Supp. 495.

In *Friebel v. Chicago City R. Co.* (1917) 280 Ill. 76, 117 N. E. 467, it was held that the employer may at once, after the compensation is fixed under the Compensation Act, in a proceeding by the employee against him, proceed in a suit against the third party who caused the injury, and recover from him the amount payable under the Compensation Act by such employer to such employee, without first having paid the employee the compensation awarded.

A few cases passing upon points of practice and procedure, compensation cases of this character, may be noticed.

A widow may, in her private capacity, both for herself and her minor child, elect as between accepting compensation from the employer or bringing suit for damages against the third person whose negligence caused the death of her husband. *Hanke v. New York Consol. R. Co.* (1917) 181 App. Div. 53, 168 N. Y. Supp. 234.

Under the Illinois act, the employer is the proper party to sue the third person whose negligence caused an injury to his employee, for which injury he became liable for compensation, although his insurer had paid such compensation. *Marshall-Jackson Co. v. Jeffrey* (1918) — Wis. —, 166 N. W. 647.

In an action by an injured employee against a third person whose negligence caused the injury, the employer is a necessary party by reason of the fact that the act gives to the employer the right to recover of such negligent third party the amount of indemnity which he has paid to the employee under the act. *Book v. Henderson* (1917) 176 Ky. 785, 197 S. W. 449.

In an action for damages against a third person whose negligence caused the injury, in which it was alleged in

the complaint and proved by the plaintiff at the trial that he had elected to sue the defendant for negligence instead of making claim against his employer under the Compensation Act, it is not error to permit the defendant's counsel to urge before the jury that the plaintiff's employer was interested in the recovery by the plaintiff because any verdict he might collect against the defendant would release the employer from liability under the Compensation

Act, and also to urge that, should the defendant succeed in his defense, plaintiff might still claim compensation from his employer, since these matters are contained in a public statute which the plaintiff felt it necessary to plead and prove as a part of his case, and the rule against permitting counsel to refer to the fact that a defendant may be or is protected by liability insurance is not applicable. *Youngs v. Cohen* (1917) 167 N. Y. Supp. 160. W. M. G.

#### MICHIGAN SUPREME COURT.

ALFRED HEINO, Admr., etc., of Roy Heino, Deceased, Plff. in Err.,  
v.

#### CITY OF GRAND RAPIDS.

(— Mich. —, 168 N. W. 512.)

#### Municipal corporation — death in park — liability.

A municipal corporation having constitutional and statutory authority to maintain parks at public expense for the recreation of its inhabitants is not liable for the death, through the negligence of its employees, of a child by drowning, in a swimming pool maintained in a park.

*For other cases, see Municipal Corporations, II. g, 1, in Dig. 1-52 N. S.*

(July 18, 1918.)

**E**RROR to the Superior Court of Grand Rapids to review a judgment in favor of defendant in an action brought to recover damages for the death of plaintiff's son, alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. G. A. Wolf and Ellis & Ellis, for appellant:

In maintaining this park and pond with-

**Note.**—The liability of a municipal corporation for injuries through unsafe conditions in parks or other public grounds, other than streets, is discussed in the notes to *Bisbing v. Asbury Park*, 33 L.R.A. (N.S.) 523, and *Bernstein v. Milwaukee*, L.R.A. 1915C, 435; and see later cases, *Nashville v. Burns*, L.R.A.1915D, 1108; *Ackeret v. Minneapolis*, L.R.A.1915D, 1111; *Hibbard v. Wichita*, L.R.A.1917A, 399; and *Bolster v. Lawrence*, L.R.A.1917B, 1285.

Many other specific aspects of the general subject of municipal liability, as affected by the distinction between public or governmental upon the one side and private or proprietary functions upon the other, are treated in annotations cited in the L.R.A. Indexes, under the title, "Municipal Corporations," subtitle, "Liability for damages."

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in it the city of Grand Rapids was not discharging simply a legislative duty.

*Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78; *Thompson v. Moran*, 44 Mich. 602, 7 N. W. 180.

There was actionable negligence on the part of the city through its park commissioners, or their agents, which was the proximate cause of the death of Roy Heino, and the judge erred in taking the case from the jury.

*Clark v. McGraw*, 14 Mich. 139; *Sheldon v. Flint & P. M. R. Co.* 59 Mich. 174, 26 N. W. 507; *Strong v. Saunders*, 15 Mich. 339; *Perrott v. Shearer*, 17 Mich. 48; *Dubois v. Campau*, 24 Mich. 364; *Hayes v. Homer*, 36 Mich. 374; *Blackwood v. Brown*, 32 Mich. 104; *Conely v. McDonald*, 40 Mich. 150; *Marcott v. Marquette, H. & O. R. Co.* 47 Mich. 1, 10 N. W. 537; *Guggenheim v. Lake Shore & M. S. R. Co.* 57 Mich. 488, 24 N. W. 827; *Klanowski v. Grand Trunk R. Co.* 57 Mich. 525, 24 N. W. 801; *Hassenyer v. Michigan C. R. Co.* 48 Mich. 205, 42 Am. Rep. 470, 12 N. W. 155; *Parsons v. E. I. Du Pont De Nemours Powder Co.* — Mich. —, L.R.A.1918A, 406, 164 N. W. 413.

Where a park is held to be a matter appertaining to city affairs, the city should use ordinary care to keep the premises reasonably safe.

*Capp v. St. Louis*, 251 Mo. 345, 46 L.R.A. (N.S.) 731, 168 S. W. 616, Ann. Cas. 1915C, 245; *Robertson v. New York*, 7 Misc. 645, 28 N. Y. Supp. 13; *Larkin v. Saltair Beach Co.* 30 Utah, 86, 3 L.R.A. (N.S.) 982, 116 Am. St. Rep. 818, 83 Pac. 686, 8 Ann. Cas. 977; *Canon City v. Cox*, 55 Colo. 284, 133 Pac. 1040; *Barthold v. Philadelphia*, 154 Pa. 109, 26 Atl. 304; *Pekin v. McMahon*, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484; *Lowe v. Salt Lake City*, 13 Utah, 91, 57 Am. St. Rep. 708, 44 Pac. 1050.

Messrs. Ganson Taggart and C. A. Watt, for appellee:

In maintaining the park and pond the



city was acting in a governmental capacity for the public good, and was not liable.

*Kokomo v. Loy*, 185 Ind. 18, 112 N. E. 994; *Clark v. Waltham*, 128 Mass. 567; *Blair v. Granger*, 24 R. I. 17, 51 Atl. 1042; *Bisbing v. Asbury Park*, 80 N. J. L. 416, 33 L.R.A.(N.S.) 523, 78 Atl. 196; *Park Comrs. v. Prinz*, 127 Ky. 460, 105 S. W. 948; *Russell v. Tacoma*, 8 Wash. 156, 40 Am. St. Rep. 895, 35 Pac. 605; *Bernsein v. Milwaukee*, 158 Wis. 576, L.R.A.1915C, 435, 149 N. W. 382, 8 N. C. C. A. 624; *Harper v. Topeka*, 92 Kan. 11, 51 L.R.A.(N.S.) 1032, 139 Pac. 1018; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Highway Comrs. v. Martin*, 4 Mich. 558, 69 Am. Dec. 333; *Miller v. Detroit*, 156 Mich. 630, 132 Am. St. Rep. 537, 121 N. W. 490, 16 Ann. Cas. 832; 2 Dill. Mun. Corp. 4th ed. 1022-1024; *Davidson v. Hine* 151 Mich. 302, 15 L.R.A.(N.S.) 575, 123 Am. St. Rep. 267, 115 N. W. 246, 14 Ann. Cas. 352; *Murray v. Grass Lake*, 125 Mich. 2, 83 N. W. 995; *Nicholson v. Detroit*, 129 Mich. 247, 56 L.R.A. 601, 88 N. W. 695; *Gilboy v. Detroit*, 115 Mich. 121, 73 N. W. 128; *Detroit v. Blackeby*, 21 Mich. 84, 4 Am. Rep. 450; *Shipman v. State Live-Stock Sanitary Commission*, 115 Mich. 488, 73 N. W. 817; *O'Leary v. Marquette Fire & Water Comrs.* 79 Mich. 286, 7 L.R.A. 170, 19 Am. St. Rep. 169, 44 N. W. 608; *Brink v. Grand Rapids*, 144 Mich. 472, 108 N. W. 430, *Daniels v. Board of Education*, 191 Mich. 340, L.R.A.1916F, 468, 158 N. W. 23; *Curran v. Boston*, 151 Mass. 505, 8 L.R.A. 243, 21 Am. St. Rep. 465, 24 N. E. 781.

A pond of water, either natural or artificial, that partakes of the nature of a natural pond, is not an attractive nuisance, the maintenance of which subjects the owner to liability.

*Schauf v. Paducah*, 106 Ky. 228, 90 Am. St. Rep. 220, 50 S. W. 42, 6 Am. Neg. Rep. 73; *Sullivan v. Huidekoper*, 27 App. D. C. 154, 5 L.R.A.(N.S.) 263, 7 Ann. Cas. 196; *Yakima Central Heating Co. v. Yakima*, 86 Wash. 99, 149 Pac. 341; *Smith v. Jacob Dold Packing Co.* 82 Mo. App. 9; *Thompson v. Illinois C. R. Co.* 105 Miss. 636, 47 L.R.A.(N.S.) 1105, 63 So. 185; *Wheeling & L. E. R. Co. v. Harvey*, 77 Ohio St. 235, 19 L.R.A.(N.S.) 1143, 122 Am. St. Rep. 503, 83 N. E. 66, 11 Ann. Cas. 981, 21 Am. Neg. Rep. 272; *Peters v. Bowman*, 115 Cal. 349, 56 Am. St. Rep. 1068, 47 Pac. 113, 598; *Cooper v. Overton*, 102 Tenn. 222, 45 L.R.A. 591, 73 Am. St. Rep. 864, 52 S. W. 183; *Barnhart v. Chicago, M. & St. P. R.* 89 Wash. 304, L.R.A.1916D, 443, 154 Pac. 441, 12 N. C. C. A. 966; *Ryan v. Towar*,

128 Mich. 463, 55 L.R.A. 310, 92 Am. St. Rep. 481, 87 N. W. 644.

The cause of plaintiff's death was purely conjectural, and there is no evidence to show negligence on the part of the city, nor that anything that it could do would or could have made for the safety of the deceased.

*Robinson v. Charles Wright & Co.* 94 Mich. 283, 53 N. W. 938; *Redmond v. Delta Lumber Co.* 96 Mich. 545, 55 N. W. 1004; *Peppett v. Michigan C. R. Co.* 119 Mich. 640, 78 N. W. 900; *Elaey v. J. L. Hudson Co.* 189 Mich. 135, L.R.A.1916B, 1284, 155 N. W. 377; *Dombrowski v. Roe-Stephens Mfg. Co.* 180 Mich. 202, 146 N. W. 666; *Fuller v. Wurzburg Dry Goods Co.* 192 Mich. 447, 158 N. W. 1026.

Steere, J., delivered the opinion of the court:

On August 10, 1915, Roy Heino, a boy eight years and three months of age, lost his life, presumably by drowning, in a public swimming and bathing pool, maintained by defendant in one of its city parks. Alfred Heino, his father, brought this action as administrator to recover damages for his death, claiming it was attributable to negligence on the part of the city in not properly guarding the safety of children permitted free use of the pool.

The case was tried in the superior court of Grand Rapids before a jury, and a verdict directed in favor of defendant, the trial court holding that in providing and maintaining the bathing pool for the free use and recreation of its inhabitants the city was acting under legislative authority and discharging a governmental duty, in performance of which it was not liable for damages resulting from negligent acts of its servants or employees, and that in any event no actionable negligence was shown, as there were no witnesses to the drowning, both the cause and manner of its occurrence being purely speculative.

The pool in question was a sheet of shallow water, from 350 to 360 feet long and about 175 feet across at the widest place, located in a basin on the southwesterly side of the park, where its level was maintained by a controlled supply of water from two small creeks, which could be led into or diverted from it. The contour of that portion of the park afforded natural facilities for its construction by a gradual slope of the ground to a depression, in which water from the creeks could be impounded to create a pool of the size and depth desired, by building a semicircular wall or dam of concrete 55 feet in length at the westerly or lower end, near which the water was deepest, gradually shallowing

towards the shores and back to the east. The superintendent of parks, who stated he built the pool, estimated its greatest depth at between 4 and 5 feet, which he located about 10 feet back, or west, of the spillway of the dam, there being a spring-board at the west end, from which he stated that he had seen men dive in there, and when they stood up their heads would be out of water. There was some conflicting evidence as to the exact depth in the deepest place. A brother testified that the water would be over deceased's head where his body was found, and he was shown to have been 4 feet 6 inches tall.

Two small buildings were provided as changing or dressing rooms for bathers, referred to as the "boys' house" and the "girls' house," and different parts of the pool are mentioned as the "girls' side" and the "boys' side." In the bathing season a swimming pool director, or guard, was on duty during the hours when the pool was open to the public for swimming and bathing. Many children availed themselves of the privilege in warm weather, and the record of bathers on the day of the accident was 380, of which number there were ninety-five boys and twenty girls in the forenoon, and 150 boys and 105 girls in the afternoon. None of them were shown to have any knowledge of just when or how the accident occurred.

Plaintiff lived near Creston park with his family, and his children were accustomed to go swimming, or bathing, in this pool, which was constructed by the city in 1900 or 1910. They were provided with bathing suits for that purpose, and on the day of the accident five of them went over there together, at about 10 o'clock in the forenoon, to "go swimming," carrying their bathing suits in a basket. The oldest was a girl named Edna, over nine years of age, Roy being the next younger, and the others respectively six, five and two years old. They played around the park until the guard came, after which they put on their bathing clothes and went into the pool. After changing to their bathing suits at the buildings provided for that purpose, they went to the east end together, carrying their other clothing in the basket, which they left under a tree when they went into the water. Roy stayed with the rest in the shallow water for a short time, and while there borrowed some "water wings" from a girl who was with them, which he soon returned and went away, saying he was going over to the boys' side. He is not shown to have been seen alive by the other children or noticed by anyone after that time, although there were also other people then in swimming, both boys

and girls. When the Heino children were through swimming, or bathing, they found his dry clothing yet in the basket, but could not find him. They waited for a time, and looked for him unsuccessfully, after which they went home, arriving there shortly before 12 o'clock, and told of their inability to find him. This was reported to plaintiff when he came home to dinner soon after. A search was then instituted in which others joined, and his body was found in the lower part of the pool at about 3 o'clock that afternoon. He was shown to have been an active, healthy boy, in the habit of going into this pool. His age and height were stated, but whether he could swim was not disclosed.

The negligence charged was failure to maintain a rope or similar protection for the small children in the shallow end of the pool, that there were places in it where the bottom was muddy and soft, and that the guard was away from the pool, though yet in sight, watching a ball game during a portion of the time the children were there. To what extent such alleged negligence, if shown, may have caused or contributed to the boy's death, would be largely a matter of conjecture, or inference on inference, for no one is shown to have seen him at the time, or to know how it happened; but the important question most seriously argued in the case is the immunity of the city from liability, because acting in a governmental capacity in maintaining this free swimming pool in its public park, without pecuniary benefit, for the public good.

Section 22, art. 8, of the state Constitution, authorizes any city to acquire, establish, and maintain parks within or without its limits for the public welfare. The revised charter of Grand Rapids, under which that city was operating when this accident occurred (Act 593, Local Acts 1905), also confers authority upon the city to provide, improve, and maintain at public expense parks, boulevards, and other public grounds for the furtherance of urban convenience and civic betterment. Under title 3 of the charter, relating to "the powers and duties of the common council," it is given power, subject to the limitations of the act, to legislate upon various matters, amongst which it is authorized (§ 15) "To provide for public parks, public grounds and squares, and improvement of the same, subject, however, to the provisions of title XI. of this act. May enact all needful ordinances and regulations for the protection and control of all parks, boulevards, cemeteries and other public grounds or places belonging to the city, whether within or without the boundaries thereof."

By § 53 of said title 3 it is again authorized, by a two thirds vote of the aldermen elect, "to obtain by purchase, or gift, and to hold, improve, and properly maintain real estate within the limits of the city for park, driveway and boulevard purposes," and likewise without the city limits, when deemed a necessary public improvement for the benefit of the city.

Under title 11 of the act (to which reference is made in § 15 of title 3) that subject is again taken up with the mandate that "there shall be created and constituted in and for the city of Grand Rapids a board of park and cemetery commissioners," etc. The number of members, manner of selection, terms of office, etc., are prescribed, and by § 9 of said title 11 it is provided, amongst other things, that such board "shall have the control and management, and shall have charge of the care and improvement of all parks and public grounds of said city, whether within or without said city, and of such parks or public grounds as may hereafter be acquired, laid out, purchased or dedicated . . . by said city. . . . All the

powers and duties now vested in the common council or in the board of public works of the city of Grand Rapids relating to said parks, public grounds or boulevards, are hereby transferred as provided in this title."

The park board is required to make an annual report to the common council of its doings and expenditures, with an estimate of the amount of money necessary for park purposes, etc., during the ensuing year, upon which the common council "shall make an appropriation for the care, maintenance and improvement of the said parks of said city." The determined fund is thereafter raised by taxation, and, when collected into the city treasury, "credited to the fund to be styled the park fund."

No suggestion is contained in any of these provisions relative to parks, authorizing a business enterprise or municipal activity maintained for pecuniary gain, or contemplating compensation to the city, but, on the contrary, it is only empowered to provide at public expense, met by taxation, and furnish to the public gratuitously, for the common welfare, the recognized sanitary and social benefits which public parks afford. So far as its liability as a governmental agency for negligence in the performance of such functions when assumed are concerned, it is immaterial whether the authorized public duty be permissive or mandatory. *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289; *Nicholson v. Detroit*, 129 Mich. 246, 56 L.R.A. 601, 88 N. W. 695.

The tort here charged against the municipality is not for a direct trespass, but for consequential injury, resulting from the negligent conduct of its agents in providing and maintaining an authorized public park and appurtenances for the general pleasure, comfort and health, free to all who desire to avail themselves of it. This swimming pool, an artificial pond of shallow water with gradually sloping margins, was an appropriate and common accessory to the ornamental features of the park, not to be classed as a dangerous or attractive nuisance. To construct and permit its free use at proper times, and under proper restrictions, for bathing or swimming, was within the beneficent purposes for which the park was authorized and established. The more serious question upon which counsel divide with sustaining authorities from other jurisdictions is whether, in providing for and maintaining this park and pond for the purpose shown and under the authority conferred, the city was acting in a legislative or governmental capacity for the public welfare, or, in its authorized proprietary capacity, was providing a local attraction in which private interest as distinguished from public duty was paramount.

As directly applied to public parks and liability of a municipality for injury to those patronizing them, from negligence in their maintenance, the question has not been passed upon by this court, and opposing counsel cite to their contentions conflicting decisions from other jurisdictions, where accidents in parks are involved; their lines of authority harking from two opposing rules of municipal liability for tort sometimes called the New York and Massachusetts rules.

The New York courts early held that cities given by statute exclusive control of their streets were under a common-law liability for injuries resulting from negligence in their maintenance, and subsequently applied that rule to city parks. *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622. Other states which have adopted that doctrine have followed in its application to cases involving the control and management of parks. Early in the history of this state it was held that, in the absence of statutory provisions, municipalities were not liable for failure to keep highways and bridges in safe repair. *Highway Comrs. v. Martin*, 4 Mich. 558, 69 Am. Dec. 333; *Detroit v. Blackeby*, 21 Mich. 84, 4 Am. Rep. 450. In the latter case the New York rule was discussed and rejected in a carefully considered opinion by Justice Campbell. In *Miller v. Detroit*, 156 Mich. 630, 132 Am. St. Rep. 537, 121 N.

W. 490, 16 Ann. Cas. 832, it is said of the New York rule: "That this is illogical is shown by the cases of *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332, and *Detroit v. Blackeby*, supra."

The local polity of Michigan has often followed and been much influenced by that of the New England states, and the Massachusetts decisions as to municipal liability for torts, generally, taken as precedent.

The general rule of that state, the principles of which have been adopted in this and numerous other jurisdictions, is thus well stated in the recent case of *Bolster v. Lawrence*, 225 Mass. 387, L.R.A.1917B, 1285, 114 N. E. 722, where many preceding decisions on various phases of the subject will be found: "The municipality, in the absence of special statute imposing liability, is not liable for the tortious acts of its officers and servants in connection with the gratuitous performance of strictly public functions, imposed by mandate of the legislature or undertaken voluntarily by its permission, from which is derived no special corporate advantage, no pecuniary profit, and no enforced contribution from individuals particularly benefited by way of compensation for use or assessment for betterments."

In the *Bolster* Case it was held that the city of Lawrence, which maintained a public bathhouse by permissive legislative authority, was not liable for the death of one properly using the facilities offered, caused by the structure and its approaches falling through the negligence of the municipality or its servants.

In the note to *Bisbing v. Asbury Park*, 33 L.R.A.(N.S.)523, where several leading cases upon both sides of the question as to liability of municipalities for injuries through unsafe conditions in parks or other public grounds than streets are digested, it is said the weight of authority supports the fundamental proposition: "That a municipality maintaining public parks is discharging a public duty, and is not performing a private, corporate function for its own advantage."

It is further strenuously urged for plaintiff that this state is aligned by previous decisions with those adopting the contrary view, and said: "The state of Michigan has never been, as a state, in the park business, and it has not delegated to any township or municipality the right to act for the state in any such capacity, but it has always, and in all of the statutes of this state, regarded the property so taken or used as the property and real estate of the municipality where it was situated," etc., citing in support of this contention the early cases: *Detroit v. Corey*, 9 Mich.

165, 80 Am. Dec. 78; *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 86, 9 Am. Rep. 103; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *Cooper v. Detroit*, 42 Mich. 584, 4 N. W. 262; *Thompson v. Moran*, 44 Mich. 602, 7 N. W. 180; *Niles Waterworks v. Niles*, 59 Mich. 324, 26 N. W. 525.

In the *Niles* Case the question involved and decided was the right of the city to contract an indebtedness for hydrants and meters without popular vote, in violation of the express provisions of its charter. The *Corey* Case involved an accident from a sewer excavation in the street, left in a dangerous condition, and it was held that sewers of the city were its private property, and their construction was not a governmental function. The *Cooper* Case involved an attempt by complainant to enjoin the city from continuing and enlarging a public market upon a strip of land claimed to be a part of a street, which the court held had been extinguished by legislative authority, and the strip held by the city under claim of title for over thirty years, denying the injunction on the ground that "the Statute of Limitations long since made the city title impregnable." While the functions of a city are more or less discussed in those cases, we discover nothing in them indicating the capacity in which a city provides, improves, and maintains a park at public expense.

The *Hurlbut* Case involved the validity of an act establishing a board of public works for the city of Detroit, tested by quo warranto proceedings to determine the right of members of its board of water commissioners and sewer commissioners to hold their respective offices after the act went into effect. In the four opinions filed a wide range was taken in the field of municipal government, historically and otherwise; the case taking near seventy pages of the printed report. The court was not then considering the question directly involved here, and while aid to plaintiff's contention may be extracted from some of the views there expressed, the only material question decided was the validity of the act then before the court. *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202, was an application for mandamus to compel the city council to provide for and order issuance of bonds to purchase lands for a park, contracted for by the commissioners. In discussing the legislation creating the park commission, and manner of selecting its members, the conclusion was reached that the persons named were appointees of the legislature, who could not be regarded as representatives of the city for the purpose proposed.

and the court had no power to aid it by legal process, "because, concerning as it does the private corporate interests of the city, it [the board's action] has been had without the consent of the city expressly or by implication given." In holding that the commissioners, as appointees of the legislature, did not then have the power to bind the city for an indebtedness to purchase land for parks, and that cities have the right to use their own discretion in regard to incurring indebtedness for property or improvements of local concern, it is evident, as applied to the question decided, the court regarded a city park as a matter of private corporate interest of the city, rather than a public governmental activity. And in *Thompson v. Moran*, 44 Mich. 602, 7 N. W. 180, involving a demurrer to an information in the nature of a quo warranto to inquire into respondents' authority to usurp a franchise under which they took possession of Belle Isle for the purpose of improving it as a public park, the court, conceding in comment relator's contention that the city was acting in its private corporate capacity, held, under the authority conferred by statute, the right of the city to take possession of and improve lands outside the city limits as a public park was a franchise, saying in conclusion: "If respondents usurp it, they usurp a public franchise, public so far as concerns the city, which is all that is important here."

It is manifest that in these cases where parks figure the question of liability or nonliability of the municipality for imputed negligence in their free maintenance for the public welfare, without compensation for their use or pecuniary benefit to the city, was foreign to the issues involved, and, so far as appears, not advertently discussed or even mentioned. That certain functions of municipal activity may be governmental for some purposes, and of private characteristics in others, is recognized. *O'Leary v. Marquette Fire & Water Comrs.* 79 Mich. 282, 7 L.R.A. 170, 19 Am. St. Rep. 169, 44 N. W. 608; *Brink v. Grand Rapids*, 144 Mich. 472, 108 N. W. 430; *Davidson v. Hine*, 151 Mich. 294, 15 L.R.A. (N.S.) 575, 123 Am. St. Rep. 267, 115 N. W. 246, 14 Ann. Cas. 352; *Simpson v. Paddock*, 195 Mich. 581, 161 N. W. 898.

Counsel's statement that "Michigan has never been, as a state, in the park business," nor recognized parks as a matter of state concern, can be accepted as more applicable to the time when those cases relative to the Detroit park board were before the court than later. Michigan, through its legislature, has recognized the acquisition, improvement, and maintenance of

free public parks as a governmental function, by itself acquiring, improving, and maintaining at state expense, under the supervision of its appointed board, the Mackinac island state park; and, independent of the legislature, the people of the state, by adopting its present Constitution, have authorized any city or village to acquire and maintain parks, even without their corporate limits, grouping them with works which involve public health and safety. The Federal government is also in "the park business" as a governmental function, and, whether they be Federal, state, or municipal parks, the beneficial public purpose intended and served by such free recreation grounds for the people, and the resultant benefits which justify their free maintenance at public expense as a governmental activity, are the same, except it be in degrees; and in that particular a comparison of the beneficial results to the greatest number of people at large, throughout this commonwealth, from the free use and enjoyment of Belle Isle city park and Mackinac island state park, might indicate the degree is not necessarily in favor of the larger governmental unit.

While, like public schools for education, public parks are primarily provided for the recreation, pleasure, and betterment of the people within the limits of the governmental organizations which maintain them, they are not, by legal restraint or custom, or in fact, solely for the benefit of the municipality's own inhabitants, but when thrown open as public parks the public generally, without distinction, are permitted to visit them and freely enjoy the attractions and benefits gratuitously offered.

Along the line of facilities which parks afford, playgrounds for healthy exercise, swimming pools, baths, appliances for manual training, and other equipment for balanced physical and mental development, with instructors as to proper use and methods, are now recognized and frequently adopted in the curriculum of our public schools as essentials of education and sanitation, both acknowledged subjects of state concern and governmental activity.

It is said, imputed negligence is a matter of public policy, subject to legislative regulation, and "it is for the legislature to determine how far, if at all, a body whose negligence, if it is so called, is imputed and in no sense actual, shall be made subject to suit for the misconduct of its employees." *O'Leary v. Marquette Fire & Water Comrs.* 79 Mich. 281, 7 L.R.A. 170, 19 Am. St. Rep. 169, 44 N. W. 608. No right of action conferred by statute is applicable here. The constitutionally author-

ized function this municipality was exercising was without private gain to the corporation or to individuals, for purposes essentially public and of a beneficial character, in furtherance of the common welfare, in harmony with the general policy of the state, and was in its nature a governmental activity, whether it be put upon the ground of health, education, charity, social betterment by furnishing the people at large free advantages for wholesome recreation and entertainment, or all of them.

As applied to public parks of this nature, the fundamental proposition of the Massachusetts rule, which this court has generally approved, is well sustained by

the reasoning in the following cases and those they lead to: *Tindley v. Salem*, 137 Mass. 176, 50 Am. Rep. 289; *Donohue v. Newburyport*, 211 Mass. 561, 98 N. E. 1081, Ann. Cas. 1913B, 742; *Bolster v. Lawrence*, 225 Mass. 387, L.R.A.1917B, 1285, 114 N. E. 722; *Blair v. Granger*, 24 R. I. 17, 51 Atl. 1042; *Bisbing v. Asbury Park*, 33 L.R.A.(N.S.) 523, note; *Park Comrs. v. Prinz*, 127 Ky. 460, 105 S. W. 948; *Nashville v. Burns*, 131 Tenn. 281, L.R.A.1915D, 1108, 174 S. W. 1111; *Harper v. Topeka*, 92 Kan. 11, 51 L.R.A.(N.S.) 1032, 139 Pac. 1018; *Russell v. Tacoma*, 8 Wash. 156, 40 Am. St. Rep. 895, 35 Pac. 605.

Judgment is affirmed.

## NEBRASKA SUPREME COURT.

LAWRENCE ALLERTZ

v.

LOU HANKINS

and

LEE BURROUGHS, Appt.

(— Neb. —, 166 N. W. 608.)

### Master and servant — liability for servant's act.

1. In an action to hold a master liable for the act of a servant, if the act complained of is within the scope of the agent's employment the master may be liable if the servant did the act with a view to the service for which he was employed. If, then, the question is whether the servant at the time had some purpose of his own and not connected with his employment in doing the act, it becomes a question of fact for the jury.

For other cases, see *Trial*, II. o, 9, in *Dig.* 1-52 N. S.

### Same — assault by foreman.

2. If the employment of a foreman in a restaurant includes the maintaining of decent order among the waiters and employees generally, with authority to discharge an employee if necessary for that purpose, it does not follow that the scope of the employment includes corporal punishment or personal violence. The employer will not be liable for such action on the part of his

employee in the absence of evidence that he has directed or authorized it.

For other cases, see *Master and Servant*, III. a, 2, in *Dig.* 1-52 N. S.

### Pleading — amendment — time.

3. A pleading may be amended before or after judgment, in furtherance of justice, "when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." Rev. Stat. 1913, § 7712. If the evidence, without objection, clearly proved a "claim or defense," the pleading will upon appeal be considered amended accordingly. For other cases, see *Pleading*, I. a, in *Dig.* 1-52 N. S.

(Hamer, J., dissents.)

(February 16, 1918.)

**A**PPEAL by defendant Burroughs from a judgment of the District Court for Lancaster County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by an assault upon him by defendant Hankins. Reversed.

The facts are stated in the opinion.

Messrs. Morning & Ledwith, for appellant:

The master is not responsible for the wilful acts of his servant done without his authority, even though done while engaged in the master's business.

*Davis v. Houghtellin*, 33 Neb. 582, 14 L.R.A. 737, 50 N. W. 765; *Younkin v. Rocheford*, 76 Neb. 531, 107 N. W. 853, 110 N. W. 632; *Smith v. Memphis & A. C. Packet Co.* — Tenn. —, 1 S. W. 104; *Golden v. Newbran*, 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 537; *Crelly v. Missouri & K. Teleph. Co.* 84 Kan. 19, 33 L.R.A.(N.S.) 328, 113 Pac. 386, 3 N. C. C. A. 854; *Hudson v. Missouri K. & T. R. Co.* 16 Kan. 470; *Hardeman v. Williams*, 150 Ala. 415, 10

Headnotes by SEDGWICK, J.

**Note.** — The liability of the master for injuries inflicted upon an employee, maliciously or in sport, by another employee, is discussed in the notes to *Medlin Mill Co. v. Boutweel*, 34 L.R.A.(N.S.) 109; *Robinson v. Melville Mfg. Co.* 52 L.R.A.(N.S.) 385; and *Wells v. Henderson Land & Lumber Co.* L.R.A.1918A, 118, and see references in last-mentioned note for annotations on related questions.

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L.R.A.(N.S.) 653, 43 So. 726; Stephenson v. Southern P. Co. 93 Cal. 558, 15 L.R.A. 475, 27 Am. St. Rep. 223, 29 Pac. 234; Little Miami R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373; Williams v. Pullman Palace Car. Co. 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631; Ware v. Barataria & L. Canal Co. 15 La. 169, 35 Am. Dec. 189; Kincaid v. Chicago, M. & St. P. R. Co. 107 Iowa, 682, 78 N. W. 698, 6 Am. Neg. Rep. 64; Galveston, H. & S. R. Co. v. Currie, 100 Tex. 136, 10 L.R.A.(N.S.) 367, 96 S. W. 1073; Dolan v. Hubinger, 109 Iowa, 408, 80 N. W. 514, 6 Am. Neg. Rep. 506; Holler v. Ross, 68 N. J. L. 324, 59 L.R.A. 943, 96 Am. St. Rep. 546, 53 Atl. 472; Waaler v. Great Northern R. Co. 18 S. D. 420, 70 L.R.A. 731, 112 Am. St. Rep. 794, 100 N. W. 1097, 17 Am. Neg. Rep. 1131; Meehan v. Morewood, 52 Hun, 566, 5 N. Y. Supp. 710; Cobb v. Simon, 124 Wis. 467, 102 N. W. 891; Goodloe v. Memphis & C. R. Co. 107 Ala. 233, 29 L.R.A. 729, 54 Am. St. Rep. 67, 18 So. 166; Jones v. St. Louis, N. & P. Packet Co. 43 Mo. App. 398; Gabrielson v. Waydell, 135 N. Y. 1, 17 L.R.A. 228, 31 Am. St. Rep. 793, 31 N. E. 969; Fraser v. Freeman, 43 N. Y. 566, 3 Am. Rep. 740; Jolly v. Doolittle, 169 Iowa, 658, 149 N. W. 890; Evers v. Krouse, 70 N. J. L. 653, 66 L.R.A. 592, 58 Atl. 181, 16 Am. Neg. Rep. 515; Everingham v. Chicago, B. & Q. R. Co. 148 Iowa, 662, 127 N. W. 1009, Ann. Cas. 1912C, 848.

Wherever negligence is an issue it must be shown to be the proximate cause of the injury complained of, and where negligence of a master in selecting incompetent fellow servants is the basis of the action, it must be shown that the negligence was the proximate cause.

Albrecht v. Morris, 91 Neb. 442, 136 N. W. 48; Gulf C. & S. F. R. Co. v. Williams, — Tex. Civ. App. —, 39 S. W. 967; Fordyce v. Yarbrough, 1 Tex. Civ. App. 260, 21 S. W. 421.

Since the plaintiff's own evidence conclusively shows that he knew of the character of Hankins all the time, he fails to make out his case, and defendant is not obliged to plead assumption of risk.

White v. Lewiston & Y. Frontier R. Co. 94 App. Div. 4, 87 N. Y. Supp. 901; Greeley v. Foster, 32 Colo. 292, 75 Pac. 351; Yazoo & M. Valley R. Co. v. Woodruff, 98 Miss. 36, 33 So. 687, 57 So. 914; McMurtry v. Louisville, N. O. & T. R. Co. 67 Miss. 601, 7 So. 491, 4 Am. Neg. Cas. 308; Taylor v. Prairie Pebble Phosphate Co. 61 Fla. 455, 54 So. 194; Everingham v. Chicago, B. & Q. R. Co. 148 Iowa, 662, 127 N. W. 1009, Ann. Cas. 1912C, 848.

Messrs. O. J. Campbell and H. R. Ankeny for appellee.

L.R.A.1918F.

Sedgwick, J., delivered the opinion of the court:

The defendant Burroughs was the proprietor of a restaurant in the city of Lincoln. The plaintiff and the defendant Hankins were in his employ in the restaurant. The plaintiff brought this action in the district court for Lancaster county against Hankins and Burroughs jointly to recover damages alleged to have been caused by an assault upon him by the defendant Hankins. He recovered a judgment against both of the defendants, and the defendant Burroughs has appealed.

The defendant Hankins contends that he acted in self-defense only, and that the plaintiff was responsible for his own injuries. As Hankins is not a party to this appeal, that question is not discussed in the briefs, and it is assumed for the purpose of this decision that Hankins assaulted the plaintiff, and that the evidence justifies the recovery against him. The plaintiff insists that although Burroughs was not, at the time, in the room where the assault occurred, he is liable for the acts of Hankins under the circumstances. Hankins was foreman for the defendant Burroughs, and, in Burroughs' absence, had charge of the business and control of the employees. He also acted as cook, and plaintiff was one of the waiters. The difficulty between Hankins and the plaintiff arose from the manner of the latter's service of some of the patrons of the restaurant. It is alleged, and we assume the jury was justified by the evidence in finding, that Hankins rebuked the plaintiff for his manner of performing the service, and, in anger and without cause, threw some article, which was for use in the business, at plaintiff, which caused the plaintiff's injuries. It is suggested in the brief that Burroughs anticipated such conduct on Hankins' part and encouraged it, but the evidence wholly fails to warrant such a suggestion. It is contended that, after the trouble, Burroughs took the view that the plaintiff was at fault, and attempted to protect Hankins from prosecution or trouble on account thereof, but this evidence has no tendency to show that anything that Burroughs did could have been considered to have been the cause of the assault. The questions principally discussed in the briefs are: First, whether the act of Hankins in making this assault was within the scope of his employment or so connected with his duties as to make his employer responsible for his acts; and, second, whether Burroughs knew that Hankins was quarrelsome and vicious to such an extent as to make him a dangerous man in his position as foreman, and so was guilty of negligence in continuing him, in

such employment, which was the proximate cause of the plaintiff's injury.

Upon the first question the plaintiff quotes from the note in *Goodloe v. Memphis & C. R. Co.* 107 Ala. 233, 18 So. 166, 29 L.R.A. 729, 54 Am. St. Rep. 89: "Whether a servant did a tortious act with a view to his master's service, or to serve a purpose of his own, is a question of fact for the jury."

When the act complained of is within the scope of the agent's employment, the master may be liable if the servant did the act with a view to the service for which he was employed, although the master would not be liable if the servant at the time had some purpose of his own, and not connected with his employment, in doing the act; and, when the question depends upon the purpose and intention of the servant, it becomes a question of fact for the jury. And the statement quoted, under such circumstances, would be accurate. A more complete statement and one of more general application is found in the quotation from *Nelson Business College Co. v. Lloyd*, 60 Ohio St. 448, 46 L.R.A. 314, 71 Am. St. Rep. 729, 54 N. E. 471: "In an action seeking to hold the master liable for an act of his servant, which, from its nature, is within his employment, the question is whether it was in fact done in the performance of his service to his master, or was done wholly for the purpose of injuring the plaintiff, and none other, that question must be determined by the jury."

And this quotation suggests the vital question in this case. Was the act of Hankins in assaulting this plaintiff, "from its nature within his employment?" If the nature and quality of the act are clearly shown, without dispute, in the evidence, the court must so determine, and not submit that question to the jury. When Burroughs authorized Hankins to act as foreman in his business, he gave him such authority over the persons there employed as he himself would possess under the same circumstances. It is said that Hankins had authority to direct the action of the employees, to rebuke them for misconduct, and even to discharge them from the employment altogether. If the evidence would justify the finding of such authority reposed in Hankins, it would not follow that he was authorized to commit violent assaults upon the employees, or that he was employed with a view to any such conduct on his part. In some cases, as in the employment of a street car conductor, the scope of the employment necessarily includes the proper use of force under some circumstances. If a drunken rowdy so conducts himself as to become dangerous to the passengers, it may become necessary to remove him from the car, and, in such case, to use necessary and proper force for that pur-

pose is within the scope of the conductor's employment, so that his employer would be liable for a misuse of force or for unnecessary violence. There is some evidence that this foreman was expected to maintain decent order in the restaurant, and that he might even discharge an employee if necessary for that purpose. But there is no evidence in this record that would justify the finding that to use corporal punishment, or personal violence, was within the scope of his employment. Indeed, the proprietor himself had no such function, and could not delegate such powers.

There is some evidence that, upon a former occasion, Hankins and another employee had had difficulty, which possibly resulted in blows, and that Hankins was still retained in the employment, but this fact of itself is not sufficient to establish contemplating any such action on the part of Hankins, or any reason to suppose that it would be repeated.

There is evidence from which, perhaps, it might be inferred that Hankins was a quarrelsome man—so much so that it might possibly be considered dangerous to place him in such a position. If the evidence shows that Burroughs was aware of this fact, it is much more clearly proven that this plaintiff was also aware of Hankins' disposition and practices. The plaintiff contends that Burroughs is not now in a position to avail himself of the defense of assumption of risk on the part of plaintiff, because that defense was not pleaded in his answer. The statute (§ 7712, Rev. Stat. 1913) provides: "The court may either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding. . . . when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

It has been the settled practice in this state that "Where the ends of justice seem to demand it, leave will be given in the supreme court to amend a petition so as to fully state the cause of action." *Humphries v. Spafford*, 14 Neb. 488, 16 N. W. 911.

The statute quoted expressly applies "when the amendment does not change substantially the claim or defense," and the same rule must necessarily be applied to both "claim or defense." The plaintiff's own evidence shows that he was familiar with the character and conduct of Hankins, and still continued in the employment without making any objection or complaint to the defendant Burroughs. He cannot, therefore, avail himself of this supposed negligence on the part of Burroughs.

The plaintiff has entirely failed to prove his cause of action against the defendant



Burroughs, and the judgment of the District Court is reversed, and the cause remanded.

Letton and Rose, JJ., not sitting.

Hamer, J., dissenting:

In the majority opinion it is said: "It is assumed for the purpose of this decision that Hankins assaulted the plaintiff, and that the evidence justifies the recovery against him."

It is further said: "It is alleged, and we assume the jury was justified by the evidence in finding that Hankins rebuked the plaintiff for his manner of performing the service, and, in anger and without cause, threw some article, which was for use in the business, at plaintiff, which caused the plaintiff's injuries."

The majority opinion takes the view that the evidence fails to warrant the suggestion in plaintiff's brief that Burroughs anticipated Hankins' conduct. Whether the act of Hankins was within the scope of his employment is an important question, to be ascertained from the evidence. It is also important whether Burroughs knew that Hankins was quarrelsome and accustomed to treat men with violence, who were under his direction in the restaurant. These questions were for the jury and, as I think, from an examination of the evidence, were probably rightly determined. The jury found for the plaintiff.

Let us first examine the evidence and see whether Hankins had the support of his employer Burroughs, in the supervision which he attempted to exercise, and in the discipline he undertook to administer. Hankins appears to have slapped a man named Bradley, and to have thrown him under the stairway. Bradley seems to have been a very small man. Burroughs seems to have known about it, because Bradley came out into the dining room with his head bleeding. Burroughs appears to have been in the house at that time. John Downing was an old man and a helper. Hankins "got hold of him, jerked his apron off; he threw him out of the door, and threw his apron after him." The witness thinks that Burroughs was around the restaurant at that time. The witness seems to have thought that Hawkins was violent. "I seen him slam things around there. One instance, I seen him, an old gentleman there by the name of Colonel that was working. He slammed his knife down on the platform, and scared the old man, and he jumped over against a barrel." The old man claimed that he ruptured himself, and the witness saw him after that when "he was bandaged up." The witness recites that "the old Colonel was washing dishes there, and did not hear very well. Lou hol-

lered over after him for some dishes or something and the old man did not seem to pay any attention to him, and he [Hankins] threw the ribs that was cut off the rest of the piece at the old gentleman, and it went through the window open right above his head where, if he had straightened up, he would have been hit." The witness says that Burroughs had to put the window in, and that "he knew that Lou broke it; that is all." The witness testified that he had heard these assaults discussed in Burroughs' hearing; "it would be amongst ourselves, in hearing distance." It does not appear that Burroughs found fault with Hankins for making these assaults. He seems to have been violent in his conduct. The witness saw him "kick the meat block out of the house." Then he picked up the beefsteak "and threw it on the range." Hankins assaulted W. A. Heskett. Heskett testified that he had a conversation with Burroughs immediately after the assault. Heskett asked him if he (Heskett) should work. "He says, 'You stay here until I come up,' and he went down stairs, and when he came up I went back in the kitchen, and he says, 'I want you fellows to forget about this.'" It appears that Heskett wanted to know who should pay for the dishes that were broken when Hankins and Heskett had an affray.

The plaintiff offered to show that Hankins paid for all the dishes that were broken that time, amounting in value to \$5. There was an objection, which was sustained. The money appears to have been paid to the defendant Burroughs. If admitted, this would have shown that Burroughs knew something of Hankins' disciplinary tendencies.

Burroughs testified:

Why, he [Hankins] was in charge of my kitchen; in charge of everybody that was in that kitchen any time and all the time.

Q. Now this man Hankins, according to your system there, had charge of everyone connected with that kitchen?

A. Yes, sir.

The altercation between Hankins and Allertz arose over the bringing out of an order for spinach. Burroughs seems to have wanted Allertz to bring out the spinach.

Q. And Hankins wanted it brought out?

A. We both wanted it brought out.

Q. And it was over the bringing out of that order that the altercation arose between Allertz and Hankins?

A. Yes, sir.

Burroughs seems to have paid a hospital bill of \$1.50 at St. Elizabeth Hospital. He also seems to have paid \$4 for a hack

to convey his wife. That these violent exhibitions of temper could have gone on without Burroughs knowing it seems unreasonable. I think the evidence clearly shows that Burroughs knew that Hankins was violent, and Hankins appears to have justified the conclusion of the jury. I am not quite sure that the evidence warrants the conclusion that Burroughs anticipated that Hankins would administer the chastisement which he did administer to the plaintiff. Of course he could not justify the defendant Hankins in throwing a bowl at the plaintiff and breaking his skull, or otherwise injuring him. Hankins was probably very efficient, and appears to have entertained strong ideas touching his right to administer chastisement to the waiters by the exercise of personal violence. The evidence appears to show that he had, on several former occasions, asserted his physical superiority on behalf of his employer.

In the majority opinion there is no effort to justify the conduct of Hankins, and it is contended, apparently, that because the plaintiff knew Hankins' violent character, that therefore he assumed the risk. It is said in the opinion: "The plaintiff's own evidence shows that he was familiar with the character and conduct of Hankins, and still continued in the employment without making any objection or complaint to the defendant Burroughs. He cannot, therefore, avail himself of this supposed negligence on the part of Burroughs."

Whatever this may mean, it is not sufficient justification of the conduct of Burroughs in keeping this sort of a man in his employ. He ought not to be allowed to do so without paying the damage which the plaintiff sustained. "Where, in an action at law, the evidence is conflicting, it is not the province of this court to examine it further than to see that there is sufficient [evidence] to justify the conclusion reached." *Young v. Kinney*, 85 Neb. 131, 122 N. W. 679. That the judgment should not be set aside, see *Omaha v. Houlihan*, 72 Neb. 326, 100 N. W. 415; *Shirley v. Minden*, 84 Neb. 544, 121 N. W. 431; *Tillson v. Holloway*, 94 Neb. 635, 143 N. W. 939; *First Nat. Bank v. Hedgecock*, 87 Neb. 220, 127 N. W. 171; *Roden v. Williams*, 100 Neb. 46, L.R.A.1917A, 415, 158 N. W. 36; *Dohner v. Barr*, 100 Neb. 172, 158 N. W. 965; *Mundy v. Meyer*, 100 Neb. 296, 159 N. W. 404; *Shapiro v. Omaha & C. B. Street R. Co.* 100 Neb. 452, 160 N. W. 886. *Holmvig v. Dakota County*, 90 Neb. 576, 134 N. W. 166; *Smith v. Chicago, St. P. M. & O. R. Co.* 99 Neb. 719, 157 N. W. 622.

The district judge seems to have carefully and fairly submitted the case to the jury upon a conflict of testimony, and it seems that the verdict ought not to be disturbed, and that the judgment of the District Court should be affirmed.

Petition for rehearing denied.

## ARKANSAS SUPREME COURT.

STATE OF ARKANSAS FOR THE USE  
OF ARKANSAS STATE PENITENTIARY, Appt.,

v.

BANK OF COMMERCE.

(— Ark. —, 202 S. W. 834.)

**Bank — payment of check on forged indorsement — effect.**

Payment of a check on a forged indorsement does not constitute an acceptance of it in favor of the payee so as to entitle him to maintain an action on the instrument against the drawee.

*For other cases, see Banks, IV. a, 3, b, (3), in Dig. 1-52 N. S.*

(April 15, 1918.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Pulaski County sustaining a demurrer to a complaint to

recover the amount of a forged check alleged to have been wrongfully paid by the defendant bank. **Affirmed.**

The facts are stated in the opinion.

Messrs. John D. Arbuckle, Attorney General, and T. W. Campbell, Assistant Attorney General, for appellant:

A bank must ascertain at its own peril that the person presenting a check drawn upon such bank, to it for payment, is authorized to receive the money thereon, and that the indorsement upon the check so paid by the bank has been made by the real payee named in the check or by someone duly authorized by such payee to execute such indorsement for him: and, if the indorsement be forged or the bank pay the money to one other than the payee, the bank is liable, either to the drawer of the check or to the payee, for the amount wrongfully paid upon the forged indorsement.

**Note.** — The right of a holder of a check to maintain an action thereon against the bank is treated in the annotation following *Ballard v. Home Nat. Bank*, L.R.A.

L.R.A.1918F.

1916C, 165, and see especially pages 181 et seq. as to effect of payment of check upon a forged indorsement as an acceptance in favor of payee.

5 R. C. L. 566; 7 C. J. p. 693; § 422; Zane, Banks & Bkg. §§ 146, 147; Morse, Banks & Bkg. 5th ed. § 474; Magee, Banks & Bkg. 2d ed. p. 351; 2 Dan. Neg. Inst. § 1663; Johnson v. First Nat. Bank, 6 Hun, 124; Seventh Nat. Bank v. Cook, 73 Pa. 483, 13 Am. Rep. 751; Millard v. National Bank, 3 MacArth. 54; McFadden v. Follrath, 114 Minn. 85, 37 L.R.A.(N.S.) 201, 130 N. W. 542; Jackson v. National Bank, 92 Tenn. 154, 18 L.R.A. 663, 36 Am. St. Rep. 81, 20 S. W. 802; Bristol Knife Co. v. First Nat. Bank, 41 Conn. 421, 19 Am. Rep. 517; Vanbibber v. Bank of Louisiana, 14 La. Ann. 486, 74 Am. Dec. 442; Farmer v. People's Bank, 100 Tenn. 187, 47 S. W. 234; Pickle v. Muse (Pickle v. People's Nat. Bank) 88 Tenn. 380, 7 L.R.A. 93, 17 Am. St. Rep. 900, 12 S. W. 919; Graham v. United States Saving Inst. 46 Mo. 186; Dispatch Printing Co. v. National Bank, 109 Minn. 440, 50 L.R.A.(N.S.) 74, 124 N. W. 236; Columbia Mill. Co. v. National Bank, 52 Minn. 224, 53 N. W. 1061; William Deering & Co. v. Kelso, 74 Minn. 41, 73 Am. St. Rep. 324, 76 N. W. 792; Sage v. Burton, 84 Hun, 267, 32 N. Y. Supp. 1122; Goodell v. T. M. Sinclair & Co. 112 Ill. App. 594; Knoxville Water Co. v. East Tennessee Nat. Bank, 123 Tenn. 364, 131 S. W. 447; Schmidt v. Garfield Nat. Bank, 64 Hun, 298, 19 N. Y. Supp. 252; Kimbro v. First Nat. Bank, 1 MacArth. 415; Brown v. People's Nat. Bank, 170 Mich. 416, 40 L.R.A.(N.S.) 657, 136 N. W. 506; Burstein v. People's Trust Co. 143 App. Div. 165, 127 N. Y. Supp. 1092; Dodge v. National Exch. Bank, 20 Ohio St. 234, 5 Am. Rep. 648; First Nat. Bank v. Pease, 168 Ill. 40, 48 N. E. 160; Michie, Banks & Bkg. p. 1215; Van Schaack, Bank Checks, 114; Commercial Nat. Bank v. Lincoln Fuel Co. 67 Ill. App. 166.

Messrs. Morris M. Cohn and Louis M. Cohn, for appellee:

The payee of a check or draft whose indorsement was forged, after payment by the bank upon which it was drawn, upon such forged indorsement, cannot maintain an action against the drawee to recover the amount of it.

Sims v. American Nat. Bank, 98 Ark. 1, 135 S. W. 356; First Nat. Bank v. Whitman, 94 U. S. 343, 24 L. ed. 229; Elyria Sav. & Bkg. Co. v. Walker Bin Co. 92 Ohio St. 406, L.R.A. 1916D, 433, 111 N. E. 147, Ann. Cas. 1917D, 1055; Ballard v. Home Nat. Bank, 91 Kan. 91, L.R.A.1916C, 164, 136 Pac. 935; Rogers Commission Co. v. Farmers' Bank, 100 Ark. 537, 140 S. W. 992.

L.R.A.1918F.

Smith, J., delivered the opinion of the court:

The complaint in this cause contained the following allegations:

"That on November 27, 1916, Landauer Brothers Cotton Company of Little Rock, Arkansas, executed its check upon the defendant, the Bank of Commerce, in the sum of \$5,000 payable to the order of the Arkansas State Penitentiary, said check being in part payment of certain cotton sold to the said Landauer Brothers Cotton Company by the state board of penitentiary and reform school commissioners; that on said date said check was delivered by said Landauer Brothers Cotton Company into the hands of R. G. Anderson, who was at that time the clerk of the said state board of penitentiary and reform school commissioners; that on said date the said R. G. Anderson, wholly without any authority or right so to do, indorsed said check and presented it to the defendant, the Bank of Commerce, and the said defendant then and there wrongfully and without any right or authority whatsoever paid to the said R. G. Anderson the \$5,000 in cash, and then and there charged said check against the account of the said drawers thereof, the said Landauer Brothers Cotton Company.

"That the said R. G. Anderson wholly failed to pay over the said \$5,000 or any portion thereof to the state board of penitentiary and reform school commissioners, or to the state treasurer, but that the said Anderson appropriated said money to his own use; that the said state board of penitentiary and reform school commissioners and the state of Arkansas have wholly failed to receive any portion of said money.

"That the said indorsement of said check by the said Anderson was a forgery; that the said Anderson, as clerk of the said board, was not empowered or authorized by law to indorse said check nor to receive the money thereon, nor was the said Anderson authorized by the said board nor any member thereof to indorse said check nor to receive the money thereon; that by reason of the premises aforesaid, the plaintiff, the state of Arkansas, for the use of the Arkansas State Penitentiary, is entitled to recover from the said defendant, Bank of Commerce, the said sum of \$5,000, together with interest thereon at 6 per cent per annum from November 27, 1916."

A demurrer to this complaint was sustained, and, the state having elected to stand upon the complaint, the cause was dismissed, and this appeal has been prosecuted.

Counsel for the state concede that the point in issue was decided by this court in the case of Sims v. American Nat. Bank,

98 Ark. 1, 135 S. W. 356. It is argued, however, that the opinion in that case, in so far as it appears to be decisive of the point at issue in this case, is dictum. The point decided in the Sims Case was responsive to the following question asked in the opinion: "Can the payee of a check or draft whose indorsement was forged, after payment by the bank upon which it was drawn, upon such forged indorsement, maintain an action against the drawee to recover the amount of it?"

The court treated that question as stating the point there in issue, and made its answer to that question decisive of the facts of that case. Therefore, the answer to this question cannot be treated as dictum. The court recognized the question as one of first impression in this court, and after a review of the authorities, as is indicated both by the opinion itself and the abstract of the briefs filed in that case, took a position based upon the decision of the Supreme Court of the United States in the case of *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. ed. 229. The case cited and relied upon presents the exact question which we have here, and this court quoted with approval the following language from that case: "We think it is clear, both upon principle and authority, that the payee of a check, unaccepted, cannot maintain an action upon it against the bank on which it is drawn."

The doctrine of the Sims Case, *supra*, was reaffirmed by this court in the case of *Rogers Commission Co. v. Farmers' Bank*, 100 Ark. 537, 140 S. W. 992, where it was said "that the giving of a check upon a bank is not an assignment of the amount of it to the payee, upon which he can bring a suit against the bank for its payment; there being no privity between the drawee bank and the holder of the check, until acceptance by it."

The point there decided, under the facts of that case, cannot be said to be dictum.

The opinion of this court in the Sims Case is vigorously assailed by learned counsel for the state upon the ground that this doctrine, as applied to the facts of that case, is dictum, and it is also assailed upon the ground that it is contrary to the weight of authority and is against the sounder reason.

In reply to this argument it may be said that the point, at least, has been decided by this court as the doctrine of the Sims Case, *supra*, was reaffirmed in the *Rogers Commission Co. Case*, *supra*, and, for the reason stated, the language quoted was not dictum. Learned counsel are mistaken in the statement that these decisions are contrary to the weight of the authority

upon his subject. The contrary appears to be the case, as is shown by the exhaustive note on the subject which is appended to the case of *Ballard v. Home Nat. Bank*, 91 Kan. 91, L.R.A.1916C, 161, 136 Pac. 935. The author of this note sets out the reported cases upon this subject, and states the majority rule to be that announced by the Supreme Court of the United States, in the case of *First Nat. Bank v. Whitman*, *supra*. The opinions of this court in the cases mentioned, in 98th and 100th Arkansas Reports, are cited, along with the others, as comprising the majority rule. According to this note, there can be no question that the rule, as approved by this court in the cases cited, accords with the majority rule on the subject. This question was thoroughly considered by this court in the Sims Case, *supra*, and this court took its position, after a review of the leading authorities upon the subject. We do not therefore feel at liberty to overrule our cases simply because it might appear (which we do not decide) that the minority rule is based upon the sounder reason.

This court gave in the Sims Case, *supra*, the following reason for the position which it then took: "In such matters it is important that uniformity should obtain in the different jurisdictions, and that but one rule should be applied to the business dealings of the citizens of the different states with each other, so closely interwoven in such business activity and association with the vast commercial life of the nation; and since the United States Supreme Court is the highest court of last resort, and does not follow the decisions of the state courts upon general banking and commercial questions, we will follow it."

Since the rendition of the opinions of this court in the cases cited, the Negotiable Instruments Law has been enacted (Acts 1913, p. 280), and it is argued by counsel for appellee that, if the question at issue had not already been decided in the cases cited, the enactment of this law enacts that rule. Section 189 of this act is as follows: "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check."

Section 132 of this act is as follows: "The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money."

The author of the note to the case cited

in L.R.A.1916C, 161, *supra*, expresses the view that the enactment of a Negotiable Instruments Law by a state operates to enact what he calls the majority rule; and the cases there cited appear to support that view. Whether this be the necessary effect of the enactment of the Negotiable Instruments Law in this state or not, the provisions of the statute are certainly not contrary to the decisions of this court, prior to its enactment.

It is argued that the action of the bank in paying the check and charging it to the account of the drawer operates as an acceptance of the check by the bank, and thereby assigns, pro tanto, the amount of the check to the use and benefit of the legal owner of the check, and that, when payment has been made, and the amount paid has been charged against the drawer, no question remains except the legal ownership of the sum of money thus assigned upon the books of the bank, and that the question to be decided is that only of the ownership of the money. In support of this view counsel cite § 474 of Morse on Banks & Banking, and the text cited appears to support that position. But, in so far as the cases cited by the text support it, these cases are from courts which have adopted the minority rule. It must be conceded, of course, that, when the bank has accepted a check, its liability becomes fixed in favor of the payee for the amount thereof. The Negotiable Instruments Law so provides, and the cases on the subject so hold. But has there been an acceptance by the bank, where the payment was made upon a forged indorsement? An answer to this question is found in 2 Michie on Banks & Banking, in the note No. 80 found at page 17. The caption of this note is as follows: "Payment upon unauthorized indorsement held not an acceptance authorizing action by real owner."

The author cites the case of *First Nat. Bank v. Whitman*, *supra*, and other cases which announce the majority view. The author cites in support of the statement contained in the heading of his note a portion of the opinion in the case of *First Nat. Bank v. Whitman*, *supra*, as follows: "It is further contended that such an acceptance of the check as creates a privity between the payee and the bank is established by the payment of the amount of this check in the manner described. This argument is based upon the erroneous assumption that the bank has paid this check. If this were true, it would have discharged all of its duty, and there would be an end of the claim against it. The bank supposed that it had paid the check; but this was an

error. The money it paid was upon a pretended and not a real indorsement of the name of the payee. The real indorsement of the payee was as necessary to a valid payment as the real signature of the drawer; and, in law, the check remains unpaid. Its pretended payment did not diminish the funds of the drawer in the bank, or put money in the pocket of the person entitled to the payment. The state of the account was the same after the pretended payment as it was before. We cannot recognize the argument that a payment of the amount of a check or sight draft, under such circumstances, amounts to an acceptance creating a privity of contract with the real owner. It is difficult to construe a payment as an acceptance under any circumstances. The two things are essentially different. One is a promise to perform an act; the other an actual performance."

It would appear to follow, from an adherence to the majority rule, that the erroneous payment upon a forged indorsement was not an acceptance.

What we have here said does not conflict with the views expressed in the case of *Mills v. Hurley Hardware & Furniture Co.* 129 Ark. 350, 196 S. W. 121. There the suit was by the payee against the drawer of a check which had been delivered to one who had the authority to receive it. The agent's authority was exceeded not by receiving the check, but by indorsing it, and we held that the drawer of a check, who had delivered it to one authorized to receive it in payment of a demand against the drawer, had discharged his full duty by providing funds to his credit in the hands of the bank against which the check was drawn, and that the drawer of the check, under those circumstances, was not responsible for the dereliction of the defaulting agent in wrongfully indorsing the check, and that the check thus properly received, but wrongfully indorsed, constituted full payment of the sum of money named in the check. A majority of the judges are of the opinion that the facts just stated sufficiently distinguish that case from the present one without saying anything further, and that the decision in that case is not in conflict with the conclusion now reached in this one. They decline to express any opinion at this time as to the authority of Anderson or the board of penitentiary commissioners to receive the check, or to collect funds due the state from sales of products of the state farm.

It follows, therefore, that the demurrer was properly sustained, and the judgment of the court below is affirmed.

## MINNESOTA SUPREME COURT.

E. W. WILLIAMS, Resp't.,

v.

ELIZA P. EVANS et al., Appts.

A. M. RAMER COMPANY, Resp't.,

v.

SAME, Appts.

(139 Minn. 32, 165 N. W. 495.)

**Constitutional law — liberty — police power.**

1. The state legislature possesses all legislative power not withheld or forbidden by the state or Federal Constitution. The provisions of the state Constitution, so far as here applicable, are not more restrictive than the 14th Amendment to the Federal Constitution. This amendment guarantees liberty of contract, subject to regulation under the police power of the state.

*For other cases, see Constitutional Law, II, b, 4, b, in Dig. 1-52 N. S.*

**Same — minimum wage.**

2. Chapter 547, Laws 1913 (Gen. Stat. 1913, §§ 3094-3093), establishing a Minimum Wage Commission and providing for the determination and establishment of minimum wages for women and minors, is a valid exercise of the police power of the state.

*For other cases, see Constitutional Law, II, c, 4, c, in Dig. 1-52 N. S.*

**Legislature — delegation of power.**

3. The legislature cannot delegate legislative power, but it may delegate authority or discretion to be exercised under and in pursuance of the law. It may delegate power to determine some fact or state of things upon which the law makes its own operation depend.

*For other cases, see Constitutional Law, I, d, in Dig. 1-52 N. S.*

**Statute — delegation of power.**

4. This act was a complete statute when it left the legislature, and does not delegate legislative power to the Minimum Wage Commission.

*For other cases, see Constitutional Law, I, d, 4, in Dig. 1-52 N. S.*

**Constitutional law — equal protection.**

5. Inequalities of minor importance do not render a law invalid. The limitations of the Constitution are flexible enough to permit of practical application.

*For other cases, see Constitutional Law, II, a, 1, in Dig. 1-52 N. S.*

(December 21, 1917.)

Headnotes by HALLAM, J.

**Note.** — The constitutionality of a Minimum Wage Law Relating to private employment is treated in the annotation following this case, post, 547, and see references therein to annotations on related questions.

L.R.A.1918F.

**A** PPEAL by defendants from an order of the District Court for Ramsey County enjoining the enforcement of orders of the defendant Wage Commission, fixing minimum wages for women and minors in certain occupations. Reversed.

The facts are stated in the opinion.

Mr. Felix Frankfurter for National Consumers' League.

Messrs. Lyndon A. Smith, Attorney General, John C. Nethaway, Assistant Attorney General, and Alva R. Hunt for appellants.

Messrs. Brown, Abbott, & Somsen and O'Brien, Young, & Stone, for respondent company:

The private rights of individuals, especially the right of freedom of contract, can be interfered with only where public health, morals, or welfare absolutely require it.

*Lochner v. New York*, 198 U. S. 48, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Peterson v. Widule*, 157 Wis. 641, 52 L.R.A.(N.S.) 790, 147 N. W. 966, Ann. Cas. 1916B, 1040.

Chapter 547, known as the Minimum Wage Law, is an unauthorized attempt to delegate legislative power and discretion to the Commission.

*State ex rel. Hahn v. Young*, 29 Minn. 474, 9 N. W. 737; *State ex rel. Luley v. Simons*, 32 Minn. 540, 21 N. W. 750; *State ex rel. Railroad & W. Commission v. Chicago, M. & St. P. R. Co.* 38 Minn. 281, 37 N. W. 782; *Anderson v. Manchester F. Assur. Co.* 59 Minn. 182, 28 L.R.A. 609, 50 Am. St. Rep. 400, 60 N. W. 1095, 63 N. W. 241; *State ex rel. Tracy v. Cooley*, 65 Minn. 406, 68 N. W. 66; *State ex rel. Hagestad v. Sullivan*, 67 Minn. 379, 69 N. W. 1094; *Ellwell v. Comstock*, 99 Minn. 261, 7 L.R.A. (N.S.) 621, 109 N. W. 113, 698, 9 Ann. Cas. 270; *State v. Great Northern R. Co.* 100 Minn. 445, 10 L.R.A.(N.S.) 250, 111 N. W. 289; *Hunter v. Tracy*, 104 Minn. 378, 116 N. W. 922; *Brenke v. Belle Plaine*, 105 Minn. 84, 117 N. W. 157; *Arnett v. State*, 168 Ind. 180, 8 L.R.A.(N.S.) 1192, 80 N. E. 153; *Sheldon v. Hoyne*, 261 Ill. 222, 103 N. E. 1021; *St. Louis Merchants' Bridge Terminal R. Co. v. United States*, 110 C. C. A. 63, 188 Fed. 195; *State v. St. Louis Southwestern R. Co.* — Tex. Civ. App. —, 165 S. W. 491; *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716; *Bull v. Read*, 13 Gratt. 78; *State ex rel. Merrick v. District Ct.* 33 Minn. 235, 22 N. W. 625, 632.

The act is unconstitutional because it, and the orders made under it, are so indefinite and uncertain in their terms as to be incomprehensible.

*Sutherland, Constr.* pp. 140, 141; *State*

ex rel. Hughes v. Reusswig, 110 Minn. 473, 126 N. W. 279.

Messrs. Durment, Moore, & Oppenheimer for other respondents.

Hallam, J., delivered the opinion of the court:

The legislature of Minnesota in 1913 passed an act (Laws 1913, chap. 547; Gen. Stat. 1913, § 3904) establishing a Minimum Wage Commission, and providing for the determination and establishing of minimum wages for women and minors.

This act defines a living wage as a "wage sufficient to maintain the worker in health and supply him with the necessary comforts and conditions of reasonable life." "Minimum wage" is given the same meaning. Section 20 (Gen. Stat. § 3923.)

The act prohibits every employer in any occupation "from employing any worker at less than the living wage or minimum wage as defined in this act and determined in an order of the Commission." Section 12 (Gen. Stat. § 3915).

The act gives the Commission the power, "at its discretion," or at the request of not less than 100 persons engaged in any occupation where women and minors are employed, to make an investigation. The commission must hold public hearings at which employers and employees may appear. If, after investigation, the Commission is of opinion that the wages paid to one sixth or more of the women or minors employed therein are less than living wages, the Commission shall establish a legal minimum rate of wages in said occupation for women and minors of ordinary ability, and for learners and apprentices. The Commission shall then issue an order, to be effective thirty days thereafter, making the wages then determined the minimum wages in said occupation throughout the state or within any area of the state, if differences in the cost of living warrant this restriction.

Defendants, members of a Commission constituted as provided by the act, after a hearing and investigation, made two orders fixing minimum wages for women and minors of ordinary ability in certain occupations. These actions are brought to restrain the enforcement of the orders, on the ground that the statute is unconstitutional and void. The trial court overruled a demurrer to the complaint and ordered a temporary injunction as prayed. Defendants appealed. The ground of the order was that the statute is unconstitutional and void. This is the question in the case.

1. We do not look to the Constitution to find legislative power of a state. The state legislature possesses all legislative

power not withheld or forbidden by the terms of the state or Federal Constitution. *State v. Corbett*, 57 Minn. 345, 24 L.R.A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317; *State ex rel. Simpson v. Mankato*, 117 Minn. 468, 463, 41 L.R.A.(N.S.) 111, 136 N. W. 264.

There are some limitations in the state Constitution on legislative power. It may safely be said, however, that, so far as applicable to the facts in this case, there are none more restrictive than the limitations of the 14th Amendment to the Federal Constitution. We may, therefore, direct our inquiry to the question whether this law is violative of any provisions of the 14th Amendment.

The pertinent part of the 14th Amendment reads: "Nor shall any state deprive any person of . . . liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This guarantees to the citizen liberty of contract and liberty to conduct his business affairs in his own way. *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; *Lochner v. New York*, 198 U. S. 45, 48, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *McLean v. Arkansas*, 211 U. S. 539, 545, 53 L. ed. 315, 318, 29 Sup. Ct. Rep. 206; *Coppage v. Kansas*, 236 U. S. 1, 59 L. ed. 441, L.R.A. 1915C, 960, 35 Sup. Ct. Rep. 240. This right, it is claimed, has been infringed by this statute.

The liberty of contract guaranteed by this amendment is not absolute. It is subject to the power of the state to legislate for certain permissible purposes. For example, the state may, under certain conditions, regulate hours of labor of women (*Muller v. Oregon*, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; *Riley v. Massachusetts*, 232 U. S. 671, 58 L. ed. 788, 34 Sup. Ct. Rep. 469); or of minors in certain occupations (*Sturges & B. Mfg. Co. v. Beauchamp*, 231 U. S. 320, 58 L. ed. 245, L.R.A.1915A, 1196, 34 Sup. Ct. Rep. 60); or of men engaged in employments hazardous to health (*Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Bunting v. Oregon*, 243 U. S. 426, 61 L. ed. 830, 37 Sup. Ct. Rep. 435, Ann. Cas. 1918A, 1043); or of men employed on public work (*Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124); or it may regulate conditions of labor, or the time of payment of employees (*Patterson v. The Eudora*, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821; *Erie R. Co. v. Williams*, 233 U. S. 685, 58 L. ed. 1155, 51 L.R.A.

(N.S.) 1097, 34 Sup. Ct. Rep. 761); or the manner or medium of payment. *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; *McLean v. Arkansas*, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206.

The power of a state legislature to restrict liberty of contract is coincident with what is familiarly known as the police power. *Freund, Pol. Power*, §§ 498-500. The police powers of the state, said Chief Justice Taney, in the *License Cases*, *Thurlow v. Massachusetts*, 5 How. 504, 583, 12 L. ed. 256, 291, "are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominion." In *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357, Justice Field defines the police power as the power "to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." In *Noble State Bank v. Haskell*, 219 U. S. 104, 111, 55 L. ed. 112, 116, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, 188, Ann. Cas. 1912A, 487, that court broadened the definition as follows: "It may be said in a general way that the police power extends to all the great public needs. . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare"—citing *Camfield v. United States*, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864.

Yet there is a limit to the valid exercise of the police power by the state. It is not enough to merely assert that the subject relates to the health, peace, morals, education, or good order or welfare of the people. "The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor." *Lochner v. New York*, 198 U. S. 45, 57, 49 L. ed. 937, 941, 25 Sup. Ct. Rep. 539, 543, 3 Ann. Cas. 1133. "The liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint," not freedom from reasonable regulation. The real test is whether the limitation is a "reasonable regulation to safeguard the public interest," imposed, not solely for the benefit of the individual, but essentially for the common benefit of all. *Miller v. Wilson*, 236 U. S. 373, 380, 381, 59 L. ed. 628, 630, L.R.A.1915F, 829, 35 Sup. Ct. Rep. 342.

2. Bearing these principles in mind, we must determine whether this statute is within the proper field of legislation.

There is a notion, quite general, that women in the trades are underpaid, that they are not paid so well as men are paid for the same service, and that, in fact, in many cases the pay they receive for working during all the working hours of the day is not enough to meet the cost of reasonable living. Public investigations by publicly appointed commissions have resulted in findings to the above effect. Starting with such facts, there is opinion, more or less widespread, that these conditions are dangerous to the morals of the workers and to the health of the workers and of future generations as well.

It is a strife for employer and employee to secure proper economic adjustment of their relations, so that each shall receive a just share of the profits of their joint effort. In this economic strife, women as a class are not on an equality with men. Investigating bodies, both of men and of women, taking all these facts into account, have urged legislation designed to assure to women an adequate working wage. The legislatures of eleven states have passed laws having the same purpose as the one here assailed.

It is not a question of what we may ourselves think of the policy or the justification of such legislation. The question is: Is there any reasonable basis for legislative belief that the conditions mentioned exist, that legislation is necessary to remedy them, and that laws looking to that end promote the health, peace, morals, education, or good order of the people, and are "greatly and immediately necessary to the public welfare?" If there is reasonable basis for such legislative belief, then the determination of the propriety of such legislation is a legislative problem, to be solved by the exercise of legislative judgment and discretion. *Holden v. Hardy*, 169 U. S. 366, 398, 42 L. ed. 790, 18 Sup. Ct. Rep. 383.

We think sufficient basis exists. It is not necessary that we should hold that statutes of this kind applicable to men would be valid. We think it clear there is such an inequality or difference between men and women in the matter of ability to secure a just wage, and in the consequences of an inadequate wage, that the legislature may, by law, compensate for the difference. That there is such difference has been recognized as an economic fact by the United States Supreme Court. *Muller v. Oregon*, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324, 13 Ann. Cas. 957; *Miller v. Wilson*, 236 U. S. 373, 59 L. ed. 628,



L.R.A.1915F, 829, 35 Sup. Ct. Rep. 342. Two cases have arisen in other states involving the constitutionality of Minimum Wage Laws for women. In both the laws were sustained. *Stettler v. O'Hara*, 69 Or. 519, L.R.A.1917C, 944, 139 Pac. 743, Ann. Cas. 1916A, 217; *State v. Crowe*, 130 Ark. 272, L.R.A.1918A, 567, 197 S. W. 4.

We sustain the principle of minimum wage legislation as applied to women. By like reasoning, the principle may be sustained as applied to minors.

3. The other main contention of the respondent is that the law is unconstitutional because it delegates legislative power to a commission. The act delegates to the Commission extensive powers. It is well settled that the legislature may not delegate to a commission the power to make laws. *State ex rel. Railroad & W. Commission v. Chicago, M. & St. P. R. Co.* 38 Minn. 281, 37 N. W. 782; *State v. Great Northern R. Co.* 100 Minn. 445, 10 L.R.A. (N.S.) 250, 111 N. W. 289; *Brenke v. Belle Plaine*, 105 Minn. 84, 117 N. W. 157. A statute, to be valid, must be complete as a law when it leaves the legislature. If, by the terms of the act, it is to be effective only in case a commission deems the act expedient, then there is a delegation of legislative power and the act is void, for a determination of legislative expediency can be made by the legislature alone. *State ex rel. Hahn v. Young*, 29 Minn. 474, 9 N. W. 737. The legislature may, however, delegate to a commission the power to do some things which it might properly but cannot advantageously do itself. *State v. Chicago, M. & St. P. R. Co.* 38 Minn. 281, 299, 37 N. W. 782; *Wayman v. Southard*, 10 Wheat. 1, 42. 6 L. ed. 263. It may vest in a commission authority or discretion, to be exercised in the execution of the law. *State v. Chicago M. & St. P. R. Co.* supra; *State ex rel. Beek v. Wagener*, 77 Minn. 483, 46 L.R.A. 442, 77 Am. St. Rep. 681, 80 N. W. 778; *State v. Great Northern R. Co.* 100 Minn. 445, 10 L.R.A. (N.S.) 250, 111 N. W. 289; *Borgnis v. Falk Co.* 147 Wis. 327, 358, 37 L.R.A. (N.S.) 489, 133 N. W. 209, 3 N. C. A. 649. It may delegate power to determine some fact or state of things upon which the law makes its own action or operation depend (*Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716; *Union Bridge Co. v. United States*, 204 U. S. 364, 383, 51 L. ed. 523, 27 Sup. Ct. Rep. 367); and may declare its law shall be operative or applicable only upon the subsequent establishment of some facts. *Minneapolis St. P. & S. Ste. M. R. Co. v. Railroad Commission*, 136 Wis. 146, 17 L.R.A. (N.S.) 821, 116 N. W. 905; *The Aurora v. United States*, 7 Cranch, 382, 3 L. ed. 378. In all such

cases, when it does take effect, it is by force of legislative action as fully as if the legislature had fixed, without condition, the time or occasion of its becoming effective. *State ex rel. Hagestad v. Sullivan*, 67 Minn. 379, 69 N. W. 1094. "The true distinction" . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter, no valid objection can be made." *Cincinnati, M. & Z. R. Co. v. Clinton County*, 1 Ohio St. 77, 88, quoted in *Marshall Field & Co. v. Clark*, 143 U. S. 649, 693, 694, 36 L. ed. 294, 310, 12 Sup. Ct. Rep. 495.

4. Respondent contends that this act was not a complete law when it left the legislature, and that there was no complete law until after the Commission made an order, and that the power to determine "when and where there shall be any law, and what it shall be, is to be exercised at the whim and caprice of the Commission."

Let us address ourselves to this question. As above stated, § 20 defines a living wage. Section 12, in effect, enjoins every employer to pay a living wage, "as defined in this act and determined in an order of the Commission."

We think this must be construed as establishing a living wage as defined in the act as the lawful minimum wage, and as fixing a living wage, as so defined, as the standard by which the Commission must be guided in determining a minimum wage for any occupation. The determination of a minimum wage by the Commission is, accordingly, a determination of a fact "upon which the law makes . . . its own action depend."

We do not overlook the fact that the statute cannot be effectively executed nor its penalties enforced until the Commission establishes a minimum wage, nor the fact that the Commission is given a discretion as to when to make the investigation into any particular occupation, which may result in an order fixing a minimum wage in that occupation. These provisions vest "discretion as to its execution to be exercised under and in pursuance of the law," and they do not prevent the act from being a complete law nor render it invalid. There are abundant instances of the application of this principle.

One court has gone so far as to say: "Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them.

But it cannot be said that the exercise of such a discretion is the making of the law." *Moers v. Reading*, 21 Pa. 188, 202, quoted in *Marshall Field & Co. v. Clark*, 143 U. S. 649, 694, 36 L. ed. 294, 310, 12 Sup. Ct. Rep. 495.

The acts of Congress establishing forest reservations provide that their use for grazing purposes is subject to rules and regulations established by the Secretary of Agriculture, and make violation of such rules and regulations a penal offense. In *United States v. Grimaud*, 220 U. S. 506, 522, 55 L. ed. 563, 569, 31 Sup. Ct. Rep. 480, 485, the defendant was convicted of violation of some rule or regulation of the department. The court sustained the law as against objection that this was an unconstitutional delegation of legislative power, and said: "A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty."

In *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S. 380, 390, 56 L. ed. 240, 244, 32 Sup. Ct. Rep. 152, an act of the legislature of North Carolina provided that "all kerosene or other illuminating oils, sold or offered for sale in this state shall be subject to inspection and test to determine the safety and value for illuminating purposes."

Power is conferred on the board of agriculture to make all necessary rules and regulations for the inspection of such oil, and to adopt standards of safety, purity and luminosity, "which they may deem necessary to provide the people of the state with satisfactory illuminating oil." Penalties are provided for disobedience of the orders of the board. There could be no penalty until the board made an order. Objection was raised that this was a delegation of legislative power. The court held the objection untenable and regarded the statute as, in effect, imposing a requirement that illuminating oils be safe, pure, and afford a satisfactory light, and as empowering the board of agriculture to determine what oils measure up to these standards.

In *Buttfield v. Stranahan*, 192 U. S. 470, 496, 48 L. ed. 525, 535, 24 Sup. Ct. R. 349, the court had before it an act of Congress which made it unlawful to import tea inferior in purity, quality, and fitness for consumption, provided for a board of experts, gave the Secretary of the Treasury power, upon recommendation of the board, to fix uniform standards of purity, quality, and fitness for consumption, and provided that tea inferior to such standards should

be within the prohibition of the act. Inferior tea was liable to destruction under certain conditions. Objection was made that this vested legislative power in the Secretary of the Treasury. This was overruled. The court held that "Congress legislated on the subject as far as was reasonably practicable and, from the necessities of the case, was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute."

See also *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356; *Mutual Film Corp. v. Industrial Commission*, 236 U. S. 230, 59 L. ed. 552, 35 Sup. Ct. Rep. 387, Ann. Cas. 1916C, 296.

In all such cases, the punishment is not fixed by the board, the making of rules is administrative, the substantial legislation is in the statute, which provides the law and the penalty. *Brodhine v. Revere*, 182 Mass. 598, 66 N. E. 607; *United States v. Grimaud*, 220 U. S. 506, 520, 55 L. ed. 563, 569, 31 Sup. Ct. Rep. 480.

Decisions similar to the foregoing might be multiplied, but we think it unnecessary. The principles stated are now well recognized. The act contains no delegation of legislative power.

5. Other minor objections are raised. The Commission is empowered to establish a minimum wage in any occupation, only when the wages paid to one sixth or more of the women or minors employed therein are less than living wages. This is assailed as an unlawful basis of classification. The objection is not well taken. The act may exclude cases of minor or negligible importance. In *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, similar objections were made to the Workmen's Compensation Act of the state of Ohio, and they were overruled. See also *Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; *McLean v. Arkansas*, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206.

The limitations of the Constitution are flexible enough to permit of practical application. Recent decisions have more and more "recognized the difficulty of exact separation of the powers of government" (*Mutual Film Corp. v. Industrial Commission*, 236 U. S. 230, 246, 59 L. ed. 552, 560, 35 Sup. Ct. Rep. 387, Ann. Cas. 1916C, 296), and the necessity of giving weight to practical considerations. *Buttfield v. Stranahan*, 192 U. S. 470, 496, 48 L. ed. 525, 535, 24 Sup. Ct. Rep. 349; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 578, 59 L. ed. 364, 369, 35 Sup. Ct. Rep. 167.

Objection is raised to §§ 7 to 9 (Gen. Stat. §§ 3910-3912), which provide for "an

advisory board," define its powers, and the power of the Commission to act upon its estimates, and § 10 (Gen. Stat. § 3913), which gives power to the Commission, in certain event, to order new rates of minimum wages, "if it sees fit." The validity of these provisions is not involved in this case, unless it can be said the whole act depends upon their validity. We do not think it does. We do not pass upon these provisions.

Order reversed.

A petition for rehearing having been filed, the following *Per Curiam* response was handed down on March 1, 1918 (— Minn. —, 166 N. W. 504):

The point is made in an application for a rehearing in this cause, that the court failed to determine the question whether the order of the Commission is void for uncertainty, in that the period is not therein prescribed during which employees may be treated as "learners" and "apprentices." We did not regard this as fatal to the order. These terms have a modern meaning, reasonably well understood. *St. Louis v.*

*Bender*, 248 Mo. 113, 44 L.R.A. (N.S.) 1072, 154 S. W. 88. Practical experience under the order may suggest and render necessary something more specific in the respect stated. If so, a modification may be made to meet the conditions thus disclosed. But the absence of specific provisions in this particular is not fatal, and the order in the present form is valid. Until some action is taken by the Commission, or by statute, the matter will be subject to regulation by contract between the employer and employee.

By the terms of the statute under which the order was made, the operation thereof was postponed for the period of thirty days from its date. Prior to the expiration thereof the injunction herein was issued, thereby further postponing the operation of the order, and it will not go into effect until the injunction is dissolved, on the remand of the cause to the court below. *Gen. Stat. 1913, § 7888; State v. Chicago, M. & St. P. R. Co.* 130 Minn. 144, L.R.A. 1916B, 764, P.U.R.1915D, 797, 153 N. W. 320.

Petition for rehearing denied.

### Annotation—Constitutionality of a Minimum Wage Law, relating to private employment.

The validity of statute, ordinance, or contract, fixing minimum wage for persons employed upon public work, is discussed in the note to *Malette v. Spokane*, 51 L.R.A. (N.S.) 686, supplemented in note to *Stettler v. O'Hara*, L.R.A. 1917C, 944.

The Minimum Wage Laws relating to private employment, that have so far been before the courts upon the question of validity, have been confined to the establishment of a minimum wage for women, or for women and minors. What has been said by the courts with reference to their validity must be understood in the light of this fact.

It seems to be assumed that the validity of a Minimum Wage Law must be sustained, if it is sustained, as an exercise of the police power. In holding that such a law is within the police power of the state, the Oregon court, in *Stettler v. O'Hara* (1914) 69 Or. 519, L.R.A.1917C, 944, 139 Pac. 743, Ann. Cas. 1916A, 217, says that "the court cannot say, beyond all question, that the act is a plain, palpable invasion of rights secured by the fundamental law, and has no real or substantial relation to the protection of public health, the public morals, or public welfare. Every argument put forward to sustain the

Maximum Hours Law, or upon which it was established, applies equally in favor of the constitutionality of the Minimum Wage Law, as also within the police power of the state, and as a regulation tending to guard the public morals and the public health." That a Minimum Wage Law is within the police power of the state is held also in *State v. Crowe*, 130 Ark. 272, L.R.A.1918A, 568, 197 S. W. 4; *McCulloch, Ch. J.*, dissenting; *WILLIAMS v. EVANS*, ante, 542.

A Minimum Wage Law does not violate the 14th Amendment to the Federal Constitution. *Stettler v. O'Hara* (Or.) supra, specific attention is directed to the provision of the 14th Amendment, that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," in the subsequent case of *Simpson v. O'Hara* (1914) 70 Or. 261, 141 Pac. 158, and it is there held that this provision is not violated by a Minimum Wage Law. The right of contract, guaranteed by the 14th Amendment, is not unconstitutionally abridged by a Minimum Wage Law. *State v. Crowe* (Ark.) supra; *WILLIAMS v. EVANS*.

Nor does a Minimum Wage Law violate art. 1, § 20 of the Oregon Constitu-

tion, providing that no law shall be passed, granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens. *Stettler v. O'Hara (Or.) supra*.

The minimum wage is, under the usual form of statute, fixed by a commission provided for in the statute. Some of the objections have been directed at this provision.

Empowering a commission to ascertain and declare standards of minimum wages within the state is not a delegation of legislative power to the commission. *Stettler v. O'Hara (Or.) supra*. See *WILLIAMS v. EVANS*, ante, 542.

Nor does the fact that an order made by the commission applies to manufacturing establishments in only one city in the state render the law discriminatory, and therefore void, where the law itself applies throughout the state. *Stettler v. O'Hara (Or.) supra*. At least, this is true where there is nothing in the record, suggesting that the conditions against which the order is directed exist in any locality in the state, other than the city in question. *Ibid*.

The fact that the law makes the finding of the commission conclusive on all questions of fact does not render the law void, as a taking of property without due process of law, where the statute provides an opportunity on the part

of those to be affected, to be heard before the commission. *Ibid*. The Oregon court suggests that, even though an employer be given no right of appeal from the final finding of facts, he is not without remedy as to matters that would be the appropriate subject of judicial inquiry, namely, if the rates fixed are confiscatory. *Ibid*.

Without any discussion, the Washington Minimum Wage Statute is sustained in *Larsen v. Rice* (1918) — *Wash* —, 171 Pac. 1037, upon the authority of *Stettler v. O'Hara*, and *Simpson v. O'Hara (Or.) supra*.

The Oregon cases of *Stettler v. O'Hara*, and *Simpson v. O'Hara* were, upon appeal to the United States Supreme Court, affirmed, without opinion, by an evenly divided court, Justice Brandeis being disqualified on account of having been counsel in the case, (1917) 243 U. S. 629, 61 L. ed. 937, 37 Sup. Ct. Rep. 475.

The Adamson Law, which, in effect, fixed a minimum wage for railroad employees by forbidding, pending the investigation therein provided, payment for an eight-hour day of less than the existing standard day's wage was sustained by the United States Supreme Court, in *Wilson v. New* (1917) 243 U. S. 332, 61 L. ed. 755, L.R.A.1917E. 938, 37 Sup. Ct. Rep. 298, Ann. Cas. 1918A, 1024. W. A. E.

#### MISSOURI SUPREME COURT. (Division No. 1.)

FRANK LIGE, Resp't.,  
v.

CHICAGO, BURLINGTON, & QUINCY  
RAILROAD COMPANY, Appt.

(— Mo. —, 204 S. W. 508.)

#### Carrier — Liability for assault by intoxicated passenger.

A carrier is not liable for injury to a passenger by a sudden blow of an intoxicated fellow passenger if he was not boisterous and disturbed no one prior to the time of the sudden assault, so that there was nothing to charge those in charge of the train with notice of any intended violence. *For other cases, see Carriers, II. c, in Dig. 1-52 N. S.*

(June 4, 1918.)

**Note.**—As to carrier's liability for assault by fellow passenger, see annotation following this case, post, 555, and references therein to annotations on related questions.

L.R.A.1918F.

**A**PPEAL by defendant from a judgment of the Circuit Court for Harrison County in favor of plaintiff in an action brought to recover damages for personal injuries sustained by him while a passenger on one of defendant's trains. Reversed.

Statement by Woodson, J.:

This is a suit brought by the plaintiff against the defendant, in the circuit court of Harrison county, to recover damages for personal injuries sustained by him while a passenger upon one of its trains, by being assaulted by Bert Burke, another passenger thereon, while in a drunken or intoxicated condition. The plaintiff recovered judgment for \$1,000, and the defendant timely and properly appealed the cause to this court. Omitting unessentials the petition reads:

"Plaintiff further states that the defendant, wholly disregarding its duties towards its said passengers, and especially towards this plaintiff, and while plaintiff was so riding on the said ticket purchased as aforesaid, negligently and carelessly, by and

through its servants and agents, to it, its conductor and brakeman in charge of said train, permitted one Bert Burke, while drunk and in a condition dangerous to the property and lives of its passengers, to enter its said train at St. Joseph, Missouri, and to become a passenger on the same train at St. Joseph, Missouri, and to become a passenger on the same train that defendant was carrying this plaintiff to Blythedale, Missouri, as aforesaid. And that the defendant by its said conductor and brakeman negligently and carelessly permitted and suffered said Bert Burke, through the negligence and carelessness of its servants, to remain on its train as a passenger, while said Burke was drunk and in a condition dangerous to the property and lives of defendant's said passengers traveling on said train as aforesaid—all of which was in violation of article 7, chapter 36, of the Revised Statutes of Missouri, as aforesaid.

"Plaintiff further states that, while so traveling as a passenger as aforesaid on the railroad of the defendant as aforesaid, from St. Joseph, Missouri, to Blythedale, in Harrison county, Missouri, on said 30th day of November, 1912, at a point on defendant railroad between Bethany, Missouri, and Ridgeway, Missouri, and without any fault on the part of this plaintiff, the said Bert Burke aforesaid, while drunk and in a condition dangerous to the lives and property of the other passengers on said train, while he was being carried by defendant, who had knowledge of his condition, unlawfully, wrongfully, and feloniously assaulted this plaintiff, by striking him upon the head with a large iron T-wrench, or stove key, giving to him a dangerous wound, thereby wounding, injuring, and permanently disfiguring the plaintiff, and causing him great pain, suffering, and humiliation."

Then follows an allegation as to the extent of the injuries, that they were caused by the wrongful acts of Burke and said negligence of the defendant, and prayed judgment for \$2,500. The statutes referred to in the petition read as follows:

"Section 1. It shall be unlawful for any person in this state to enter a passenger train or car, kept for the conveying of passengers, intoxicated, or drink intoxicating liquor on said passenger train or car, or to exhibit or carry exposed any intoxicating liquor," while "on said passenger trains or cars, and every person or persons so doing shall be guilty of a misdemeanor, and fined not less than \$5 or more than \$25 for said offense.

"Sec. 2. It shall be the duty of the conductor on every passenger train or car in this state to report to the prosecuting at-

torney of the counties in which any such offense is committed, together with the name of the person so intoxicated, the date thereof, and the name of three witnesses who have personal knowledge of the commission of said offense, and upon failure to do so within five days thereafter he shall be guilty of a misdemeanor, and fined for each and every offense not less than \$5 nor more than \$25.

"Sec. 3. Providing nothing in the two preceding sections shall be so construed to apply to dining cars or private cars."

Laws 1909, p. 438 (Rev. Stat. 1909, §§ 4710-4712).

The answer of defendant was as follows:

"Now comes the defendant in the above-entitled cause, and denies the allegations in plaintiff's petition contained.

"Defendant, further answering, states that §§ 4710, 4711, and 4712 of article 7 of chapter 36 of the Revised Statutes of the state of Missouri for the year 1909, to which law reference is made in plaintiff's petition, is unconstitutional, invalid, and of no effect, for the reason that said law exempts from its provisions dining cars and private cars, and for the further reason that said law, when passed during the session of 1909 by the legislature of the state of Missouri (Sess. Acts 1909, p. 438), did not have the subject-matter clearly expressed in the title, as required by § 28 of article 4 of the Constitution of the state of Missouri, and for the further reason that said alleged law is in violation of the 14th Amendment to the Constitution of the United States, in that it abridges the privileges and immunities of citizens of the United States and denies to persons within the jurisdiction of the state of Missouri the equal protection of the laws, and for the further reason that the said alleged law is in violation of § 53 of article 4 of the Constitution of the state of Missouri, and for the further reason that the said alleged law is in violation of § 30 of article 2 of the Constitution of the state of Missouri, and for the further reason that said alleged law is in violation of § 23 of article 2 of the Constitution of the state of Missouri. Wherefore defendant, having fully answered, asks to be discharged, with its costs in this behalf expended."

The following facts are undisputed: Frank Lige the plaintiff, and Bert Burke, who assaulted him, were perfect strangers, and were passengers on defendant's train from St. Joseph, Missouri, to points in Harrison county, on November 30, 1912. Both of them sat in the smoking car of the train. The train left St. Joseph about 10 A. M. It passed through the towns of Crosby, Helena, Union Star, King City, Ford City,

Darlington, Albany, New Hamton, Bowman, and Bethany. Somewhere between Bethany and Ridgeway, Burke picked up an iron T-wrench near a stove in the smoking car and struck Lige on the head, causing a painful wound. The assault was committed without any warning whatever, without any prior threat, or any previous verbal altercation.

Several witnesses for the plaintiff testified that Burke was under the influence of liquor while on the train. Some described him as being intoxicated, others as being drunk, and still others as being under the influence of liquor. One said: "I thought he was intoxicated." Others testified that "he was under the influence of liquor." "He was a little bit intoxicated." "Well, think he had some whisky on him." "I would judge he was under the influence of liquor." "I would call him intoxicated." "He looked to me like he had been on a spree." "I thought he was pretty drunk." "He was feeling pretty good, I thought." "He looked a little full to me." "He looked like he was intoxicated." "My opinion was at the time he was rather under the influence of liquor to some extent."

In short, it was the testimony of all the witnesses, including the conductor and brakeman, in the train, who saw and knew, that Burke was in an intoxicated condition; the attention of the witnesses, some of them strangers to Burke, were attracted to him by his "joshing and talking" and intoxicated appearance. The evidence also tended to show that Burke was intoxicated when he boarded the train at St. Joseph, with his shirt slightly torn, and that his condition appeared to some of the witnesses to grow worse as the train moved on; that, independent of Burke's intoxication, joshing and talking as previously mentioned, Burke was guilty of no improper conduct whatever while in the train until he suddenly and without cause assaulted the plaintiff as before stated. He did not know nor had he addressed or threatened plaintiff prior to that time, but was conversing pleasantly with other parties and having a jolly time.

Messrs. H. J. Nelson, Barlow, Barlow, & Kautz, J. A. Lydick, and M. G. Roberts, for appellant:

The fact that the passenger was under the influence of liquor or even intoxicated, but otherwise not guilty of any misbehavior, will not subject a carrier to liability for an injury caused by his act in assaulting a fellow passenger.

Galveston, H. & S. A. R. Co. v. Long, 13 Tex. Civ. App. 664, 36 S. W. 485, 8 Am. Neg. Cas. 643; Putnam v. Broadway & S. Ave. R. Co. 55 N. Y. 108, 14 Am. Rep. 190;

Brehony v. Pottsville Union Traction Co. 218 Pa. 123, 66 Atl. 1006; Pittsburgh, C. & St. L. R. Co. v. Vandyne, 57 Ind. 576, 26 Am. Rep. 68; Milliman v. New York C. & H. R. R. Co. 66 N. Y. 643; 10 C. J. 905; 3 Thomp. Neg. §§ 3087, 3093, pp. 545, 550; Thomson v. Manhattan R. Co. 75 Hun, 548, 27 N. Y. Supp. 608, 2 Am. Neg. Cas. 577; Mills v. Atlantic Coast Line R. Co. 172 N. C. 266, 90 S. E. 221; Felton v. Chicago, R. I. & P. R. Co. 69 Iowa, 580, 29 N. W. 618; Spohn v. Missouri P. R. Co. 87 Mo. 74, 4 Am. Neg. Cas. 584; Woas v. St. Louis Transit Co. 198 Mo. 664, 7 L.R.A. (N.S.) 231, 96 S. W. 1017, 8 Ann. Cas. 584.

The injury in this case was not caused by any agency or instrumentality under the control of the defendant, but by the direct act of a fellow passenger. In such a case knowledge of the existence of the danger, or of facts and circumstances from which the danger might have been reasonably anticipated, was necessary, to fix liability upon the carrier.

Woas v. St. Louis Transit Co. supra; Anderson v. South Carolina & G. R. Co. 77 S. C. 434, 122 Am. St. Rep. 591, 58 S. E. 149; Tall v. Baltimore Steam Packet Co. 90 Md. 248, 47 L.R.A. 120, 44 Atl. 1007; Spohn v. Missouri P. R. Co. 87 Mo. 74, 4 Am. Neg. Cas. 584; 10 C. J. 901; 4 R. C. L. p. 1187, § 609; Widener v. Philadelphia Rapid Transit Co. 224 Pa. 171, 73 Atl. 209; Pointer v. Mountain R. Constr. Co. 289 Mo. 104, L.R.A.1917B, 1091, 189 S. W. 805, 14 N. C. C. A. 788; Putnam v. Broadway & S. Ave. R. Co. 55 N. Y. 108, 14 Am. Rep. 190; Galveston, H. & S. A. R. Co. v. Long, 13 Tex. Civ. App. 664, 36 S. W. 485, 8 Am. Neg. Cas. 643; Trotter v. St. Louis & Suburban R. Co. 122 Mo. App. 405, 90 S. W. 508; Sullivan v. Jefferson Ave. R. Co. 133 Mo. 1, 32 L.R.A. 167, 34 S. W. 566, 9 Am. Neg. Cas. 530; Sure v. Milwaukee Electric R. & Light Co. 37 L.R.A. (N.S.) 724, and note, 148 Wis. 1, 133 N. W. 1098, Ann. Cas. 1913A, 1074; Beiser v. Cincinnati, N. O. & T. P. R. Co. 43 L.R.A. (N.S.) 1050, and note, 152 Ky. 522, 153 S. W. 742.

The distinction between the degree of care demanded of a carrier in protecting its passengers from the acts or negligence of third persons, and that required in respect to acts or omissions of a servant of the carrier whom it employs and selects, is reasonable.

2 White, Personal Injuries on Railroads, § 744, p. 1131; Woas v. St. Louis Transit Co. 198 Mo. 664, 7 L.R.A. (N.S.) 231, 96 S. W. 1017, 8 Ann. Cas. 584; Tall v. Baltimore Steam Packet Co. 90 Md. 248, 47 L.R.A. 120, 44 Atl. 1007; 4 R. C. L. § 609, p. 1187.

Messrs. J. C. Wilson and Garland Wilson for respondent.

Woodson, J., delivered the opinion of the court:

I. The first contention advanced by counsel for the defendant is that the trial court erred in refusing the demurrer asked by them to the plaintiff's evidence. This contention is divided by counsel into two subdivisions, and each discussed separately upon wholly different grounds. The first contends that the act of the legislature mentioned in the pleadings is violative of § 30 of article 2 of the Constitution of Missouri and § 1 of the 14th Amendment of the Constitution of the United States, known as the due process clauses, respectively, thereof, in that it is unreasonable and arbitrary, in requiring a conductor of a train to report to the prosecuting attorney every person who is intoxicated, or who takes a drink of intoxicating liquor or who exhibits intoxicating liquor on his train, together with the names of three witnesses who have personal knowledge of the facts; and the second contention is that said act of the legislature violates § 53 of article 4 of the Constitution of Missouri, and the 14th Amendment of the Constitution of the United States, which respectively prohibit the enforcement of any law of the state denying equal rights, or abridges the privileges and immunities of the citizens of the United States. We will dispose of these propositions in the order stated.

Attending to the first: No authority is cited in support of this contention, and, in our opinion, for the reason that none exists, and if the act is given a reasonable construction, which is one of the fundamental rules of statutory construction, no other authority will be necessary. The evident intention of the legislature was to impose a duty upon the conductor to report to the prosecuting attorney all parties who, to his knowledge, had been intoxicated or drinking or exhibiting intoxicating liquors on his train, for the purpose of having them punished for being guilty of such conduct upon the cars of a common carrier, in the presence of fellow passengers, and thereby deter all persons from indulging in such misconduct on all such trains. We state this for the reason that the accomplishment of no other object seems to have been in the mind of the legislature; had it also been the design to afford immediate protection to the passengers from the abuse, insults, and assaults of such persons, then it would seem that the legislature would have used some appropriate language, requiring the conductor to prevent such persons entering the train, and to remove all such therefrom,

and make the company liable in damages for all injuries sustained by any passenger by reason of such misconduct on the part of any such person. But an examination of the act, which we have copied in full in the statement of the case, will reveal the fact that no such idea is expressed by the language used therein, nor is reasonably inferable therefrom; but the design, as previously stated, was not to affect the company, but to make it unlawful for any intoxicated person to enter a passenger train, or to drink or exhibit intoxicating liquors thereon, and thereby deter them from the commission of all such crimes in the future. The duty of the company to prevent such persons from entering its trains, remove them therefrom, and protect its passengers from their insults and injury, is well defined and regulated by the common law, which we suppose had much to do with influencing the legislature in the passage of the act in the form we find it. This common-law duty of the carrier will receive careful consideration hereafter in a more appropriate place. For the reason stated, the act is not applicable to defendant company, but to the conductor and intoxicated passenger, etc., only, and therefore the defendant is in no position to question the constitutionality of the act.

But, assuming that we are mistaken in the foregoing views, and assuming that the act is applicable to the defendant, then the second contention mentioned would be of a more serious character. Section 1 of the act in question makes it unlawful for any person in this state to enter a passenger train or car kept for the conveyance of passengers, while intoxicated, etc., and imposes a fine of not less than \$5 nor more than \$25 for said offense, while § 3 thereof provides that nothing therein contained shall be so construed as to apply to dining cars or private cars. In other words, that section makes it unlawful for any person to go upon a passenger train or enter any car thereof while intoxicated, or to drink intoxicating liquors, or exhibit the same while thereon, excepting therefrom dining and private cars. This act, in our opinion, is clearly unconstitutional, violative of both the state and United States constitutional provisions before mentioned, in that there is no substantial and reasonable distinction between passenger and sleeping cars on the one hand and dining and private cars upon the other. The primary purpose of the first named is for the occupancy by the public while traveling thereon, and incidentally they are constantly used by many for eating and sleeping purposes also. The second are chiefly designed for traveling and sleeping purposes, yet they are also constantly

used by many for eating places. The diner is intended for eating places for all aboard the train who desire to avail themselves of the privilege, yet they are incidentally used for travel while the passengers are dining therein, and the private car is designed for all of said purposes, for those aboard them. But, after all, all of them, with the engine and tender, constitute the means of transportation of the traveling public, the paramount object of their creation, and, while all of them serve a useful purpose in accomplishing that end, yet some of them, in addition, contribute to the pleasure and comfort of the passengers while en route, and even to their necessities while on through trains on long journeys, but nevertheless each and all of them constitute a link in the train of transportation, and are so closely commingled and inseparably connected in their common purpose, there can be no reasonable separation or classification made of them without disturbing the comforts and necessities of all on board the train, and subjecting all to the insults and injuries which the act was designed to prohibit. Under these conditions, the law would not and could not operate equally and alike upon all similarly situated. That being true, the act is clearly unconstitutional, as previously stated, and as shown by the following authorities: *State ex rel. Rolston v. Chicago, B. & Q. R. Co.* 246 Mo. 512, loc. cit. 514, 515, 152 S. W. 28; *Embree v. Kansas City & L. Boulevard Road Dist.* 257 Mo. 593, loc. cit. 616, 166 S. W. 282.

But, notwithstanding the unconstitutionality of this act for the reasons stated, yet the demurrer to plaintiff's evidence could not be properly sustained on that ground only, because the petition, independent of the plea of the act mentioned, stated a good cause of action at common law, and the cause should have been submitted to the jury upon that theory of the case, if the evidence introduced upon that branch of the case warranted a submission, which we will consider in the next paragraph.

II. Regarding the common-law cause of action: The petition in substance stated that the defendant was a common carrier of passengers; that the plaintiff was a passenger upon one of defendant's trains going from St. Joseph, Missouri, to Ridgeway; that one Burke was also a passenger upon said train, and was riding in the same car with plaintiff between said points; that at the time said Burke entered said car he was intoxicated, and remained so during the time the train ran from St. Joseph to Ridgeway, which fact was well known to the agents and servants of defendant in charge of said train and car, and that they

knew that said Burke was liable to insult and injure its passengers on said train, and especially the plaintiff; that it was the duty of the defendant to use the highest degree of care to safely transport plaintiff between said points, and to protect him from insults and injury at the hands of other passengers on the train, and that, in violation of said duty, the defendant, through its said agents and servants, negligently and carelessly permitted said Burke, without cause or excuse, to assault and strike plaintiff with an iron rod over the head, and thereby greatly injure him, etc.

The plaintiff's evidence tended to show the truthfulness of all of said allegations, except as hereinafter stated; and all the evidence for both parties showed that Burke, prior to the assault complained of, was not boisterous or insulting in his talk and conduct, but was talking generally and having a jolly good time, disturbing no one, until the train neared Ridgeway, when he suddenly and without warning picked up the poker and struck the plaintiff with it. The evidence also failed to show that the conduct of Burke prior to the assault was such as to warn the conductor in charge of the train, or anyone else on the car, that he was in a bad humor, or that he intended to insult or to do violence to anyone. Upon this state of the record counsel for the defendant contend that the court erred in refusing the defendant's demurrer to the plaintiff's evidence, on the common-law theory of the case, and state their reasons therefor in this language:

"A sudden and unanticipated assault by one passenger upon another does not render the carrier liable, unless it is shown that its employees knew or could have known, in time to prevent the assault from the wrongdoer's act and conduct, that he was contemplating injury to his fellow passengers. In this case it appears beyond any question that Burke made no threats, used no profanity, was not abusive to anyone, had no trouble, and conducted himself properly, until he suddenly picked up the wrench and quickly assaulted the plaintiff. Under such circumstances the carrier is not liable. The fact that he was under the influence of liquor, or even intoxicated, but otherwise not guilty of any misbehavior, will not subject a carrier to liability for an injury caused by his act in assaulting a fellow passenger."

The following authorities are cited in support of this contention: *Galveston, H. & S. A. R. Co. v. Long*, 13 Tex. Civ. App. 664, 36 S. W. 485, 8 Am. Neg. Cas. 643; *Putnam v. Broadway & S. Ave. R. Co.* 55 N. Y. 108; 14 Am. Rep. 190; *Brehony v. Pottsville U. Traction Co.* 218 Pa. 123, 66



Atl. 1006; Pittsburgh, C. & St. L. R. Co. v. Vandyne, 57 Ind. 576, 26 Am. Rep. 68; Milliman v. New York C. & H. R. R. Co. 66 N. Y. 643; 10 C. J. 905; 3 Thomp. Neg. § 3093, p. 550, and § 3087, p. 545; Thomson v. Manhattan R. Co. 75 Hun, 548, 27 N. Y. Supp. 608, 5 Am. Neg. Cas. 577; Mills v. Atlantic Coast Line R. Co. 172 N. C. 266, 90 S. E. 221; Felton v. Chicago, R. I. & P. R. Co. 69 Iowa, 580, 29 N. W. 618; Spohn v. Missouri P. R. Co. 87 Mo. 74, 4 Am. Neg. Cas. 564; Woas v. St. Louis Transit Co. 198 Mo. 664, loc. cit. 677, 7 L.R.A.(N.S.) 231, 96 S. W. 1017, 8 Ann. Cas. 584.

It is no longer a debatable question in this country that a common carrier of passengers for hire is bound to exercise the utmost practicable care to safely transport its passengers and to protect them, while in transit, from insults and violence at the hands of all on the train, including fellow passengers, and any violation of this duty which results injuriously to a passenger renders the carrier liable in damage therefor; but that duty does not amount to an absolute guaranty that a passenger will be transported absolutely safely to his destination, or that he will not be insulted or injured by a fellow passenger while in transit. It simply means that the conductor and those in charge of the train must use the highest degree of care, consistent with the business, to ascertain and prevent such injuries; but the carrier is not liable for an injury to a passenger caused by an impending danger, if not discernible by the exercise of that degree of care.

In the case at bar Burke had said nor done nothing indicating to an ordinarily prudent person engaged in that class of business that he had any evil design against anyone, or that he intended to do violence to anyone, much less the plaintiff, whom he did not know and had never met. The conductor and all of the passengers who testified stated that they did not see or hear Burke say or do anything, prior to the assault, that led them to believe he intended to strike the plaintiff or do violence to anyone. Even the sheriff of the county, who was a passenger on the same car with plaintiff, and whose duty it was to preserve the peace, did not see or hear the latter do or say anything to cause him to apprehend any trouble whatever on the part of Burke. In discussing a similar case, the supreme court of Pennsylvania, in the case of Brehony v. Pottsville U. Traction Co. 218 Pa. 123, 66 Atl. 1006, clearly announced the facts and law of a similar case, which are substantially stated in the syllabus of the case as follows: "In an action by a woman passenger against a street railway company

to recover damages for personal injuries, sustained as the result of a kick of an intoxicated passenger, where the only negligence alleged was the action of the conductor in admitting into the car the man who inflicted the injuries, when visibly intoxicated, it is reversible error to submit the case to the jury, where the evidence shows that there was nothing in the appearance or the conduct of the man as he entered the car to attract attention, or excite suspicion, and that he did not become violent until an altercation arose between him and the conductor as to the fare."

In the case of Galveston, H. & S. A. R. Co. v. Long, 13 Tex. Civ. App. 664, 36 S. W. 485, 8 Am. Neg. Cas. 643, where a passenger on a railway train, who was somewhat intoxicated, and who passed a number of times through the train, apparently looking for someone, without offense toward anyone, accidentally stumbled over some baggage, and a revolver fell from his pocket, which was discharged and wounded another passenger, the court of civil appeals of Texas held that the defendant had no reason to anticipate such an accident, and therefore was not liable for the injury sustained by the plaintiff.

In the case of Putnam v. Broadway & S. Ave. R. Co. 55 N. Y. 108, 14 Am. Rep. 190, the plaintiff's intestate, with two ladies, took passage upon one of defendant's cars. Shortly thereafter, one Foster, who was intoxicated got on the front platform of the car, and, after riding there a short distance, opened the car door and insulted and annoyed the ladies. Putnam asked the conductor to make him be quiet; the conductor directed him to sit down and behave himself. He sat down near Putnam, and after the conductor returned to the rear platform he addressed to the former abusive and threatening language, in a low tone, not audible to the conductor. After remaining a short time he returned to the front platform, where he remained quietly until Putnam left the car, when he jumped therefrom with the car hook, and, as Putnam was assisting the ladies to alight, Foster struck him with the hook, causing death. In an action against the company to recover damages, the court held that there was no evidence of neglect of duty on the part of the conductor, or want of proper care and vigilance on the part of the servants of defendant; certainly none connected with the attack upon Putnam, or to which it could be legally or logically traced, and that defendant was not liable.

In the case of Pittsburgh, C. & St. L. R. Co. v. Vandyne, 57 Ind. 576, 26 Am. Rep. 68, the supreme court of Indiana held that slight intoxication of the defendant,

such as would not seriously affect the safety of the passengers aboard the train, would not justify a railroad company in refusing to receive and carry him. In the case of *Milliman v. New York C. & H. R. R. Co.* 66 N. Y. 642, the court of appeals held the fact that a man is intoxicated does not alone deprive him of the right to ride upon a railroad car, nor does it free the company from its duty to render to him, as a passenger, due care. On page 905 of 10 *Corpus Juris* it is said: "It is the duty of the carrier's employees to protect passengers from the acts or conduct of an intoxicated fellow passenger, and, where there is reason to apprehend injury or annoyance from him to other passengers, they should eject him from the train or other vehicle, or require him to remain seated and behave himself; and where, by reason of the employees' negligent failure to afford such protection, a passenger is injured by an intoxicated fellow passenger, the carrier is liable. But it is not liable where there has been no reasonable opportunity to discover such passenger's condition and intent; and failure to eject a passenger merely because he is drunk, if otherwise well behaved, will not alone subject a carrier to liability for an injury caused by his acts or conduct."

And Judge Thompson, in the discussion of this question in volume 3, page 545, § 3089, of his work on Negligence, says: "If the conduct of a railway passenger is such as to excite reasonable apprehensions that his presence will result in injury or annoyance to other passengers, it is the right and duty of the conductor to expel him, without waiting for any overt act of violence. Nor is it enough for a railway carrier to protect his passengers against actual violence from other passengers, but such a carrier is liable in damages, even in favor of passengers riding in a second-class car, for suffering them to be subjected to annoyances, not necessarily or ordinarily incident to such travel, such as hearing rough, profane, and obscene language, and witnessing acts of violence and drunkenness, which the company, by the exercise of proper care and due regard for the welfare of its passengers, could prevent. For stronger reasons, such a carrier is liable in damages to a peaceable passenger who is injured in consequence of a quarrel between drunken passengers on the carrier's vehicle, where the carrier, in the exercise of the degree of care imposed upon him by the law, might have prevented the injury. But it was well held that a railway carrier was not liable to a passenger for abuse and violence from an intoxicated

fellow passenger, who demanded from him money which he claimed was due him, and who threatened to take his life unless he paid it, where the conductor quieted the person intoxicated, and remained between the two during a subsequent difficulty, and delivered the intoxicated person to a policeman on reaching the next station."

The same general rule of law is announced in all of the other cases cited by counsel for the defendant; while, upon the other hand, counsel for plaintiff have cited no case, involving an injury to a passenger inflicted by an intoxicated passenger, which holds the carrier liable therefor, but all of them are based upon the broad general rule that the carrier is liable to a passenger for injuries inflicted by any cause, if it could have been prevented by the exercise of the highest degree of care usually exercised by very cautious persons engaged in similar business, and cite in support thereof the following cases: *Spohn v. Missouri P. R. Co.* 101 Mo. 417, loc. cit. 452, 14 S. W. 880, 4 Am. Neg. Cas. 629; *Westcott v. Seattle, R. & S. R. Co.* 41 Wash. 618, 4 L.R.A. (N.S.) 947, 111 Am. St. Rep. 1038, 84 Pac. 588, 20 Am. Neg. Rep. 230; *Jackson v. Boston Elev. R. Co.* 217 Mass. 515, 51 L.R.A. (N.S.) 1152, 105 N. E. 379.

There is no doubt about the correctness of that general rule, but that rule does not absolutely bar an intoxicated man of his right to ride upon the railroads of the country, nor authorize a carrier of passengers to exclude him from its trains, without his conduct is such as to cause the agents and servants of the company in charge thereof to apprehend danger from him to his fellow passengers. We are therefore clearly of the opinion that the court erred in refusing defendant's demurrer to the plaintiff's evidence.

III. The views stated in §§ I. and II. of this opinion render it unnecessary to pass upon the other legal propositions presented by the record and briefs of counsel.

The judgment of the trial court, for the reasons stated, is reversed.

All concur; **Bond, P. J.**, in § II. and the result.

**Blair, J.**, concurring:

It is unnecessary to pass upon the constitutionality of the Act of 1909. Further, I am far from convinced that the act is unconstitutional. With these qualifications, I concur in the opinion.

Petition for rehearing denied July 5, 1918.

**Annotation—Carrier's liability for assault by fellow passenger.**

For earlier cases on this subject see notes to *Illinois C. R. Co. v. Minor*, 16 L.R.A. 627; *Brown v. Chicago, R. I. & P. R. Co.* 2 L.R.A. (N.S.) 105, and *Jansen v. Minneapolis & St. L. R. Co.* 32 L.R.A. (N.S.) 1206.

As to duty of sleeping or parlor car company to protect passenger from assault, including assault by a fellow passenger, see note to *Garrett v. Southern R. Co.* L.R.A.1917F, 888.

As to the carrier's liability for injury including injury by assault to a passenger, by another passenger permitted to remain in the car in violation of the Separate Coach Law, see note in 33 L.R.A. (N.S.) 133.

As to liability of carrier for injury resulting from meddlesome or negligent act of fellow passenger, see notes in 37 L.R.A. (N.S.) 724; 49 L.R.A. (N.S.) 810, and *Wood v. Philadelphia Rapid Transit Co.* post, 817.

As to carrier's liability for assault by servant on passenger, while on train, see the notes to *Davis v. Houghtelin*, 14 L.R.A. 738; *Daniel v. Petersburg R. Co.* 4 L.R.A. (N.S.) 485; *Houston & T. C. R. Co. v. Bush*, 32 L.R.A. (N.S.) 1201, and *St. Louis, I. M. & S. R. Co. v. Jackson*, L.R.A.1915E, 668.

The doctrine of *LIGE v. CHICAGO, B. & Q. R. Co.* ante, 548, that, while a carrier of passengers is bound to exercise the utmost practicable care to safely transport its passengers and protect them from insults and violence at the hands of fellow passengers, this duty does not amount to an absolute guaranty against injury by a fellow passenger, but merely means that those in charge of the train must use the highest degree of care consistent with the business, to ascertain and prevent such injuries, and that the carrier is not liable for an injury caused by an impending danger, if not discernible by the exercise of that degree of care,—is repeated in quite similar terms in *Mills v. Atlantic Coast Line R. Co.* (1916) 172 N. O. 266, 90 S. E. 221.

The view that the carrier must exercise a high degree of care to prevent assault by fellow passengers is also expressly recognized in *Hoff v. Public Service R. Co.* (1917) 90 N. J. L. 386, 101 Atl. 404, and *Kelly v. Navy Yard Route* (1913) 77 Wash. 148, 137 Pac. 444, and is assumed in most, at least, of the other cases.

In *Seaboard Air Line R. Co. v. Mobley* (1915) 194 Ala. 211, 69 So. 615, the L.R.A.1918F.

court said that the carrier is responsible to the passenger for the slightest negligence on the part of its servants and agents, proximately resulting in injury and insult to such passengers.

Several of the cases expressly recognize, what is doubtless assumed by all of them, that to render the carrier liable it is necessary to bring home to its employee knowledge or opportunity to know that the injury was threatened and to show that by his prompt intervention he could have prevented or mitigated it. *Spinks v. New Orleans, M. & C. R. Co.* (1913) 106 Miss. 53, 63 So. 190; *Central of Georgia R. Co. v. Hopkins* (1916) 18 Ga. App. 230, 89 S. E. 186; *Hoff v. Public Service R. Co.* (N. J.) supra; *Kline v. Milwaukee Electric R. & Light Co.* (1911) 146 Wis. 134, 131 N. W. 427, Ann. Cas. 1912C, 276.

In *Spires v. Atlantic Coast Line R. Co.* (1912) 92 S. O. 564, 75 S. E. 950, the court said that it is the duty of a carrier to use the highest degree of care to protect a passenger from the attacks of a fellow passenger, when the carrier has knowledge of the existence of danger from this cause, or of facts from which danger may reasonably be anticipated.

A carrier is not called upon, under ordinary circumstances, to expect that one passenger will assault another; or that, because one passenger is engaged in frolic or sport with another, such conduct will result in injury to one of them. But when the circumstances are such, and the conduct, speech, or manner of one passenger toward another indicates, that violence or harm is likely to result, and the carrier has reasonable notice of such circumstances and conduct, and has the opportunity to take measures to prevent the threatened violence, then it becomes its duty to protect the threatened passenger, and see that no harm comes to him. *Eisenberg v. New York, N. H. & H. R. Co.* (1915) 221 Mass. 182, 108 N. E. 1046.

In *Mills v. Atlantic Coast Line R. Co.* (N. O.) supra, the carrier was held not liable, where there was nothing in the condition of the passenger who assaulted plaintiff in the presence of the conductor, to indicate that he was quarrelsome or unruly, although he had, in fact, been drinking.

In *Hillebrecht v. Pittsburg R. Co.* (1913) 55 Pa. Super. Ct. 204, where plaintiff was assaulted by one member of a party, in whose appearance or con-

duct, at the time he boarded the train, there was nothing to indicate that to admit him would occasion danger to other passengers, and the only member of the party who, prior to the assault, had created any disorder or exhibited any disposition, to violence, was not the one who suddenly and without warning, assaulted plaintiff, it was held that a jury could not have properly found the trainmen negligent.

In *Ft. Worth & R. G. R. Co. v. Stewart* (1916) 107 *Tex.* 594, 182 S. W. 893, reversing (1912) — *Tex. Civ. App.* —, 146 S. W. 355, where the conductor's testimony indicated that, though the passenger who made the assault and his associates had been drinking, and had had trouble with the conductor and with plaintiff, they had returned to their seats and were quiet and apparently pacified, and had not been disorderly at any other time, and that they were within a few miles of their destination, the court held that the conductor was not, as a matter of law, required to eject them for plaintiff's protection; and a judgment for the plaintiff was reversed because of the refusal of an instruction requested by the defendant, to the effect that if the attack upon the plaintiff was so sudden and of such a character that the conductor, if present, could not reasonably have prevented the same, the jury could not find a verdict for plaintiff on account of the fact that the conductor was not present and personally looking after the plaintiff's protection.

In *Twichell v. Pecos & N. T. R. Co.* (1910) 62 *Tex. Civ. App.* 175, 131 S. W. 243, where the trainmen were informed that another passenger had assaulted plaintiff a few days before, that plaintiff anticipated another assault, and that such passenger had the reputation of being a violent and dangerous man, but none of the trainmen were in the car when the assault took place, the court held that it was for the jury to determine whether the railway employees exercised the high degree of care to prevent the assault, imposed by law; but, on a subsequent appeal (1912) — *Tex. Civ. App.* —, 145 S. W. 319, it was held that as the fellow passenger showed no indication of disturbing plaintiff, but appeared to be behaving himself properly until he suddenly assaulted plaintiff, when the trainmen were in other parts of the train, they could not have prevented it by the exercise of the high-

est degree of care, and the company was not liable.

In *Chicago, R. I. & P. R. Co. v. Brown* (1914) 111 *Ark.* 288, 163 S. W. 525, where plaintiff's wife was pushed from a moving train by other passengers, during a panic caused by two other passengers engaging in a duel with pistols, the carrier was held not liable, because there was nothing the train crew could have done to prevent the accident.

In *Central of Georgia R. Co. v. Hopkins* (1916) 18 *Ga. App.* 230, 89 S. E. 186, it was held that if a trouble between a passenger and a newsboy (not an employee of the carrier) came up suddenly and unexpectedly, and the conductor had no knowledge thereof until after it happened, and could not reasonably have anticipated that it would occur, the carrier was not liable to the passenger.

In *Spinks v. New Orleans, M. & C. R. Co.* (1913) 106 *Miss.* 53, 63 So. 190, where it appeared that the conductor placed an intoxicated passenger in the baggage car, and requested plaintiff and another passenger who were more or less acquainted with him to assist in caring for him, and prior to such request there had been nothing in his conduct to indicate that he was dangerous to anyone but himself, the court held that the conductor was guilty of no negligence, and the carrier was not liable for an assault on plaintiff by the intoxicated man.

In *Hoff v. Public Service R. Co.*, it appeared that the passenger, in the conductor's presence, addressed insulting remarks to a female passenger as she boarded the car; soon afterward two policemen entered the car, and no further remarks were made until plaintiff was leaving, when the passenger again made insulting remarks, and she threatened to strike him if he persisted, whereupon he assaulted her. The supreme court ( (1917) 90 *N. J. L.* 386, 101 *Atl.* 404) held that the conductor, who was in arm's reach, had reason to anticipate the assault, and upheld a recovery; but the court of errors and appeals ( — *N. J.* —, 103 *Atl.* 209) held that the conductor could not have anticipated that plaintiff would leave the car by the rear door, near which the man was sitting, or that an assault would occur, especially, as plaintiff's failure to appeal to the conductor or the policemen indicated that danger was not imminent or anticipated by her; and, moreover, that she to some extent invited the trouble. It

therefore denied a recovery. The supreme court's decision was upon the assumption that the passenger who committed the assault was drunk, but the court of errors and appeals said that it found no warrant in the evidence for the assumption.

In *Kline v. Milwaukee Electric R. & Light Co.* (1911) 146 Wis. 134, 131 N. W. 427, Ann. Cas. 1912C, 276, where there was evidence that a conductor had his attention called to, and had been requested to eject, a drunken passenger, who was noisy and using obscene language, and had engaged in a fight with a companion, the court held that the conductor should have, at least, kept a vigilant supervision over him to prevent injury to other passengers, and that it was for the jury to say whether he had the knowledge or opportunity to know that the injury was threatened or probable, and whether he exercised his duty to protect other passengers.

In *Galveston, H. & S. A. R. Co. v. Bell* (1914) — *Tex. Civ. App.* —, 165 S. W. 1, 5 N. C. C. A. 621, where the conductor knew that a drunken passenger was insulting other passengers, but, instead, of taking him from the car, merely brought him to a point near the passenger who had complained, and left him, upon his refusal to go further, the company was held liable to plaintiff, injured by a shot fired in a subsequent difficulty between the drunken passenger and the one who made the complaint. The court rejected the defendant's attempted distinction between the acts of a drunken man and the acts of another, brought about by the former's unlawful conduct.

In *Nevill v. Gulf, C. & S. F. R. Co.* (1916) — *Tex. Civ. App.* —, 187 S. W. 388, where plaintiff, a "news butcher," had been threatened by a passenger, who subsequently assaulted him, and reported the threat to the conductor, but the latter did nothing to protect him, it was said that, considering plaintiff as a passenger, the negligence of the carrier was a question for the jury upon the evidence; but a judgment for defendant upon an instructed verdict was affirmed on the ground that, according to the Federal rule which governed the case, the plaintiff did not have the status of a passenger.

In *Wachser v. Interborough Rapid Transit Co.* (1910) 69 Misc. 346, 125 N. Y. Supp. 767, where it appeared that a drunken passenger addressed insulting epithets to plaintiff, and kicked him,

and the conductor, though appealed to, did nothing until a further violent assault was made, the court held that it was the conductor's duty to protect plaintiff from annoyance and, after the first assault, to eject the drunken man from the car, and having failed to do so, the company was liable. It also held that plaintiff was not barred from recovery on the theory that he voluntarily exposed himself to danger, because he returned to the same seat near the drunken man, after appealing to the conductor.

In *Nute v. Boston & M. R. Co.* (1913) 214 Mass. 184, 100 N. E. 1099, where a passenger was injured by jumping from a train, in order to avoid injury from rioting passengers, the jury, upon the evidence, might have found that the carrier knew that a strike was going on, that strike breakers had been employed, and that there was a bitterness of feeling between the strikers and the strike breakers, and it appeared that the conductor was warned that strikers were boarding the same car which the strike breakers were taking, according to their usual practice. The court held that the jury might have found that the carrier had warning of the necessity of providing for the protection of its other passengers, and that it could reasonably have taken measures to avert an outbreak or protect the other passengers.

In *Isenberg v. New York, N. H. & H. R. Co.* (1915) 221 Mass. 182, 108 N. E. 1046, where it appeared that plaintiff had complained to the conductor and a trainman that he was being annoyed and threatened by another passenger, and the trainman, though he saw the attitude and conduct of the other passenger and heard his speech, did nothing to prevent a further outbreak except to ask him to let plaintiff alone, it was held that it was a question for the jury whether the carrier complied with its obligations to use the highest degree of care to prevent injury to its passengers, consistent with its undertaking.

In *Starr v. Chicago, B. & Q. R. Co.* (1912) 156 Iowa, 311, 136 N. W. 524, where the conduct of a drunken passenger who assaulted plaintiff had been such as should have attracted the attention of a trainman, and, according to the testimony of some of the witnesses, the conductor and brakeman actually witnessed a material part of the affray, the carrier was held negligent because of its failure to exercise its authority to enforce peace and good order.

In *Repp v. Indianapolis, C. & S. Traction Co.* (1915) — *Ind. App.* —, 109 N. E. 441, 9 N. C. C. A. 730, it was held that, where those in charge of a train knew that a passenger was being assaulted and robbed, the carrier owed him the duty of reasonable protection and assistance, and for a failure to render such protection and assistance it was liable.

Where the trainmen should have known that a passenger was drunk, it was their duty to exercise reasonable care to prevent him from annoying other passengers, if they did not arrest him and put him off the train, as authorized by statute; and having failed to do this, the carrier was liable for an assault on a fellow passenger. *Memphis, D. & G. R. Co. v. Trussell* (1916) 122 *Ark.* 516, 183 S. W. 981.

In *St. Louis Southwestern R. Co. v. Bradley* (1911) 99 *Ark.* 346, 138 S. W. 478, a carrier was held liable, where its conductor failed to protect plaintiff, an infant of tender years accompanied by her parents, from injury by a drunken passenger, when it knew that he was intoxicated and annoying other passengers by placing his feet on their seat.

In *Stanley v. Southern R. Co.* (1912) 160 N. O. 323, 76 S. E. 221, reversing a judgment of nonsuit, where it appeared that negroes on an excursion train had been drinking and had firearms and whisky, and were drinking and shooting, it was held that a jury might have found the company negligent in not having sufficient officers on the train to preserve order and prevent an assault on plaintiff, who entered the negro coach to rescue another white man who was being assaulted; also that plaintiff was not contributorily negligent in entering such coach.

In *Utterback v. St. Louis & S. F. R. Co.* (1916) — *Mo.* —, 189 S. W. 1171, it was held, that, even though the conductor knew or should have known by the exercise of ordinary care that other passengers were threatening and assaulting plaintiff, the law did not impose on the company the duty of absolutely preventing them from approaching plaintiff, but only the duty of exercising the highest degree of care that a prudent person engaged in similar business would have exercised, to prevent the assaults. It was further held that the plaintiff was not, as a matter of law, guilty of contributory negligence in jumping from the train in order to avoid the assault.

In *Birmingham, R. Light & P. Co. v.* L.R.A.1918F.

*Lipscomb* (1917) — *Ala.* —, 73 So. 962, it was held to be a conductor's duty to interfere in an altercation between plaintiff and another passenger, and protect plaintiff from injury, regardless of whether she was the aggressor.

In *Seaboard Air Line R. Co. v. Mobley* (1915) 194 *Ala.* 211, 69 So. 614, the carrier was held liable, where a woman passenger was thrown down by one of two drunken passengers, who were thereupon confined by the conductor in a toilet, where they indulged in indecent, profane, and disorderly language, causing plaintiff physical and mental pain and suffering.

In *Gooch v. Birmingham R. Light & P. Co.* (1912) 177 *Ala.* 293, 58 So. 196, 6 N. C. C. A. 818, it was held that a street car conductor's act in leaving his car during an altercation with a passenger who had alighted, and who thereupon fired into the car, killing plaintiff's intestate, did not render the company liable. The court observed that as the grievance of the person firing was against the conductor it would seem that the latter's leaving the car was calculated to protect the passenger. It was held that the company was liable if the motorman provoked the shooting by throwing the controller lever at the murderer.

In *Chace v. Norfolk & W. R. Co.* (1917) 174 N. O. 301, L.R.A.1918A, 1070, 93 S. E. 834, it was held that the negligence of a railroad company in permitting a passenger coach to be without light and overcrowded was not the proximate cause of an assault upon and robbery of a passenger by a fellow passenger, and that the carrier was not liable. (See note to this case in L.R.A. 1918A, 1072, on "Failure to properly light car or waiting room, or permitting car to be overcrowded, as affecting carrier's liability for assault upon or robbery of passenger.")

In *Kelly v. Navy Yard Route* (1913) 77 *Wash.* 148, 137 *Pac.* 444, where a fellow passenger on a boat, who was somewhat under the influence of liquor and had the reputation of being a dangerous man, had made a previous assault on plaintiff without provocation or excuse, and had been induced by the steward to go into another room, and the steward then, believing that he had the aggressor quieted, went on with his work, it was held that it was for the jury to determine whether the carrier exercised the degree of diligence demanded, and whether it should have

taken effective means to guard against the occurrence of a subsequent assault, which was also without excuse or provocation.

In *Spires v. Atlantic Coast Line R. Co.* (1912) 92 S. O. 564, 75 S. E. 950, where, prior to assaults on plaintiff on an excursion train, disorder and violence had developed amounting to a riot, recoveries were upheld, although the trainmen had strong reason to believe that any effort by them to enforce order would increase the danger to other passengers, the court saying that the company should have provided an adequate police force, and that the trainmen should have backed the train to a nearby

station or demanded the assistance of officers at stations passed on the trip.

In *Adderly v. Great Northern R. Co.* [1905] 2 Ir. R. 378, 4 B. R. C. 293, it was held that where a drunken man was admitted to a station platform and, while being led along the platform by a porter, suddenly swung his arm and broke the window of the car in which plaintiff was sitting, injuring his eye, the assumption on which the case was submitted, that the failure to notice his condition, or the admission of him in that condition, rendered the company absolutely liable for what he did, was erroneous. A. McT.

## RHODE ISLAND SUPREME COURT.

### STATE OF RHODE ISLAND

v.

WILLIAM BURTON.

(— R. I. —, 103 Atl. 962.)

#### Conflict of laws — state and Federal — war time.

A member of the United States Naval Reserve force, on duty as a despatch bearer, is not subject to state Speed Laws when traveling on a public highway under orders of his superior officer, in time of war, to proceed with all possible despatch in the performance of a duty assigned him.

For other cases, see *Automobiles, I. in Dig.* 1-52 N. S.

(June 19, 1918.)

**C**ERTIFICATION by the Superior Court for Newport County, for determination by the Supreme Court, of a question arising upon an appeal by defendant from a judgment convicting him of violating the provisions of the Speed Law. Negative answer returned.

The facts are stated in the opinion.

Mr. Fred A. Otis, Assistant Attorney General, for the State.

Messrs. Sheffield & Harvey, for defendant:

The Rhode Island law is subordinated to the United States laws, and therefore the authority of the United States laws is a complete defense.

Ex parte Siebold, 100 U. S. 371, 394, 25 L. ed. 717, 725; *Tennessee v. Davis*, 100 U. S. 257, 272, 25 L. ed. 648, 653; *Re Neagle*,

**Note.** — As to subordination or suspension of state law during war, see annotation following this case, post, 561; and references therein to annotations on related questions.

L.R.A.1918F.

135 U. S. 60, 34 L. ed. 70, 10 Sup. Ct. Rep. 658.

Defendant was engaged in acting as an agent of the United States in the exercise of its exclusive authority; therefore the state court is without jurisdiction to try him on a criminal charge.

*Osborn v. Bank of United States*, 9 Wheat. 865, 6 L. ed. 234; *Re Waite*, 81 Fed. 359, affirmed in 31 C. C. A. 403, 59 U. S. App. 734, 88 Fed. 102; *Ohio v. Thomas*, 173 U. S. 276, 43 L. ed. 699, 19 Sup. Ct. Rep. 453.

The state of Rhode Island is powerless to punish the defendant for the violation of its Speed Laws, inasmuch as he is entitled to a writ of habeas corpus commanding his release.

*South Dakota v. North Carolina*, 192 U. S. 286, 320, 48 L. ed. 448, 461, 24 Sup. Ct. Rep. 269.

Defendant, as a subordinate, is bound to obey the orders of his superior officer.

*Re Grimley*, 137 U. S. 147, 34 L. ed. 636, 11 Sup. Ct. Rep. 54; *United States v. Clark*, 31 Fed. 710; *Re Lewis*, 83 Fed. 159; *Re Fair*, 100 Fed. 149.

Sweetland, J., delivered the opinion of the court:

This case is a criminal complaint, charging the respondent with operating a motor vehicle on Thames street, a public highway in the city of Newport, at an unreasonable rate of speed. The respondent is a machinist mate, second class, regularly enlisted in the United States Naval Reserve force, and said alleged violation of law occurred while the respondent was on duty as a despatch driver. The case is before us upon the certification by the superior court of a question of law raised by the attorney general. The question certified is as follows: "1. Is a machinist mate, second class, regularly

enlisted in the United States Naval Reserve force, while on duty as a despatch driver, and acting under the specific instructions of his superior officer to proceed with all possible despatch, and assumed by the officer to necessitate the violation of the Speed Laws, and which instructions he was obliged to obey, in a matter by said officer deemed to be of urgency and in a matter appertaining to the conduct of the war between the United States and Germany, amendable to the laws of the state of Rhode Island for violating the Speed Laws under the provisions of chapter 298, section 5, of the General Laws?"

The question is inexact, and appears to us somewhat lacking in clearness. No person is amenable to the laws of the state for violating the Speed Laws under the provisions of chapter 298, § 5, of the General Laws, as said section is entirely without reference to the regulation of speed upon the highway. The provision of law which is probably referred to is that contained in chapter 1354 § 17, Public Laws approved March 30, 1916, regulating the operation of motor vehicles. From the language of the charge it is apparent that the complainant intended to set out in said complaint a violation of the provisions of the last-named section. From the argument of counsel before us we assume that the question intended to be propounded to us might be formulated as follows: Is a man of the United States Naval Reserve force, on duty as a despatch driver, amenable to the provisions of chapter 1354, § 17, of the Public Laws, while acting under the specific instructions of his superior officer to proceed in a motor vehicle with all possible despatch along one of the highways of the state, which instruction said man was obliged to obey, which instruction was assumed by said officer to necessitate the violation by said man of the Speed Laws of the state, and which instruction was given by said officer in a matter deemed by him to be of urgency and appertaining to the conduct of the war between the United States and Germany?

In essence this question is: Are the rules established by the general assembly regulating the use of the highways of the state subordinate to the exigencies of military operations by the Federal government in time of war? In our opinion, they are. Under the Constitution of the United States, the conduct of the war now existing between this country and Germany vests wholly in the Federal government. Any state law, the operation of which will hinder that government in carrying out such constitutional power, is, during the exercise of the power, suspended as regards

the national government and its officers, who are charged with the duty of prosecuting the war. The principle is well established that, in respect to the powers and duties exclusively conferred and imposed upon the Federal government by the Constitution of the United States, the several states have subordinated their sovereignty to that of the nation. *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648; *Re Neagle*, 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; *Re Waite* (D. C.) 81 Fed. 359; *Re Fair* (C. C.) 100 Fed. 149.

It is not questioned that in time of war, within the territory occupied by the Army or the Navy, and in the districts affected by military operations, a military commander is supreme; he may override civil authority, and pursue whatever course the necessities of the situation commend to his judgment. Newport is not within the theater of actual conflict. It is, however, the headquarters of the second naval district. The waters about it are in the actual control of the naval forces of the United States, which are charged with the duty of guarding our coasts and waterways against surprises and attacks by an active and resourceful enemy. Any plan of the naval authorities for the furtherance of that purpose cannot be hampered by the enforcement of the ordinary regulations pertaining to the use of our highways. The respondent is a sailor in the service of the United States, and was bound to obey the lawful orders of his superior officer. The order in question, although it called for a disregard of the ordinary rules of conduct, was not illegal in the circumstances, but on its face was one which was justified by the rules of war and the situation then existing at Newport. It should protect the respondent.

In the argument before us it was suggested that the prosecution of this complaint was in some measure forced upon the police authorities of Newport, in an effort to restrain the inconsiderate use of motor vehicles in the congested streets of that city by a few men in the military and naval service, who have appeared to consider that their connection with that service relieved them from an observance of the ordinary highway and traffic regulation of the state and city. If such condition exists, this opinion should in no degree foster such false and un-American notion. Such an attitude is undoubtedly contrary to the spirit of the general orders and regulations of the United States Army and Navy. The principle which we have enunciated in this opinion is without application to cases which show a failure to com-



ply with our laws and ordinances when no military necessity exists. In the case of *Re Waite* (D. C.) 81 Fed. 359, the court, after stating the proposition that, in matters within the sole control of the government of the United States, its officers carrying forward such matters should not be interfered with by criminal proceedings instituted in the state court, said: "By this it is not meant to assert that, because a person is an officer or agent of the Federal government, he is thereby excepted out from the jurisdiction of the state or the binding force of its laws. The mere fact that when the acts by him done were done he was an officer of the United States, charged with certain duties to that government, will not afford him immunity

from prosecution under the laws of the state; nor will the mere fact that he claims that the acts done were within the line of his official duty afford him protection, if the acts are such as to show that the claimed immunity is a mere subterfuge, and that under no fair consideration of his official duty could he have assumed that he was acting in his official capacity when the acts complained of were done by him."

The question certified, as we have interpreted its intent and as we have reframed it, in our opinion should be answered in the negative, and we so decide. The papers in the case, with this decision certified thereon, are sent back to the Superior Court for further proceedings.

### Annotation—Subordination or suspension of state law during war.

While there seems to be no case precisely in point with *STATE v. BURTON*, ante, 559, the general question of civil and criminal responsibility of soldiers and militiamen is treated in note to *Franks v. Smith*, L.R.A.1915A, 1141, and especial attention is directed to *Ex parte Bright* (1876) 1 *Utah*, 145, and *Ex parte Schlaffer* (1907) 154 *Fed.* 921, which involved the violation of a municipal ordinance by a soldier when off duty, and are contained in this note on page 1178.

As to power of state under Federal Constitution to legislate with respect to Army and Navy, see note to *State v. Holm*, L.R.A.1918C, 307.

As to homicide in discharge of military duty, see note to *State v. Phillips*, 67 L.R.A. 292.

As to state or municipal regulations affecting those engaged in handling United States mail, see note to *Com. v. Closson*, L.R.A.1918C, 940. J. D. C.

### WASHINGTON SUPREME COURT. (Department No. 1.)

C. E. RAY, Admr., etc., of Logan Murphy,  
Deceased, Resp.,  
v.

INDUSTRIAL INSURANCE COMMIS-  
SION, Appt.

(99 Wash. 176, 168 Pac. 1121.)

#### Workmen's compensation — survivor- ship of claim.

The claim under the Compensation Act, for injury causing partial disability of one who dies without heirs before a warrant is issued for his compensation, does not survive for the benefit of his creditors where, under the statute, the claim is not assignable or capable of passing by operation of law.

For other cases, see *Abatement and Revival*, II. in *Dig.* 1-52 N. 8.

(December 7, 1917.)

Note. — As to right of personal representatives to compensation that was being paid to dependents or employees, see annotation following this case, post, 563, and references therein to annotations on related questions.

L.R.A.1918F.

APPEAL by the Commission from a judgment of the Superior Court for Lewis County in favor of the administrator in a proceeding to recover compensation awarded to his decedent by the Commission. Reversed.

The facts are stated in the opinion.

Messrs. W. V. Tanner, Attorney General, and Howard Waterman, Assistant Attorney General, for appellant:

A provision of the Workmen's Compensation Act, prohibiting the passing by operation of law of a claim to payment from the accident fund, bars the administrator of a deceased workman from asserting any claim.

*Jones v. Miller*, 35 Wash. 499, 77 Pac. 811; *Slauson v. Schwabacher Bros.* 4 Wash. 783, 31 Am. St. Rep. 948, 31 Pac. 329; *Conoway v. Co-operative Homebuilders*, 65 Wash. 39, 117 Pac. 716; *Ingersoll v. Gourley*, 72 Wash. 462, 130 Pac. 743; *Wozneak v. Buffalo Gas Co.* 175 App. Div. 268, 161 N. Y. Supp. 675; *Murphy's Case*, 224 Mass. 592, 113 N. E. 283; *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 67, 57 L. ed. 417, 420, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; *Gulf, C. & S. F. R. Co. v. McGinnis*,

228 U. S. 173, 175, 57 L. ed. 785, 786, 33 Sup. Ct. Rep. 426, 3 N. C. C. A. 806; *Garrett v. Louisville & N. R. Co.* 235 U. S. 308, 312, 59 L. ed. 242, 244, 35 Sup. Ct. Rep. 32; *Fogarty v. Northern P. R. Co.* 85 Wash. 90, L.R.A.1916C, 803, 147 Pac. 652, 11 N. C. C. A. 84.

**Mr. Gus. L. Thacker**, for respondent:

The claim having accrued in the lifetime of Logan Murphy, and he being entitled to receive the same, and after such time having died, said claim constitutes a chose in action which was assignable, and was property to which his administrator is entitled as assets of said Murphy.

*Stertz v. Industrial Ins. Commission*, 91 Wash. 588, 158 Pac. 256, Ann. Cas. 1918B, 354; *Power v. Harlow*, 57 Mich. 107, 23 N. W. 606; 18 Cyc. 175; *United Collieries v. Simpson* [1909] A. C. 383, 78 L. J. P. C. N. S. 129, 101 L. T. N. S. 129, 25 Times L. R. 678, 53 Sol. Jo. 630, [1909] S. C. 19, 46 Scot. L. R. 780.

**Webster, J.**, delivered the opinion of the court:

On May 28, 1914, Logan Murphy, while engaged in an extrahazardous occupation, included within the scope of chapter 74, Laws 1911, p. 345 (Rem. Code, § 6604-1 et seq. commonly known as the Workmen's Compensation Act, received an injury which resulted in the total loss of his left eye. This injury constituted a permanent partial disability, as defined by the act, and, under the schedule of allowances as fixed by the Industrial Insurance Commission, entitled him to an award of \$850 from the accident fund. In due time and in the manner provided by law, he filed with the Commission his claim for compensation; but before a warrant in payment thereof had been issued and delivered to him, he was accidentally killed, the cause of his death being in no way connected with his employment. The deceased left no heirs and no estate, other than his claim against the insurance fund; however, there are outstanding debts amounting approximately to \$400. Thereafter the plaintiff was appointed his administrator, and later made demand upon the Industrial Insurance Commission for the amount stated. The Commission refused to pay, and the plaintiff appealed to the superior court. After a trial upon the merits, judgment was entered in plaintiff's favor, from which the Industrial Insurance Commission has appealed to this court.

Considerable space in the briefs is devoted to a discussion of whether the claim filed was acted upon and allowed by the Commission. As we view the case, it is not necessary to determine this question; it being conceded that no warrant therefor was is-

sued and delivered prior to the death of the deceased. The sole issue involved is: Did the right to compensation pass to the personal representative, as an asset of Murphy's estate? Section 1 of the act referred to provides: "The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided." Sess. Laws 1911, pp. 345, 346 (Rem. Code, § 6604-1).

Within the scope of its operation, the rights conferred and the benefits to be derived therefrom, likewise the persons by whom and the manner in which such rights are to be exercised and benefits received, are deemed exclusive. The claim upon which the plaintiff's action is based has its source in this statute. As all compensation for injuries received in such extrahazardous employment and all causes of action therefor are abolished, except as in the act provided, it necessarily follows that, unless the statute confers the right upon the plaintiff, the cause of action does not exist; moreover, the granting power may likewise limit, control, or take away the rights conferred. Section 10 of the act provides: "No money paid or payable under this act out of the accident fund shall, prior to issuance and delivery of the warrant therefor, be capable of being assigned, charged, nor ever be taken in execution or attached or garnished, nor shall the same pass to any other person by operation of law. Any such assignment or charge shall be void." Sess. Laws 1911, p. 364 § 10 (Rem. Code, § 6604-10).

This court, in keeping with the universal rule, has held that the test of survivorship of a cause of action is its assignability, and, conversely, the test of assignability is survivorship, which is to say, assignability and survivorship are convertible terms. *Ingersoll v. Gourley*, 72 Wash. 462, 130 Pac. 743; *Slauson v. Schwabacher Bros.* 4 Wash. 783, 31 Am. St. Rep. 948, 31 Pac. 329; *Conaway v. Co-operative Homebuilders*, 65 Wash. 39, 117 Pac. 716.

Since the assignment of the claim is expressly prohibited, prior to the issuance and delivery of the warrant, an event which did not occur in the decedent's lifetime, or at all, and since the statute further provides,

"nor shall the same pass to any other person by operation of law," the conclusion seems irresistible that the cause of action does not survive to the personal representative of the deceased, but is a right limited to the injured workman, or his dependents, as defined by the statute.

The expression "operation of law" is defined in *Bouvier's Law Dict.* Rawle's 3d ed. as "a term applied to indicate the manner in which a party acquires rights without any act of his own."

The right asserted by the plaintiff was so acquired; and inasmuch as it is not conferred by the statute under consideration, but, on the contrary, is expressly denied thereby, the action cannot be maintained. The language is plain and unambiguous. It leaves no room for construction. To hold otherwise is not to interpret the statute but to annihilate it. Legislation of this character is of recent enactment, differing widely in scope and effect; hence, precedents are few, and recourse to analogy of little assistance. However, the following cases are instructive upon the principles involved: *Wozneak v. Buffalo Gas Co.* 175 App. Div. 268, 161 N. Y. Supp. 675; *Murphy's Case*,

224 Mass. 592, 113 N. E. 283; *National Bank v. Downie*, 218 U. S. 345, 54 L. ed. 1065, 31 Sup. Ct. Rep. 89, 20 Ann. Cas. 1116, note; *Wells v. Edwards Hotel & C. R. Co.* 27 L.R.A. (N.S.) 404, note.

The legislatures of California and Wisconsin, in enacting similar laws, having in mind that survivability depended upon assignability, inserted the following clause to preserve the right of action against abatement: "No claim for compensation under this act shall be assignable before payment, but this provision shall not affect the survival thereof." Cal. Laws 1911, chap. 399, § 22; Wis. Laws 1911, chap. 50, § 23.

This is especially significant in light of the fact that the courts in both of these jurisdictions were committed to the same test of survivability as that adhered to in this state. *Hannon v. Harper*, 9 Cal. App. 260, 98 Pac. 685; *Puffer v. Welch*, 144 Wis. 506, 129 N. W. 525, Ann. Cas. 1912A, 1120.

We conclude that the judgment of the Superior Court should be reversed. It is so ordered.

Ellis, Ch. J., and Parker, Main, and Fullerton, JJ., concur.

### **Annotation—Right of personal representatives to compensation that was being paid to dependents or employees.**

The general subject of Workmen's Compensation Acts is treated in annotations in L.R.A.1916A, 23, and L.R.A. 1917D, 80. For later cases and annotations on Workmen's Compensation Statutes, consult the L.R.A. Indexes for volumes subsequent to L.R.A.1917D, under the title, "Workmen's Compensation."

The rule in Massachusetts is that, upon the death of the dependent, all obligation of the employer or insurer to pay future instalments of compensation awarded to the dependent ceases; in other words, the personal representative of the dependent has no right to any unpaid, undue instalments of compensation awarded to the dependent. *Murphy's Case* (1916) 224 Mass. 592, 113 N. E. 283; *Bartoni's Case* (1916) 225 Mass. 349, L.R.A.1917E, 765, 114 N. E. 663; *Re Derinza* (1918) 229 Mass. 435, 118 N. E. 942; *Bott's Case* (1918) 230 Mass. 152, 119 N. E. 755.

This rule was first laid down in *Murphy's Case* (Mass.) cited above, where the court said: "There is no provision in the Workmen's Compensation Act dealing expressly with the question which this case presents. Whether the sum which the dependent is entitled

to upon the death of an employee is a vested interest, or ceases upon the death of the dependent, is a question which must be decided by the general provisions of the act, interpreted in the light of the object which the act was passed to the effect." The court further said: "To hold that the dependent's right to compensation is a vested right, which passes to a legatee by will and, in case of intestacy, goes to the dependent's next of kin, would be to put upon the insurer a burden not called for by the object which the act was passed to attain. In addition, the compensation awarded the dependent would go, in that case, to persons altogether outside the class contemplated by the act. So construed, the act would or might enrich strangers, in place of doing justice to the family and next of kin of an employee killed in the course of and so as an incident to the business in which he was employed."

In *Bartoni's Case* (Mass.) supra, it was said that the right to the weekly award does not vest absolutely in the dependent, but continues only during the life of such dependent, and right to compensation on the account of that dependent ceases with his death.

In *Bott's Case (Mass.)* supra, in speaking of *Murphy's Case*, the court said: "Its reasoning, in brief, was that there was no provision in the act for payment to be made to anybody save to the dependents therein named, and nothing to indicate a purpose that the payments be made to the personal representatives of dependents in case of their death, and that to treat the right to such payments as passing to their executors or administrators often would or might result in payments to persons in no way connected with the deceased employee, or his family or kindred, and this might deprive some of his kindred, in truth dependent upon his wages for support, of any payment under the act."

In an award of compensation for a period of 500 weeks, the decree ought to contain a clause stating in express terms that the payments are to cease upon the decease of the dependent before the expiration of the period of payment. *Re Derinza* (1918) 229 *Mass.* 435, 118 *N. E.* 942.

The administrator, however, is entitled to any instalments of compensation which were due, but unpaid, at the time of the death of the dependent. *Bartoni's Case* (1916) 225 *Mass.* 349, L.R.A.1917E, 765, 114 *N. E.* 663.

The Massachusetts act provides that, where a deceased employee leaves a wife and minor children, the compensation shall be awarded to the widow only. In such a case, if the widow dies before the full payments of compensation have been completed, then it is proper for the industrial accident board to review its award, and to apportion the compensation payable among the minor children.

Thus, in *Bartoni's Case (Mass.)* supra, where the deceased employee left a minor dependent child as well as a dependent widow, and all compensation had been made payable to the widow, the court said: "It would be 'subject to the provisions of' the Workmen's Compensation Act to order the payment of weekly compensation to be made to a minor child of the deceased employee, actually dependent upon his father for support at the time of the latter's decease, after the decease of his widowed mother. The case at bar is the typical one referred to, by way of illustration, in *Murphy's Case* (1916) 224 *Mass.* 592, 113 *N. E.* 283."

In the *Murphy Case (Mass.)* cited above, it was contended that, upon the death of the dependent, the case should be sent back to the board for an award to some other than the dependent, who

was the mother of the deceased workman. She was, however, at the death of the workman, his sole next of kin, and the court said: "The act provides that, in case the employee dies of his injury, compensation shall be awarded to those persons who were, in fact, his next of kin or members of his family at the time of the injury and who, in fact, were dependent upon him for support at that time. It does not authorize an award of compensation to be made, for example, to persons who would have been his next of kin if his sole next of kin had been dead, and who were not, in fact, dependent upon him, but might have been dependent upon him had it been that the next of kin who was dependent upon him had died. It follows that, in the case at bar, no order in favor of anyone else could be made now."

On the other hand, under the British act, it has been held that, upon the death of the sole dependent, his representative is entitled to claim all that the dependent might have claimed, and this is true in a case in which the claim had been made by the dependent during his lifetime, and also in a case in which the dependent had died without making any claim whatsoever. *Darlington v. Roscoe* [1907] 1 *K. B. (Eng.)* 219, 76 *L. J. K. B. N. S.* 371, 96 *L. T. N. S.* 179, 23 *Times L. R.* 167; *United Collieries v. Simpson* [1909] *A. C. (Eng.)* 383, 78 *L. J. P. C. N. S.* 129, 101 *L. T. N. S.* 129, 25 *Times L. R.* 617, 63 *Sol. Jo.* 630, [1909] *S. C.* 19, 46 *Scot. L. R.* 780, 2 *B. W. C. C.* 308.

In the latter case, the court said that, although it might seem anomalous to enforce payments when no dependent is still living to require support, nevertheless the act provides a fixed sum, and this must be taken as a statutory provision, whether, in the event, it is needed or not.

So, under the Ohio statute, it has been held that an award of compensation from the state insurance fund to a wholly dependent person vests in the dependent when the award is made; so that in case of the death of such dependent, his or her personal representative is entitled to the balance, if any, remaining unpaid. *State ex rel. Munding v. Industrial Commission* (1915) 92 *Ohio St.* 434, L.R.A.1916D, 944, 111 *N. E.* 299, *Ann. Cas.* 1917D, 1162, 13 *N. C. C. A.* 713. The court stated that the theory of the law is that, when an employee is injured or killed in the course of his employment, a sum fixed by law is set off from the fund to compensate him for his injuries, or his dependents for his death,

to compensate for taking away the man's right to earn a livelihood, which, but for the accident, he would have earned, and a fixed sum is set off from the fund to compensate for the loss which has occurred. The court went on to say: "The intent, apparent and express throughout the act, that compensation is to be paid only to dependents, was not for the purpose of securing an abatement of unpaid compensations upon the death of a dependent. The purpose is to insure that compensation shall go intact to the injured employee or his dependents, without any shrinkage by passing through or into the hands of assigns, agents, attorneys, friends, or relatives, it being common knowledge that if a sum of money, on its journey from the one from whom to the one to whom it is due, passes through the hands of others, it is inevitable that it suffer diminution, sometimes almost to the vanishing point."

In respect to the rights of personal representatives of an employee, who died from causes other than the accident, in the compensation which was being paid to him, the decision of the Washington court in *RAY v. INDUSTRIAL INS. COMMISSION*, ante, 561, appears to be the only one which bases this decision squarely upon the ground that the right did not survive, because it was not assignable under the express terms of the statute.

The New Jersey Act of 1911 contained no provision for a case where the employee died from a cause other than the accident, during the period of payment for permanent injury; by the Amendment of 1913, the legislature enacted that the remaining payments should be paid to his or her dependents. The courts, however, held that the amendment was not retroactive, so as to apply to a case arising under the Act of 1911. *Erie R. Co. v. Callaway* (1917) — N. J. L. —, 102 Atl. 6,

It has also been held that, under the New York Act, an award of compensation, to be paid periodically for a specified time to an injured employee, is not a vested interest which will pass to his personal representative upon his death, from causes entirely unconnected with the accident, before the period during which the payments were to be continued had been filled. *Wozneak v. Buffalo Gas Co.* (1916) 175 App. Div. 268, 161 N. Y. Supp. 675. The court said that it is only when the employee's death results from the injuries received in the industry, that there in any equitable reason why the industry should be called upon to pay

benefits to those dependent upon him. The court went on to say: "If it could be held, under any possible theory, that the compensation awarded to the claimant was translated by his natural death into a benefit, the statute would still require that it be paid, not to the representatives of the estate of the deceased, thus to become subject to his debts (for a personal exemption clearly would not extend beyond the life of the claimant), but to the dependents named in the statute; for it is provided that 'compensation and benefits shall be paid only to employees or their dependents' (§ 33), and in these hands, and these only, would the exemptions provided in the act prevail."

"That the award made to the claimant in this proceeding could not have been vested absolutely in the claimant is evident from the provisions of § 22 of the law, which provides that the Commission, . . . on the ground of a change in conditions, may 'review any award, and, on such review, may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this chapter, and shall state its conclusions of facts and rulings of law,' etc. He had a right during his lifetime, and while the award remained unchanged, to receive the compensation fixed for the period limited by the statute; but with his death from natural causes he has ceased to have any right to compensation, just as his contract of employment for a definite period would have been terminated by the same event, if no accident had befallen him. The right to compensation was personal to himself, as much under the statute as it was under his contract of employment; the former grew out of the latter."

On the other hand, a lump sum judgment in favor of an injured workman, taken under the Kansas act, does not abate by his death, but may be revived in the name of the administrator, notwithstanding the statute forbids its assignment. *Monson v. Batelle* (1918) 102 Kan. 208, 170 Pac. 801. The court, after stating that it had been held in *Wozneak v. Buffalo Gas Co.* (N. Y.) supra, that a judgment for periodical payments to an injured workman, although subject to commutation, did not survive the employee's death, said: "That decision, however, if accepted as sound, would not control here. In the present case, the plaintiff had obtained an absolute personal judgment, requiring the immediate payment of a fixed

amount. It was the legal duty of the defendant to pay it at once, unless a stay should be procured pending an appeal. If payment had been made, the money would have been wholly at the disposal of the plaintiff. If the final result is an affirmance, it will amount to an adjudication that the rights of the parties shall remain as fixed at the time the judgment was rendered. The defendant gains no immunity from the fact of his having taken an appeal which is ultimately determined not to have been well founded."

The court further said that an assignment of a judgment under the Compensation Act, to a trustee for the benefit of the children of the injured workman, did not seem necessarily in conflict with the provision of the statutes that payments due under the act, as well as judgment attained thereunder, should not be assignable; but the decision rests upon other grounds.

In *Smith v. Southern Surety Co.* (1917) — *Tex. Civ. App.* —, 193 S. W. 204, it was said that, under the Texas act, the absolute ownership of the benefit fund vests at once, upon the death of the employee, in his legal beneficiary, but this statement was made in answer to the contention that the administrator of a deceased employee, leaving legal beneficiaries, had a right to maintain an action for the compensation, payable because of the injury and death of the employee. The court said: "Appellant is temporary administrator of the estate of a deceased person. The claim upon which he sues is, by the law creating it, the specific property of legal beneficiaries living. The conclusion then is inevitable that the temporary administrator of a deceased person, whose right and interest in the fund provided in the policy terminated upon his death, could have no legal or remedial interest in the subject-matter of the suit as brought."

W. M. G.

**MISSISSIPPI SUPREME COURT.  
(Division B.)**

**CARTWRIGHT-CAPS COMPANY, Appt.,**

v.

**A. S. FISCHER et al.**

(113 Miss. 359, 74 So. 278.)

**Libel — publication — dictation to stenographer.**

1. The dictation of a libelous letter by the president of a corporation to its stenographer in the course of its business is not a libel in the absence of any repetition by president or stenographer to other persons. *For other cases, see Libel and Slander, II, f, in Dig. 1-52 N. S.*

**Same — business letter — privilege.**

2. A letter from a corporation to its customer concerning a business transaction existing between them, and containing statements libelous to the customer, which is then sealed for the inspection of the customer alone, is privileged.

*For other cases, see Libel and Slander, II, e, 3, in Dig. 1-52 N. S.*

(March 5, 1917.)

**A** PPEAL by defendant from a decree of the Chancery Court for Warren County overruling a demurrer to a bill filed to

**Note.** — For communication to stenographer or copyist as affecting publication or privilege, see annotation following this case, post, 568, and references therein to annotations on related questions.

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recover damages for an alleged libel. Reversed.

The facts are stated in the opinion.

Messrs. **Hirsh, Dent, & Landau**, for appellant:

The words "cheap Jew" are not, in themselves, libelous, under the general law of libel.

*Foster v. Boue*, 38 Ill. App. 613; 25 Cyc. 253; *Rice v. Simmons*, 2 Harr. 417, 31 Am. Dec. 766; *Hanaw v. Jackson Patriot Co.* 98 Mich. 506, 57 N. W. 734.

Without any innuendo showing the meaning of the words, "the prerogative of a cheap Jew," it was error to hold, as a matter of law, that the words are, per se, defamatory, and therefore actionable.

*Walker v. Tribune Co.* 29 Fed. 827; *Maynard v. Fireman's Fund Ins. Co.* 47 Cal. 207; *Clarke v. Fitch*, 41 Cal. 472; *Newell, Slander & Libel*, 2d ed. p. 619; *Walsh v. Pulitzer Pub. Co.* 250 Mo. 142, 157 S. W. 326, Ann. Cas. 1914C, 985.

Messrs. **Brunini, Hirsch, & Griffith**, for appellees:

The publication of the letters was libelous per se.

*Newell, Slander & Libel*, 3d ed. 84; 25 Cyc. 250 et seq.

**Ethridge, J.**, delivered the opinion of the court:

**Fischel & Kaufman**, a partnership composed of Jewish citizens doing business in Vicksburg, brings this suit in the chancery court for an alleged libel contained in cer-

tain correspondence written by the appellant to the appellees. It seems that the appellees are engaged in the laundry business and purchased certain machinery from the appellants, known as a "water softening outfit," and the correspondence grew out of the transactions regarding the purchase and use of this machinery. It is alleged that on or about the 4th of November the appellant mailed to the appellees a letter which, omitting the immaterial parts, reads as follows:

We cannot help but feel that you are exercising the prerogative of a cheap Jew, and in order to get these notes paid and forget them we are sending draft amounting to \$406.42 for notes, less W. H. Bruser invoice of \$43.58, as per your letter of October 19th. Please honor same.

Yours very truly,

Cartwright-Caps Co.,

Per Chaplin A. Cartwright, President.

P. S.—The above draft will be presented on November 13th, the day the last note is due.

There was another letter, alleged to have preceded this letter, and marked "Exhibit A" to and made a part of the bill, as follows:

Chicago, Oct. 23, 1914.

Messrs. Fischel & Kaufman,

Prop. Pearl Laundry,

Vickburg, Miss.

Gentlemen:—

We are at a loss to understand your attitude regarding the payment of your notes, and also that part of your letter which reads as follows: "That after plant was installed, gave us no satisfaction,"—especially after receiving your letter in which you state how delighted you were, and in addition having been personally told of the satisfactory results you were obtaining. Further, we do not see why, if you want to be square, you should ask us to send these notes for collection. Your contract called for this money in Chicago funds. From this letter you evidently want to ignore our bill for the castings and room and board of our man while making the change in your filter. It seems that no dependence whatever can be put in you. We have your several promises of paying, yet you do not honor our drafts when sent to the bank. We feel that you are very unjust and unkind in trying to hold us up for this tank, for, as we have stated several times, we do not feel that our equipment was at fault, and the suggestions that have been made were made to you with a view of giving you something which would in a way protect you against your own carelessness, if

you did neglect it or fail to take care of it. The original filter which was put in the tank—had the water been kept away from the foundations—would have given you perfect filtration, but in the condition in which the writer found your tank, and the water still running around the foundations, the chances are there wasn't a tight joint in the whole filter box. Yet in one of your letters you state that at the expense of a very few dollars you could have repaired that, but instead of acting on your own initiative you were writing letters of complaint in here and holding up payment of your notes. Please tell us what is to be done with such people. As your Mr. Kaufman stated to the writer and also wrote to this office, how easily and how cheaply the repairs could have been made, we are at a loss to understand why you permitted our Mr. Aagaard to make any change whatever. The Cartwright-Caps Company stand back of every machine they put out, but we cannot anticipate nor forestall carelessness and neglect. As stated in our previous letters, we do not feel obligated for expense you were put to for installing the auxiliary tank, and feel you are using your nerve in presuming to hold us up for this money. Until you pay your notes, some of which are long past due, and advise us of your intentions regarding the bill for castings and Mr. Aagaard's expense, we cannot enter into any discussion in regards to allowances.

Yours very truly,

Cartwright-Caps Co.,

Per Chaplin A. Cartwright, President.

The publication alleged of this letter is that it was published among the clerical force of the office of the appellant. The bill does not set out by averment the particular meanings of the portions of the letter relied on, but relies on the statements as being libelous per se, without innuendo or allegation as to what the letter was understood to mean by the parties by whom and to whom they were written.

This bill was demurred to by the defendants—first, on the ground that the bill of complaint does not set forth facts sufficient at law to constitute a cause of action; second, that it does not set forth facts sufficient to grant relief; third, that the letters are not, nor is any part thereof, libelous and defamatory. This demurrer was overruled by the chancellor, and an appeal granted under the statute to settle the principles of the case.

The contentions made by the appellees are that the letters are libelous per se, and that they are not privileged, and that the dictation of the letters to the stenographer of the complainant was a sufficient publica-

tion. The case was filed in the chancery court because, under a statute of this state, there is a proceeding in chancery authorizing attachments against nonresidents both on contract and in tort.

In our view of the case it is not necessary to decide the question as to whether the statements in the letters alleged to have been written were libelous per se or not. Under the facts of this case we think that the letters were privileged, and that there was not, in a legal sense, a publication of the letters in question. The appellant in this case is a corporation, and, of course, can act only through agents, and the acts of both the president and the stenographer to whom the letter was dictated are the acts of the corporation. In our opinion, under the present conditions, the dictation of a letter to a stenographer, when employed by the person or corporation as a stenographer in the business, is not a sufficient publication, in the absence of any repetition by the person or stenographer to other persons.

In the second place, we think the letter in this case was privileged, because it was written by the corporation to the appellees concerning a business transaction existing between them, and while in tone the letters may not come up to the standards of business courtesy and propriety, we do not think, where they are sent to the party to whom written, sealed and for his inspection alone, that they constitute actionable libel. It was held by the Arkansas court in the case of *Bohlinger v. Germania L. Ins. Co.* 100 Ark. 477, 36 L.R.A. (N.S.) 449, 140 S. W. 257, Ann. Cas. 1913C, 613, that a report by one employed to ascertain the character of another as an insurance risk, and his fitness for the position of agent, which states that he had lost a position through

carelessness, and had paid too much attention to women and drank some, if made in good faith, and if seen only by those having an interest in the matter and confidential stenographers, is privileged, even when sent by the company requesting it, to the examiners and agents who had recommended the risk and employment, to check the correctness of their recommendation. The report of this case in L.R.A. supra, with the case note appended thereto, is filled with authorities covering the learning on this subject, and we do not deem it necessary to go into the authorities elaborately on this question, even though it is a new one in this state.

It is inconceivable how the business of the country, under the present conditions, can be carried on, if a business man or corporation must be subject to litigation for every letter containing some statement too strong, where it is only sent to the person to whom directed, and only heard by a stenographer to whom the letter is dictated. If the stenographer should, in violation of his or her duties, disclose such statement, there might be a liability because of the negligence of the person in employing an improper person as stenographer. However, it is unnecessary to decide this question, because the declaration here does not disclose such a state of case. Our court, in the case of *Hines v. Shumaker*, 97 Miss. 669, 52 So. 705, had this question presented, but decided the case on other grounds, pretermittting a decision upon this ground, probably because there was a conflict of authorities upon the proposition. We think that line of authorities which hold in accordance with this opinion is more in harmony with sound jurisprudence. The case is therefore reversed and remanded.

### **Annotation—Libel: communication to stenographer or copyist as affecting publication or privilege.**

The present annotation includes only cases of dictation to stenographers, or delivery of matter to a clerk or employee for copying. Generally as to privilege of communications between principal and agent, see annotation to *Bohlinger v. Germania L. Ins. Co.* 36 L.R.A. (N.S.) 449.

There seems to be considerable difference of opinion upon the subject indicated in the title. The courts do not always distinguish between the logically distinct questions of publication and privilege; doubtless for the reason that in this instance the same considerations that control the conclusion on one ques-

tion will determine the decision of the other.

The rule that a defamatory communication to a stenographer or copyist is a publication thereof, and not privileged, based on the ground that such communications refer to business unconnected with the communicator's ordinary business, in that the writing of libelous matter is not ordinary business, seems to have been first laid down by the Queen's bench in *Pullman v. Hill* [1891] 1 Q. B. (Eng.) 524, wherein it was held that both the dictation of a libel by an officer of a mercantile firm to a stenographer, employed by it, and its de-



livery to an office boy to have letter-press copies made, were publications. And it was further held that the communication was not privileged, not only upon the ground above stated, but on the additional ground, that as the stenographer had no interest in hearing or seeing the communication, he did not fall within the rule that an occasion is privileged where the person who makes a communication has a duty to make it to the person to whom he does make it, and such person has an interest in hearing it. In rendering this decision Lord Esher, M.R., said that he did not think that the necessities or the luxuries of business could alter the law of England, and that if a merchant wished to write a letter containing defamatory matter and keep a copy of the letter, he had better make it himself. Lopes, L.J., said: "It is said that business cannot be carried on if merchants may not employ their clerks to write letters for them in the ordinary course of business. I think the answer to this is very simple. I have never yet heard that it is in the usual course of a merchant's business to write letters containing defamatory statements. If a merchant has occasion to write such a letter, he must write it himself and make a copy of it himself, or he must take the consequences;" and Kay, L.J., said: "The consequences of such an alteration in the law of libel would be this,—that any merchant or solicitor who desires to write a libel concerning any person would be privileged to communicate the libel to any agent he pleased if it was in the ordinary course of his business. That would be an extraordinary alteration of the law, and it would enable people to defame others to an alarming extent." It is also worthy of note that Lord Esher, M.R., also said: "If there was no publication, the question whether the occasion was privileged does not arise;" but some cases, as is subsequently shown, seem to have regarded the question of privilege independently of any question of publication; and still other cases have treated the question as one whether the dictation was such a publication as prevented the communication from being a privileged one.

And *Pullman v. Hill* [Eng.] supra, was followed in *Moran v. O'Regan* (1907) 38 N. B. 189, on subsequent appeal in (1908) 38 N. B. 399, it having been held that the giving by a merchant of a draft of a letter containing defamatory matter to a confidential clerk and typewriter to copy was a publication of

the libel, and not privileged. In reaching this conclusion the majority of the court adopted the reasoning that it does not fall within the ordinary business of a merchant to write defamatory statements, so that it is not reasonably necessary that he should have it copied by a clerk, and this although the letter related to property which the plaintiff, while acting as a clerk for the defendant, was alleged to have appropriated to his own use. Here a part of the court regarded *Pullman v. Hill* as not controlling, basing such conclusion on the ground that the decision in the latter case had been so limited by a subsequent decision of the same court as to render it inapplicable.

And the *Pullman* Case was followed in *Puterbaugh v. Gold Medal Furniture Mfg. Co.* (1904) 7 Ont. L. Rep. 582, 1 Ont. Week. Rep. 250, 24 Can. L. T. Occ. N. 205, 1 Ann. Cas. 100 (reversing (1903) 5 Ont. L. Rep. 680, 23 Can. L. T. Occ. N. 193), where it was held that a foreman of a company published a libelous letter, written in the interest of the company, but unconnected with its ordinary business, by giving a draft of same to a clerk to copy on a typewriter, and that such publication was not a privileged one. However, in this case a part of the court were seemingly reluctant to so hold, and did so only because they considered themselves bound by the Queen's bench decision.

And the narrow English view of *Pullman v. Hill* (Eng.) supra, to the effect that the dictating by the managing director of a firm to a stenographer employed by it of a libelous letter is a publication thereof, was again adopted in *Gambrill v. Schooley* (1901) 93 Md. 48, 52 L.R.A. 87, 86 Am. St. Rep. 414, 48 Atl. 730, wherein it was held that the dictation of a libelous letter, apparently in the due course of business, to a private and confidential stenographer, is in law a publication of the libel, the court expressly refusing to draw a distinction between cases where the libel is dictated in the ordinary course of business and those where the communication is unreasonable because clearly outside of the usual course of business of the dictator. And following the *Gambrill* Case it was held in *Ferdon v. Dickens* (1909) 161 Ala. 181, 49 So. 888, that the dictation of a libelous letter to a stenographer, who transcribed his notes on a typewriter, and the subsequent signing thereof by the person who dictated it, is a publication of the contents of the letter sufficient to support libel, although there

was no communication of its contents to any other person.

So, in *Sun Life Assur. Co. v. Bailey* (1903) 101 Va. 443, 44 S. E. 692, the court seems to have been of the opinion that publication may be made by dictating a libelous business letter to a stenographer.

In Iowa it has been held that where a libelous letter written in a foreign language was given by the writer to a third person to transcribe, and the copy was forwarded to a foreign country, a publication was made in this country. *Kiene v. Ruff* (1855) 1 Iowa, 482.

Seemingly the first case to lay down the principle that the communication of libelous matter in the course of the discharge of an ordinary business duty to a stenographer or copyist is not a publication of such matter which will in itself render the communicant liable in libel, and that such communication does not destroy any privilege, is *Lawless v. Anglo-Egyptian Cotton & Oil Co.* (1869) L. R. 4 Q. B. (Eng.) 262, 10 Best & S. 226, 38 L. J. Q. B. N. S. 129, 17 Week. Rep. 498, it having been held in that case that the delivery of a report of the directors of a stock company which contained a libelous reference to the company's manager, to a printer, to make copies for distribution among stockholders, was not such a publication as prevented the communication from being privileged, it not appearing that the directors had departed from the usual course employed in distributing such information, which it was their duty to furnish the stockholders.

And in *Boxsius v. Goblet Frères* [1894] 1 Q. B. (Eng.) 842, the court of Queen's bench applied the rule that libelous matter is privileged when dictated to a stenographer in the course of the discharge of an ordinary business duty, holding that where a solicitor dictated to his stenographer a letter containing libelous statements, which letter was also copied into a letter book by another clerk, it was upon a privileged occasion, since the client would have himself been privileged in sending the letter direct, and this privilege extended to the solicitor, he having been directed to send it. Lord Esher, M.R., said: "It is the duty of the solicitor to write and send this letter, and it is his duty to do that in the ordinary and reasonable way. The duties of a solicitor are not to one client only, but to all his clients, and he has to take measures to perform them with all due diligence and according to the necessary and reasonable method of conduct-

ing business in a solicitor's office. If a solicitor is instructed to write defamatory matter on a privileged occasion on behalf of a client, he must do this business as he does other business of the office, in the ordinary way, and that involves his having the communication taken down or copied by a clerk in his office and copied into the letter book." In reaching this conclusion the court distinguished *Pullman v. Hill* (Eng.) supra, on the ground that in that case it was not within the ordinary business of the merchant to write the defamatory matter complained of. It is also of interest in connection with the *Boxsius* Case that at least one Judge (Lopes, L.J.) was clearly of the opinion that there was evidence of publication by communicating the letter to the clerks, but the court evidently did not regard this as affecting the question of privilege, or, at least, as destroying the privilege of the occasion.

And following *Boxsius v. Goblet Frères* (Eng.) supra, the rule of *Pullman v. Hill* (Eng.) supra, was again limited in *Edmondson v. Birch & Co.* [1907] 1 K. B. (Eng.) 371, 1 B. R. C. 444, 76 L. J. K. B. N. S. 346, 96 L. T. N. S. 415, 23 Times L. R. 234, 7 Ann. Cas. 192, and the rule of privilege extended to dictation and delivery of defamatory matter for copying, where the duty is only one of imperfect obligation, and not absolute, as in the *Boxsius* Case. And applying this more liberal rule, it was held that where business communications containing defamatory statements were dictated to a stenographer and copied in a copy letter book by another clerk on a privileged occasion, the privileged occasion covered such a publication, so that the statements were not actionable. In reaching this conclusion *Collins, M.R.*, expressly stated that the decision in the *Pullman* Case was explained and qualified in the *Boxsius* Case, and summed up the result of the two cases as follows: "The result of the two cases to which I have alluded, taken together, appears to me to be that, where there is a duty, whether of perfect or imperfect obligation, as between two persons, which forms the ground of a privileged occasion, the person exercising the privilege is entitled to take all reasonable means of so doing, and those reasonable means may include the introduction of third persons where that is reasonable and in the ordinary course of business; and if so, it will not destroy the privilege. In the case of a solicitor, his duty in conducting the business of his client may be absolute, whereas in

this case it may be said that the duty was one only of imperfect obligation; but the nature of the obligation which gives rise to the privilege cannot, I think, alter its effect in this respect. If the duty is such as to give rise to a privileged occasion, then the fact that it is only one of imperfect obligation cannot affect the mode in which the privilege may be reasonably exercised." And Cozens-Hardy, L.J., in expressing a concurring opinion, added this: "I think that, if we accede to the argument for the plaintiff, we should in effect be destroying the defense of privilege in cases of this kind, in which limited companies and large mercantile firms are concerned; for it would be idle in such cases to suppose that such documents as those here complained of could, as a matter of business, be written by, and pass through the hands of, one partner or person only. In the ordinary course of business such a document must be copied and find its way into the copy letter book or telegraph book of the company or firm. The authorities appear to me to show that the privilege is not lost so long as the occasion is used in a reasonable manner and in the ordinary course of business."

So in *CARTWRIGHT-CAPS CO. v. FISCHER*, ante, 566, the dictation of a libelous letter by the president of a corporation to its stenographer, in the course of its business, was held not to constitute a publication of the libel in the absence of any repetition by the stenographer to other persons.

And in *Harper v. Hamilton Retail Grocers' Asso.* (1900) 37 *Can. L. J.* 31, where the secretary of a grocers' association gave the alleged libelous matter, which apparently related to the defendant's business, to a typewriter not in the regular employment of the defendants, but occasionally employed and paid by the secretary, to copy, it was held that there was no publication to the typewriter such as would render the association liable for libel.

In *Owen v. J. S. Ogilvie Pub. Co.* (1898) 32 *App. Div.* 465, 53 *N. Y. Supp.* 1033, 6 *N. Y. Anno. Cas.* 76, the court again laid down the rule that the dictation by the manager of a corporation to a stenographer of the firm of a libelous letter concerning firm business does not constitute a publication of the letter, but much stress was laid upon the fact that the manager and the stenographer were servants of a common master, engaged in their respective employments: and the case was seemingly regarded as distinct from one where the

one giving the dictation and the stenographer bore the relation of master and servant rather than coemployees of a common master. For instance, in this connection it was said: "It may be that the dictation to the stenographer and her reading of the letter would constitute a publication of the same by the person dictating it, if the relation existing between the manager and the copyist was that of master and servant, and the letter be held not to be privileged. Such, however, was not the relation of these persons. They were both employed by a common master, and were engaged in the performance of duties which their respective employments required. Under such circumstances we do not think that the stenographer is to be regarded as a third person in the sense that either the dictation or the subsequent reading can be regarded as a publication by the corporation. It was a part of the manager's duty to write letters for the corporation, and it was the duty of the stenographer to take such letter in shorthand, copy it out, and read it for the purpose of correction. The manager could not write and publish a libel alone, and we think he could not charge the corporation with the consequences of this act, where the corporation, in the ordinary conduct of its business, required the action of the manager and the stenographer in the usual course of conducting its correspondence. The act of both was joint, for the corporation cannot be said to have completed the act which it required by the single act of the manager, as the act of both servants, was necessary to make the thing complete. The writing and the copying were but parts of one act; i. e., the production of the letter. Under such conditions we think the dictation, copying, and mailing are to be treated as only one act of the corporation; and, as the two servants were required to participate in it, there was no publication of the letter, in the sense in which that term is understood, by delivery to and reading by a third person. There was in fact but one act by the corporation, and those engaged in the performance of it are not to be regarded as third parties, but as common servants engaged in the act." And expressly following the rule laid down in *Owen v. J. S. Ogilvie Pub. Co.* (*N. Y.*) supra, it was again held in *Central of Georgia R. Co. v. Jones* (1916) 18 *Ga. App.* 414, 89 *S. E.* 429, that the dictation by an officer of a corporation to his stenographer, in the prosecution of its business, of a libelous letter, does not constitute a publication,

since in such a case the stenographer cannot be regarded as a third person for the purposes of publication.

That the mere delivery of a libelous message to an office boy for the purpose of making a letter-press copy does not constitute a publication, at least where there is no evidence that the boy read the message, see *Western U. Teleg. Co.*

*v. Cashman* (1906) 9 L.R.A.(N.S.) 140, 81 C. C. A. 5, 148 Fed. 367, 9 Ann. Cas. 693. And that there is no proof of publication of a libelous letter by dictation to a third person, where it does not appear whether the sender wrote it himself or dictated it, see *Roberts v. English Mfg. Co.* (1908) 155 Ala. 414, 46 So. 752. G. J. C.

#### NORTH CAROLINA SUPREME COURT.

ACME MANUFACTURING COMPANY  
v.

MARTIN J. McCORMICK, Appt.

(175 N. C. 277, 95 S. E. 555.)

#### Evidence — parol — to vary writing.

1. Evidence is not admissible, in an action upon a promissory note, of a contemporaneous parol agreement that it was not to be paid according to its terms.

*For other cases, see Evidence, VI. c, in Dig. 1-52 N. S.*

#### Bills and notes — extending time of payment — validity of contract.

2. An agreement for a valuable consideration after the execution of a promissory note, to extend the time of payment of the principal upon payment of the interest, is valid.

*For other cases, see Bills and Notes, VI. b, in Dig. 1-52 N. S.*

#### Insurance — necessity of consent to policy.

3. Consent by the insured is necessary to a valid policy of insurance on his life issued to his creditor as security for a debt, and the giving of such consent is therefore a sufficient consideration for extension of the time for payment of the debt.

*For other cases, see Contracts, I. c, 2, in Dig. 1-52 N. S.*

(April 3, 1918.)

**A** PPEAL by defendant from a judgment of the Superior Court for Robeson County in favor of plaintiff in an action on a note. Reversed.

**Note.** — For consent of the person whose life is insured as a condition of insurance thereon, see annotation following this case, post, 574, and references therein to annotation on related questions.

The admissibility of parol evidence that a written instrument for the payment of money was executed in reliance upon a parol promise that payment was subject to a condition not incorporated therein is discussed in the note to *Gandy v. Weckerly*, 18 L.R.A.(N.S.) 434; and see also the case of *Kernodle v. Williams*, 34 L.R.A.(N.S.) 934. The related question as to the admissibility of parol evidence to show that

#### Statement by Allen, J.:

This is an action on a note executed by the defendant to John W. Ward for \$2,500, dated April 19, 1915, and payable October 15, 1915.

The defendant admitted that the plaintiff was the equitable owner of the note, but denied that it was transferred to the plaintiff before maturity. The defendant alleged in his answer as a defense:

(1) That it was agreed between the defendant and the said Ward, at the time of the execution of the note, that he, the said Ward, would hold the note and accept the interest on the same annually until the defendant could pay the whole of the note.

(2) That after the execution of the note the said Ward agreed with the defendant that if he would allow the said Ward to take out insurance on his life in the sum of \$5,000, payable to the said Ward, as security for the said note, that he, the said Ward, would pay the premiums on the policy and hold the same to secure the payment of the said note in the event of the death of the defendant and that in consideration of the defendant allowing the said Ward to take out said insurance on his life he would hold the note and accept the interest on the same each year until the defendant could pay the same.

The plaintiff moved for judgment upon the pleadings upon the ground that the answer admitted the execution of the note, and that the plaintiff was the equitable owner thereof, and that the answer did not set up a defense available to the defendant.

The motion of the plaintiff was allowed,

a bill or note was delivered upon a condition is discussed in the notes to *Beach v. Nevins*, 18 L.R.A.(N.S.) 288, and *Colvin v. Goff*, L.R.A.1917C, 306.

The court in *ACME Mfg. Co. v. McCormick* being of the opinion that consent by the maker to the taking out of the insurance on his life as security for the debt constituted in itself a valuable consideration, there was no occasion to consider the question as to the validity of the agreement to extend the time if there had been no independent consideration, which is treated in the note to *Maker v. Taft*, 52 L.R.A.(N.S.) 331.

judgment was rendered accordingly, and the defendant excepted and appealed.

Messrs. W. E. Lynch and T. A. McNeill, Jr., for appellant.

Messrs. McLean, Varner, & McLean and McIntyre, Lawrence, & Proctor, for appellee:

The alleged oral agreement cannot be enforced because the legal effect thereof would be to render forever unenforceable the note sued upon.

Hilliard v. Newberry, 153 N. C. 109, 68 S. E. 1056; Western Carolina Bank v. Moore, 138 N. C. 532, 51 S. E. 79; Moffitt v. Maness, 102 N. C. 460, 9 S. E. 399; Rousseau v. Call, 169 N. C. 177, 85 S. E. 414; Boushall v. Stronach, 172 N. C. 274, 90 S. E. 198.

It cannot be enforced because it is too vague, uncertain, and indefinite to be capable of enforcement.

Elks v. North State Ins. Co. 159 N. C. 626, 75 S. E. 808; Spragins v. White, 108 N. C. 452, 13 S. E. 171; Shute v. Heath, 131 N. C. 281, 42 S. E. 704; Teague v. Schaub, 133 N. C. 458, 45 S. E. 762; Cooper v. Jones, 128 N. C. 41, 38 S. E. 28; Price v. Price, 133 N. C. 514, 45 S. E. 855; Gay Mfg. Co. v. Hobbs, 128 N. C. 46, 83 Am. St. Rep. 661, 38 S. E. 28; Pepper v. Harris, 73 N. C. 365; Ingram-Day Lumber Co. v. Rodgers, 105 Miss. 244, 48 L.R.A.(N.S.) 435, 62 So. 230, Ann. Cas. 1916E, 174; 9 Cyc. 249.

It cannot be enforced for want of consideration to support it.

Hall v. Fisher, 126 N. C. 205, 35 S. E. 425; First Nat. Bank v. Lineberger, 83 N. C. 454, 35 Am. Rep. 582; Lahn v. Koep, 52 L.R.A.(N.S.) 333, note.

It is void for want of mutuality.

Cooper v. Jones, 128 N. C. 41, 38 S. E. 28; 9 Cyc. 325; 1 Page, Contr. p. 452; Hammond, Contr. p. 682; 1 Parsons, Contr. 9th ed. 436.

The agreement cannot be considered because it contradicts the plain terms of the written instrument sued upon.

Ray v. Blackwell, 94 N. C. 12; Dr. Shoop Medicine Co. v. J. A. Mizell & Co. 148 N. C. 386, 62 S. E. 511; Mudge v. Varner, 146 N. C. 149, 59 S. E. 540; Walker v. Cooper, 150 N. C. 131, 63 S. E. 681; Woodson v. Beck, 151 N. C. 146, 31 L.R.A.(N.S.) 235, 65 S. E. 751; American Gas & Ventilation Mach. Co. v. Wood, 90 Me. 516, 43 L.R.A. 456, 38 Atl. 548.

If the court below was correct in ruling that the further defense set up in the answer did not in law constitute any defense against the note sued upon, then it was correct in entering judgment in favor of plaintiff upon the pleadings, and this judgment should be affirmed.

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Western Carolina Bank v. Moore, 138 N. C. 532, 51 S. E. 79; North Carolina Corp. Commission v. Atlantic Coast Line R. Co. 137 N. C. 1, 115 Am. St. Rep. 636, 49 S. E. 191; Ward v. Phillips, 89 N. C. 215.

Allen, J., delivered the opinion of the court:

The first defense relied on, that there was a contemporaneous agreement that the defendant would not be required to pay the note according to its terms, and that the time to pay the principal would be extended upon the payment of interest, cannot be allowed, because in direct contradiction of the written promise to pay.

In Hilliard v. Newberry, 153 N. C. 109, 68 S. E. 1057, defendant relied upon an alleged oral contemporaneous agreement extending the time of payment beyond that shown by the face of the note sued on, and the court said: "As heretofore stated, the obligation sued on . . . contains, in addition, a positive promise to pay a definite sum, and at a specified time, and entitles the plaintiff to judgment according to the tenor of the bond. The claim that there was a contemporaneous oral agreement to the effect that the time could be further extended is in direct contradiction to the written stipulation of the agreement, and under several recent decisions of the court such a position was not open to defendant. Woodson v. Beck, 151 N. C. 145, 31 L.R.A.(N.S.) 235, 65 S. E. 751; Walker v. Cooper, 150 N. C. 129, 63 S. E. 681; Walker v. Venters, 148 N. C. 388, 62 S. E. 510; Mudge v. Varner, 146 N. C. 147, 59 S. E. 540; Western Carolina Bank v. Moore, 138 N. C. 529, 51 S. E. 79."

And in Western Carolina Bank v. Moore, 138 N. C. 532, 51 S. E. 80: "The only defense attempted amounts in substance to this: That, though the defendant executed his note and received a valuable consideration for same, there was an understanding and agreement at the time that payment should never be enforced or demanded. All the authorities are agreed that such a defense is not open to the defendant."

See also to the same effect Rousseau v. Call, 169 N. C. 177, 85 S. E. 414, and Boushall v. Stronach, 172 N. C. 274, 90 S. E. 198.

These authorities are not in conflict with Evans v. Freeman, 142 N. C. 61, 54 S. E. 847, and Kernodle v. Williams, 153 N. C. 475, 34 L.R.A.(N.S.) 934, 69 S. E. 431, which permit the proof of a contemporaneous agreement as to the mode of payment, or with many other cases in our reports in which the contemporaneous agreement did not contradict the writing.

This rule, excluding evidence of a parol

agreement, has no application to an agreement, made after the execution of the writing, changing or modifying the written agreement (*Brown v. Mitchell*, 168 N. C. 313, 84 S. E. 404, Ann. Cas. 1917B, 933), and the subsequent agreement to extend the time of the payment of the principal upon the payment of the interest upon the debt in consideration of the defendant giving his consent for the payee to take out insurance on his life as security for the debt, is therefore a defense if based on a valuable consideration.

The question of what constitutes a valuable consideration was considered in *Leaksville-Spray Institute v. Mebane*, 165 N. C. 644, 81 S. E. 1020, where the court says:

"In 9 Cyc. 312, the author cites many authorities to support the position that 'there is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has the right to do, whether there is any actual loss or detriment to him, or actual benefit to the promisee, or not.' . . .

"The exchequer chamber, in 1875, defined consideration as follows: 'A valuable consideration in the sense of the law may consist either in some right, interest, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other. Courts will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to anyone. It is enough that something is promised, done, forbore, or suffered by the party to whom the promise is made, as consideration for the promise made to him.' *Anson, Contr.* 63. 'In general, a waiver of any legal right at the request of another party is a sufficient consideration for a promise.' *Parsons, Contr.* 444. 'Any damage, or suspension, or forbearance of right will be sufficient to sustain a promise.' 2 *Kent, Com.* 12th ed. 465."

If the consent of the defendant was necessary to the issuing of the policy of insurance, the agreement alleged in the answer comes within the principle laid down, as he has done an act which he was not required to do, and has also conferred a substantial benefit on the creditor, the payee in the note.

Was the consent of the defendant necessary to a valid policy of insurance? The question has not been presented in this court before this, and it will be of rare occurrence, because usually the insured must submit to a physical examination, but the authorities generally agree that the consent of the insured is necessary.

"It is held to be contrary to public policy to insure the life of a person who has not consented to the issuance of a policy." 14 *Mod. Am. Law*, 145.

"Except perhaps in the case of an infant, it is a general rule that a policy of life insurance taken out without the knowledge or consent of the insured person is unenforceable, though it is frequently the case that such a policy is enforced, no question being raised." 14 *R. C. L.* 889.

"It is against public policy to allow one person to have insurance on the life of another without the knowledge of the latter. Indeed, it is sometimes made a felony to take out insurance on the life of another without his knowledge." 25 *Cyc.* 732.

See also to the same effect *Vance, Ins.* 145; *Rombach v. Piedmont & A. L. Ins. Co.* 35 *La. Ann.* 233, 48 *Am. Rep.* 239.

The principle has been adopted to prevent speculation in human life, the consent of the insured being regarded as a safeguard against excessive insurance on the life of the debtor, which might cause the creditor to be more interested in his death than in the continuance of his life.

We therefore conclude that there was error in rendering judgment upon the pleadings in favor of the plaintiff.

Reversed.

### **Annotation—Consent of the person whose life is insured as a condition of insurance thereon.**

This note is supplementary to the note to *Martin v. McAllister*, 56 *L.R.A.* 585, where the early cases upon the above question are covered.

As to illegality of policy for lack of insurable interest, as affecting right to recover back premiums paid, see note to *Security Mut. L. Ins. Co. v. Little*, *L.R.A.* 1917A, 477.

It will be noted that in *ACME Mfg. Co. v. McCORMICK*, ante, 572, it was held that *L.R.A.* 1918F.

consent by the insured was necessary to a valid policy on his life issued to his creditor as security for a debt, and that the giving of such consent was therefore a sufficient consideration for the extension of time for the payment of the debt.

It appears from the prior note that although there were then some dicta that a policy taken on the life of an adult, under circumstances the same as those in *ACME Mfg. Co. v. McCORMICK*, might be

valid without the consent of the debtor, there was no explicit authority to that effect, and it was there stated that the only class of cases in which there was clear authority in favor of the validity of insurance on the life of a person whose consent was not given was that of infant insurance. The only cases decided since the writing of that note have dealt with the right to recover premiums paid where policies had been issued on the lives of adults without their consent; and they, like the cases of the same class cited in the earlier note, apparently proceeded upon the assumption that there could be no recovery upon the policy in such a case. In some of these cases, however, there was an express provision in the policy requiring the consent of the insured.

It is stated in the prior note that the weight of authority seems to be that an innocent party, who is persuaded by the fraudulent misrepresentations of an insurance agent to take a policy on the life of another without the knowledge of the latter, contrary to the rules of the company rendering such a policy void, may recover such premium from the insurance company, on discovery that the policy is void. A like result has been reached in later cases.

Thus, it has been held that where one who was innocent of any intentional wrong was induced by the insurance agent to take a policy on her husband's life without his knowledge or consent, contrary to the rules of the company, she had the right when she discovered the fraud to rescind the contract and recover the premiums paid. *Metropolitan L. Ins. Co. v. Asmus* (1904) 25 Ky. L. Rep. 1550, 78 S. W. 204.

And in *Metropolitan L. Ins. Co. v. Felix* (1905) 73 Ohio St. 46, 75 N. E. 941, 4 Ann. Cas. 121, where the rules and regulations of the insurer provided that no policy should be binding upon the insurer unless the person whose life was insured should consent to the insurance and be examined by a physician, and required applications upon the life of a husband to be signed by him, notwithstanding the insurer's allegation that it had treated as valid a policy which had been obtained by an insurance agent for a wife on the life of her husband without his knowledge or consent, upon the agent's representation that his signature and consent were unnecessary, and the further allegation that it was willing to carry out the policy,—it was held that a contract, against which the insurer might interpose a valid defense, did not

exist, and that the wife might recover the premiums, which she had paid, without knowledge of the facts rendering the policy invalid.

And in *Delouche v. Metropolitan L. Ins. Co.* (1899) 69 N. H. 587, 45 Atl. 414, where an ignorant person was induced by an insurance agent's fraud to procure policies upon the life of her husband without his knowledge, and the policies were void by the express terms of one of the company's by-laws, it was held that the insurer was bound by their agent's knowledge of the situation, and that the policies were valid contracts against it, but that the person induced to take the policies were not bound to continue them after discovering the fraud, and might rescind them and recover the amount of the premiums paid, less the value of the insurance enjoyed during the continuance of the policies.

In *Mahoney v. Metropolitan L. Ins. Co.* (1910) 80 N. J. L. 136, 76 Atl. 458, where policies were obtained by a wife on the life of her husband without his knowledge or signature to the application, and by the rules of the company, which could not be varied by the agent's acts, policies were void unless the husband's consent and signature were obtained, and it appeared that, although the husband had paid some of the premiums, he had done so under a belief that the policies were on his wife's life, it was held that the policies were void from their inception, and that the husband, upon learning of the facts, might repudiate the policies and recover the premiums paid.

And in a Kentucky case, relying on the earlier Kentucky decisions, cited in the former note, it was held that policies taken upon the life of one without his knowledge or consent are void, but that one who in good faith paid premiums upon them might recover the premiums so paid. *Griffin v. Equitable Assur. Soc.* (1905) 119 Ky. 856, 84 S. W. 1164.

And in *American Mut. L. Ins. Co. v. Bertram* (1904) 163 Ind. 51, 64 L.R.A. 935, 70 N. E. 258, a policy procured by one on the life of another, without the knowledge or consent of the latter, and without any insurable interest in her life, was held void from its inception, but it was held that one who, without knowledge of the facts, took an assignment of the policy and paid the premiums in reliance upon the assurance of the agent of the insurer, which was confirmed by its vice president, that the policy was valid and the assignment

good, might recover back the premiums paid, it being held that the parties to the assignment were not in *pari delicto*, and that the insurer ought not in good conscience to retain the moneys paid.

In *Mailhoit v. Metropolitan L. Ins. Co.* (1895) 87 Me. 374, 47 Am. St. Rep. 336, 32 Atl. 989, where a husband was induced by the insurance agent to take a policy on the life of his wife by representations that the wife need not sign the application, or know of or consent to it, and that she need not be examined by a physician, and the agent filled out an application, signed it, and forwarded to the company, what purported to be a certificate of medical examination of the wife, signed by a physician of the company, although the wife was not examined,—it was held that the effect of the agent's acts was merely to render the policy issued voidable, and not void, and that, as the insurer had treated the policy as a valid one, and had never attempted to take advantage of the agent's

fraud, and as the representations were as to facts of interest to the insurer alone, the husband could not treat the policy as void, and maintain an action for the recovery of the premiums paid by him; and this was held although there seems to have been a provision that any policy issued upon the life of a wife for the benefit of her husband without her knowledge and consent should be null and void, the theory being that upon the facts the contract was not void, but voidable, and that, the risk having attached, no recovery of premiums paid could be had.

In *Work v. American Mut. L. Ins. Co.* (1903) 31 Ind. App. 153, 67 N. E. 458, it was held that one who knowingly secured policies upon the lives of other persons without their consent, could not recover the premiums paid thereon, although the insurer knew all of the facts, the making of such a contract being against public policy, and a statute forbidding it.

J. T. W.

**COLORADO SUPREME COURT.**  
(In Banc.)

E. E. DRACH, Plff. in Err.,  
v.

CHARLES H. LECKENBY, as State Auditor, et al.

(— Colo. —, 172 Pac. 424.)

**Officer — de facto — right to salary.**

A de facto officer cannot compel the public to pay him for services rendered as such, after another has been judicially declared to be the de jure incumbent of the office, regardless of the good faith of the claimant in performing the duties.

For other cases, see *Officers, III. in Dig.* 1-52 N. S.

(Hill, Ch. J., and Teller and Scott, JJ., dissent.)

(April 1, 1918.)

**ERROR** to the District Court for the City and County of Denver to review a decree in favor of defendants in a mandamus proceeding brought to compel the state auditor to issue warrants for salary earned by petitioner while acting as state bank commissioner. Affirmed.

The facts are stated in the opinion.

**Note.**—As to right of de facto officer to salary of office, see annotation following this case, post, 587, and references therein to annotations on related questions.

L.R.A.1918F.

Messrs. Barnett & Campbell, for plaintiff in error:

A de facto officer who was in the actual possession of the office, holding by virtue of a legal appointment or election, and discharging the duties of his office honestly and in good faith, believing that he had a legal right to hold, is entitled to the salary of the office, as against another claimant who afterwards is declared in a quo warranto proceeding to be the officer de jure.

Throop, Pub. Off. § 443; Conner v. New York, 5 N. Y. 285; Board of Auditors v. Benoit, 20 Mich. 176, 4 Am. Rep. 382; Smith v. New York, 37 N. Y. 518; Jayne v. Drorbaugh, 63 Iowa, 711, 17 N. W. 433; Stuhr v. Curran, 44 N. J. L. 181, 43 Am. Rep. 353; Erwin v. Jersey City, 60 N. J. L. 141, 64 Am. St. Rep. 584, 37 Atl. 732; Dill. Mun. Corp. 5th ed. § 429; McAfee v. Russell, 29 Miss. 84; Henderson v. Glynn, 2 Colo. App. 303, 30 Pac. 265; Terhune v. New York, 88 N. Y. 251, 42 Am. Rep. 248; El Paso County v. Rohde, 41 Colo. 258, 16 L.R.A.(N.S.) 794, 124 Am. St. Rep. 134, 95 Pac. 551; Thompson v. Denver County, 61 Colo. 470, 158 Pac. 309, Ann. Cas. 1918B, 915.

When an office is abolished the officer goes with it, and his rights are terminated.

Norton v. Shelby County 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121; People v. Toal, 85 Cal. 333, 24 Pac. 603; Buck v. Eureka, 109 Cal. 504, 30 L.R.A. 409, 42



Pac. 243; *Re Hinkle*, 31 Kan. 712, 3 Pac. 531.

Messrs. Melvin C. Goss, Frank A. Kemp, Jr., and Harold H. Healy, for defendant in error McFerson:

Drach, the *de facto* officer, is not entitled to recover the salary in question.

*People ex rel. Morton v. Tieman*, 30 Barb. 193; *Matthews v. Copiah County*, 53 Miss. 715, 24 Am. Rep. 715; *Dolliver v. Parks*, 136 Mass. 499; *Phelon v. Granville*, 140 Mass. 386, 5 N. E. 269; *Sheridan v. St. Louis*, 183 Mo. 25, 81 S. W. 1082, 2 Ann. Cas. 480; *People v. Potter*, 63 Cal. 127; *Eubank v. Montgomery County*, 127 Ky. 261, 128 Am. St. Rep. 340, 105 S. W. 418, 16 Ann. Cas. 483; *Garfield Twp. v. Crocker*, 63 Kan. 272, 65 Pac. 273; *State ex rel. Egan v. Schram*, 82 Minn. 420, 85 N. W. 155; *Meagher v. Storey County*, 5 Nev. 244; *O'Brien v. St. Paul*, 72 Minn. 256, 75 N. W. 375; *Vicksburg v. Groome*, — Miss. —, 24 So. 306; *Stephens v. Campbell*, 67 Ark. 484, 55 S. W. 856; *McCue v. Wapello County*, 58 Iowa, 698, 41 Am. Rep. 134, 10 N. W. 248.

The *de jure* officer is entitled to receive and collect the salary regardless of whether he is permitted to perform the duties of the office.

*Coughlin v. McElroy*, 74 Conn. 397, 92 Am. St. Rep. 224, 50 Atl. 1025; *Kreitz v. Behrensmeyer*, 149 Ill. 406, 24 L.R.A. 59, 36 N. E. 983; *Dolan v. New York*, 68 N. Y. 274, 23 Am. Rep. 168; *Comstock v. Grand Rapids*, 40 Mich. 397; *Whitaker v. Topeka*, 9 Kan. App. 213, 59 Pac. 668; *Scott v. Crump*, 106 Mich. 288, 58 Am. St. Rep. 478, 64 N. W. 1; *Fylpaa v. Brown County*, 6 S. D. 634, 62 N. W. 962; *McVeany v. New York*, 80 N. Y. 185, 36 Am. Rep. 600; *Andrews v. Portland*, 79 Me. 490, 10 Am. St. Rep. 280, 10 Atl. 458; *Tanner v. Edwards*, 31 Utah, 80, 120 Am. St. Rep. 919, 86 Pac. 765, 10 Ann. Cas. 1091; *Kendall v. Raybould*, 13 Utah, 226, 44 Pac. 1034; *State ex rel. Worrell v. Carr*, 129 Ind. 44, 13 L.R.A. 177, 28 Am. St. Rep. 163, 28 N. E. 88; *Morris v. People*, 8 Colo. App. 375, 46 Pac. 691; *Church v. Mullins*, 10 Colo. App. 318, 50 Pac. 1054; *Arnold v. Hilts*, 61 Colo. 8, 155 Pac. 316.

Bailey, J., delivered the opinion of the court:

The action was in *mandamus* by E. E. Drach to compel the state auditor to issue warrants for salary earned while acting as state bank commissioner. In response to the alternative writ the auditor filed an interpleader which set out that one McFerson claimed to be the *de jure* bank commissioner for the period in question and entitled to the salary, and prayed that

he be brought in in order that the court might determine to whom the warrants should issue, and he was accordingly made a party.

In his answer to the alternative writ McFerson set up a final judgment in quo warranto which declared him to be the *de jure* bank commissioner, and to have been such officer from May 6th, 1915, to July 5th, 1916, the time for which petitioner demanded pay, and during which period Drach was held disentitled to the office. The court entered judgment against Drach, and the auditor was directed to issue warrants for the salary during the period in question to McFerson. This decree is here for review on error. In the opinion the parties will be designated as in the trial court.

It will be necessary to consider only those assignments which relate to the right of Drach as *de facto* bank commissioner to recover salary. The question is whether a *de facto* officer who performs the duties of an office to which there is a judicially ascertained *de jure* claimant, can, after surrender of the position to such officer, recover salary.

It is urged that there is no property right in a public office; that it is not a franchise, and that the one who performs the duties is entitled to the pay. Cases holding that the salary of an officer may be increased or reduced at the will of the legislature, or that, in the absence of constitutional inhibition, it may lawfully abolish an office, or that the salary is deemed an equivalent for the services rendered, or that a person is not entitled to the salary unless he both hold and discharge the duties of the office, are cited in support of the claim of petitioner. These principles may be conceded to be correct but they have not the remotest application to this case.

*Henderson v. Glynn*, 2 Colo. App. 303, 30 Pac. 265; *El Paso County v. Rohde*, 41 Colo. 258, 16 L.R.A. (N.S.) 794, 124 Am. St. Rep. 134, 95 Pac. 551; and *Thompson v. Denver*, 61 Colo. 470, 158 Pac. 309, Ann. Cas. 1918B, 915, hold that payment to a *de facto* officer is a defense to the state in an action by the *de jure* officer to recover the salary. From this sound doctrine petitioner attempts to extract the premises that, because he might have compelled payment of his salary while performing the duties of the office, he may, after the *de jure* officer has been disclosed by court decree, still enforce his claim against the state. It is true, as urged by petitioner, that such payment to him while he occupied the office would have barred McFerson from recovery from the state, but

he, however, ignores the proposition that McFerson, after having been declared the de jure officer, could have maintained an action against the de facto officer for the emoluments of the office even though the latter had discharged the duties attached to the place. Drach, while serving, might have compelled payment to him, not because the salary attaches to the person who performs the service, but because, as matter of sound public policy, the business of the state must go forward in an orderly manner, and the question of the right to the office not having been determined, the de facto officer, in the interest of the public, and because the question of title to the office cannot be determined in mandamus, is permitted to perform the service and get the salary. But when the de jure officer has been ascertained, the de facto incumbent must respond to him for such salary. That the de jure officer can compel such repayment is almost unanimously held. The only well considered case which we have been able to find, holding otherwise, is *Stuhr v. Curran*, 44 N. J. L. 181, 43 Am. Rep. 353.

In *Eubank v. Montgomery County*, 127 Ky. 261, 128 Am. St. Rep. 340, 105 S. W. 418, 16 Ann. Cas. 484, it is said in discussing the rights of a de facto officer to salary: "We are satisfied that in the case at bar Eubank was standing on his legal rights with notice that his right was disputed, and that he took the risk of his right being upheld. A man cannot be allowed to hold onto an office to which he is not entitled when he knows his right to the office is denied and then claim compensation for his services after it is held that he had no right to the office. By holding onto the office under such circumstances he takes the risk of his right being established. . . . We have held that he could not be punished for usurpation of office, and, if we should now adjudge him entitled to the emoluments of the office, he would be in the same status as if he had been adjudged the office. It is a sound rule of public policy that those who hold public offices without right are not entitled to the emoluments of the office. Their acts are valid as to third persons for the protection of the public, but they are invalid as to themselves. . . . If their acts are invalid as to themselves, they cannot be adjudged compensation from the public for these acts."

In *United States v. Crawford*, 6 Wall. 291, 18 L. ed. 919, the court passed upon the refusal to give an instruction to the effect that, if the jury should find that the de facto incumbent of an office had received the salary thereof,

the de jure officer was entitled to recover from him that amount with interest, providing the jury also found the de jure officer was ready and willing to discharge the duties and was prevented only by the interference of the de facto incumbent. This instruction was declared to correctly state the law, and its refusal was adjudged reversible error.

In *People ex rel. Morton v. Tie-man*, 30 Barb. 193, it is said at page 195: "The salary and fees are incident to the title, and not to the usurpation and colorable possession of an office. An officer de facto may be protected in the performance of acts done in good faith in the discharge of the duties of an office under color of right, and third persons will not be permitted to question the validity of his acts by impeaching his title to the office. Public interests require that the acts of public officers who are such de facto should be respected and held valid as to third persons, who have an interest in them, and as concerns the public, in order to prevent a failure of justice. 2 Kent, Com. 295. It does not follow that a right can be asserted and enforced on behalf of one who acts merely under color of office without legal authority, as if he were an officer de jure. When an individual claims by action the office, or the incidents to the office, he can only recover upon proof of title. Possession under color of right may well serve as a shield for defense, but cannot, as against the public, be converted into a weapon of attack, to secure the fruits of the usurpation and the incidents of the office."

Speaking to the same question the supreme court of West Virginia in *Bier v. Gorrell*, 30 W. Va. 95, at page 97, 8 Am. St. Rep. 17, 3 S. E. 32, said: "It seems to be well settled that a de jure officer who has been kept out of his office by the intrusion of another person may by action recover from such person for the injury sustained by him, and that in such action the lawful prerequisites which the plaintiff would have received if he had exercised the office are the proper measure of his recovery. . . . It seems to be a principle of natural justice, as well as law, that where one person has injured another, or received the compensation which in equity and good conscience belongs to another, he may be required by action to account to such other for the injury done him. In like manner will an intruder in office be required to account to the legal officer for injury done by the intrusion. The legal right to an office confers the right to receive and appropriate the fees and perquisites legally incident thereto. When such

officer performs the duties of his office, he may demand and receive the compensation therefor allowed by law, and he is as fully entitled to such compensation as he would be in any other case entitled to pay for skill and labor done for another at his request. The legal fees and emoluments of an office are a part thereof, and belong to the rightful incumbent; and, where a person receives such fees and emoluments on the pretense of title to the office, the de jure officer may recover the profits of the office from him by an action of assumpsit for money had and received to his use.

Where the office is one with a fixed salary attached to it, the officer will be entitled to recover the entire official salary, without any deduction for the services of the incumbent, or for what he may have earned himself while ousted."

In discussing the right of a de facto officer to compel payment by the state of his claim for services while wrongfully in office, the court in *Matthews v. Copiah County*, 53 Miss. 715, 24 Am. Rep. 715, said: "The question at issue here is whether he can assert against the state, or against a county, which is the constituent part of a state, a demand for official fees which he claims to have earned by a violation of her constitution. If he can do so, there is an end at once of all distinctions between a de jure and a de facto officer, since it is impossible to perceive how the latter, while undisturbed by quo warranto, occupies a position at all inferior to the former. The acts of both are alike valid, both would be alike protected from the assaults of private persons, and each would have an equal claim upon the state for compensation. Such a construction of the law would be a direct encouragement to usurpation of office. The intruder or the incumbent wrongfully holding over would be liable, indeed, to be ejected at the end of a long and costly litigation, but in the meantime he would have grown rich by the fees and salaries which he would have extorted from the state, whose laws he had violated in holding the position."

The principle that the emoluments of the office belong to the de jure officer is asserted and approved in *Goughlin v. McElroy*, 74 Conn. 397, 92 Am. St. Rep. 224, 50 Atl. 1025: "The courts of this country that have had occasion to pass upon this last question have almost unanimously answered it in the affirmative. That, in cases like the present, the legal right to the office carries with it the right to the salary and emoluments thereof, that the salary follows the office, and that the de facto officer, though he performs the duties of the office, has no legal right to the emolu-

ments thereof, are propositions so generally held by the courts as to make the citations of authorities in support of them almost superfluous. Nearly all, if not all, cases hereinbefore cited upon both views as to the liability of the city, hold that the de facto officer, for fees and emoluments of the office received by him, is liable at common law to the officer de jure. So far as we are aware the only well-considered case taking a contrary view of the law is that of *Stuhr v. Curran*, 44 N. J. L. 181, 186, 43 Am. Rep. 353, and that was decided by a divided court standing seven to five. We think the able dissenting opinion of Chief Justice Beasley in that case shows conclusively that at common law, in a case like the present, the de jure officer is entitled to recover from the de facto officer. Another well-considered case directly in point in favor of this view is that of *Kreitz v. Behrensmeyer*, 149 Ill. 496, 24 L.R.A. 59, 36 N. E. 983. . . . That this law will at times operate harshly against the de facto officer and that it will so operate in the case at bar, must be conceded: and the seeming injustice of it is forcibly stated in the majority opinion of the New Jersey court before cited; but the courts must enforce the law as it is, and not the law as they think it ought to be. If the law requires to be changed, that must be left to the legislature."

Speaking to the same question, *Throop on Public Officers*, at § 659, says: "It is recognized in several of the cases hereinbefore cited, and directly in those contained in the note, which hold that, where an officer claims any right by virtue of his office, he must show that he is an officer de jure as well as officer de facto. . . . Thus, as was said by a learned chief judge of the court of appeals of New York: Where a person sets up a title to property by virtue of an office, and comes into court to recover it, he must show an unquestionable right. It is not enough that he is an officer de facto, that he merely acts in the office; but he must be an officer de jure, and have a right to act."

And at § 661: "A person who sues to recover from a municipality or other public body, the salary or other emoluments attached to an office which he claims to hold, or sues a private person to recover fees allowed by law for official services, must, if his right to the salary, fees, or other emoluments is put in issue, show not only that he has acted as such officer, but also that he did so as an officer de jure."

And *Mechem on Public Officers*, § 331, states this: "But while the acts of the de facto officer are thus valid as to third persons, he cannot himself acquire rights based

upon his defective title. It is well settled, therefore, that he cannot maintain an action to recover the salary, fees, or other compensations attached to the office."

The rights and duties of de facto officers are discussed in 29 Cyc. 1393, as follows: "As the rule regarding de facto officers has been adopted merely with the idea of protecting the public, the de facto officer is not permitted to benefit personally from what is legally a usurpation of the office. He thus has no claim to the emoluments of the office. As a necessary consequence the de facto officer is liable to the de jure officer for the emoluments of the office obtained during the time he has wrongfully occupied the office."

Henderson v. Glynn, 2 Colo. App. 303, 30 Pac. 265; El Paso County v. Rohde, 41 Colo. 258, 16 L.R.A.(N.S.) 794, 124 Am. St. Rep. 134, 95 Pac. 551, and Thompson v. Denver, 61 Colo. 470, 158 Pac. 309, Ann. Cas. 1918B, 915, are cited by petitioner in support of his claim. These cases are not in point. They hold only that payment by the state of the salary to a de facto officer is a defense in a suit by the de jure officer to recover the same salary from the state. Such payment by the state and such defense are permitted upon the principle of public emergency and necessity, as already pointed out in this opinion.

There are Colorado cases, however, directly supporting the doctrine that the emoluments of the office may be recovered from a de facto officer by the de jure claimant. Morris v. People, 8 Colo. App. 375, 40 Pac. 691; Church v. Mullins, 10 Colo. App. 318, 50 Pac. 1054. This principle is also affirmed in Arnold v. Hiltz, 61 Colo. 8, 155 Pac. 316, which, although upon an entirely different state of facts from these here involved, is in principle authority for the views herein expressed.

That the salary is attached to the office, and is not the property of one who unlawfully holds the office and performs the duties thereof, is announced and approved in the following additional cases: Cobb v. Hammock, 82 Ark. 584, 102 S. W. 382; McCue v. Wapello County, 53 Iowa, 698, 41 Am. Rep. 134, 10 N. W. 248; Stott v. Chicago, 205 Ill. 281, 68 N. E. 736; Phelon v. Granville, 140 Mass. 386, 5 N. E. 269; Fylpaa v. Brown County, 6 S. D. 634, 62 N. W. 962; Dolliver v. Parks, 136 Mass. 499; State ex rel. Egan v. Schram, 82 Minn. 420, 85 N. W. 155; Luzerne County v. Trimmer, 95 Pa. 97; Com. ex rel. Bowman v. Slifer, 25 Pa. 23, 64 Am. Dec. 680; Riddle v. Bedford County, 7 Serg. & R. 386; Vicksburg v. Groome, — Miss. —, 24 So. 306; Christian v. Gibbs, 53 Miss. 314; Ermston v. Cincinnati, 9 Ohio S. & C. P. Dec. 657;

State ex rel. Henry v. Newark, 8 Ohio S. & C. P. Dec. 344; Dolan v. New York, 68 N. Y. 274, 23 Am. Rep. 168; Re Berger, 152 Mo. App. 663, 133 S. W. 96; Russell v. Lyon, 90 S. C. 5, 72 S. E. 496; Lawrence v. Wheeler, 90 Kan. 689, 136 Pac. 315; Mayfield v. Moore, 53 Ill. 428, 5 Am. Rep. 52; Kreitz v. Behrensmeyer, 149 Ill. 496. 24 L.R.A. 59, 36 N. E. 983; Douglass v. State, 31 Ind. 429; Sigur v. Crenshaw, 10 La. Ann. 297; Nichols v. McLean, 101 N. Y. 520, 54 Am. Rep. 730, 5 N. E. 347; Wenner v. Smith, 4 Utah, 238, 9 Pac. 293; Fulgham v. Lightfoot, 1 Call. (Va.) 250; Booker v. Donohoe, 95 Va. 359, 28 S. E. 584; Rule v. Tait, 38 Kan. 765, 18 Pac. 160; Hogan v. Hamilton County, 132 Tenn. 554, 179 S. W. 128; Sandoval v. Albright, 14 N. M. 345, 93 Pac. 717; State ex rel. Evans v. Gordon, 245 Mo. 12, 149 S. W. 638; Jones v. Dushman, 246 Pa. 513, 92 Atl. 707, Ann. Cas. 1916D, 472; Comstock v. Grand Rapids, 40 Mich. 397; Whitaker v. Topeka, 9 Kan. App. 213, 59 Pac. 668; Scott v. Crump, 106 Mich. 288, 58 Am. St. Rep. 478, 64 N. W. 1; Andrews v. Portland, 79 Me. 490, 10 Am. St. Rep. 280. 10 Atl. 458; Tanner v. Edwards, 31 Utah, 80, 120 Am. St. Rep. 919, 86 Pac. 765, 10 Ann. Cas. 1091; Kendall v. Raybould, 13 Utah, 226, 44 Pac. 1034; State ex rel. Worrell v. Carr, 129 Ind. 44, 13 L.R.A. 177, 28 Am. St. Rep. 163, 28 N. E. 88; Meagher v. Storey County, 5 Nev. 244; O'Brien v. St. Paul, 72 Minn. 256, 75 N. W. 375; Stephens v. Campbell, 67 Ark. 484, 55 S. W. 856.

The leading case upon which petitioner relies is Stuhr v. Curran, supra, in which it was held that one who had received a certificate of election to a public office, and was subject to a statutory penalty, which distinguishes it from the present and other similar cases, if he failed to qualify and perform the duties thereof, might retain the salary of the office when he had performed the duties, as against one who later was declared to be legally elected. This opinion, as pointed out in Coughlin v. McElroy, supra, was by a divided court, seven to five, with a strong and persuasive dissenting opinion by chief Justice Beasley, in which four other justices concurred. And it is to be further noted that in a recent case, Gaskill v. Atlantic City, 89 N. J. L. 269, 98 Atl. 385, upon facts quite like those here involved, it was held by the same court that a de facto officer, could not recover the emoluments of the office from the state.

It is conceded that petitioner occupied the office under a mistaken claim of right. But such mistake, even coupled with actual performance of the duties of the place, gives no right to the salary as against the de

jure officer. The emoluments follow, and are inseparable from, the legal title. No motive, however worthy, can protect the de facto incumbent from the consequences of his intrusion, so far as payment for services be concerned. The fact that he labored under a mistake of law, and was free from bad intent, does not detract from the damage done to the rightful claimant. Drach took the risk of the validity of his title, and the loss should fall upon him rather than upon the one who holds the true title.

Upon practically unanimous authority it is settled that a de facto officer cannot recover compensation for services rendered, after the de jure claimant, as here, has been judicially ascertained and declared, and a plea by the auditor in his return to the alternative writ, that McFerson had been finally declared to be the de jure officer, would have been a complete bar to recovery of salary by Drach from the state.

The question of the right to the office having been determined against Drach, the matter of awarding the salary to McFerson by decree in mandamus becomes immaterial, and will not be disturbed. Under a different state of facts this question might present legal difficulties of a serious nature.

The judgment of the trial court should be affirmed, and it is so ordered.

HILL, Ch. J., and Teller and Scott, JJ., dissent.

HILL, Ch. J., dissenting:

Regardless of the conclusion of the majority, which the opinion states is supported by the weight of authority, I am not convinced of its justness, or that all the declarations therein contained will stand the test of time, as the law of this state. As I view it, Mr. McFerson has no place as a party in this action of mandamus. *McAffee v. Russell*, 29 Miss. 84. It is conceded that Mr. Drach, plaintiff in error, had possession of the office and performed the services during the period for which he sought the salary. It is also conceded that he was acting in good faith, and that, had this suit been instituted and tried during the period he was holding the office, the writ would have issued in his favor as a matter of course. Per former decisions of this court, as well as our court of appeals, the auditor has no right to question the de facto officer's right to the salary. *Thompson v. Denver*, 61 Colo. 470, 158 Pac. 309, Ann. Cas. 1918B, 915; *El Paso County v. Rohde*, 41 Colo. 258, 16 L.R.A. (N.S.) 794, 124 Am. St. Rep. 134, 95 Pac. 551; *Henderson v. Glynn*, 2 Colo. App. 303, 30 Pac. 265. I do not think that the de jure offi-

cer, after having been so declared by this court, has the right to do so by intervening in a mandamus action between the de facto officer and the auditor. In making this declaration, I am not claiming that Mr. McFerson has no cause of action against Mr. Drach for damages on account of having been kept out of the office, or that he might not, in a proper proceeding, by showing that Mr. Drach was insolvent or attempting to place his property beyond the jurisdiction of the court, or something that way, have the warrants withheld until the question of his damage was determined: but no such conditions are even hinted at here. However, as I view it, these questions of procedure are of but minor importance.

That portion of the opinion which I think is fundamentally wrong is the declaration, in substance, that under all such conditions the de jure officer is entitled to all of the emoluments of the office, even though its duties have been discharged by the de facto officer during the time the office was unlawfully held by him. This, as I take it, means all fees or salary, as the case may be. When I say "unlawful" I mean to distinguish it from wrongful so far as the moral viewpoint is concerned. There certainly have been many cases, and as certain will be many more, where an office is retained by the holder of a certificate of election pending the result of a contest and thereafter a review by this court thus held in the utmost good faith, yet where the ultimate outcome was against him, and in some cases where even then it was the incumbent's duty to thus continue. Take a case where the result hinges upon the right of certain electors to vote at that election in certain precincts or counties, depending solely upon questions of fact; is it right to hold that the party holding the certificate must determine in advance of a judgment whether he was elected, or, at his peril, as a penalty for holding on, lose all compensation for the services rendered pending its determination, even though it can be shown that the contester during said period earned a larger amount than the fees or salary of the office? To put it another way: Suppose he holds onto the certificate of election, yet arranges with the contester to take possession pending the decision with the understanding that the contest suit continue, and it is ultimately adjudged that the contestee was entitled to the office; should the contester be thus penalized? If this illustration is not practical, suppose the contester for a county office wins, and the contestee brings it to this court, but surrenders the office, and does not ask for a supersedeas, yet wins in the long run; is it just and right that the

contester be subject to this penalty for taking what is given to him by a judgment of a court of competent jurisdiction, although thereafter reversed? Likewise, as here, where able counsel and even members if this court disagree over the effect of an appointment by the governor. If this rule announced by the majority is to remain as the law of this state, it means that, where any person runs, say, for a county office, receives the certificate of election, and thereafter a contest is filed against him and determined in his favor by the trial court, is brought to this court by writ of error and reversed, say, two years thereafter, and he is held not entitled to the office, although, acting in the best of faith, he performs the duties during this entire period on the strength of the certificate of election and judgment of the trial court, nevertheless he is liable to the de jure officer for the entire amount of the salary or fees earned, and this regardless of the damage to the other person, and even though the de jure officer, during the entire time, was getting a salary elsewhere greater than he would have received had he held the office. To bring the facts within this case: The record discloses that Mr. Drach was regularly appointed on January 6, 1914, to fill a vacancy in the office of state bank commissioner, which appointment was approved by the senate; that he qualified and continuously performed the duties until July 5, 1916. It is not claimed that he was not acting in the best of faith in assuming that the Civil Service Law entitled him to the office, or that in any event he was entitled to hold under his appointment until the first Wednesday of April, 1916, as set forth in the quo warranto action. It is also conceded that he was acting under the advice of able counsel. In addition, this court, or at least some of its members, expressed a question concerning the correctness of this judgment, which is evidenced by granting him a supersedeas; yet, regardless of all this, the ruling is to the effect that the warrants are not to be issued to him, although he performed the services, but are to be issued to Mr. McFerson, who, it is conceded, did not perform the services, without any credit being given to Mr. Drach for their performance, and in a mandamus action between Mr. Drach and the auditor wherein Mr. Drach was given no opportunity to show anything in mitigation of Mr. McFerson's damages. Is it not proper to assume that one possessed of the ability of either of these gentlemen along banking lines has more than an average earning capacity? Our statute requires a bank examiner to give his time to the performance of the duties of the office, and who can say,

when the question was not allowed to be litigated, what Mr. McFerson earned during this period, or that he may not have been earning a salary greater than what he would have received from the state had he devoted this time to the office? If such is the case, or in case he received any compensation for any part of his time during said period, in equity and good conscience ought not such fact to be taken into consideration in an adjustment of the matter between them?

Under my assumption that Mr. McFerson had an earning capacity during this period, and that he used it for at least a part of this time, or, if he did not, he ought to, is it fair, just, right, or equitable to allow Mr. Drach nothing for the services rendered, and thereby place Mr. McFerson in a better position financially than he would have been had he held the office? I do not think so, and cannot agree that this arbitrary declaration is supported by all the well-reasoned authorities. In *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52, the court followed the English rule in holding that the person entitled to the office has a property right in it in the nature of a franchise. but, when it came to a question of fees during the period it was held by the de facto officer in good faith, it declined to follow the English doctrine by recognizing that the equities of the parties were entitled to be taken into consideration. In passing upon this phase of the case, at page 433 of 53 Ill., the court said: "Inasmuch, however, as appellee obtained the certificate of election and a commission was issued to him, he was acting in apparent right, and, so far as this record discloses, he resorted to no fraudulent or improper means to produce that result; he does not occupy the position he would, had he resorted to such a course. He should only be required to account for the fees and emoluments of the office received by him, after deducting reasonable expenses in earning them. This being an equitable action, it should be governed, in this respect, by the same rules that would obtain had this been a bill for an account instead of an action for money had and received. He should have only a reasonable allowance for the necessary expense."

This principle is recognized in *Board of Auditors v. Benoit*, 20 Mich. 176, 4 Am. Rep. 382. The same rule is laid down in *Havird v. Boise County*, 2 Idaho, 687, 24 Pac. 542; *Sandoval v. Albright*, 14 N. M. 345, 93 Pac. 717; and *Bier v. Gorrell*, 30 W. Va. 95, 8 Am. St. Rep. 17, 3 S. E. 30. While these cases involved fees, and not salaries, in my opinion there is no difference in principle between the two. In this

respect, I agree with the supreme court of Washington in *Samuels v. Harrington*, 43 Wash. 603, at page 605, 117 Am. St. Rep. 1075, 86 Pac. at page 1072, wherein, in passing upon this question, the court says: "On principle there can be no difference between the fees of an office and the salary of an office with respect to the property rights of the officer *de jure* therein. If the right to an office carries with it a property right in the salary of the office, so does the right to the office carry with it a property right in the fees of the office, and the payment of the one to an officer *de facto* is no more a wrongful payment than is the payment of the other."

Inasmuch as my views are in the minority, I have not felt justified in giving to the damage phase of this question the time I otherwise would. As at present advised, I am of opinion that an office in Colorado is not a franchise or property right, but that the person duly elected or regularly appointed has a legal right to possession of such office, which includes the opportunity of earning and receiving its fees or salary, and that he has a cause of action against anyone who prevents him from so doing, and that the measure of the damages, when applied to a case of this kind, should be the amount actually sustained, not exceeding the maximum amount of the salary, and that the proof should be the same as in any other case where a person has a contract of employment for a certain term and is ready and willing to perform, yet is unlawfully kept from doing so; this to include, as in other cases, the showing of seeking other employment, the success, if any, in so doing, the result and the deduction in damages, if any, as the result of such other employment. This would be fair and equitable, and would not tend to prohibit a timid person, or one who lacks finances from honestly and in good faith asserting his right to an office given him by a certificate of election or by the judgment of a trial court, for fear of the heavy penalty to follow, per the rule announced by the majority, should the contest against him be ultimately sustained.

I appreciate that my views on this phase of the case are not in apparent harmony with *People ex rel. Benoit v. Miller*, 24 Mich. 458, 9 Am. Rep. 131, and *Comstock v. Grand Rapids*, 40 Mich. 397; however, I cannot agree with the reasoning in the first of these cases upon which both are based. Of course, if this reasoning announced in 1872, which is to the effect that a public office is intended as a sinecure, that there are very few duties which cannot be performed by deputies to be paid by the county outside of the incumbent's

salary, and that the salary is not dependent upon the work, and that the office does not require the personal services of the incumbent, and that he would not forfeit it or the salary by having the bulk or all of his duties performed by deputies and paid therefor by the county, is sound, and if an office is to be likened unto a pedestal upon which a person is to be elevated with the salary as a gift or donation by the people for the privilege of being allowed to elevate the incumbent to the office, then I might be compelled to concede that one would be entitled to all the salary, although earned by another; but such is not the case here. Per our statute, this office calls for the time and individual attention of the appointee; besides, according to former rulings of this court, there is nothing specially sacred about an office of this kind. It can be abolished, and the salary discontinued. In such case, as I view it, there is no reason for a rule which fixes the measure of damages any different concerning compensation for the performance of its duties than applies to any other case where one is unlawfully prevented from performing certain services which he has the right to perform and to receive the compensation therefor.

#### Teller, J., dissenting:

I cannot agree with the majority opinion that the question presented on this record has, in principle, been determined in this state. It is, in my judgment, a case of first impression, and should be decided on sound principle. By which statement I eliminate all precedents which are not founded on established legal principles, or which do not follow cases so founded.

A considerable part of the majority opinion is devoted to cases which hold that a *de jure* officer may recover from a *de facto* officer fees or salary which he has received, though that is not the question here presented.

This cause involves only the right to the salary of an office by one who has in good faith, and under color of right, discharged for a time the duties of such office. It may be said, of course, that if a *de facto* officer cannot retain the salary paid him, it results that he had no right to it in the first instance. The cases on that point may, then, fairly be open for consideration in this case.

It is not to be questioned that the great majority of cases in which the right of a *de jure* officer to the salary was in issue support the majority opinion. My objection to following them is that they are based, either directly or indirectly, on English cases which do not apply in this coun-

try, or on an erroneous view of the ground on which the right is claimed.

In England public offices are incorporeal hereditaments, the subject of grant, and the holder has an estate in them to him and his heirs, for life, for a term of years, or at pleasure. 2 Bl. Com. 36. In other words, an office is property. From that fact it follows that one entitled to an office is entitled to the emoluments thereof, even though he does not have possession of it, as fully as the owner of land of which he has been wrongfully dispossessed is entitled to the rents and profits of it. Many American cases announce this doctrine, regardless of the facts which make it inapplicable here.

In this country a public office is an agency for public purposes, and cannot be sold or transmitted to heirs. It is not a matter of grant or of contract, and is in no sense property. The majority opinion concedes this, and then proceeds to cite and approve a line of cases based wholly on the English doctrine to the contrary. Take away the common-law ground of the rule which is announced in the majority opinion, that "the emoluments follow and are inseparable from, the legal title," and there is nothing to support it.

The salary is no part of the office, as has been many times held, and the very word contradicts the assertion that it belongs to the holder of the title to an office, regardless of services. Salary is compensation for services rendered, and has no similarity to income and rents from property. It does not grow out of the office, but is attached to it upon a condition implied that the officer will perform the duties of his office. Under the Constitution of this state (article 12, § 2) no person can hold a public office "without devoting his personal attention to the duties of the same." If an office cannot be held without a discharge of its duties, how can any right to the salary of it accrue to anyone who has not discharged those duties? Before one entitled to an office has qualified and entered upon its duties, he has only the right to obtain possession of it and earn the salary.

The rights of a *de jure* officer are thus defined in *Nichols v. McLean*, 101 N. Y. 526, 54 Am. Rep. 730, 5 N. E. 347, and that is the only reasonable definition that can be given. If one has no property in an office, he can derive pecuniary benefit therefrom only by doing something to earn it. This, however, is not to say that a *de jure* officer may not have a right to damages because excluded from the office and the opportunity to earn the salary. That rests upon other grounds.

The opinion rightly limits the decisions in this state to the rule that a *de facto* officer, while still in office may recover his salary from the state, but fails to note that such rule is in conflict with many of the cases cited, which hold that to recover from the state the officer must establish his title as a basis of his right. So far as our cases throw any light upon this question, it would seem that they are against the conclusion of the majority opinion, since they recognize a right to compensation as resulting from possession and services in the office. Expressions not called for by the facts in those cases cannot be regarded as controlling.

This case well illustrates the danger of following precedents without considering the grounds upon which they are based. The majority opinion quotes at length from *People ex rel. Morton v. Tieman*, 30 Barb. 193, a case determined by a single judge at nisi prius on an application for a mandamus. The matter quoted is pure dictum, since the office which the relator claimed to have exercised was found by the court to have been abolished by statute prior to the time of the alleged incumbency. It may be said in passing that this also was the ground for the decision by this court in the case of *Arnold v. Hiltz*, cited in the majority opinion; that is, that the office had been abolished. This New York case is also the basis of the decision in *People ex rel. Dorsey v. Smyth*, 28 Cal. 21, which is itself the foundation of a line of decisions in that state and of other states. On such worthless foundation does the rule rest.

The next case from which quotation is made is *Bier v. Gorrell*, 30 W. Va. 35, 8 Am. St. Rep. 17, 3 S. E. 30, an action for damages against a *de facto* officer. This case cites as authority *Boyter v. Dodsworth*, 6 T. R. 681, 101 Eng. Reprint. 770, 3 Revised Rep. 315; *Board of Auditors v. Benoit*, 20 Mich. 176, 4 Am. Rep. 382, and *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52. The English case involved an office held by patent, to which no fees were attached, and the right of recovery by the patentee was denied. Lord Kenyon there said: "With regard to natural justice, the person who performs the duty is in justice entitled to the money given for such duty. Here the defendant in fact performed the services, and on principles of natural justice he is entitled to the reward."

In the Michigan case the court, after citing with approval *Smith v. New York*, 37 N. Y. 518, and pointing out that an office is not one of contract relation, said: "There can be no consistent theory, except that which regards official rewards as the



recompense for actual or implied official work. Nor would it be possible in most cases to have the work done without some certainty of pay for it. An officer is not to be expected to work for nothing so long as it may please his enemies to assume to doubt his title. . . . The laws assume that the laborer is worthy of his hire, and the person who is required to be recognized for the time being as the legal incumbent for the purposes of doing the work should be recognized for . . . remuneration also, so far as those are concerned with whom he deals officially, and who have no personal interest in the contest for the office."

In the New York case above mentioned it is said: "An office in this country is not property nor are the prospective fees of an office the property of the incumbent. *Conner v. New York*, 5 N. Y. 285. The incumbent cannot sell his office, or purchase it or encumber it. It will not pass by an assignment of all his property, nor will such an assignment affect his right to prospective fees. *Ibid.*, and cases cited. . . . The same authority holds, and it is conceded by the appellants here, that the right to fees or compensation does not grow out of any contract between the government and the officer, but arises from the rendition of the services [citing cases]. An office is simply an appointment or authority on behalf of the government to perform certain duties, usually at and for a certain compensation. . . . There can be neither property or contract in such a subject. It is but a deputation for the benefit and advantage of the government."

It was accordingly held that, since the plaintiff had no contract with the city, he had no right of recovery.

The Illinois decision is founded upon the English doctrine above discussed, quotes from Blackstone the definition of an office above given, and says: "The fees of an office are incident to it as fully as are the rents and profits of land or the increase of cattle"—a statement impossible of acceptance without holding that an office is property.

An examination of the large number of cases cited in support of the majority opinion discloses the fact that a great majority of them follow the English precedents regardless of their inapplicability under the conditions in this country. The rest of the cases are based upon the proposition that the principle which renders the acts of a *de facto* officer valid, as concerning the public and third parties, does not apply when he is claiming something for himself. If by this is meant that he cannot rely upon the principle when, for his own benefit, he

asserts that some particular official act performed by him is valid because done while he was a *de facto* officer, there is no reason to question it. The right of a *de facto* officer to recover for his services does not, however, depend in the least degree upon the validity of his acts. The claim is for compensation for public services which are valid on grounds of public policy. He is making no claim upon any specific act whose validity is open to question. The right of a *de facto* officer to such compensation has been recognized many times, as is shown by quotations heretofore made, and it has often been judicially recognized that until one has performed the duties of an office he cannot recover the salary thereof.

In *Steubenville v. Culp*, 38 Ohio St. 18, 43 Am. Rep. 417, the court held that an officer, while wrongfully suspended, cannot recover salary, "for the reason that salary and perquisites are the reward of express or implied services, and therefore cannot belong to one who could not lawfully perform such services,"—citing *Smith v. New York*, *supra*.

The court adds: "Offices are held, in this country, neither by grant nor contract, nor has any person a vested interest or private right or property in them."

This case repudiates the English rule, because it recognizes that it does not apply here, and it also recognizes that salary results only from services, and not from title.

In *Jayne v. Drorbaugh*, 63 Iowa, 711, 17 N. W. 433, a state in which the English rule is adopted, and based upon English cases, it is recognized that a salary does not necessarily go with the title. The court said: "The right to compensation depends upon the performance of the duties, or at least there must be possession of the office in fact, as distinguished from the mere right of possession."

In *Farrell v. Bridgeport*, 45 Conn. 191, the court said that, as a rule, those only are entitled to salary who both obtain and exercise their offices, and that payment follows the actual discharge of the duties.

In *McAffee v. Russell*, 29 Miss. 84, it is said that a claimant having rendered no services has no right to compensation.

The majority opinion finds the dissenting opinion of the chief justice in the New Jersey case (*Stuhr v. Curran*) very persuasive, regardless of the fact that it is avowedly based on English cases, which, as has been pointed out, cannot be authority on the question in this country. The chief justice says: "These English adjudications are entirely uniform, and run through three or four centuries."

In many of the cases which form the

basis of the rule adopted in the majority opinion, it is held that one who holds an office to which he knows he has no title has no right to compensation, which must be conceded; but these cases are used as authority in cases in which it cannot be said that there is such knowledge, either actual or presumed.

The holder of an election certificate is not presumed to know the facts upon which his right to it rests, yet the rule is applied to such cases, as if he were wilfully usurping the office. The injustice of so doing is recognized in Michigan, though the English rule has been adopted there (*People ex rel. Benoit v. Miller*, 24 Mich. 459, 9 Am. Rep. 131), in *Scott v. Crump*, 106 Mich. 288, 58 Am. St. Rep. 478, 64 N. W. 1, where it is held that an officer with a certificate of election is not an intruder or usurper, so that his salary could be denied him. My objection is that a correct rule for some cases is made general, and applied to other cases when there is no reason for its application.

Neither is it just to assume that an officer holding over, or claiming to have been appointed, under circumstances in which there is fair ground for his action, knows or should be presumed to know that he has no title. This is illustrated in the instant case. The bank commissioner is a bonded officer whose duties include the winding up of insolvent banks and the performance of other important duties, and the public interest requires him to withhold the office from any demandant of whose right there is any doubt. A legal presumption is not indulged in to the injury of anyone unless it be necessary to the advancing of justice, and there is here no ground for presuming that plaintiff in error knew that he had no title to the office. The hypothesis in this case is that the claim to the office is made in good faith, and that eliminates many of the cases whose basis is the bad faith of claimant.

In *Stuhr v. Curran*, supra, the New Jersey court recognized that the common-law cases were not authority, and made clear the propriety of *Stuhr's* action, the injustice of denying him compensation, and the evil results of a rule which denies to an incumbent in good faith all right to compensation, if another subsequently establishes title to the office. It shows that the evils suggested in some cases, growing out of an allowance of fees to a *de facto* officer, are fairly offset by the dangers resulting from the contrary rule.

One of the grounds which has been given for holding a *de facto* officer entitled to recover for his services is that the public interest requires that the duties of an office

be discharged; but, if an incumbent is subjected to the risk that, after having held the office in good faith, the compensation is going to another who has done nothing whatever, there would be little encouragement for a man to perform official duties in case of a dispute as to the right to the office.

If the right to compensation grows out of the title, regardless of everything else, it results that an officer *de jure* might with profit permit an officer *de facto* to perform the duties of the office. The former might engage in profitable business during the entire term, and be entitled to the salary in addition, while the other in good faith will have been acting in his official place.

This majority opinion calls attention to *Gaskill v. Atlantic City*, 89 N. J. L. 203, 98 Atl. 385, the facts in which it says "are quite like those here involved," holding that a *de facto* officer could not recover from the state. That case is not in conflict with *Stuhr v. Curran*, nor does it support the majority opinion in this case. The facts are radically different. The ground of the decision, as stated by the court, was that "an unauthorized person who gains possession of a public office by force, and with full knowledge that his title thereto is disputed by the lawful incumbent, has no right of action against the public for the prescribed salary during such usurpation."

If it is true, as the opinion states, that "emoluments follow, and are inseparable from, the legal title," how can the state refuse salary to the *de jure* officer on the ground that it has paid a *de facto* officer? If the right to salary is vested in the holder of the title, it cannot be divested by payment to anyone else. It follows that our decisions repudiate the doctrine stated in this opinion and just quoted.

A public officer is an agent of the state, and his acts within the sphere of his official duties are valid upon the same basic principle as that upon which the acts of agents within the apparent scope of their authority are held binding upon their principals. The reasons which relieve the public from inquiry as to the title of *de facto* officers do not apply in the case of a demand of the state for salary. The principal must be presumed to know whether or not one acting as his agent has right to do so, if that question is in issue. Moreover, the state has the means, and may take the time, to determine the question, the absence of which circumstances on the part of individuals is the principal ground of holding acts valid as to them. It has been said that "the *de facto* doctrine is one of those legal makeshifts by which unlawful or irregular corporate and public

acts are legalized for certain purposes on the score of necessity." *Re Ringler & Co.* 204 N. Y. 30, 97 N. E. 593, Ann. Cas. 1913C, 1036.

Obviously there is no necessity for applying it in an action against the state for salary or fees. Therefore the only logical basis for paying salary to one in office, without determining his title, is that he has discharged the duties of the office. This is recognized in *El Paso County v. Rohde*, 41 Colo. 258, 16 L.R.A. (N.S.) 794, 124 Am. St. Rep. 134, 95 Pac. 551, where the court gives as the reason for holding that the de jure officer could not recover from the county the fees allowed to the de facto officer, that "the people cannot be compelled to pay twice for the same services." Certainly there is here no recognition of any right to compensation without services, and merely because of title to office. Hence our cases sustain the principle

for which I am now contending, and which many courts have recognized, as above shown.

I can conceive of no ground of public policy upon which, of two claimants for an office, the one who has in good faith and with reasonable basis for his claim discharged the duties of the office should be denied compensation, and it be given to the other, who has done nothing. In every case, the question of good faith may be determined in an action by the de jure officer against the de facto officer for damages. A rule of law which punishes the innocent as well as the guilty, when the cases are easily distinguishable, ought not to be adopted, and this is especially true when the rule has no real foundation in either reason or authority.

The judgment should be reversed.

Petition for rehearing denied May 6, 1918.

### Annotation—Right of de facto officer to salary of office.

The present annotation supplements that to *Peterson v. Benson*, 32 L.R.A. (N. S.) 949, wherein the principles and rules governing this class of cases are set out and discussed at some length.

The effect of payment made to a de facto officer as a defense to an action for salary by a de jure officer is considered in the notes to *State ex rel. Greeley County v. Milne*, 19 L.R.A. 689; *El Paso County v. Rhode*, 16 L.R.A. (N.S.) 794; *Stearns v. Sims*, 24 L.R.A. (N.S.) 475; and *People ex rel. Sartison v. Schmidt*, L.R.A. 1918C, 373.

The general rule that an officer de facto cannot maintain an action for the salary of an office the duties of which he has performed, because the salary incident to an office can be claimed only by one who can prove his legal title to such office, and because when an action for salary is brought the title is in issue and must be established,—is supported by the following recent decisions: *Re Pringle* (1915) 22 Haw. 557; *Ducharme v. Biddeford* (1912) 110 Me. 6, 85 Atl. 157; *Flick's Case* (1912) 49 Pa. Super. Ct. 402; *Hannigan v. McLeod* (1915) 48 N. S. 340, 21 D. L. R. 509. And see *Kalakiela v. Bicknell* (1914) 22 Haw. 216, and *People ex rel. Dinneen v. Bradford* (1915) 267 Ill. 486, 108 N. E. 732.

Another form of this rule is that the compensation annexed to a public office is incident to the title to the office, and not to the occupation and exercise of the functions thereof, so that no recovery can be had for the discharge of the du-

ties of an office by a de facto officer. *Northrup v. United States* (1909) 45 Ct. Cl. (Fed.) 50; *Anderson v. Lewis* (1915) 29 Cal. App. 24, 154 Pac. 287; *Legerton v. Chambers* (1917) 32 Cal. App. 601, 163 Pac. 678; *Norton v. Lewis* (1917) 34 Cal. App. 621, 168 Pac. 388. And see *Edwards v. Kirkwood* (1912) 162 Mo. App. 576, 142 S. W. 1109.

And that, in cases unaffected by statutory provision, a de facto officer is not entitled to the salary of an office of which he is in exclusive possession and the duties of which he has performed, especially where there is a de jure claimant, is the rule laid down in *Bannerman v. Boyle* (1911) 160 Cal. 197, 116 Pac. 732.

And in *Gaskill v. Atlantic City* (1916) 89 N. J. L. 269, 98 Atl. 385, it was held that an unauthorized person who gains possession of a public office by force and with full knowledge that his title thereto is disputed by the lawful incumbent cannot recover the prescribed salary during such usurpation.

The view that a de facto officer who has in good faith performed the duties pertaining to the office is entitled to the salary of the office where there is no de jure claimant is directly supported by the following cases in addition to those cited in the earlier note: *Elledge v. Wharton* (1911) 89 S. C. 113, 71 S. E. 657, wherein the court distinguished the case from those where other persons claim or have a right to claim the salary in question; *Uhr v. Brown* (1916)

— **Tex. Civ. App.** —, 191 S. W. 379; *State ex rel. Elliott v. Kelly* (1913) 154 **Wis.** 482, 143 N. W. 153, holding that such is the better rule, especially where the employing medium is willing to pay the salary and the only objector is the ministerial officer having charge of the execution of a warrant therefor; and *State ex rel. Kleinstaub v. Kotecki* (1913) 155 **Wis.** 66, 144 N. W. 200, laying down the rule without qualification. And see dictum in *Stewart v. Hutchings* (1817) **Newfoundl. Sel. Cas.** 68. And in *Colorado a de facto officer may recover the salary of an office the duties of which he has performed down to the time of a decree that another was a de jure officer; but in such a case he is liable over to the de jure officer even though the latter has performed none of the duties of the office.* **DRACH v. LECKENBY**, ante, 576. And see *State ex rel. Evans v. Gordon* (1912) 245 **Mo.** 12, 149 S. W. 638. But under this rule a de facto officer who has performed the duties of an office cannot recover the salary of the office after another has been decreed to be the de jure officer. **DRACH v. LECKENBY**. And it has been held that to entitle the usurper of an office to the salary thereof, he must at least have had color of title, even though he performed

the duties of the office and there was no de jure claimant. *Russell v. Lyon* (1911) 90 **S. C.** 5, 72 S. E. 496.

In California, under §§ 936, 937 of the Political Code, a person who has the regular evidence of title (such as a certificate of election or a commission) to an office which is in fact contested, and who performs the duties thereof, has the same right that he would have if there were no contest; but if the office is held and its duties performed during the contest by one who does not have the regular evidence of title, the salary is withheld during the period thereof. *Bannermann v. Boyle* (**Cal.**) supra. And that the same is true under the Missouri Act of February 21, 1873 (*Rev. Stat.* 1909, § 11,830), see *State ex rel. Vail v. Clark* (1873) 52 **Mo.** 508, and *State ex rel. Evans v. Gordon* (1912) 245 **Mo.** 12, 149 S. W. 638. Statutes of this character do not apply where there is no contest of the title to the office (*Bannermann v. Boyle* (**Cal.**) supra; *Norton v. Lewis* (1917) 34 **Cal. App.** 621, 168 **Pac.** 388; *State ex rel. Vail v. Clark* (**Mo.**) supra), but of course do apply and control pending an actual contest (*State ex rel. Evans v. Gordon* (**Mo.**) supra).

G. J. C.

## UTAH SUPREME COURT.

JAMES WILLIAMSON, Respt.,

v.

SALT LAKE & OGDEN RAILWAY COMPANY, Appt.

(—Utah, —, 172 **Pac.** 680.)

### Trial — question for jury — negligence.

1. The question of the carrier's negligence rendering it liable for injury to a passenger is for the jury and not the court where there is substantial evidence of negligence on its part and that it is the proximate cause of the injury.

For other cases, see *Trial*, II. c, 8, b, (1), in *Dig. 1-52 N. S.*

### Evidence — sudden starting of train — effect.

2. While the sudden starting of a train to the injury of a passenger attempting to

board it authorizes the jury to infer negligence on the part of the carrier which will render it liable for the injury, it does not raise an inference of negligence which will require a finding against the carrier unless it overcomes such inference.

For other cases, see *Evidence*, II. h, 1, b, (1), in *Dig. 1-52 N. S.*

(April 16, 1918.)

**A**PPPEAL by defendant from a judgment of the District Court for Weber County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Boyd, De Vine, Eccles, & Woolley, for appellant:

When a passenger is injured after he is upon the car by reason of the jerking or

**Note.**—The presumption of negligence from the sudden starting of a car injuring a passenger is treated at page 611 of the note in 13 **L.R.A.(N.S.)** 601; page 814 of the note in 29 **L.R.A.(N.S.)** 808; and page 373 of the note in **L.R.A.1916C**, 364, treating generally of the presumption of negligence from an injury to a passenger. And see later case as to presumption of negli-

**L.R.A.1918F.**

gence from sudden starting of car. *United R. & Electric Co. v. Phillips*, **L.R.A.1917C**, 384.

As to the relation of the doctrine of *res ipsa loquitur* to the burden of proof, see notes to *Cleveland, C. C. & St. L. R. Co. v. Hadley*, 16 **L.R.A.(N.S.)** 527, and *Hughes v. Atlantic City & S. R. Co.* **L.R.A.1916A**, 929.

sudden movement of the train, before the carrier can be held liable in damages it must be established that the jerking or movement was unusually sudden, extraordinary, or violent, or done in a negligent manner, or due to some defect in equipment or appliances under the control of the defendant.

McGann v. Boston Elev. R. Co. 199 Mass. 446, 18 L.R.A.(N.S.) 506, 127 Am. St. Rep. 509, 85 N. E. 570; Foley v. Boston & M. R. Co. 193 Mass. 332, 7 L.R.A.(N.S.) 1076, 79 N. E. 765; Byron v. Lynn & B. R. Co. 177 Mass. 303, 58 N. E. 1015; Martin v. Boston Elev. R. Co. 216 Mass. 361, 103 N. E. 828; Benoit v. Boston & N. Street R. Co. 216 Mass. 320, 103 N. E. 830; Saunders v. Boston Elev. R. Co. 216 Mass. 355, 103 N. E. 779; Boston Elev. R. Co. v. Smith, 23 L.R.A.(N.S.) 890, 94 C. C. A. 84, 168 Fed. 628; Fitch v. Mason City & C. L. Traction Co. 124 Iowa, 665, 100 N. W. 618; Hite v. Metropolitan Street R. Co. 130 Mo. 132, 51 Am. St. Rep. 555, 31 S. W. 262, 32 S. W. 33; Pryor v. Metropolitan Street R. Co. 85 Mo. App. 367; Bartley v. Metropolitan Street R. Co. 148 Mo. 124, 49 S. W. 840, 5 Am. Neg. Rep. 635; Adams v. Washington & G. R. Co. 9 App. D. C. 26, 9 Am. Neg. Cas. 163; Johnson v. Interurban Street R. Co. 88 N. Y. Supp. 866; Jacksonville Street R. Co. v. Chappell, 21 Fla. 175, 2 Am. Neg. Cas. 340; Saunders v. Chicago & N. W. R. Co. 6 S. D. 40, 60 N. W. 148.

The mere sudden starting of a car after a passenger has gotten on board and is on the steps is not sufficient to justify the application of the doctrine of *res ipsa loquitur*.

Christensen v. Oregon Short Line R. Co. 35 Utah, 137, 20 L.R.A.(N.S.) 255, 99 Pac. 676, 18 Ann. Cas. 1159, 1 N. C. C. A. 232; Connell v. Oregon Short Line R. Co. — Utah, —, 168 Pac. 337; Sweeney v. Erving, 228 U. S. 233, 57 L. ed. 815, 33 Sup. Ct. Rep. 416, Ann. Cas. 1914D, 905; Hughes v. Atlantic City & S. R. Co. 85 N. J. L. 212, L.R.A.1016A, 927, 89 Atl. 769.

Mr. J. G. Willis for defendant.

Frick, Ch. J., delivered the opinion of the court:

Plaintiff commenced this action on the 8th day of March, 1916, to recover damages for personal injuries which he alleged he received through the negligence of the defendant on June 14, 1912. In his complaint he alleges that he was injured while attempting to board one of defendant's passenger trains at Clinton, a station some distance south of Ogden city. The acts of negligence relied on are alleged as follows: "That while plaintiff was such passenger, and in the act of boarding said train at said station of Clinton, and while

he was upon the lower step of the rear platform of said car, the said car was, through the negligence of defendant, suddenly started and put into quick motion, without allowing plaintiff sufficient, or any, time to safely get upon said car; and in consequence thereof, and of the negligence of the servants of defendant conducting and operating said car, plaintiff was violently thrown against the rear end of the platform of said car, whereby he sustained great and permanent injuries, as follows.

The alleged injuries are then described, and plaintiff adds a prayer for judgment.

The defendant, upon the ground of want of knowledge or information, denied that plaintiff was a passenger on defendant's train: that he was injured as alleged, or at all. As an affirmative defense, defendant averred that, if plaintiff was injured as alleged, such injury was caused wholly and solely through his own negligence, etc.

Upon those issues the case was tried, and at the conclusion of the evidence the defendant requested the court to direct the jury to return a verdict in its favor, for the reasons (1) that the evidence is insufficient to justify a finding of negligence on the part of the defendant; (2) that the alleged injuries were caused through plaintiff's own negligence and want of ordinary care; and (3) that the evidence shows that the alleged injuries were caused by some cause other than the alleged accident.

The court refused to so charge, but submitted the cause to the jury upon the evidence, and six out of eight jurors impaneled returned a verdict in favor of the plaintiff. Judgment was duly entered upon the verdict, and the defendant appeals.

While many errors are assigned, yet counsel in their brief have argued but two.

Counsel insist that the court erred in refusing the request to direct a verdict in favor of the defendant for the reasons before stated. The plaintiff was the only witness produced who seemed to know anything concerning the happening of the accident. While the conductor and brakeman in charge of the train on the day of the alleged accident were called by the defendant, neither of them knew anything of the happening of the accident, and neither of them knew the plaintiff, or that he was a passenger on the train at the time in question. No other witness was called who either saw or knew anything about the accident. The plaintiff, who was a plumber engaged in that work, in substance testified that at about twenty minutes before 5 o'clock on the afternoon of the 14th day of June, 1912, and while he was on the steps of one of the cars of de-

defendant's train, and while attempting to board the train carrying his plumbing tools, the train was suddenly started, and he was injured.

In answer to his counsel's questions he described the accident as follows:

Well, when the train came into the depot I was standing there and they stopped; and while I was in the act of getting on the train, I picked up my tools off the ground, put them on my shoulder, and put my gasoline furnace on my arm like that, and this hand grasped the—

Q. Which hand is that?

A. Left had grasped the handrail, and just as I was taking a step up,—I had stepped up on the right foot first,—and just as I was taking the step up, before my left foot got on the step, the car started off with a jerk.

The witness said he was thrown against a ledge at the end of the car, and that he thereby injured his hip, etc.

The plaintiff, although he alleged he was injured in the manner aforesaid on June 14, 1912, nevertheless made no claim of any kind against the railroad company until the 22d day of November, 1915, and thereafter brought this action, as before stated.

Counsel insist that the evidence is insufficient to justify a finding of negligence on the part of the defendant. While it is true that the evidence of negligence in some respects is not strong, yet, in view of the high degree of care that a common carrier owes to his passenger, we are not prepared to say that there was no substantial evidence of the negligence produced by the plaintiff. If there is any substantial evidence of negligence on the part of the defendant, and that such negligence was the proximate cause of the injury complained of, then the question is one of fact for the jury, and not one of law for the court. While there are a number of circumstances in this case, which we need not pause to state here, from which the jury might have found the facts in favor of the defendant, yet the effect that should be given to such circumstances was purely a question to be determined by the jury. It follows, therefore, that the district court did not err in refusing to direct the jury to return a verdict for the defendant, and in submitting the case to the jury.

It is, however, also insisted that the court erred in charging the jury. The court charged the jury as follows: "The mere fact, if you find it to be a fact, that plaintiff was injured at the time and place men-

tioned, does not justify an inference either that the plaintiff was negligent or the defendant was negligent; yet if you believe from a preponderance of the evidence that plaintiff boarded the car at Clinton, having a mileage ticket with which to pay his fare and intending to take passage therein, and while in the act of getting on the car he was injured by the sudden starting of the car, the sudden starting of the car under such circumstances raises an inference of negligence on the part of the defendant, though not a conclusive one, and the law casts upon the defendant the burden of showing that such starting was not caused by the negligence of the defendant or its servants in control of the car, or that plaintiff was negligent and his negligence was a proximate cause of or contributed to his injury. Nevertheless, whether or not the defendant was negligent, and whether or not the plaintiff was negligent, are questions of fact to be determined by you from all the evidence in the case, and in the light of these instructions as to the law applicable thereto." (Italics ours.)

Counsel excepted to the charge, and especially to that portion which is given in italics. It will be observed that in the instruction excepted to the district court informed the jury respecting the effect of the maxim *res ipsa loquitur*. While expressions similar to those used by the court in the instruction are often met with in the written opinions of the courts, yet it is not always safe to charge a jury in the precise language used by the justices in writing opinions. Opinions are not intended as instructions to laymen or jurors, but they are intended for judges and lawyers, who are learned in the law. It will be observed that the court told the jury in express terms that the "sudden starting of the car . . . raises an inference of negligence on the part of the defendant. . . . and the law casts upon the defendant the burden of showing that such starting was not caused by the negligence of the defendant." The jurors were thus informed in positive terms that the sudden starting of the car raised an inference of negligence, and that the burden was cast on the defendant to explain away or to dissipate such inference. The natural and obvious meaning of the language of the instruction is, and a jury of laymen, we think, would so understand it, that from the sudden starting of the car an inference or presumption of negligence necessarily arose, and that, unless the defendant produced evidence to explain the sudden starting of the car, the plaintiff was entitled to a verdict as a matter of course. In other words, if the jury believed the car

was suddenly started, it then became their duty to infer negligence. If, therefore, the agents and servants of the defendant (which is a corporation, and can and does know and act only by and through its agents and servants) knew nothing about the happening of the alleged accident and the sudden starting of the car, and for that reason could not explain why the car was started, as claimed by plaintiff, the jury, under the instruction, would assume that only one result was permissible, and that was to return a verdict for the plaintiff. Much has been said and written concerning the effect of the doctrine of *res ipsa loquitur*, and when it is applicable. The clearest statement concerning the effect of that doctrine that the writer has seen is found in the somewhat recent case of *Sweeney v. Erving*, 228 U. S. at page 240, 57 L. ed. 818, 33 Sup. Ct. Rep. 418, Ann. Cas. 1914D, 905, where the Supreme Court of the United States, speaking through Mr. Justice Pitney, states what is meant by the doctrine, in the following words: "In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff.

"Such, we think, is the view generally taken of the matter in well-considered judicial opinions." (Italics ours.)

In the foregoing statement the distinction between the court charge in the case at bar, and what a charge in a case where the doctrine is applicable should be, is clearly and admirably stated.

In addition to the foregoing, other well-considered statements of the doctrine and its application are found in 4 Words & Phrases, 2d Series, 318, where it is said: "The principle of *res ipsa loquitur* renders the question of negligence one for the jury, but does not relieve the plaintiff of the burden of proof. It does not raise any presumption in plaintiff's favor, but simply entitles the jury, in view of all the circumstances and conditions as shown by the plaintiff's evidence, to infer negligence, and to say whether, upon all the evidence, the plaintiff has sustained his allegation."

It is there further said: "The doctrine of *res ipsa loquitur* does not dispense with the rule that the person alleging negligence must prove it: but it is simply a mode of proving negligence, and does not change the burden of proof."

Numerous cases in support of the foregoing texts are cited, which we need not refer to here.

In the instruction in question the district court in effect told the jury that the sudden starting of the car "raises," that is, compels, an inference of negligence. That is not the law. The law is that, inasmuch as the train was under the exclusive management and control of the defendant's servants, the sudden starting of the car warranted or authorized the jury to infer or assume that the sudden starting was caused through the negligence of those who then managed and controlled the train, and not that such starting necessarily raised such an inference or presumption. In the case at bar, in view that the defendant was unable to explain the sudden starting of the car by reason that it knew nothing concerning the accident, the jury no doubt assumed that a finding of negligence necessarily followed as a matter of law. The sudden starting complained of merely authorized the jury to infer negligence, but did not require it to so find. The jury, without any evidence or explanation on the part of the defendant, were nevertheless, under the law, authorized to find that there was no negligence. The jury, therefore, should have been instructed that if they found the car was suddenly started, that fact, standing alone, would warrant or authorize an inference of negligence on the part of the defendant, and unless the sudden starting was explained by it the jury would be justified in returning a verdict for the plaintiff upon that issue.

Counsel for defendant, however, also contend that the doctrine of *res ipsa loquitur* had no application in this case. In this contention counsel are in error. Here the train, which was alleged to have been suddenly started "with a jerk," which, it is claimed, caused the injury, was under the exclusive management and control of the defendant. If, therefore, something unusual or extraordinary occurred in the operation and management of the train which resulted in injury to a passenger, the occurrence warranted, but did not compel, an inference that it was due to the negligence of the defendant, unless it was made to appear that the occurrence was due to some other cause than the one assumed or inferred, and for which the defendant was not responsible.

We desire to add that it does not necessarily follow that because similar language is sometimes used, or may be used, in a charge to the jury, that for that reason alone the judgment in a particular case would, under all circumstances, be reversed. It might well be that upon the whole record it would appear that no prejudice resulted notwithstanding the use of such language, and in such event the judgment would not be reversed. In view of the peculiar circumstances of this case, how-

ever, to which we have referred, we are not satisfied that no prejudice resulted from the giving of the instruction complained of, and hence, for the reason stated, the judgment is reversed, and the cause is remanded to the District Court of Weber county, with directions to grant a new trial. Appellant to recover costs.

McCarty, Corfman, Thurman, and Gideon, JJ., concur.

## OKLAHOMA CRIMINAL COURT OF APPEALS.

FRED SPENCER, Appt.,  
v.  
STATE OF OKLAHOMA.

(— Okla. Crim. Rep. —, 169 Pac. 270.)

### Indictment — adultery.

1. An information for open and notorious adultery which charges the offense on a single day is sufficient. It is not necessary to allege such offense with a *continuendo*. *For other cases, see Indictment, etc., II. e, 3, in Dig. 1-52 N. S.*

### Evidence — marriage — admissions.

2. Proof of admissions and declarations of the defendant is competent to prove marriage in a prosecution for adultery. *For other cases, see Evidence, X. c, in Dig. 1-52 N. S.*

### Evidence — sufficiency.

3. Evidence examined, and held sufficient to sustain a conviction for living in open and notorious adultery. *For other cases, see Evidence, XII. t, in Dig. 1-52 N. S.*

### Trial — instructions.

4. For instructions held to be a sufficient definition of open and notorious adultery, and not confusing or misleading, see body of opinion. *For other cases, see Trial, II. e, 5, in Dig. 1-52 N. S.*

### Same — refusal.

5. Requested instructions based upon the theory of the defense that the fact that defendant and the woman with whom he was living were not husband and wife, and that defendant was married to another woman, must have been known to the community generally during all the time the parties were living in an adulterous relation, before a conviction of open and notorious adultery could be had, held, properly refused. It is sufficient if the adulterous relationship became generally known among

the neighbors and acquaintances of the parties before it ceased and prior to the commencement of the prosecution. After that proof of a single day's continuance of the unlawful relationship is sufficient to sustain a conviction.

*For other cases, see Adultery; Trial, III. b, in Dig. 1-52 N. S.*

(June 16, 1917.)

**A**PPEAL by defendant from a judgment of the District Court for Kiowa County convicting him of living in open and notorious adultery. Affirmed.

The facts are stated in the opinion.

Messrs. Hays & Hughes for appellant.

Messrs. S. O. Freeling, Attorney General, and R. McMillan, Assistant Attorney General, for the State:

The information complies with the law of this state, and of other states with a similar statute.

Heacock v. State, 4 Okla. Crim. Rep. 607, 112 Pac. 949; Ex parte Cranford, 3 Okla. Crim. Rep. 191; 1 Cyc. 955.

The term "notorious" is sufficiently answered if the act is done in such a manner, or under such circumstances, as necessarily to become public or generally known in the neighborhood.

Grisham v. State, 2 Yerg. 589; State v. Cagle, 2 Humph. 414; Cole v. State, 6 Baxt. 243; Mynatt v. State, 8 Lea, 47; State v. Crowner, 56 Mo. 150; Harris v. State, 11 Okla. Crim. Rep. 273, 145 Pac. 759; Ex parte Burris, 10 Okla. Crim. Rep. 84, 133 Pac. 1139.

Where the case is made out so clearly as to preclude any possibility of a jury arriving at any verdict save the one in the instant case, and where there are no material errors, constitutional or statutory, the court will not reverse a cause.

Byers v. Territory, 1 Okla. Crim. Rep. 698, 100 Pac. 261, 103 Pac. 532; Fowler v. State, 8 Okla. Crim. Rep. 130, 126 Pac. 831; McRae v. State, 8 Okla. Crim. Rep. 483, 129 Pac. 71; Rogers v. State, 9 Okla. Crim. Rep. 277, 131 Pac. 941.

Headnotes by MATSON, J.

**Note.** — As to what is necessary to constitute open, notorious adultery, see annotation following this case, post, 595.

L.R.A.1918F.



Matson, J., delivered the opinion of the court:

It is first contended that the court erred in overruling the demurrer to the information. The charging part of the information is as follows: "That on the ——— day of October, A. D. 1914, at and within said county and within the jurisdiction of said court, one Fred Spencer, then and there being, did then and there unlawfully and feloniously live in open and notorious adultery and have sexual intercourse with one Mary Doe, whose real name to your informant is unknown, he, the said Fred Spencer, then and there being a married man and the husband of one Bessie Spencer, and not the husband of said Mary Doe, contrary," etc.

The ground relied upon by counsel for the appellant is that living in an open and notorious state of adultery being a continuing offense, it is necessary to allege the crime with a *continuendo*. We cannot agree with this contention. In the case of *Kitchens v. State*, 10 Okla. Crim. Rep. 603, 140 Pac. 619, this court said: "If the parties for a single day lived together in open and notorious adultery, the offense was complete."

Also in the case of *Lyman v. People*, 98 Ill. App. 386, affirmed in 198 Ill. 544, 64 N. E. 974, it was held: "An indictment for adultery which charges the offense on a single day is sufficient where the proof showed that the adulterous relation continued for a period of four weeks or longer."

It is also contended that the evidence is insufficient to prove that the appellant was married to some other woman than the one with whom he cohabited at the time of the commission of this offense. The only proof of his marriage is by admissions and declarations upon his part, together with the fact that, during the time the proof shows that he was living with one Mary Doe, or Ella Spencer, he admitted that he brought a divorce proceeding in Oklahoma City, Oklahoma, against another woman who was at that time residing in Chicago, Illinois. The notice of publication for service of summons in this divorce proceeding was also seen by several of the witnesses who testified. The first wife also appeared before the commencement of this prosecution, and in the presence of the defendant accused him of being her lawful husband, which fact did he not specifically deny. Also it appears that defendant had a property settlement with the Chicago woman at the time she was in Hobart. The case was not defended upon the theory that the appellant was not married to some other woman at the time of this alleged unlawful cohabitation. We have carefully examined the evidence along

this line, and it is our opinion that the proof is sufficient in view of the fact that there was no denial that the marital relation existed between the defendant and Bessie Spencer. Proof of admissions and declarations of the defendant is competent to establish such relationship. *Owens v. State*, 94 Ala. 97, 10 So. 669; *Cook v. State*, 11 Ga. 53, 56 Am. Dec. 410; *State v. Sanders*, 30 Iowa. 582; *State v. Libby*, 44 Me. 469, 69 Am. Dec. 115; *Com. v. Holt*, 121 Mass. 61; *State v. McDonald*, 25 Mo. 176; *Boger v. State*, 19 Tex. App. 91.

It is also contended that the demurrer to the state's evidence should have been sustained. While demurrers to evidence in criminal cases are not recognized by our Code, we will treat this demurrer as a motion on the part of the defendant's counsel addressed to the trial court to direct a verdict of "not guilty." The basis of this assignment is that there was no evidence to show that Fred Spencer and Ella Spencer, or Mary Doe, were living in open and notorious adultery. The proof shows beyond question that for a period of time covering some eighteen months or more Fred Spencer and a woman who was known as Ella Spencer lived together alone and maintained a residence connected with a photograph gallery, which they operated and maintained in the city of Hobart. This residence was located on Main street in said city in the business district thereof. When the defendant first came to Hobart he announced to some of his neighbors that his wife would soon follow him, and in a short time the said Ella Spencer appeared upon the scene. She was introduced by the defendant as his wife, and as Mrs. Spencer, and assisted him in caring for his photograph gallery, did the marketing, opened a bank account in the name of Ella Spencer, paid bills connected with the photograph business, assisted in maintaining a garden, did the washing and ironing, and in general occupied the intimate relation that a wife does to a husband. She was received by the public generally as the wife of the defendant, and was so known and accepted. This is the uncontradicted proof on the part of both the state and the defendant. It is the theory of the defense in this case, however, that, during all this time these parties were living together in secret in an adulterous relationship, they were received as husband and wife, and nobody knew different. Therefore, although the relationship was adulterous and the living together open, there was no notoriety connected with the offense, and therefore there can be no conviction. Counsel rely upon the case of *People v. Salmon*, 148 Cal. 303, 2 L.R.A. (N.S.) 1186, 113 Am. St.

Rep. 268, 83 Pac. 42, cited by this court in the case of *Copeland v. State*, 10 Okla. Crim. Rep. 1, 133 Pac. 258, where the question of what constitutes notoriety was not involved.

Whatever may be said respecting the *Salmon Case*, it will be appropriate in this opinion to note that, after the supreme court of California had given the construction to the words "open and notorious" that was given in that case, the legislature of California, in 1911, saw fit to strike the words "open and notorious" from their statute. Were it absolutely necessary to do so in this opinion, upon mature reflection this court could not conscientiously follow all the argument of the supreme court of California in the *Salmon Case*. That case opens the doors for parties to hide themselves to strange communities and live openly in adultery with one another and by means of concealing their true relationship impose themselves upon the public generally and be received in decent society to the humiliation and disgrace of the law-abiding people, whereas if their true relationship was known the public could protect itself against such conduct.

It is not the policy of the law to encourage a culpable defense to an act which is itself criminal. The adulterous relationship was criminal. The living together was open and well known to the community generally. The *Salmon Case* is based upon the assumption that after such relationship becomes known there is no public scandal and disgrace occasioned by reason of the previous living together of the parties in open adultery. In other words, the notoriety will only attach should the parties continue that relationship. It is our opinion that when such relationship has been made to appear the public scandal and disgrace are just as great and the notoriety is just as prevalent as had it been known during the entire time. The notoriety of such a continuous living together, and the thought that good people had been deceived into receiving such parties into their homes and treating them with the respect and consideration due to lawfully married people, are humiliating in the extreme. The legislature never intended to condone such conduct as that merely because the guilty parties are able for a time to conceal their true relations. To so hold, in our opinion, is a fraud upon society, and tends to destroy rather than to preserve and promote the institution of marriage. To confess their illicit relation would expel them from all decent society, and very few people are so infatuated as to forego the advantages of social intercourse and respecta-

bility if they can obtain them by the assumption of virtue.

This subject was heretofore been commented upon by this court in the case of *Kitchens v. State*, 10 Okla. Crim. Rep. 603, 140 Pac. 619, a later case than the *Copeland Case*, in which the court said: "The law seeks not alone to prevent illicit cohabitation and to prohibit the public scandal and disgrace incident thereto, but also to preserve and promote the institution of marriage, upon which the best interests, and indeed the existence, of society, depend."

There was not only an open living together by these parties, but, after it became known by many in the community that the said Fred Spencer and the said Ella Spencer were not married to each other, they continued to maintain the same relationship, and even after the county attorney had notified this defendant that their relationship was unlawful and defendant agreed to leave the community in forty-eight hours (which he did), they afterwards returned, and in the very face of society and in defiance of the laws of this state again assumed this unlawful relation. This all occurred after it had become known that the said Fred Spencer had sought a divorce from another woman. Thereafter, when the wife appeared upon the scene from Chicago and was seen upon the public thoroughfares of the city of Hobart, and went to the place of business of this defendant, and it was published in the daily paper in the city of Hobart that she had appeared upon the scene, it is apparent that the relations between Fred Spencer and Ella Spencer did not then cease.

This prosecution was instituted in October, 1914, and the trial was had in the latter part of December, 1914, and some of the witnesses testify that the said Ella Spencer did not leave Hobart finally until about three weeks before the trial. In view of all these facts and circumstances, it is our opinion that, were this court inclined to follow the doctrine of *People v. Salmon*, supra, there is yet sufficient evidence to sustain this conviction on the theory that there was a continuance of the adulterous relation openly after that relation became generally known in the community in which these parties were residing before this prosecution was instituted. As was said in *Kitchens v. State*, supra: "If the parties for a single day lived in open and notorious adultery, the offense was complete." Surely, after the happening of all the events herein enumerated, there was an apparent intention on the part of the defendant to continue his adulterous relation with Ella Spencer. We hold, therefore, that

the court did not err in refusing to instruct the jury to acquit defendant.

The trial court gave the following instruction over the objection and exception of the defendant: "The particular statute upon which the information is based is 'Adultery is the unlawful voluntary sexual intercourse of a married person with one of the opposite sex; and when the crime is between persons only one of whom is married, both are guilty of adultery. Prosecution for adultery can be commenced and carried on against either of the parties to the crime only by his or her own husband or wife, as the case may be, or by the husband of the other party to the crime: Provided, that if any person may make complaint when persons are living together in open and notorious adultery.' The jury will observe that under the law ordinary adultery is simply the unlawful intercourse of a married person with one of the opposite sex other than his wife or her husband. The defendant, however, in this case, is charged with the crime unlawfully, voluntarily, and feloniously living in open and notorious adultery with a woman not his wife, and under the law the burden of proof is upon the state to not only prove the defendant committed the crime of adultery with the person named as Mary Doe, but also that he lived with her in open and notorious adultery, to warrant a conviction. If adultery is not open and notorious, it is not a crime punishable by law, unless the prosecution is commenced and carried on by the wife or husband of one of the offending parties. Simply having occasional illicit intercourse without a public or notorious living together is not sufficient to constitute the offense of living in a state of open and notorious adultery. The parties must reside together in open and notorious adultery, as charged against the defendant, publicly in the face of society, as if the conjugal relation existed between them, and their illicit intercourse must be habitual to constitute the crime charged against the defendant."

It is contended that the said instruction is confusing as to the law applicable to the case, and does not contain a correct definition of what is meant by "living together in open and notorious adultery." It will be noted that the court distinguished what he termed "ordinary adultery" from the crime charged in the information. This it

is claimed tended to confuse the jury in that they were led to believe that the defendant was being prosecuted for "extraordinary adultery." If such had been the case we cannot see wherein the jury could have been misled by the instruction as a whole. The same distinction was made by this court in *Heacock v. State*, 4 Okla. Crim. Rep. 606, 112 Pac. 949, wherein, at the bottom of page 609, the term "ordinary adultery" is used to distinguish between the offense which only the husband or wife of the offending party may prosecute and that which is open and notorious and an offense against society itself.

The definition given of open and notorious adultery follows the language of this court in the cases of *Copeland v. State*, and *Kitchens v. State*, *supra*. The conclusion is reached that the foregoing instruction was not confusing or misleading, and that the definition given of living in open and notorious adultery was correct and sufficient under our statute.

It is also contended that the trial court erred in refusing to give certain instructions requested by the defendant. These instructions were based upon the theory of the defendant that the fact that Fred Spencer and Ella Spencer were not husband and wife must have been known to the community generally during all the time they were living together in the relation of husband and wife, before a conviction of open and notorious adultery could be had. We do not understand that to be the law of this state. It is sufficient if the adulterous relationship became generally known among the neighbors and acquaintances of the parties before it ceased and prior to the commencement of the prosecution. After that proof of a single day's continuance of the unlawful relationship is sufficient to sustain a conviction. It is our opinion, therefore, that the instructions refused did not correctly state the law as applicable to the proof in this case, and the refusal to give the same in this case was not erroneous. The instructions given by the trial court were sufficient to cover the law of the case as applicable to the facts.

The judgment of the trial court is affirmed.

Doyle, P. J., and Armstrong, J., concur.

Petition for rehearing denied January 5, 1918.

### Annotation—What is necessary to constitute open, notorious adultery.

Living in a state of open and notorious adultery "is something more than occasional illicit intercourse, indulged in fur-

tively or sub rosa; but on the contrary something aggressive and defiant in its nature, which fears not to flaunt its

lecherous colors in the light of day and the frowning face of public reprobation." *State v. Sekrit* (1895) 130 Mo. 401, 32 S. W. 977.

The law is "aimed against scandal to society and the wickedness of gross example which arises from a continuous cohabiting and living together in illicit relation." *State v. Holland* (1912) 162 Mo. App. 678, 145 S. W. 522.

In *State v. Crouner* (1874) 56 Mo. 147, the court said: "The offense consists of an open and notorious living or cohabiting together; occasional illicit intercourse will not constitute the offense. The statute was intended to provide against persons who in defiance of morality and of the good or well-being of society should openly live together; they must reside together publicly in the face of society as if the conjugal relation existed between them; their illicit intercourse must be habitual. . . . I would not be understood to say that the cohabiting and abiding together must be for any great length of time, perhaps a short time would do, but the parties must live together in a notorious and open manner, to the evil example of society. Simply having occasional illicit intercourse, without a public or notorious living together, as the evidence in this case tends to prove, is certainly not sufficient."

In *Harris v. State* (1915) 11 Okla. Crim. Rep. 270, 145 Pac. 759, the court, in affirming a conviction, said: "The courts, when called upon to determine what constitutes the state of 'living together in open and notorious adultery,' have defined it as the state of cohabiting. In other words, the parties must dwell together openly and notoriously, upon terms as if the conjugal relation existed between them. There must be an habitual illicit intercourse between them.

. . . The object of the proviso was to prohibit the public scandal and disgrace of the living together of such persons notoriously in illicit intimacy, which outrages public decency, by providing that any person other than the husband or wife of either party may make complaint."

#### **Mere adultery not sufficient.**

Under an indictment charging a married man with living with an unmarried woman in an open state of adultery and fornication, a verdict finding the defendant guilty of adultery in the manner and form as charged in the indictment was held not responsive to the indictment, for the reason that it did not find that

defendant was guilty of openly living together with the woman named, such being necessary to constitute the crime. *People v. Moreland* (1914) 186 Ill. App. 562.

So, when the offense charged was living in a state of open and notorious adultery, a verdict is erroneous, as not including every essential element of the crime, which finds a defendant "guilty of adultery as charged in the information." *State v. Holland* (Mo.) supra.

But it has been held that "an information charging open and notorious adultery, which pursues the words of the statute, is not bad because it contains additional averments showing that the adultery was committed by the intercourse between the parties." *State v. Yocum* (1881) 9 Mo. App. 589.

In *Heacock v. State* (1911) 4 Okla. Crim. Rep. 606, 112 Pac. 949, where the statute provided: "Prosecutions for adultery can be commenced and carried on against either of the parties to the crime only by his or her own husband or wife, as the case may be, or by the husband or wife of the other party to the crime: Provided, that any person may make complaint when persons are living together in open and notorious adultery," the court said: "Anything short of living together in open and notorious adultery is not an offense against society in general. . . . But in cases of ordinary adultery no grand jury can indict and no person can prefer a charge and no prosecuting attorney or court can present or try a defendant or defendants upon the charge of ordinary adultery, unless such prosecution is commenced and carried on by the husband or wife of one of the defendants. This clearly makes adultery a personal offense against the injured husband or wife."

So, in *Copeland v. State* (1913) 10 Okla. Crim. Rep. 1, 133 Pac. 258, where the wife had nothing to do with the prosecution, it was held that the prosecution was not authorized by law if the adultery was not open and notorious under the statute, and that therefore it was error to refuse to charge the jury that "although you believe after a careful consideration of all the evidence in this case, beyond a reasonable doubt, that the defendants did have on one or two or more separate and distinct occasions illicit carnal intercourse with each other, yet if you also believe from the evidence in the case that on said occasion or occasions, as the case may be, that said illicit carnal intercourse was indulged in by

the defendants in secret, and not in an open and notorious manner, that then, in that case, you should acquit the defendants and each of them, although you may further believe from the evidence in this case that the defendants were observed by a third person while engaged in the act of secret illicit carnal intercourse on one of such occasions."

**Duration.**

It will be observed that in *SPENCER v. STATE*, ante, 592, it is held that it is sufficient to charge the offense on a single day.

In *Kitchens v. State* (1914) 10 Okla. Crim. Rep. 603, 140 Pac. 619, the court said that, if the parties for a single day lived together in open and notorious adultery, the offense was complete.

In *Lyman v. People* (1902) 198 Ill. 544, 64 N. E. 974, where the charge was that the persons concerned unlawfully, wrongfully, and wilfully did live, cohabit, and have carnal intercourse together in an open state of adultery on a day named, it was held that, if the man lived with the woman in an open state of adultery for four weeks or longer, as the evidence tended to prove, he was guilty of that offense on each day of the crime.

**Must be open and notorious.**

Where the offense "consists in living 'in a state of open and notorious cohabitation and adultery,' the notoriety is as material in making out the offense as is the fact of adultery committed." *People v. Gates* (1873) 46 Cal. 52, where the court reversed the conviction on the ground that there was not the slightest proof of living with the woman in a state of notorious adultery or cohabitation within the intent of the statute.

"We do not think it necessary that the parties should claim to be husband and wife. It is sufficient if they lived together and behaved themselves in each other's presence in the familiar manner of husband and wife, and that their lewd and lascivious conduct was witnessed by other persons. The law seeks not alone to prevent illicit cohabitation, and to prohibit the public scandal and disgrace incident thereto, but also to preserve and promote the institution of marriage, upon which the best interests, and indeed the existence, of society, depend." *Kitchens v. State* (Okla.) supra, where the parties were master and servant. The companion case was affirmed on the same opinion, *Mitchell v. State* (1914) 10 Okla. Crim. Rep. 697, 140 Pac. 622.

In *Brevaldo v. State* (1886) 21 Fla. 789, where the offense was living in an open state of adultery, the court said: "Without saying that the absence of the word 'notorious' from our statute may not constitute a distinction between it and those statutes where it does appear (*People v. Gates* (1873) 46 Cal. 53), still there must be a living together openly, as if the legal relation of husband and wife existed between the parties; a mere occasional illicit intercourse is not sufficient, but there must be a living or residing together openly, as if the conjugal relation existed."

It has been held in California that "a man and woman married to other persons, who come into a community where the facts are unknown and live quietly as husband and wife, with nothing to excite suspicion that their intercourse is adulterous, cannot be convicted of living in a state of open and notorious adultery." *People v. Salmon* (1905) 148 Cal. 303, 2 L.R.A.(N.S.) 1186, 113 Am. St. Rep. 268, 83 Pac. 42.

But in Oklahoma the law is otherwise. *SPENCER v. STATE*.

In a Tennessee case where the defendants were indicted and convicted for the offense of "unlawfully, openly, and publicly dwelling and cohabiting together in lewdness and adultery, being unmarried to and with each other," the court, in holding that the allegation of notoriety, if necessary, was sufficiently made by the term 'openly and publicly,' said: "For the state, it is urged that, if two persons of different sex live, dwell, and cohabit together with the apparent relation of man and wife, without in fact being married, and therefore in lewdness and adultery, although the fact of being unmarried might not be generally known or notorious, the offense would be indictable without alleging or proving such notoriety, the gravamen of the offense consisting in the adulterous cohabitation of unmarried persons, and not in the general knowledge of the community of the negative fact of their being so unmarried. And this is probably correct." *State v. Cagle* (1841) 2 Humph. (Tenn.) 414.

**Occasional intercourse not sufficient.**

An indictment for living in open and notorious adultery with a certain woman is not sustained by proof of an occasional illicit intercourse between the defendant and the woman named, as the offense consists in an open and notorious cohabitation. *Wright v. State* (1840) 5 Blackf. (Ind.) 358, 35 Am. Dec. 126.

Similarly, an indictment charging that the defendant did commit and live in open and notorious adultery with the woman named by then and there having carnal knowledge of the said woman is insufficient. *State v. Gartrell* (1860) 14 Ind. 280.

The defendants accused of living in a state of open and notorious adultery are not guilty if, at the time charged in the information, they were simply stopping together in the same room occasionally and were guilty only of occasional acts of illicit intercourse. *State v. Crowner* (1874) 56 Mo. 147.

"Simply having occasional illicit intercourse, without a public or notorious living together, is not sufficient to constitute the offense of living in a state of open and notorious adultery. The parties must reside together publicly, in the face of society, as if the conjugal relation existed between them; their illicit intercourse must be habitual." *Copeland v. State* (1913) 10 Okla. Crim. Rep. 1, 133 Pac. 258.

So where the offense charged is living in an open state of adultery. *Brevaldo v. State* (1886) 21 Fla. 789.

An indictment that a man and a woman live together in an open state of adultery cannot be proved by evidence of illicit intercourse; the illicit intercourse must be habitual. *Miner v. People* (1871) 58 Ill. 59.

#### Illustrations.

Evidence that the parties charged with open and notorious adultery were residing together publicly and that the illicit intercourse was habitual will warrant a conviction. *State v. Yocum* (1881) 9 Mo. App. 589.

In *Crane v. People* (1897) 168 Ill. 395, 48 N. E. 54, the court affirmed a conviction of the offense of living together in open adultery where the parties occupied the same house for a considerable period, having bedrooms opening on the same hall, where there was evidence of guilty relations between them before they came into the county, showing an adulterous disposition between them, and there were other general circumstances in the case tending to prove the offense.

Where the female defendant lived in the family of the male defendant as a member of it, slept in the same room, if not in the same bed with him, gave birth in his house to five children, which he admitted to be his, the youngest being eight or nine months old at the time of the trial, and all these facts were known to his neighbors; and where, to one of

the neighbors who advised him to get rid of the woman, he replied that it was worth all that it was costing him; and again he said that it would be more honorable to raise and educate children than to drive them off,—the court said that stronger proof than this that the defendants were in the face of society abiding and cohabiting together in open and notorious adultery would be very difficult to furnish. *State v. Coffee* (1898) 75 Mo. App. 88.

In *State v. Hicks* (1913) 170 Mo. App. 186, 155 S. W. 482, both of the defendants admitted that prior to about three years before the trial they had been guilty of occasional illicit sexual intercourse, and that as a result two or three children were born, but claimed that nothing of the kind had occurred between them during the time covered by the indictment. It was held that they were properly convicted of living together in open and notorious adultery where it appeared that the female defendant had been married, but her husband was dead, and the male defendant "was running the farm on which she resided, and that he was there part of the time,—working there sometimes and sometimes at his home; that sometimes defendant Hicks would be there for a week at a time; that he would stay there at night and that there was but one dwelling house on the place with but two sleeping rooms; that defendant Hicks took groceries and provisions there the same as he did to his own home; that said defendant had several times during the year preceding the trial made the statement to the witness that he did live with her and proposed to as long as the law would let him, or until they locked him out," and there were other corroborating facts.

#### Miscellaneous.

In an indictment for unlawfully living together in an open state of adultery and fornication, it is error to instruct the jury as a condition of acquittal that they shall find from the evidence that the defendants did not cohabit together and have illicit intercourse between them, as the law raises the presumption that the defendants did not do these things. *Tomlinson v. People* (1902) 102 Ill. App. 542.

In an indictment for unlawful living together in an open state of adultery and fornication, it is error to refuse to instruct the jury as follows: "The court further instructs the jury that they are to determine from all the circumstances,

as brought out by the evidence, whether or not the defendants lived together in a state of adultery, and in order to find the defendants guilty they must find from the evidence that the defendants were living together in an open and notorious state of adultery, and that they were cohabiting together; and if the evidence does not establish the living together and cohabiting together of the defendants in the minds of the jurors beyond a reasonable doubt, then they must find the defendants not guilty." *Ibid.*

In *Crane v. People* (1897) 168 Ill. 395, 48 N. E. 54, the court said: "The question is not whether there was sufficient evidence of acts occurring in Kane county to prove their guilt beyond a reasonable doubt, but whether there was such evidence tending to establish their guilt as charged, and which, when taken in connection with all the evidence in the case and as explained by the evidence showing the prior illicit relations between the parties, was sufficient to prove the offense as laid, beyond all reasonable doubt." B. B. B.

**WASHINGTON SUPREME COURT.**  
(Department No. 1.)

ANNIE B. PHILLIPS et al., Appts.,  
v.

LOUISE A. TOMPSON et al., Respts.

(73 Wash. 78, 131 Pac. 461.)

**Quieting title — unknown claimants — publication of notice.**

1. The legislature may provide for the quieting of title against unknown claimants by publication of notice, although they are beyond the jurisdiction of the court.

*For other cases, see Writ and Process, II. c, in Dig. 1-52 N. S.*

**Same — heirs of known heir — form of notice.**

2. The heirs of a child and known heir of a person against whose heirs a title to real estate is sought to be quieted may be regarded as heirs of the latter, so that a publication of notice to them as such heirs is sufficient, although the child was named as a party to the suit, and died after its commencement.

*For other cases, see Writ and Process, II. c, in Dig. 1-52 N. S.*

**Pleading — absence of allegation — presumption.**

3. Failure to allege in a complaint to set aside a decree quieting title to real estate that notice of lis pendens was not filed in the action in which the title was quieted, as required by statute, raises the presumption that it was filed and that the proceedings were regular.

*For other cases, see Evidence, II. m, in Dig. 1-52 N. S.*

(April 16, 1913.)

**A**PPEAL by plaintiffs from an order of the Superior Court for King County sustaining a demurrer to the third amended complaint and dismissing an action brought

**Note.**—As to validity and effect of a judgment against parties designated in an action as unknown, see annotation following *Buck v. Simpson*, post, 609.

to quiet title to certain land and redeem the same from a mortgage lien. Affirmed.

The facts are stated in the opinion.

Messrs. Bell & McNeill and Roney & Loveless, for appellants:

The averments of facts are sufficient to constitute a cause of action.

17 Enc. Pl. & Pr. 328, 334; *Rogers v. Miller*, 13 Wash. 82, 52 Am St. Rep. 20, 42 Pac. 525; *Stoddart v. Burge*, 53 Cal. 394; *Ely v. New Mexico & A. R. Co.* 129 U. S. 291, 32 L. ed. 688, 9 Sup. Ct. Rep. 293; *Lemon v. Waterman*, 2 Wash. Terr. 485, 7 Pac. 899; *Miller v. Neiman*, 27 Ark. 233; *Kitts v. Willson*, 106 Ind. 147, 5 N. E. 400; *Feikert v. Wilson*, 38 Minn. 341, 37 N. W. 535; *Maury v. Fitzwater*, 88 Fed. 768; *McEachern v. Brackett*, 8 Wash. 652, 40 Am. St. Rep. 922, 36 Pac. 690; *Bailey v. Hood*, 38 Wash. 700, 80 Pac. 559; 17 Am. & Eng. Enc. Law, 842, 23 Cyc. 909, 910; *Hauswirth v. Sullivan*, 6 Mont. 203, 9 Pac. 798; *Wilson v. Hawthorne*, 14 Colo. 530, 20 Am. St. Rep. 290, 24 Pac. 549; *Symes v. Charpiot*, 17 Colo. App. 463, 69 Pac. 311; *Hanson v. Wolcott*, 19 Kan. 207; *Pray v. Jenkins*, 47 Kan. 599, 28 Pac. 716.

Charles G. Phillips as the heir of Annie M. Phillips, was a necessary and an indispensable party defendant to the foreclosure of said mortgage.

*Anrud v. Scandinavian-American Bank*, 27 Wash. 16, 67 Pac. 364; *Sawyer v. Vermont Loan & T. Co.* 41 Wash. 524, 84 Pac. 8; *Schlarb v. Castaing*, 50 Wash. 331, 97 Pac. 289; *Kager v. Vickery*, 61 Kan. 342, 49 L.R.A. 153, 78 Am. St. Rep. 318, 59 Pac. 628; 27 Cyc. 1574.

Plaintiff, in an action to quiet title against the record owners, must have a good and valid title, legal or equitable.

32 Cyc. 1329, 1330; 17 Enc. Pl. & Pr. 303; *Adams v. Harris*, 47 Miss. 144; *Humphries v. Sorenson*, 33 Wash. 563, 74 Pac. 690; *Jackson v. Tatebo*, 3 Wash. 456, 28 Pac. 916; *Bloomingtondale v. Weil*, 29 Wash. 611, 70 Pac. 94; *Shelton Logging Co. v. Gosser*,

26 Wash. 126, 66 Pac. 151; *Davies v. Cheadle*, 31 Wash. 168, 71 Pac. 728; *Johnson v. Murray*, 112 Ind. 154, 2 Am. St. Rep. 174, 13 N. E. 273; *Helden v. Hellen*, 80 Md. 616, 45 Am. St. Rep. 371, 31 Atl. 506, 15 Cyc. 1087; *Thygerson v. Whitbeck*, 5 Utah, 406, 16 Pac. 403; *Beringer v. Lutz*, 188 Pa. 364, 41 Atl. 643; *Barrows v. Keene*, 15 R. I. 484, 8 Atl. 713; *Humphries v. Sorenson*, 33 Wash. 570, 74 Pac. 690; *Shelton Logging Co. v. Gosser*, 26 Wash. 126, 66 Pac. 151; *Louisville v. Gray*, 1 Litt. (Ky.) 146; *O'Hara v. Parker*, 27 Or. 156, 39 Pac. 1004; *King v. Carpenter*, 37 Mich. 363; *Meighen v. Strong*, 6 Minn. 177, Gil. 111, 80 Am. Dec. 441; *Clark v. Drake*, 3 Pinney (Wis.) 233.

A person deducing his title to lands through a judicial sale, void for fraud or for jurisdictional defects, cannot maintain an action to quiet title to such land.

32 Cyc. 1333; *West v. Schnebly*, 54 Ill. 523; *Griswold v. Fuller*, 33 Mich. 268; *Sowles v. Rugg*, 55 Fed. 163.

Even admitting that the statute as to unknown heirs and unknown persons was enacted for just such a case as this one, still the court did not have jurisdiction to quiet the title as to the southeast quarter of said northwest quarter.

*Dunlap v. Steere*, 92 Cal. 344, 16 L.R.A. 361, 27 Am. St. Rep. 143, 28 Pac. 563; *Orton v. Smith*, 18 How. 263, 15 L. ed. 393; *Wilson v. Bean*, 33 Ill. App. 529; *Page County v. Burlington & M. R. Co.* 40 Iowa, 520; *Patrick v. Isenhardt*, 20 Fed. 339.

Messrs. **Hastings & Stedman and Thomas H. Bain**, for respondents:

The sheriff's certificate and deed gave color of title sufficient to support the action to quiet title.

*Philadelphia Mortg. & T. Co. v. Palmer*, 32 Wash. 455, 73 Pac. 501; *Olson v. Howard*, 38 Wash. 15, 80 Pac. 170; *McManus v. Morgan*, 38 Wash. 528, 80 Pac. 786; *Goetter v. Moore*, 53 Wash. 5, 101 Pac. 365; *Johnson v. Bartlett*, 50 Wash. 114, 96 Pac. 833.

The court had jurisdiction in the action to quiet title brought by Mrs. *Tompson*. *Tennant v. Fretts*, 67 W. Va. 569, 29 L.R.A.(N.S.) 625, 140 Am. St. Rep. 979, 68 S. E. 387; *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Kieffer v. Victor Land Co.* 53 Or. 174, 90 Pac. 582, 98 Pac. 877; 32 Cyc. 467, 468.

It is not necessary to allege that plaintiff was in possession of the premises, or that the lands were vacant.

*Brown v. Baldwin*, 46 Wash. 106, 89 Pac. 483; *Vietzen v. Otis*, 46 Wash. 402, 90 Pac. 264.

Actions against unknown heirs and un-

known persons claiming an interest in property are authorized by statute.

*Inglee v. Welles*, 53 Minn. 197, 55 N. W. 117.

**Crow, Ch. J.**, delivered the opinion of the court:

This action was commenced by **Annie B. Phillips, Charles G. Phillips, Jr., and Josephine R. Ker**, heirs at law of **Charles G. Phillips**, deceased, against **Louise A. Tompson** and other defendants, to quiet title to 80 acres of land in King county and redeem the same from a mortgage lien. A demurrer to their third amended complaint was sustained. They declined to plead further, and have appealed from an order of dismissal.

The single question presented is whether the third amended complaint states a cause of action. It is voluminous, details at length judicial proceedings hereinafter mentioned, and in substance states the following facts: On April 21, 1891, one **Annie M. Phillips**, a widow, now deceased, became the owner in fee simple of the 80 acres of land in the third amended complaint described, which she mortgaged to respondent **Louise A. Tompson**. On October 15, 1900, **Annie M. Phillips** died intestate, leaving **Charles G. Phillips**, a son who resided in the state of Ohio, as her only heir at law. On October 1, 1904, **Louise A. Tompson** commenced cause No. 44,558 in the superior court of King county against **Annie M. Phillips** to foreclose the mortgage deed. The pleadings indicate that at the date of the commencement of the foreclosure action **Louise A. Tompson** was ignorant of the previous death of **Annie M. Phillips**. On or about May 11, 1905, **C. H. Rollins** was appointed and qualified by the superior court of King county as administrator of the estate of **Annie M. Phillips**, deceased, and on May 13, 1905, was substituted as defendant in the foreclosure action, which thereafter was entitled "**Louise A. Tompson, Plaintiff, v. C. H. Rollins, Administrator of the Estate of Annie M. Phillips, Deceased, Substituted for Annie M. Phillips, Defendant.**" The administrator appeared, filed an answer, a decree of foreclosure was entered, sale was made by the sheriff of King county, and on July 9, 1906, a sheriff's deed for the land was executed and delivered to **Louise A. Tompson**. On August 1, 1908, **Louise A. Tompson**, claiming title to the land, instituted in the superior court of King county a second action, cause No. 62,411, to quiet her title. In this action she was plaintiff, while **Charles G. Phillips**, the unknown heirs of **Annie M. Phillips**, deceased, and all other persons unknown



claiming any right, title, claim, or interest in or to the real estate, were named as defendants. She alleged that at all times in her complaint mentioned, and prior to June 26, 1907, she was the owner of the land; that on June 26, 1907, she had sold and by warranty deed had conveyed a portion of the land; that Charles G. Phillips and the unknown defendants claimed some right, title, or interest in or to the premises, but that their claim, if any, was subordinate to her title. She asked a decree quieting her title as of the date of June 26, 1907, and further asked that the defendants, known and unknown, and each and all of them, be forever barred and foreclosed from any right, title, or interest in or to the land. Service by publication was had; the first publication being made on August 7, 1908. On that date Charles G. Phillips, the known and named defendant, died intestate, leaving the appellants and plaintiffs herein, Annie B. Phillips, his widow, Charles G. Phillips, Jr., and Josephine R. Ker, his children, as his sole heirs at law. There is no suggestion that Louise A. Tompson was aware of the death of Charles G. Phillips, or that she knew of the existence of appellants as his heirs at law at any time prior to the final decree in the action to quiet title, or at any time prior to April, 1910. On November 4, 1908, after entry of default, findings of fact and conclusions of law were made and entered in cause No. 62,411, upon which final decree was entered quieting the title of Louise A. Tompson in and to all of the real estate, as prayed in her complaint, and further decreeing that the defendants, Charles G. Phillips, the unknown heirs of Annie M. Phillips, deceased, and all other persons unknown, had no right, title, interest, claim, lien, or estate in or to the land, or any part thereof. The appellants herein had no knowledge of the pendency of the action to quiet the title, commenced by Louise A. Tompson, until after entry of the decree in her favor.

The complaint in the instant case further shows that the respondents herein, Roscoe C. Nisonger, Minnie Olive Barton, James C. Barton (her husband), Maggie Hiltman, Charles J. Hiltman (her husband), and Hewitt-Lea Lumber Company, a corporation, have acquired title and interests in and to portions of the land, having deraigned the same from Louise A. Tompson subsequent to the foreclosure and sale. The land is vacant, unimproved, and unoccupied. Appellants, who are non-residents of this state, first learned of the foreclosure decree and sale, and the action to quiet title, in March, 1910. They then secured the services of an attorney to rep-

resent them, and on or about April 25, 1910, through their attorney, instituted an action in ejectment in the superior court of King county in the name of Annie M. Phillips, the original owner and mortgagor, then deceased, as plaintiff, to recover the land. Appellants claim that they were ignorant of the law, that they knew nothing of court procedure, and that they relied upon the advice of their attorney. Afterwards, in October, 1910, appellants discharged their attorney who had commenced the action in ejectment, and employed their present attorneys, who, on April 5, 1911, instituted the present action. Appellants claim title as widow, children, and sole heirs at law of Charles G. Phillips, deceased, the son and sole heir at law of the original owner and mortgagor, Annie M. Phillips, deceased. They contend that as to them the foreclosure was void; that Charles G. Phillips, who, at the time of the foreclosure, was the sole heir at law of Annie M. Phillips, deceased, was a necessary party to the foreclosure action; that he was not made a party, was not served with process; that his title was never divested; that appellants hold title as his heirs at law; that the decree in cause No. 62,411, purporting to quiet title in Louise A. Tompson, is void as to appellants, for the reason that they were not made parties defendant, and were not served with process; that they still hold title to the real estate subject to the mortgage lien; that they are entitled to redeem; and that they have tendered to respondent Louise A. Tompson the amount due on her mortgage.

It may be conceded without any citation of authority that the foreclosure and sale did not divest the title of Charles G. Phillips, of whom appellants are the heirs at law; yet the respondent held an interest in and to the land, did obtain color of title by the sheriff's deed, and claimed the fee-simple title as alleged in her complaint.

The controlling question on this appeal is whether the fee-simple title was legally adjudged to, quieted and vested in, her and her grantees by virtue of the final decree entered in cause No. 62,411. Her complaint therein, which stated a cause of action and alleged title in her, made no mention of the foreclosure and sale; and the decree, which is regular upon its face, is valid if the court had jurisdiction to enter the same, and is not subject to impeachment in this collateral action. 23 Cyc. 1055, 1056.

The action to quiet title was a proceeding in rem, to which Charles G. Phillips, the unknown heirs of Annie M. Phillips, deceased, and all other persons unknown claiming any interest in the real estate,

were made defendants, under §§ 229-232, Rem. & Bal. Code. From necessity, statutes of the character of the sections cited have been enacted in many states, in order that titles may be quieted, when clouded by adverse claims of unknown heirs, and unknown parties, who may be without the jurisdiction of the state in which the real estate is located. The essential purpose of such statutes is to provide that unknown heirs and claimants may be served by publication without alleging their names, in order that they may receive the most effective notice possible, that they may appear and plead their claims, and that the court having jurisdiction of the real estate may determine and quiet the title. The state has power to thus provide for an adjudication of adverse rights or claims of persons in or to real estate situate within its borders, even though such claimants may be unknown and are without the jurisdiction of the court. Titles to real estate should not be subjected to continuous clouds. A state is under no compulsion to suffer titles to real estate situated within its borders to remain clouded for an indefinite period for the want of a proper method of serving process upon unknown claimants, or a proper procedure to quiet the same. Statutes similar to ours have been sustained with marked uniformity. The substance of appellants' objection to the decree quieting title is the want of service upon, or jurisdiction over, them. Jurisdictional objections to actions to quiet title against unknown heirs and unknown parties, where service is made by publication, have frequently been made upon the ground that actions quia timet in respect to land are equitable in their nature, that equity acts in personam, and that personal jurisdiction of defendants cannot be obtained by publication.

In *Shepherd v. Ware*, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773, the court, in passing upon a statute providing for constructive service upon unknown claimants to land, said: "It is conceded that constructive or substituted service may be authorized by the state, and resorted to in all actions or proceedings touching real property which are properly denominated actions or proceedings 'in rem'. Such are actions to partition real estate, proceedings to enforce the collection of taxes against lands, and for the condemnation of land. *Penoyer v. Neff*, 95 U. S. 714, 727, 24 L. ed. 565, 570. Actions quia timet in respect to land, to remove a cloud, or to determine adverse claims, are equitable in their nature, and, strictly speaking, equity acts upon the person, and not upon the property; and in these actions the judgment

affects the claim or title to the land, and they are not strictly actions in rem. But they concern real estate lying within the jurisdiction of the court, and the state may clothe the court with full power to inquire and adjudicate as to its status, title, and ownership; and it is now well settled, that, as respects the procedure provided, and the constructive service of notice, by publication, upon nonresident defendants at least, actions of this kind are to be classed with actions in rem. *Arndt v. Griggs*, 134 U. S. 316, 322-326, 33 L. ed. 918, 920, 921, 10 Sup. Ct. Rep. 557; *Lane v. Innes*, 43 Minn. 137, 45 N. W. 4. The question is not what a court of equity, under its general powers as such, may do, but what the state may authorize in actions to adjudicate the title to real estate. Thus it is said in *Boswell v. Otis*, 9 How. 336, 348, 350, 13 L. ed. 164, 169, 170: 'It is immaterial whether the proceeding against the property be by attachment or by bill in chancery. It must be substantially a proceeding in rem. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding in rem, in ordinary cases; but when such a proceeding is authorized by statute, on publication, without personal service of process, it is substantially of that character.' And 'the inquiry should be, have the requisites of the statute been complied with, so as to subject the property in controversy to the judgment of the court, and is such judgment limited to the property named in the bill?' The judgment can affect the property only, and the defendant is not personally bound beyond it. And such in substance, is the character of this action. Its object is an adjudication of the state of the title, and the judgment goes no further. And by the procedure under consideration, the proceedings are instituted by filing the complaint, and recording the lis pendens against the property, and followed by the publication provided for." See also *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; *State ex rel. Douglas v. Westfall*, 85 Minn. 437, 444, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175; *Title & Document Restoration Co. v. Kerrigan*, 150 Cal. 239, 8 L.R.A.(N.S.) 682, 119 Am. St. Rep. 199, 88 Pac. 356.

In *Arndt v. Griggs*, *supra*, the Supreme Court of the United States, in discussing the question whether a state has the power to provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a nonresident, is brought into court only by publication, said: "A cloud cast upon such title by a claim of a nonresident will remain for all time a cloud, unless such nonresident shall voluntarily

come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits,—its process goes not out beyond its borders,—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the state; and as this duty is one of the state, the manner of discharging it must be determined by the state, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice. So it has been held repeatedly that the procedure established by the state, in this respect, is binding upon the Federal courts.”

A valuable discussion of the purpose and validity of such statutes may be found in *McClymond v. Noble*, reported in 84 Minn. 329, 87 N. W. 838, 87 Am. St. Rep. 354, and in Mr. Freeman's note at pages 358 et seq. The superior court in the action to quiet title had jurisdiction of the real estate which is in King county. Service was made upon the unknown defendants in compliance with the statute; the complaint stated a cause of action; the decree was regular upon its face; and the court, having jurisdiction of the land, adjudicated and determined the ownership of the title.

Appellants further contend that, when Louise A. Tompson instituted the action to quiet title, she had knowledge of Charles G. Phillips, who was made a known defendant: that she attempted to serve him by publication; that she must be presumed to have also known of his heirs at law after his death; that she made no attempt to serve them either as such heirs at law, or as unknown parties claiming an interest; that they were neither unknown heirs, nor unknown parties or claimants within the contemplation of the statute; and that as to them the decree quieting respondents' title is void. Appellants' contention seems to be

that the only unknown heirs named as defendants were the unknown heirs of Annie M. Phillips, deceased, and that appellants being the heirs of Charles G. Phillips, who died after the commencement of the action, were not the unknown heirs of Annie M. Phillips, but were his heirs. Strictly speaking this may be true, but the term “unknown heirs,” as used in statutes of this character, has been so liberally construed by the courts that appellants, in contemplation of the statute, can be considered the heirs at law of Annie M. Phillips, deceased, as well as the heirs at law of Charles G. Phillips, deceased.

In *Howell v. Garton*, 82 Kan. 495, 108 Pac. 844, the syllabus, which states the substance of the opinion, reads as follows: “The term ‘unknown heirs,’ as used in the sections of the Code providing for service by publication in cases relating to real property and where the relief demanded is to exclude defendants from any interest, title, or estate in real property, means all kinds of heirs, including heirs of heirs of such defendants as well as the legatees of heirs.”

The statute of this state (Rem. & Bal. Code, § 232) provides: “. . . Any such unknown heirs or unknown persons or parties who have or claim any right, estate, lien, or interest in the said real property in controversy, at the time of the commencement of the action, duly served as aforesaid, shall be bound and concluded by the judgment in such action, if the same is in favor of the plaintiff therein as effectually as if the action was brought against such defendant by his or her name and constructive service of summons obtained: Provided, however, that such judgments shall not bind such unknown heirs, or unknown persons or parties defendant, unless the plaintiff shall file a notice of lis pendens in the office of the auditor of each county in which said real estate is located, in the manner provided by law, before commencing the publication of said summons.”

The third amended complaint in the instant case does not allege that a lis pendens notice of the action to quiet title was not filed in the office of the auditor of King county, and in the absence of such an allegation we must assume the proceedings were regular and that it was filed. The evident purpose of the statute is to bind all unknown heirs, and unknown persons or parties who had an interest in the real estate at the time of the commencement of the action; and, under the doctrine of lis pendens, to also bind all persons who may thereafter acquire an interest or title through them, whether such subsequent interest or title be acquired by voluntary conveyance or by

inheritance. If in an action under such a statute, after a complaint stating a cause of action has been filed, and publication of summons against unknown heirs and unknown parties has been made, a final decree may be avoided for the sole reason that some one of the defendants, known or unknown, dies without the plaintiff's knowledge during the pendency of the action, leaving unknown parties as his heirs at law, the very purpose of the statute would be annulled.

In *Inglee v. Welles*, 53 Minn. 197, 55 N. W. 117, an action affecting real estate was brought to determine adverse claims of Henry T. Welles, Delia Godding, and other persons and parties unknown. Service by publication was made, but subsequent to the decree it appeared that Delia Godding was dead at the time the action was commenced. Her heirs attacked the validity of the proceedings, but the supreme court of Minnesota, in sustaining the decree, said: "We are of the opinion that the proof of publication of the notice of lis pendens with the summons is sufficient; also, that the nature of the action, and the nonresidence of the named defendant, Delia W. Godding, sufficiently appeared from the affidavit for publication. We are also of opinion that the mere fact that the named defendant was dead before the action was brought did not prevent the court from acquiring jurisdiction to determine the right of 'persons or parties unknown' claiming an interest in the land described in the complaint. These being all the objections to the judgment that are urged by the appellants, the order appealed from must be affirmed."

In *Howell v. Garton*, *supra*, a case to which we have already alluded, as involving the meaning of the term "unknown

heirs," an action was brought on July 1, 1905, to quiet title against one Abbie A. Little if living, or, if dead, against her unknown heirs. Unknown to the plaintiff, Abbie A. Little had died intestate in 1895, leaving one Hattie M. Davis as her sole heir at law. It also appeared that, unknown to plaintiff, Hattie A. Davis had died testate in 1903, previous to the commencement of the action to quiet title. The supreme court held that a decree entered upon the service of summons by publication as against Abbie A. Little if living, or, if dead, as against her unknown heirs, was binding upon the legatees of her then deceased daughter, Hattie A. Davis. These cases show that the courts sustain decrees in such actions upon the theory that the actions are proceedings in rem, and that a court having jurisdiction of the real estate may adjudicate titles thereto after service by publication upon all persons known and unknown, claiming any title or interest.

Other questions affecting the procedure in the foreclosure action and also in the action to quiet title have been raised by appellants, but we regard such questions as immaterial, for, as heretofore stated, the vital question on this appeal is whether the decree quieting title was valid or void. Upon the allegations of the third amended complaint we conclude that the decree quieting title was valid; that the court had jurisdiction to render the same; that the fee-simple title was adjudged to be in the respondent Louise A. Tompson; and that the third amended complaint did not state a cause of action.

The judgment is affirmed.

Gose, Chadwick, and Parker, JJ., concur.

#### OKLAHOMA SUPREME COURT.

LEVI BUCK et al., Plffs. in Err.,  
v.

JOHN SIMPSON et al.

(— Okla. —, 166 Pac. 146.)

**Parties — suit to quiet title — error as to death.**

1. In an action to quiet title to lands, brought against the unknown heirs of one erroneously supposed to be dead and the

Headnotes by RUMMONS, C.

**Note.**—As to validity and effect of a judgment against parties designated in an action as unknown, see annotation following this case, post, 609.

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unknown heirs of those from whom his right and title to said lands descended, and service is attempted to be made under the provisions of § 4729, Rev. Laws 1910, such one is not a party to said action.

*For other cases, see Writ and Process, II. in Dig. 1-52 N. 8.*

**Judgment — effect — person not party.**

2. A judgment in an action to quiet title does not affect or impair the rights of one who was not a party to said action, either in person or through his privies, and such judgment binds said person in no degree and constitutes no bar against him.

*For other cases, see Judgment, II. e, 2, in Dig. 1-52 N. 8.*

**Indians — approval of deed — effect.**

3. An application having been made under provisions of § 9, Act Congress May 27, 1908, to the county court, having jurisdic-

tion of the settlement of the estate of a deceased Choctaw Indian, to approve a deed by a full-blood Choctaw Indian heir of such decedent, which deed purported to grant all the estate of such Indian heir in and to the lands described therein, the county court made findings of fact and made an order approving said deed. Said court in its findings erroneously found that such Indian heir had only a life estate in said lands. In an action by an heir of such Indian heir to recover his interest in the remainder of said lands after the death of said Indian heir, held, that the approval by the county court of said deed gave it validity and effect, and it conveyed to the grantee named therein all the estate of such Indian heir in said lands, and, the action of the county court in approving said deed not being judicial, that the findings made by the court form no part of the order of approval and may be treated as surplusage. *For other cases, see Indians, II. in Dig. 1-52 N. 8.*

#### Same — distribution of property.

4. An allotment of a deceased member of the Choctaw Tribe, dying without issue, intestate, before statehood, whose father and mother were full-blood members of his tribe, ascends to the father and his heirs and the mother and her heirs; and, the mother of said allottee having died before him, said deceased allottee leaving surviving him, as his sole heirs, his father and a brother, such father and brother succeed to his allotment in equal shares.

*For other cases, see Indians, II. in Dig. 1-52 N. 8.*

(June 12, 1917.)

**E**RROR to the District Court for Grady County to review a judgment in plaintiffs' favor in an action brought to quiet title to certain lands. Modified and affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Bond, Melton, & Melton and Riddle & Hammerly, for plaintiffs in error:

The proceeding instituted by the plaintiffs was a collateral attack upon the judgment pleaded as a bar.

Continental Gin Co. v. De Bord, 34 Okla. 66, 123 Pac. 159; Pioneer Teleph. & Teleg. Co. v. State, 40 Okla. 417, 138 Pac. 1033; Sockey v. Winstock, 43 Okla. 758, 144 Pac. 372; Van Fleet, Collateral Attack, §§ 2, 3; Eaves v. Mullen, 25 Okla. 679, 107 Pac. 433; Spade v. Morton, 28 Okla. 384, 114 Pac. 724; Steele v. Kelley, 32 Okla. 547, 122 Pac. 934.

John Simpson was an heir of Thomas Ketchum, deceased.

Howell v. Garton, 82 Kan. 495, 108 Pac. 844.

Every court of record of general jurisdiction has power in the first instance to

adjudicate its own jurisdiction, and when adjudicated, it is binding upon every other court of co-ordinate jurisdiction in a collateral proceeding.

Dowell v. Applegate, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611, 23 Cyc. 1188; Wyatt v. Steele, 26 Ala. 639; Milner v. Neel, 114 Ga. 118, 39 S. E. 890; Axman v. Dueker, 45 Kan. 179, 25 Pac. 582; Hotchkiss v. Cutting, 14 Minn. 537, Gil. 408; White v. Crow, 110 U. S. 183, 28 L. ed. 113, 4 Sup. Ct. Rep. 71; Phelps v. Mutual Reserve Fund Life Assn. 61 L.R.A. 717, 50 C. C. A. 339, 112 Fed. 453; Hiatt v. Darlington, 152 Ind. 570, 53 N. E. 825; Rotch v. Humboldt College, 89 Iowa, 480, 56 N. W. 658; Kipp v. Fullerton, 4 Minn. 473, Gil. 366; Mitchell v. Aten, 37 Kan. 33, 1 Am. St. Rep. 231, 14 Pac. 497; Alexander v. Maverick, 18 Tex. 194, 67 Am. Dec. 693; Withers v. Patterson, 27 Tex. 492, 86 Am. Dec. 643; Murchison v. White, 54 Tex. 78; Guilford v. Love, 49 Tex. 716; Essig v. Lower, 120 Ind. 239, 21 N. E. 1090; Cocke v. Halsey, 16 Pet. 71, 10 L. ed. 891; Thompson v. Tolmie, 2 Pet. 157, 7 L. ed. 381; United States v. Arredondo, 6 Pet. 702, 8 L. ed. 551; Voorhees v. Jackson, 10 Pet. 449, 9 L. ed. 490; Philadelphia & T. R. Co. v. Stimpson, 14 Pet. 458, 10 L. ed. 540; Fanning v. Krapf, 68 Iowa, 244, 26 N. W. 133; Jones v. Jones, 115 Ind. 504, 18 N. E. 20; Kleyla v. Haskett, 112 Ind. 516, 14 N. E. 387; Brown v. Tucker, 7 Colo. 30, 1 Pac. 221; Freeman, Judgm. §§ 126, 135, 142; Cooper v. Reynolds, 10 Wall. 308, 315, 19 L. ed. 931, 932; Hunter v. Ruff, 47 S. C. 525, 58 Am. St. Rep. 907, 25 S. E. 65; Voorhees v. Jackson, 10 Pet. 478, 9 L. ed. 501.

All of the parties being joined by blood of the common ancestor, the person nearest in line to the allottee at his death would inherit all of the land, to the postponement of the others more distantly related.

14 Cyc. 29; Shulthis v. McDougal, 95 C. C. A. 615, 170 Fed. 529; Oliver v. Vance, 34 Ark. 564.

Mr. J. M. Willis, for defendants in error:

The judgment being void, and such being the finding of the court, it was immaterial to determine whether the attack on the judgment was direct or collateral.

First State Bank v. Latimer, 48 Okla. 104, 149 Pac. 1099; Jefferson v. Gallagher, — Okla. —, 150 Pac. 1071.

Upon the death of an Indian allottee intestate and without issue, his estate is termed an ancestral estate and ascends to the tribal parent through whose blood he obtained his tribal relations; and if both

parents were members of the tribe, then it ascends to them equally.

*Shulthis v. McDougal* 95 C. C. A. 615, 170 Fed. 529; *McDougal v. McKay*, 43 Okla. 261, 142 Pac. 987; *Pigeon v. Buck*, 38 Okla. 101, 131 Pac. 1083; *Thorn v. Cone*, 47 Okla. 781, 150 Pac. 701.

**Rummons, C.**, filed the following opinion:

The land here in controversy was allotted to Thomas Simpson Ketchum, a son of Isaac Simpson and Margaret Simpson, both full-blood Choctaw Indians. Thomas Simpson Ketchum died about April 10, 1905. His mother was then dead, and he left surviving him as his sole heirs at law his father and one of the plaintiffs, John Simpson, a brother. Isaac Simpson died in October, 1909, leaving surviving him a second wife, Sarah, John Simpson, and two minor children, Lena Simpson, and Eastman Simpson. The parties will be hereinafter designated as they appeared in the court below. The plaintiff John Simpson claims title to an undivided one-half interest in said land as an heir of his brother, Thomas Simpson Ketchum, and an undivided one-ninth interest as an heir of his father, Isaac Simpson. The defendants claim title to the land in controversy through a conveyance by Isaac Simpson, duly approved by the county court of Pushmataha county on August 13, 1908, and by virtue of a judgment of the superior court of Grady county in an action brought by Levi Buck to quiet title to said lands. The plaintiffs had judgment in the court below for an undivided eleven-eightieths interest in said lands. From the briefs and oral argument of counsel for the respective parties there are but two questions raised in this case: the first is whether or not the plaintiffs in the instant case are barred by the judgment of the superior court in the action brought by the defendant Buck to quiet title. The second question involved the effect of the deed executed by Isaac Simpson under which defendants claim, and whether said deed conveyed the whole right, title, and interest in said lands of said Isaac Simpson or only a life estate therein.

The plaintiffs alleged, and still contend, that the judgment of the superior court of Grady county quieting title to said lands in said Buck is void and of no effect as to the plaintiff John Simpson. Said action to quiet title was commenced by Levi Buck against the following defendants: Sarah Roberts, née Simpson, the unknown heirs of Isaac Simpson, deceased, and the unknown heirs of Thomas Simpson Ketchum, deceased, the unknown heirs of John Simpson, deceased, and Wm. H. Ketchum and Lena Simpson, a minor, and Silas Cole, her legal guard-

ian. Service was had upon the unknown heirs of Isaac Simpson, deceased, the unknown heirs of John Simpson, deceased, and the unknown heirs of Thomas Simpson Ketchum, deceased, and some of the other defendants by publication. The court below held the judgment in this case to be void as to John Simpson, and it is contended by the defendants that therein the trial court erred.

It is argued by counsel for defendants that, the trial court having jurisdiction of the subject-matter, and having adjudged that it had jurisdiction of the parties to the action, such judgment is not void for want of jurisdiction, and cannot be collaterally attacked. Defendants contend that this is a collateral attack upon said judgment, and that said judgment, not being void, is a bar to recovery by plaintiffs in the instant case. We are unable to agree with this contention of the defendants. The defendants in the action in the superior court obtained service under § 4729, Rev. Laws 1910, which is as follows: "In actions where it shall be necessary to make the heirs or devisees of any deceased person defendants, and it shall appear by the affidavit of the plaintiff, annexed to his petition, that the name of such heirs or devisees, or any of them, and their residences, are unknown to the plaintiff, proceedings may be had against such unknown heirs or devisees, without naming them. In such actions service may be had upon such defendants by publication and the notice shall be published as in other cases of service by publication."

At the time of the institution of said action defendants were laboring under the mistaken belief that the plaintiff John Simpson was dead, and undertook to proceed against his unknown heirs as well as the heirs of Isaac Simpson, his father, and Thomas Simpson Ketchum, his brother. John Simpson was not a party to the action in the superior court in any way. He was not named as a defendant, nor was he included in the description of any of the defendants sought to be served therein as unknown heirs. John Simpson's interest in the land in controversy came to him by inheritance from his brother, Thomas Simpson Ketchum, deceased, through his mother, Margaret Simpson, and by inheritance from his father, Isaac Simpson. He was in privity of estate with these three; and, if they or any of them had been barred of their estate in these lands before descent cast upon John Simpson, he would have been barred to the same extent as they. But none of his privies were parties to this action to quiet title. The action and judgment ran only against the unknown heirs of three of them and against certain known

heirs with whom plaintiff was not in privy.

It is urged by counsel for defendants that, in bringing into court the unknown heirs of Thomas Simpson Ketchum and of Isaac Simpson, the plaintiff was brought into court, and cannot now collaterally attack the judgment of the court because of any irregularities therein. This argument is ingenious, but it will not stand the test of an examination of the statute under which the plaintiff sought to get service upon the defendants in the superior court. The section of the statutes above quoted authorizes service by publication upon the heirs of deceased persons whose names and residences are unknown to the plaintiff. The name of John Simpson was not unknown to the plaintiff, nor was it unknown to the plaintiff that he was one of the heirs of Thomas Simpson Ketchum and Isaac Simpson. The fact that John Simpson was not unknown to the plaintiff in that action appears upon the record of the judgment in the superior court. As has been said, it was erroneously supposed that John Simpson was dead, and therefore he was not made a party to the case in the superior court, but his unknown heirs were named as defendants. John Simpson or anyone to whom he was privy not being a party before the court rendering judgment quieting title to the lands in plaintiff Buck, the judgment of the court could have no binding effect upon him; nor does the fact that the superior court adjudged that it had jurisdiction of the parties to that action render the judgment one against John Simpson, because the court could not adjudge that it had acquired jurisdiction of one who was not a party to the suit. *First State Bank v. Latimer*, 48 Okla. 104, 149 Pac. 1099; *Jefferson v. Gallagher*, — Okla. —, 150 Pac. 1071.

The defendants rely upon the case of *Howell v. Garton*, 82 Kan. 495, 108 Pac. 844, in support of their contention that the defendant John Simpson is bound by the judgment of the superior court. In that case action to quiet title was commenced by one F. M. Luther against Abbie A. Little, if living, or, if dead, against her unknown heirs. Judgment was rendered in that action quieting title in Luther. Before the commencement of this action Abbie A. Little died intestate, leaving her daughter, Hattie A. Davis, as her sole heir. Hattie A. Davis died also before the commencement of the action, leaving a will devising her property to her husband, James N. Davis. Davis's grantee sued Garton, grantee of Luther, in ejectment. The court held that he was barred by the judgment in the action to quiet title, holding that the

term "unknown heirs" embraces not only the immediate heirs of the deceased, but also the heirs or devisees of such heirs. We are unable to see that this case is at all in point as bearing upon the instant case. That action was brought under the Kansas statute which permitted an action to be maintained against an individual, if living, or against his unknown heirs. In that respect the Kansas statute has been amended since it was adopted by Oklahoma territory, and we have no similar provision in our statutes authorizing an action against one, if living, or against his unknown heirs. If the defendants had been authorized to bring this action against John Simpson, if living, or his unknown heirs, if dead, and had done so, he might have been barred by the judgment. But a judgment to which he was not a party and which does not run against him or his privies cannot be pleaded as a bar to his rights.

The trial court took the view that the deed from Isaac Simpson conveyed Thomas Simpson Ketchum's allotment, conveying only the life estate of Isaac Simpson therein. This deed was a warranty deed purporting to convey to W. B. Dennis all of the estate of Isaac Simpson in said lands. This deed was approved by the county court of Pushmataha county, which had jurisdiction of the settlement of the estate of the deceased allottee, under the provisions of § 9 of the Act of Congress of May 27, 1908 (35 Stat. at L. 312, chap. 199), on August 13, 1908. The journal entry of the order approving the deed is as follows:

Now, on this 13th day of August, 1908, comes Isaac Simpson and files and presents to the court his petition praying for an order of the court approving and confirming a certain deed of conveyance executed by the said Isaac Simpson to W. B. Dennis on the 11th day of August, 1908, to the following described real estate to wit: The northwest quarter and the northwest quarter of the southwest quarter of section 36, township 10 north, range 5 west, same being allotment of said Thomas Simpson Ketchum, deceased. And the court, upon consideration of the said petition, being well and sufficiently advised in the premises, finds that the said Thomas Simpson, deceased, was a full-blood Choctaw Indian, and that he resided at the time of his death and previous thereto in that portion of the Central district of the Indian Territory which now comprises Pushmataha county, Oklahoma, that he died here on the 10th day of April, 1906, and that this court has exclusive jurisdiction of the estate of the said Thomas Simpson, deceased;

that at the time of his death he was seised of the above-described lands, which were allotted to him by the Chickasaw and Choctaw Nations and conveyed to him under allotment and homestead patents; and that the said Thomas Simpson at the time of his death was the owner of said lands in fee simple.

The court further finds that the petitioner, Isaac Simpson, is a full-blood Choctaw Indian, is father of the deceased, and inherited a life estate in his lands; that on the ——— day of ———, 1908, the said petitioner, Isaac Simpson, executed to W. B. Dennis, for and in consideration of the sum of \$500, a warranty deed to his interest in the said lands. The court further finds that the deed was duly signed and acknowledged by the said Isaac Simpson, and that the consideration of said deed was fully paid, and that the same is reasonable, adequate, and satisfactory to the said petitioner; and the court finds that the said conveyance of the said real estate from the said Isaac Simpson to the said W. B. Dennis should be in all things approved and confirmed.

It is therefore by the court considered, ordered, adjudged, and decreed that the said conveyance of the said above-described lands by the said warranty deed, dated the 11th day of August, 1908, from the said Isaac Simpson to the said W. B. Dennis, be, and the same is hereby, approved and confirmed and declared in all things legal and valid.

L. P. Davenport, County Judge.

It seems that the county court labored under the erroneous impression that Isaac Simpson took only a life estate in the lands of his deceased son, and it is contended by plaintiffs that, because said county court found that Isaac Simpson inherited a life estate in the lands of his deceased son, the order approving the deed submitted to the court authorized only a conveyance of a life estate, and that the deed approved therefore only conveyed Isaac Simpson's life estate, and upon his death the lands conveyed descended to John Simpson and his other heirs. We do not think that the order of the county court is open to the construction contended for by plaintiffs. By the provisions of § 9, Act of Congress, May 27, 1908, the county court was granted power to approve the deeds of full-blood Indians, conveying their inherited lands, and such approval was necessary to the validity of such deed. There was no authority to determine or adjudicate what interest the heir of a deceased allottee might have in the land in a proceeding to approve a deed executed by such heirs.

The only matter properly before the county court in such a proceeding was the question of whether or not the deed executed by a full-blood heir of an allottee should or should not be approved. The county court of Pushmataha county determined this question in favor of the approval of the deed executed, which on its face conveyed all the estate that Isaac Simpson had in the lands described therein. The findings of the court as to the estate inherited by Isaac Simpson were upon matters not then before him for consideration, and can have no weight in modifying the order actually made by the county court. The order of the court was that the deed executed by said Isaac Simpson to said W. B. Dennis, describing it, be approved and confirmed as in all things legal and valid. The order embraced the only matter before the court for determination, and the conveyance approved cannot be reduced or the estate conveyed thereby diminished by the erroneous findings of fact contained in the journal entry. It has been determined by this court, in the case of *Cochran v. Blank*, 53 Okla. 317, 156 Pac. 324, that the action of a county court approving a deed conveying the interest of a full-blood Choctaw Indian in lands inherited by such Indian, required by § 9, Act of Congress, May 27, 1908, supra, is not judicial in its nature nor the exercise of any judicial function. The act of the county court approving the deed in the instant case not being judicial, the findings of the court as to the estate in said lands inherited by Isaac Simpson form no part of the order of approval, there being no necessity for them, and they may therefore be treated as surplusage.

It is urged, however, by plaintiffs, that the deed described in the order of the county court approving the same was said to be dated August 11, 1908, whereas the deed in evidence in this case bears date August 5, 1908, and that therefore the deed approved by the court is not before us, and we cannot say what interest or estate was conveyed thereby. It is true the deed upon which defendants rely was dated August 5, 1908, and was filed for record August 11, 1908, but the plaintiffs cannot now and here question that the deed relied upon by defendants is the one approved by the county court of Pushmataha county. Plaintiffs in their petition allege that the deed bearing date August 5, 1908, was executed by Isaac Simpson, and allege that said deed was duly approved by the county court of Pushmataha county, and plaintiffs attach as an exhibit to the petition a copy of said deed and a copy of the order of the county court approving same. The plaintiffs cannot now be heard to say that this



deed was not the deed approved by the county court of Pushmataha county in its order made on August 13, 1908. We therefore conclude that the defendants, through the deed executed by Isaac Simpson, took all of the estate of Isaac Simpson in said lands, and that the trial court erred in holding that the plaintiff John Simpson inherited an undivided one-ninth interest therein from said Isaac Simpson.

It is urged by the defendants in their brief that Isaac Simpson inherited the entire estate of his deceased son in the lands in controversy. This contention seems, however, to have been abandoned in the oral argument, and it is, in any event, untenable. In *Thorn v. Cone*, 47 Okla. 781, 150 Pac. 701, it is determined by this court that the allotment of a deceased member of the Five Civilized Tribes dying without issue, intestate, before statehood, and whose father and mother were full-blood members of his tribe, ascends equally to the father

and his heirs and the mother and her heirs. *McDougal v. McKay*, 43 Okla. 261, 142 Pac. 987; *Pigeon v. Buck*, 38 Okla. 101, 131 Pac. 1083. It follows, therefore, that John Simpson through his mother, inherited upon the death of Thomas Simpson Ketchum an undivided one-half interest in his allotment, and the whole estate did not ascend to the surviving father.

The judgment of the trial court should therefore be modified so as to award to the plaintiffs an undivided one-half interest in the lands in controversy, and the judgment so modified should be affirmed. The costs of this appeal should be equally divided between the plaintiffs and defendants, and this cause remanded to the trial court, with directions to render judgment in conformity with this opinion.

**Per Curiam:**

Adopted in whole.

### **Annotation—Validity and effect of a judgment against parties designated in an action as unknown.**

#### **I. Introduction, 609.**

#### **II. Necessity of statutory authority, 611.**

#### **III. Constitutionality:**

##### **a. In general, 612.**

##### **b. Personal judgment, 616.**

#### **IV. Parties:**

##### **a. Who may be sued as unknown, 618.**

##### **b. Who is bound by judgment against unknown heirs, unknown persons, etc., 623.**

##### **c. Joinder of defendants, 625.**

#### **V. Procedure:**

##### **a. In general, 626.**

##### **b. Showing that parties are unknown:**

###### **1. In general, 629.**

###### **2. Who may make, 633.**

##### **c. Showing of interest of unknown parties, 634.**

##### **d. Order for publication, 635.**

##### **e. Publication, 636.**

##### **f. Proof of publication, 639.**

#### **VI. Applicability of principles governing collateral attack on judgments, 639.**

#### **I. Introduction.**

The present note is confined to an examination as to how far valid judicial proceedings may be had against persons who are not named in the proceeding except by the designation of unknown parties or claimants. The note being confined to judicial proceedings, tax proceedings are excluded except in so far as such proceedings are brought into court. In some jurisdictions a tax certificate is foreclosed by judicial action; such cases are included in the note in so far as the unknown owners of the land or unknown claimants are made parties to such proceedings.

Judicial proceedings against unknown claimants are of two classes. There is first, that class of claimants to property

who are known to exist, but whose names are unknown; second, there is that class of claimants whose names are not only not known, but who themselves are not known to exist; in other words, there is an attempt in judicial proceedings against this character of unknown claimants to exclude from an interest in property any who may have a claim thereto. Whether, when the heirs of a designated person are made parties as unknown heirs, it is necessary to prove the existence of such heirs, is a question upon which the authorities are not agreed. It has been held that a decree against unknown heirs is ineffectual in the absence of proof that there were heirs, under a statute authorizing a decree upon an order of publication against heirs where the particular names of the heirs

are unknown.<sup>1</sup> On the contrary, under a similar statute, it has been held not necessary for plaintiff, in an action against unknown heirs of a person, to prove that there were heirs, nor who they were;<sup>2</sup> but it has been held necessary to prove that the ancestor is dead.<sup>3</sup> It has been held, however, that the presumption of death arising from long-continued absence is sufficient to authorize a finding of death.<sup>4</sup>

Judicial proceedings are divided into proceedings in rem, proceedings quasi in rem, and proceedings in personam. The line between these proceedings is not always clearly drawn, especially between proceedings in rem and those quasi in rem; it is not possible to fix accurately the limit at which a proceeding in rem ends and one quasi in rem begins. In a general way, however, it may be stated that in a proceeding in rem the property is the subject of adjudication; the ownership is of secondary importance. Tax proceedings under certain statutes are illustrative of this class of proceedings. In a case under a taxing statute making such a proceeding one in rem it is stated that tax proceedings are against the land, and not against the owner,—“the notice is addressed not to the persons named in the list as owners, but to all persons who have or claim any interest in any of the tracts described in the list, and they are notified that, in case of default, judgment will be entered not against them personally, but against such pieces or parcels of land. The judgment is against the land, and the name of the owner is not required to appear at all. It is elementary that no reference to the name of the owner is necessary in proceedings in rem.”<sup>5</sup> Again it is

stated that actions in rem, strictly considered, are proceedings against property alone, treated as responsible for the claims asserted by the libellants or plaintiffs. An action quasi in rem is one which, although brought against persons, only seeks to subject certain property of those persons to the discharge of the claims asserted. In these actions the “interest of the defendant is alone sought to be affected, and citation to him is required, and judgment in the action is conclusive only between the parties.”<sup>6</sup> A proceeding in rem has been defined to be a proceeding against the property, while a proceeding quasi in rem is a proceeding against a person in respect to property.<sup>7</sup> Actions in personam, on the other hand, are not only against the person, but the judgment therein is binding generally; it is not confined to particular property.

It is apparent that a judgment in a proceeding strictly in rem, where such a proceeding is authorized and properly conducted, binds all persons who have or claim any interest in the property. strictly, this is not by virtue of their being made parties to the proceeding, but because the thing itself is brought before the court, and its status determined. Cases which are strictly in rem are beyond the scope of the present note.

However, cases in which it is assumed or held that possible claimants must in some manner be made parties and given notice, actual or constructive, are included, even though they may employ language implying that the proceeding was in rem.

It is apparent that unknown parties must be served by constructive service.<sup>8</sup> In the preparation of the present note

<sup>1</sup> Hollingsworth v. Barbour (1830) 4 Pet. (U. S.) 466, 7 L. ed. 922 (collateral attack).

<sup>2</sup> Pile v. McBratney (1853) 15 Ill. 314 (collateral attack). The statute provided: “In all suits in chancery, and suits to obtain title to lands . . . if there be persons interested in the same whose names are unknown, it shall be lawful to make such persons parties . . . by the name or description of persons unknown, or unknown heirs or devisees of any deceased person who may have been interested in the subject-matter . . . previous to his or her death.”

There is held to be a legal presumption in Illinois that a deceased person leaves heirs capable of inheriting his estate. Pile v. McBratney (Ill.) supra. While in Hollingsworth v. Barbour (U. S.) supra, it is stated that “although it may sometimes be presumed that a decedent left heirs rather than that he left none, it is not clear to my mind that the presumption should be indulged in

a case like this so far as to uphold the title of the complainant. It is but a presumption of fact in any case, and, like other presumptions, may be repelled by counter-vailing facts and presumptions.”

<sup>3</sup> Pile v. McBratney (Ill.) supra. See Gill v. More (1917) — Ala. —, 76 So. 453, text to note 102.

<sup>4</sup> Burton v. Perry (1893) 146 Ill. 71, 34 N. E. 60 (collateral attack).

<sup>5</sup> McQuade v. Jaffray (1891) 47 Minn. 326, 50 N. W. 233.

In Pritchard v. Madren (1880) 24 Kan. 486, it is stated that the name of the owner is not required in proceedings under the statute there involved for the sale of land for taxes; the collection of taxes is stated to be a proceeding in rem.

<sup>6</sup> Freeman v. Alderson (1886) 119 U. S. 185, 30 L. ed. 372, 7 Sup. Ct. Rep. 165.

<sup>7</sup> Hill v. Henry (1904) 66 N. J. Eq. 150, 57 Atl. 554.

<sup>8</sup> It is conceivable that in certain cases

a large number of questions relating to constructive service have been encountered which are not distinctive to proceedings against unknown owners. This is especially true in the subdivision relating to procedure. The plan has been to exclude such questions from the note so far as they are not distinctive to procedure against unknown parties. The statutory condition of obtaining service by publication, found in some states, that the defendant be a nonresident, is an anomalous one where unknown defendants are sought to be thus served. If they are unknown—as distinguished from their names being unknown—the fact as to their residence is unknown and no affidavit that they are nonresidents can truthfully be made. Nonresidence, however, is not a condition prescribed by all statutes for service upon unknown parties.<sup>9</sup>

The Torrens Law is discussed in another note in this series of reports;<sup>10</sup> the present note does not deal with questions connected with service against unknown parties in proceedings under such laws.

in which only the names of resident parties are unknown, actual service might be had, but such a situation is highly improbable. Moreover, there would seem to be a duty upon a plaintiff who could thus direct personal service to determine the name of the defendant and make him a party by name.

<sup>9</sup> An affidavit that the names of the heirs at law of a certain person are unknown is sufficient to authorize a publication under a statute providing that when the unknown heirs of a deceased person are necessary parties defendant, they may be made such by the description, "the unknown heirs of the deceased," and upon affidavit that their names are unknown, publication shall be made as in case of absent defendants. *Reed v. Gregory* (1872) 46 Miss. 740. It is stated that a publication is authorized on the condition that the heirs are unknown, without reference to their residence, their presence or absence from the state.

<sup>10</sup> Note L.R.A.1918D, 14.

<sup>11</sup> *Hill v. Henry* (N. J.) supra, holding that §§ 10 and 11 of the N. J. Chancery Act of 1902 did not apply to actions to quiet title, and therefore there was no authority to make unknown heirs, devisees, and personal representatives parties to such an action.

*Dunn v. Taylor* (1906) 42 Tex. Civ. App. 241, 94 S. W. 347 (tax foreclosure by state).

In an error proceeding in *Byrnes v. Sampson* (1889), 74 Tex. 79, 11 S. W. 1073, it is stated that if there is no statute authorizing service upon unknown heirs, the necessary result will be a reversal of the judgment and dismissal of the cause.

In the absence of a statute so authorizing, a court has no authority to appoint a

## II. Necessity of statutory authority.

Jurisdiction to sue unknown persons must be obtained in pursuance of some statute. There is no authority to proceed against unknown persons in the absence of statute; consequently a judgment against unknown persons is void.<sup>11</sup> At least, a judgment in an action against unknown heirs is ineffectual to bind the unknown heirs since, in the absence of a statute authorizing such a proceeding, the unknown heirs cannot be regarded as having received notice, either actual or constructive.<sup>12</sup> Where a statute does authorize a proceeding against parties without naming them, and the statutory procedure is followed, such parties are bound by the judgment in the proceeding to the same extent as if they had been named.<sup>13</sup> Being bound by the judgment they are regarded as parties to the action and may appeal from the judgment or prosecute a writ of error there-to.<sup>14</sup>

Whether a particular statute does authorize a proceeding against unknown parties is a question not considered gen-

guardian for the unknown heirs of a decedent. *State ex rel. Ross v. McLaughlin* (1881) 77 Ind. 335.

<sup>12</sup> *Hollingsworth v. Barbour* (1830) 4 Pet. (U. S.) 466, 7 L. ed. 922.

<sup>13</sup> *Taliaferro v. Butler* (1890) 77 Tex. 578, 14 S. W. 191, holding unknown heirs of a named person in a partition action bound by the judgment so far as it makes partition of the land.

*Gibson v. Oppenheimer* (1913) — Tex. Civ. App. —, 154 S. W. 694, holding that the unknown heirs of an owner of land who were residents of the state at the time they were cited by publication were bound by a judgment in an action by the vendor of the land to enforce his vendor's lien.

A judgment in an action for partition against persons unknown is stated in *Foxcroft v. Barnes* (1848) 29 Me. 128, to be conclusive upon the rights of persons who did not appear and become parties to the proceeding, although it may have been erroneous and inoperative upon the rights of those who were parties to that issue, because of the fact that the finding of the jury did not conform to the issues, and, through some inadvertence, it was not written out in form before it was affirmed.

<sup>14</sup> One who is made a party to an action to foreclose a mechanics' lien as an unknown owner of a note secured by trust deeds on the property may prosecute a writ of error from a judgment therein in his own name. *Kircher v. M. Keating & Sons Co.* (1908) 145 Ill. App. 1. *Bowles v. Rouse* (1846) 8 Ill. 408, is cited as authority for this decision. The facts in the *Bowles Case* are not clearly stated, so it is impossible to determine its bearing on the question.

erally herein.<sup>15</sup> It may be stated that it has been held that a statute authorizing the unknown heir of a known ancestor to be made a party by naming the ancestor does not authorize a tax suit against unknown owners.<sup>16</sup> But it has been held under a statutory provision that if, at the institution or during the progress of a suit, the plaintiff, his agent or attorney, should make affidavit that the names of the heirs, successors, or legal representatives of any deceased person, party to such suit, were unknown to the affiant, the clerk of the court should issue a writ for such heirs, successors, or legal representatives whose names were unknown, giving the name of the original deceased party, their ancestor, that constructive service upon unknown heirs of a deceased person is authorized at the beginning of a suit if the petition shows a cause of action against the ancestor, who is alleged to be dead,

Where the owners of land have appeared in an action by the state for taxes against unknown owners and filed pleadings therein, they have become parties thereto, and have the right of appeal upon a judgment, although the judgment is against unknown owners, and not against the parties thus appearing by name. *Watkins v. State* (1901) — *Tex. Civ. App.* —, 61 S. W. 532.

But in *Fuller v. Unknown Owner of Certain Lands* (1859) 9 Iowa, 430, it is held that no appeal lies in an action against certain lands and the unknown owners thereof to foreclose a tax title, where the name of no person appears as appellant. This is apparently on the theory that anyone making an appeal must appear and have his name substituted in the action and take an appeal in his own name, although this is not made clear in the opinion.

<sup>15</sup> The 135th section of the New York Code was held applicable merely to proceedings for the foreclosure of mortgages in *Sanford v. White* (1873) 46 How. Pr. (N. Y.) 205, affirmed in (1874) 56 N. Y. 359, and not applicable to a partition.

In *Allen v. Allen* (1854) 11 How. Pr. (N. Y.) 277, on the contrary, a plaintiff was held entitled to proceed under this section of the Code in an action in partition against unknown parties. Whether the Code was changed after this action and before the decision in the *Sanford Case* does not appear.

It is held in *Bergen v. Wyckoff* (1881) 84 N. Y. 659, that § 451 of the Code of Civil Procedure 1878, relating to service upon unknown parties, applies to actions in partition.

It has been held that an allegation in an action in which persons were made defendants under fictitious names, that their names were unknown to the plaintiff, does not bring the case within § 749 of the California Code of Civil Procedure, authorizing

although the deceased ancestor cannot be made a party to the suit.<sup>17</sup> A judgment in an action to foreclose a tax lien against an unknown owner of the land is void where the owner had paid the taxes thereon under a different description, so that the authorities were not entitled to proceed under a statute authorizing a proceeding for the collection of delinquent taxes, but making the statute inapplicable in case of land erroneously assessed on which the tax had been paid.<sup>18</sup> The provisions of a statute regulating the practice in chancery, that when the complainant does not know all the heirs, he may proceed against those unknown, as well as those known, apply to actions in partition.<sup>19</sup>

### III. Constitutionality.

#### a. In general.

It is recognized by the courts that procedure against unknown parties is un-

an action against persons unknown. *Los Angeles v. Los Angeles Farming & Mill. Co.* (1907) 150 Cal. 647, 89 Pac. 615. It is stated that such action is against the persons who make adverse claims and their true names only are unknown.

In *Los Angeles v. Los Angeles Farming & Mill. Co.* (Cal.) supra, an action to determine adverse claims to real property, as provided in § 738 of the California Code of Civil Procedure, was held not to be brought within the provisions of §§ 749, 750, and 751 of the California Code of Civil Procedure, relating to actions against unknown persons, so as to require the complaint to comply with the provisions of the latter section by the fact that four persons were named in the action under fictitious names, it being alleged that their names were unknown to the plaintiff, but not averred that the persons were unknown. The action was not against all unknown persons, nor even against all persons whose names were unknown.

<sup>16</sup> *Dunn v. Taylor* (1906) 42 *Tex. Civ. App.* 241, 94 S. W. 347.

<sup>17</sup> *Kilmer v. Brown* (1902) 28 *Tex. Civ. App.* 420, 67 S. W. 1090. The court refers to the obiter statement to the contrary found in *Byrnes v. Sampson* (1889) 74 *Tex.* 81, 11 S. W. 1073. The Texas law governing *Byrnes v. Sampson* authorized constructive service where any person had a claim to property against the heirs of a deceased person and their names were unknown. This is stated to authorize constructive service without regard to whether the ancestor was a party to the suit or not.

<sup>18</sup> *Hollywood v. Wellhausen* (1902) 28 *Tex. Civ. App.* 541, 68 S. W. 329; *Mote v. Thompson* (1913) — *Tex. Civ. App.* —, 156 S. W. 1105.

<sup>19</sup> *Lease v. Carr* (1840) 5 *Blackf. (Ind.)* 353.

satisfactory, but that of necessity must be had. The statutes authorizing such procedure have confined it to proceedings in rem or quasi in rem, and as so limited they have generally been sustained.<sup>20</sup> Unknown persons may be served by publication, and a judgment rendered against them is valid, at least to the extent that it is in rem or quasi in rem, even if they are infants,<sup>21</sup> or residents of the state.<sup>22</sup>

The constitutional objection usually urged against such statutes is that due process of law is not afforded by them. It is held generally in some cases that the due-process-of-law guaranty does not require personal service of notice upon parties resident or nonresident.<sup>23</sup> Constructive service upon unknown owners of lands who cannot, after inquiry, be ascertained, in a proceeding to enforce a tax lien, satisfies the due process of

law, whether the proceeding is by the state<sup>24</sup> or by an individual holder of a tax certificate to foreclose the same.<sup>25</sup> It is not a sufficient objection to an action to establish a title under a statute providing for actions in rem against all the world to establish titles where the public records have been destroyed, that no precisely similar proceeding was known to the common law.<sup>26</sup>

Some courts examine particularly the provisions of the statute involved. In order that there may be due process of law it is held a condition of procedure against parties as unknown that their identity cannot be discovered by the exercise of reasonable diligence.<sup>27</sup> Statutes authorizing procedure against unknown parties have been construed as requiring this diligence in order to sustain them as constitutional.<sup>28</sup> It is stated obiter by the supreme court of

<sup>20</sup> *Gill v. Moore* (1917) — Ala. —, 76 So. 453 (dictum); Title & Document Restoration Co. v. Kerrigan (1906) 150 Cal. 289, 8 L.R.A.(N.S.) 682, 119 Am. St. Rep. 199, 88 Pac. 356; *Bertrand v. Taylor* (1877) 87 Ill. 235; *Pritchard v. Madren* (1880) 24 Kan. 486; *Shepherd v. Ware* (1891) 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773; *McClymond v. Noble* (1901) 84 Minn. 329, 87 Am. St. Rep. 354, 87 N. W. 838; *Cona v. Henry Hudson Co.* (1914) 86 N. J. L. 154, 90 Atl. 1031, Ann. Cas. 1916E, 999; *Rodriguez v. La Cueva Ranch Co.* (1912) 17 N. M. 246, 143 Pac. 228 (dictum); *Lawrence v. Hardy* (1909) 151 N. C. 123, 134 Am. St. Rep. 976, 65 S. E. 766; *Hardy v. Beatty* (1892) 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778; *Sloan v. Thompson* (1893) 4 Tex. Civ. App. 419, 23 S. W. 613; *Young v. Jackson* (1908) 50 Tex. Civ. App. 351, 110 S. W. 74; *Leigh v. Green* (1904) 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390, affirming (1902) 64 Neb. 533, 101 Am. St. Rep. 592, 90 N. W. 255, affirming former opinion (1901) 62 Neb. 344, 89 Am. St. Rep. 751, 86 N. W. 1093.

The court of chancery of New Jersey has treated a bill to quiet title as a proceeding quasi in rem, and doubts the validity of a statute authorizing such a proceeding against unknown heirs, devisees, and personal representatives. *Hill v. Henry* (1904) 66 N. J. Eq. 150, 57 Atl. 554. The actual decision in this case, however, is based upon another ground.

<sup>21</sup> *Hardy v. Beatty* (Tex.) supra.

<sup>22</sup> *Pritchard v. Madren* (1880) 24 Kan. 486 (tax proceeding); *McClymond v. Noble* (1901) 84 Minn. 329, 87 Am. St. Rep. 354, 87 S. W. 838; *Pool v. Lamont* (1894) — Tex. Civ. App. —, 28 S. W. 363; *Gibson v. Oppenheimer* (1913) — Tex. Civ. App. —, 154 S. W. 694.

<sup>23</sup> *Shepherd v. Ware* (1891) 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773. See *Leigh v. Green* (1904) 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390, affirming (1902)

64 Neb. 533, 101 Am. St. Rep. 592, 90 N. W. 255, infra, note 45.

<sup>24</sup> In *Young v. Jackson* (1908) 50 Tex. Civ. App. 351, 110 S. W. 74, the form of the notice was prescribed by statute and was entitled in the name of the state and county, and directed to all parties owning or having or claiming any interest in the land which was described. It contained the information that the land was delinquent for taxes, and stated the amount of the delinquency, and the owner was notified that suit had been brought by the state for the collection of the taxes, and he was commanded to appear and defend such suit at a named term of court and show cause why judgment should not be rendered, condemning the land and ordering sale and foreclosure for the taxes.

<sup>25</sup> *Williams v. Pittock* (1903) 35 Wash. 271, 77 Pac. 385. The action in this case was against the holder of the record title "and all persons unknown, if any, having or claiming to have an interest in and to the real property hereinafter described."

<sup>26</sup> *Title & Document Restoration Co. v. Kerrigan* (1906) 150 Cal. 289, 8 L.R.A.(N.S.) 682, 119 Am. St. Rep. 199, 88 Pac. 356.

<sup>27</sup> *Gill v. More* (1917) — Ala. —, 76 So. 453; Title & Document Restoration Co. v. Kerrigan (Cal.) supra. *Shepherd v. Ware* (1891) 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773; *Rodriguez v. La Cueva Ranch Co.* (1912) 17 N. M. 246, 134 Pac. 228. See *Sloan v. Thompson* (1893) 4 Tex. Civ. App. 419, 23 S. W. 613, infra, as to the necessity of showing diligence in the affidavit.

<sup>28</sup> *Gill v. More* (Ala.) supra; *Rodriguez v. LaCueva Ranch Co.* (N. M.) supra.

It is stated, however in the *Rodriguez Case*, that as the statute did not authorize a proceeding against the appellees who were in adverse possession as unknown owners, it became unnecessary to decide specifically whether such a statute is constitutional.

California that "it is no doubt true that so far as substituted service upon a class of unknown claimants is permitted at all, in proceedings which are merely quasi in rem, it rests upon the ground of necessity, and that this necessity will not justify the omission of personal service upon all who could, with reasonable diligence, be ascertained and found."<sup>29</sup>

As to the necessity that those made parties as unknown be in fact unknown, see subdivision IV. a, *infra*.

Many of the statutes do not make the judgment final, but authorize the unknown party to appear and defend within a specified time after the judgment is rendered.<sup>30</sup> Just how far this provision is regarded essential to the validity of the statute cannot be determined in some cases. A judgment which becomes final only after a certain period has elapsed has been stated not to operate *ex proprio vigore*, but to become the starting point of a statutory period of limitation, and the right is extinguished by failure to assert it within the period.<sup>31</sup> The validity of the Illinois Burnt Records Act, providing for the establishing of titles the public record of which had been destroyed, authorizing unknown owners or claimants to be brought in under the designation of "to whom it

may concern," was sustained on the theory that such statute was in effect a statute of limitations.<sup>32</sup> It has been held, however, that a state may authorize a proceeding against all the world to establish title to real estate therein where the public records have been destroyed, and make a judgment in the proceeding binding against all persons; it is not necessary to provide that the adjudication shall be final against unknown persons only upon their failure to come in and assert their rights within a specified time after the judgment or decree.<sup>33</sup>

Practically all the statutes authorizing procedure against unknown parties relate to land. It is recognized that, of necessity, there must be some method of settling land titles in a state, and it is held that such titles may be settled against unknown parties according to procedure and methods prescribed by the state.<sup>34</sup> The state may authorize a proceeding to establish titles the public records of which have been destroyed, making parties thereto unknown claimants, and make the judgment therein binding upon such unknown claimants,<sup>35</sup> at least upon their failure to come in and defend within a specified time after judgment.<sup>36</sup>

Proceedings to quiet title, or to deter-

<sup>29</sup> Title & Document Restoration Co. v. Kerrigan (Cal.) *supra*. The court here held that the statute required diligence to ascertain the identity of claimants.

<sup>30</sup> The statutes involved in the following cases contained this provision: *Shepherd v. Ware* (1891) 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773.

One who is sued as an unknown owner, and who appears within the statutory time after the rendition of the judgment, is not entitled to have the judgment vacated under a statute providing for vacation for "sufficient cause shown," unless he has shown a sufficient cause. *Williams v. Pittock* (1904) 35 Wash. 271, 77 Pac. 385.

See *Lawrence v. Hardy* (1909) 151 N. C. 123, 134 Am. St. Rep. 976, 55 S. E. 766, *infra*, note 41.

<sup>31</sup> Title & Document Restoration Co. v. Kerrigan (1906) 150 Cal. 289, 8 L.R.A. (N.S.) 682, 119 Am. St. Rep. 199, 88 Pac. 356.

<sup>32</sup> *Gormley v. Clark* (1889) 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Bertrand v. Taylor* (1877) 87 Ill. 235.

<sup>33</sup> Title & Document Restoration Co. v. Kerrigan (Cal.) *supra*. The statute was sustained notwithstanding some provisions therein as to procedure varied from the Code of Civil Procedure of the state.

The United States Supreme Court, however, in sustaining this statute in *American Land Co. v. Zeiss* (1911) 219 U. S. 47, 55 L. ed. 82, 31 Sup. Ct. Rep. 200, refers to a general statute of the state of California

(Code Civ. Proc. § 473), giving any person interested in the property, having no actual notice of the decree, one year within which to come in and show that he was not personally served with process and state facts constituting a good defense to the proceeding, upon which he may have the decree vacated as to him and be allowed to answer to the merits, and holds that this statute applies to actions under the statute relating to the establishment of lost or destroyed records.

See *Lawrence v. Hardy* (N. C.) *supra*, *infra*, note 41.

<sup>34</sup> *Sloan v. Thompson* (1893) 4 Tex. Civ. App. 419, 23 S. W. 613; *Phillips v. Thompson*, *ante*, 599.

That a state has power to provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a nonresident, is brought into court only by publication, is held in *Arndt v. Griggs* (1890) 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557. This was a case, however, in which the defendants were named.

<sup>35</sup> Title & Document Restoration Co. v. Kerrigan (1906) 150 Cal. 289, 8 L.R.A. (N.S.) 682, 119 Am. St. Rep. 199, 88 Pac. 306.

<sup>36</sup> *American Land Co. v. Zeiss* (1911) 219 U. S. 47, 55 L. ed. 82, 31 Sup. Ct. Rep. 200; *Gormley v. Clark* (1889) 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Bertrand v. Taylor* (1877) 87 Ill. 235.

mine adverse claims to real estate, may be authorized against unknown persons claiming any right or title to the premises.<sup>37</sup> While an action to quiet title or one to determine adverse claims to real estate is equitable in its nature, and, strictly speaking, equity acts upon the person, and not upon the property, such actions may, nevertheless, by virtue of the statute, be classed with actions in rem or quasi in rem.<sup>38</sup>

An action against unknown heirs, by one who had contracted with the ancestor to locate government lands for one half the lands, to obtain title to one half the lands so located in accordance with the terms of the contract, was held to be an action in rem and within the operation of a statute authorizing proceedings against unknown parties.<sup>39</sup>

The validity of proceeding against unknown parties in partition proceedings has been sustained.<sup>40</sup> The power of a court under statutes providing for constructive service on persons unknown, to acquire jurisdiction and to make decrees affecting the status and condition and ownership of real property situated

within a state, has been sustained although it results in divesting one sued as an unknown person of his interest in property, which is sold in the partition action in which unknown heirs of an ancestor from whom plaintiff derived title were made parties.<sup>41</sup> Actions against unknown parties for partition have frequently been sustained, but without special question as to the validity of thus applying this procedure against unknown parties.

Suits to collect taxes are held to be proceedings in rem in which unknown persons may be made parties.<sup>42</sup> A tax proceeding under some statutes is purely a proceeding in rem. The whole procedure, including the assessment, foreclosure, and sale, is for the purpose of establishing and enforcing a lien for public revenue, which is chargeable to the property only, and not personally to the owner; it is the land itself with which the state is concerned, and its dominion over the land for revenue purposes exists without regard to who may be the owner.<sup>43</sup> In some jurisdictions the statute provides for a notice to all

<sup>37</sup> Gill v. Moore (1917) — Ala. —, 76 So. 453 (dictum).

Shepherd v. Ware (1891) 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773, the statute involved in this action provided that in actions to determine adverse claims the plaintiff may include as defendant in such actions and insert in the title thereof, in addition to the names of such persons or parties as appear of record to have, and other persons or parties who are known to have, some title, claim, estate, lien, or interest in the land in controversy, the following, namely: "All other persons or parties unknown, claiming any right, title, estate, lien, or interest in the real estate described in the complaint." It was provided further that service of the summons might be had upon all such unknown persons or parties defendant by publication, as provided by law in case of nonresident defendants.

McClymond v. Noble (1901) 84 Minn. 329, 87 Am. St. Rep. 354, 87 N. W. 838.

<sup>38</sup> Gill v. More (Ala.) supra (dictum) Shepherd v. Ware (Minn.) supra; McClymond v. Noble (1901) 84 Minn. 329, 87 Am. St. Rep. 354, 87 N. W. 838; Sloan v. Thompson (1895) 4 Tex. Civ. App. 419, 23 S. W. 14; PHILLIPS v. TOMPSON, ante, 599.

The general question of whether jurisdiction of suit to quiet title or remove cloud on title of land within the territorial jurisdiction may rest upon constructive service of process against a nonresident is discussed in the note to Tennant v. Fretts, 29 L.R.A. (N.S.) 625.

<sup>39</sup> Hardy v. Beaty (1892) 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778.

<sup>40</sup> Cona v. Henry Hudson Co. (1914) 86

N. J. L. 154, 90 Atl. 1031, Ann. Cas. 1916E, 999. Statute authorized proceedings against the heirs, devisees, or personal representatives of any person. The court regards its decision as being in harmony with the opinion expressed in Hill v. Henry (1904) 66 N. J. Eq. 150, 57 Atl. 554, supra, that a bill to quiet title against unknown heirs, devisees, and personal representatives is not authorized.

In Gillon v. Wear (1894) 9 Tex. Civ. App. 47, 28 S. W. 1014, unknown parties were held to be divested of their interest in land which had been assigned to others in the partition action.

See Lease v. Carr (1840) 5 Blackf. (Ind.) 353, supra, note 19.

<sup>41</sup> Lawrence v. Hardy (1909) 151 N. C. 123, 134 Am. St. Rep. 976, 55 S. E. 766. The statute involved in this case allowed an unknown person to defend after judgment rendered at any time within one year after notice and within five years from the rendition of the judgment, and on such terms as were just, but it was provided that title to property sold under the judgment to a purchaser in good faith should not be thereby affected. It was accordingly held that the sale conveyed good title to the purchaser, so that one who afterwards appeared and was entitled to defend could not obtain a lien on the land; his remedy was to recover of the known heirs to whom the proceeds of the sale had been distributed.

<sup>42</sup> Young v. Jackson (1908) 50 Tex. Civ. App. 351, 110 S. W. 74.

<sup>43</sup> Williams v. Pittock (1904) 35 Wash. 271, 77 Pac. 385. The summons in this case was specifically directed to the person in whose name the property was assessed, and

persons interested, and that all persons interested, whether named or not, shall be deemed to be defendants, and bound by the judgment. The constitutionality of such a statute is sustained.<sup>44</sup> The failure of such a statute to make provision for personal service of notice of the pendency of the tax foreclosure proceeding upon a lien holder does not deprive him of property without due process of law.<sup>45</sup> In tax proceedings the element of sovereignty is involved, and this is true although there is conferred upon the purchaser at a tax sale the right to institute a suit against the land itself, available whenever the owner is not known, whereby all persons claiming interest in the land may be barred completely on sale under decree of foreclosure. Under such a statute the state sells to a purchaser and gives him the same remedy it would have had, if it had chosen or been able to await this method of collection. The power of the state to levy taxes obviously carries with it the power to collect them and to provide all means necessary or appropriate to insure and enforce their collection. The method of doing so lies with the legislature, subject to such rules, limitations, and restraint as the Constitution of the state may have imposed. This right of the state to collect by summary process may be assigned to an individual.<sup>46</sup>

A statute relating to the distribution of the purchase price of real property in a partition action in which there are

unknown parties defendant, which provides for the investment of the sum due the unknown parties, and, at the expiration of twenty-five years, for the distribution thereof to known heirs, on the theory that the unknown heirs in existence at the time of the action are presumed to be dead, is violative of the constitutional provision against depriving one of property without due process of law.<sup>47</sup> This decision, however, was upon a narrow ground, the court distinguishing between such a presumption and a presumption that there were no unknown heirs living at the time the money was paid into the fund.

It has been held that the legislature has no power to validate a judgment against unknown heirs, rendered without obtaining jurisdiction of them.<sup>48</sup>

An early Iowa statute providing for partition of half-breed lands, and empowering the commissioners appointed for that purpose to bring an action against the owners for their fees, and providing further that such owners may be sued as "owners of the half-breed lands" and served by publication, was held to be unconstitutional, and a judgment rendered thereunder void.<sup>49</sup>

#### *b. Personal judgment.*

In the foregoing cases the judgments were merely adjudications that the unknown parties had no title or interest in the real estate in question. In other words, the judgment was one in rem. It

in addition thereto "all persons unknown, if any, having or claiming to have an interest in and to the real property hereinafter described." In proceedings to foreclose tax liens in this jurisdiction the proceeding is regarded as essentially a proceeding in rem, the owner's name not being of so much importance if the land is described.

<sup>44</sup> *Pritchard v. Madren* (1880) 24 Kan. 486. The record owner was held bound by the judgment in the tax foreclosure proceeding, which was against certain named defendants, not including the record owner, and "others unknown, and all persons having or claiming an interest therein."

<sup>45</sup> *Leigh v. Green* (1903) 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390.

<sup>46</sup> *Ibid.* And see the opinion of the state court in (1902) 64 Neb. 533, 101 Am. St. Rep. 592, 90 N. W. 255, from which the appeal was taken to the United States Supreme Court. It is stated by the state court that the proceeding under the statute involved in this case is not summary in the sense in which that term may be applied to the usual run of methods of collecting taxes, but a judicial proceeding is required, involving time and abundant opportunity to persons affected thereby.

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<sup>47</sup> *People ex rel. Miller v. Ryder* (1891) 124 N. Y. 500, 26 N. E. 1040. The court states obiter that, had the legislature provided that, after the lapse of twenty-five years, it should be presumed that there were no unknown heirs living at the time the money was paid into the fund, a different question would have been presented. Apparently this change was made, and in a subsequent proceeding the lower court expressed the opinion that such a presumption could be created by the legislature. *People ex rel. Griffin v. Ryder* (1892) 65 Hun, 175, 19 N. Y. Supp. 977.

See *Lawrence v. Hardy*, supra, note 41.

<sup>48</sup> *Nelson v. Rountree* (1868) 23 Wis. 367. The form in which the legislature attempted to effect this purpose was by a statute providing that "all orders of publication heretofore or hereafter made under . . . Revised Statute shall be evidence that the court or officer authorized to grant the same was satisfied of the existence of all facts requisite to the granting of such order or orders, and shall be evidence of the existence of such facts."

<sup>49</sup> *Webster v. Reid* (1850) 11 How. (U. S.) 437, 13 L. ed. 761; *Reed v. Wright* (1849) 2 G. Greene (Iowa) 15.



is a proposition settled since the decision in *Pennoyer v. Neff*,<sup>50</sup> that no personal judgment can be rendered, at least against a nonresident defendant served only by constructive service who does not appear in the action. This case did not involve proceedings against unknown parties, but the rule of the case is broad enough to include unknown parties and it has been so applied. Consequently in an action against unknown claimants in which the unknown claimants are nonresidents, no personal judgment for costs can be rendered.<sup>51</sup> A judgment for costs unsecured by a lien is a personal judgment, where it is to be collected by ordinary execution regardless of the nature of the suit, and such a judgment is void.<sup>52</sup> It has been held, however, that if the unknown owners are residents, a judgment for costs is valid;<sup>53</sup> and that, in an action to foreclose a vendor's lien against unknown heirs who prove to be residents of the state, the balance of a judgment remain-

ing unsatisfied after sale of the property may be collected by execution against other property of the estate.<sup>54</sup> The debts against a decedent are stated to constitute a lien upon all the property of the estate subject to the payment of debts, the holder of the vendor's lien having a debt due him from the estate as a lien upon property belonging to the estate until his debt is satisfied; if the sale of one parcel of the property does not satisfy the debt, the holder of the lien can sell another under his judgment, just as he could have done had there been personal service. In this connection the rule that jurisdiction will be presumed upon a collateral attack as to the judgments of a court of general jurisdiction unless the contrary appears of record has been applied and a personal judgment for costs in actions in rem sustained upon the presumption that the defendant against whom the judgment is rendered is a resident.<sup>55</sup> It has been held to be within the power of the court to

<sup>50</sup> (1877) 95 U. S. 714, 24 L. ed. 565.

Upon the general question of constructive or substituted service on resident in action in personam as due process of law, see notes to *Raher v. Raher*, 35 L.R.A. (N.S.) 292, and *Roberts v. Roberts*, L.R.A.1917C, 1143.

<sup>51</sup> *Taliaferro v. Butler* (1890) 77 Tex. 578, 14 S. W. 191; *Foote v. Sewall* (1891) 81 Tex. 659, 17 S. W. 373; *Gillon v. Wear* (1894) 9 Tex. Civ. App. 44, 28 S. W. 1014; *Watson v. McClane* (1898) 18 Tex. Civ. App. 212, 45 S. W. 176; *Kilmer v. Brown* (1902) 28 Tex. Civ. App. 420, 67 S. W. 1090.

It was held in the case of *Watson v. McClane* (1898) 18 Tex. Civ. App. 212, 45 S. W. 176, that such a judgment is void although it may not appear upon the record that the defendant was a nonresident. But the court in *Kilmer v. Brown* (Tex.) supra, was of a contrary opinion, although the judgment was there held invalid because it appeared from the record that the unknown parties were nonresidents.

<sup>52</sup> *Hardy v. Beaty* (1892) 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778. That the unknown parties were nonresidents seems to have been a matter of evidence in this case; at least it is so stated in *Kilmer v. Brown* (Tex.) supra. *Hardy v. Beaty* was a collateral attack in a subsequent action by some of the "unknown heirs" upon the execution sale under the judgment for costs in an action for specific performance.

*Pool v. Lamon* (1894) — Tex. Civ. App. —, 28 S. W. 363 (partition).

This conclusion is directly sustained in *Freeman v. Alderson*. (1896) 119 U. S. 190, 30 L. ed. 374, 7 Sup. Ct. Rep. 165, holding that no personal judgment for costs can be rendered against a named nonresident who is served only by publication, in an action in partition.

In setting aside a judgment in an action

to foreclose a tax lien and a sale had in pursuance thereof, it was held error to tax to one who was sued as an unknown owner and another who was served constructively, the cost of the tax foreclosure proceeding. *Crosby v. Terry* (1906) 41 Tex. Civ. App. 594, 91 S. W. 652.

<sup>53</sup> *Pool v. Lamon* (Tex.) supra (partition suit); *Watson v. McClane* (1898) 18 Tex. Civ. App. 212, 45 S. W. 176.

<sup>54</sup> *Gibson v. Oppenheimer* (1913) — Tex. Civ. App. —, 154 S. W. 694. It is stated that if the holder of the vendor's lien had alleged in its petition to foreclose it that the unknown heirs of the vendee had inherited two tracts of land from him, one on which he held a vendor's lien, and another on which he had a statutory lien, and prayed that the vendor's lien be foreclosed on the one tract and that it be sold, and if it did not sell for enough to cancel his debt, then that an execution be levied on the balance of the property, and proof had been introduced to sustain the allegation, judgment and execution would be valid. The court then concludes that if that proposition be sound, then in a collateral attack it will be presumed that those necessary matters were alleged and proved.

<sup>55</sup> *Foote v. Sewall* (1891) 81 Tex. 659, 17 S. W. 373, holding that the land which was the subject of the suit could not be sold in satisfaction of an execution on the judgment for costs.

*Kilmer v. Brown* (1902) 28 Tex. Civ. App. 420, 67 S. W. 1090 (collateral attack in a subsequent suit by some of "unknown heirs" upon the execution sale); *Gibson v. Oppenheimer* (Tex.) supra.

Contra: *Watson v. McClane* (Tex.) supra, holding such a judgment void although it does not appear from the record that the defendant was a nonresident.

make the costs adjudged against the unknown heirs of a person in a partition action a lien upon the share of land allotted to such heirs, and to order a sale if the costs are not paid.<sup>56</sup> In the great majority of proceedings against unknown parties no personal judgment is rendered, but only a judgment determining the status of the property. The general question whether a judgment in personam may be rendered upon constructive service against a resident is, of course, not within the scope of this note;

but it has been treated in earlier notes.<sup>56a</sup>

#### IV. Parties.

##### a. Who may be sued as unknown.

The very basis of the statutory procedure against unknown parties is that parties so proceeded against are in fact unknown.<sup>57</sup> In proceedings relating to land, the holder of the record title must be summoned by name to appear and defend in order to bind him.<sup>58</sup> This rule

No point is made in *Freeman v. Alderson* (U. S.) supra, of the necessity of this fact appearing of record, although it apparently so appeared.

<sup>56</sup> *Taliaferro v. Butler* (1890) 77 Tex. 578, 14 S. W. 191.

<sup>56a</sup> See notes in 35 L.R.A.(N.S.) 292, and L.R.A.1917C, 1143.

<sup>57</sup> *Wilson v. Wilson* (1908) 31 Ohio C. C. 39, holding in a collateral proceeding that a decree against unknown heirs does not quiet as against known heirs, who are not made parties to the proceeding.

And it has been stated that, in a collateral attack upon a judgment rendered in an action against unknown parties, the court should indulge the presumption, until rebutted, that those named as parties are the only parties known to the petitioner; and that if other parties are known to the petitioner, this might furnish a reason why such parties should not be bound by the decree. *Thornton v. Houtze* (1878) 91 Ill. 199.

It has been held, however, that a petition does not fail to state a cause of action against a party sued as unknown who appears and answers, because it omits to include as defendants all persons who appear of record to have some claim on the lands described in the petition, under a statute providing that the petitioner may include such persons. *Blackburn v. Bucksport & E. River R. Co.* (1908) 7 Cal. App. 649, 95 Pac. 668. It was the contention that it was the duty of the plaintiff to examine the public records and name as defendants all persons having an interest in the land in controversy in derogation of his title.

It has been held that, in an error proceeding to a judgment in an action to enforce a vendor's lien against a vendee and parties who had purchased from the vendee, and who were sued as unknown parties, the action of the court in rejecting the defendant's plea setting forth in full the names and residences of all parties interested in the subject-matter, and asking that the plaintiff make them parties, was not error. *Fayette Land Co. v. Louisville & N. R. Co.* (1896) 93 Va. 274, 24 S. E. 1016. It is stated that as the persons named in this plea had already been made parties under the designation of "parties unknown," and since as such they had a right to appear in person or by counsel and file their answers, or, if they failed to do so, they could, under

statute, appear within three years from the entry of the judgment, decree, or order, the plea was immaterial and was therefore properly rejected.

As to necessity of diligence to ascertain the identity of unknown parties, see supra, notes 28 et seq.

<sup>58</sup> *Priest v. Las Vegas* (1911) 16 N. M. 692, 120 Pac. 894, affirmed in (1914) 232 U. S. 604, 58 L. ed. 751, 34 Sup. Ct. Rep. 443, denying to one who had quieted his title to a tract of land lying in a grant which had been confirmed by the Federal Congress to a town, without making the town a party to the quiet-title proceedings, relief in a subsequent action to compel the town to execute a deed for the tract of land in question. It is stated that the plaintiff in the quiet-title proceedings knew that the town was the confirmee of the Federal grant, and that if complainant's title, which was claimed by virtue of adverse possession, had been wrested from anyone, it was from such confirmee. Knowing this, it was the duty of the plaintiff to make the town a party to the quiet-title proceedings.

The omission to name the patentee of land has been held fatal to the binding effect of a quiet-title proceeding against a grantee in a chain of title derived from the patentee, although the patent was not on record in the county where the lands were situated. The land had been certified for taxation upon the county records to the patentee, however, the plaintiff in such a proceeding is bound to take notice of the patentee of the land as well from the government records as from those of the county. *Ware v. Easton* (1891) 46 Minn. 180, 48 N. W. 775.

It is stated in *Shepherd v. Ware* (1891) 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773, that the published summons must contain the names of parties who are known and those whom the record shows to have some claim, interest, or lien so as to preserve the distinction between known and unknown parties; and to this end reasonable diligence will be required to ascertain such as are known in order to comply with the directions of the statute and effectuate its purpose in the publication of the notice.

If the holder of the record title is alleged to be dead, his unknown heirs may be made parties without him; but if the party proves to be alive, he is not bound. *Burton v. Perry* (1893) 146 Ill. 71, 34 N. E. 60.

is not changed by the fact that the holder of the record title is a town which is unincorporated, having no officer upon whom process may be served.<sup>60</sup> It has been held that the state cannot bring an action against unknown owners, under a statute authorizing procedure against unknown owners, to foreclose tax liens and deprive of title the real owner, whose title is of record,<sup>61</sup> especially if he is in possession of the land through agents or tenants.<sup>61</sup>

It has been held generally that parties

It is stated in *Evans v. Robberson* (1887) 92 Mo. 192, 1 Am. St. Rep. 701, 4 S. W. 941, that in order to bind an unknown owner of land in a tax proceeding it is necessary to make the party appearing by the record to be the owner a party to the proceeding.

See *Blackburn v. Bucksport & E. River R. Co.* supra, note 57.

But see infra, notes 71 et seq. and *Pritchard v. Madren*, supra, note 44.

<sup>60</sup> *Priest v. Las Vegas* (1911) 16 N. M. 692, 120 Pac. 894 affirmed in (1914) 232 U. S. 604, 38 L. ed. 751, 84 Sup. Ct. Rep. 448.

<sup>61</sup> *Blanton v. Nunley* (1909) 55 Tex. Civ. App. 427, 119 S. W. 881; *Wren v. Scales* (1909) 55 Tex. Civ. App. 62, 119 S. W. 879; *Mote v. Thompson* (1903) — Tex. Civ. App. —, 156 S. W. 1106.

Apparently the title of the owner of land which was sought to be sold under a tax foreclosure proceeding in *Harvey v. Providence Invest. Co.* (1913) — Tex. Civ. App. —, 156 S. W. 1127, was of record, although it is not so expressly stated. The owner was a corporation, and the land involved was a number of lots in an addition to a town, out of which addition a number of lots had been sold, but others remained in the corporation; the corporation was a well-known institution in the town where the land was located, its officers being well-known citizens, and also well known to the attorney representing the state in the tax suit. On this state of facts the owners were held not unknown, and therefore their rights could not be foreclosed as unknown owners.

Nor can the rights of a claimant to the land be foreclosed in a tax action against unknown claimants where the claimant is known or can be ascertained by reasonable diligence. The interest of the claimant in question was a matter of record, being a tax deed obtained by him upon a purchase at another tax sale. *Preston v. Bennett* (1910) 67 W. Va. 392, 68 S. E. 45.

At least, a judgment in a suit against the unknown heirs of a former owner does not bind the true owner, whose title is of record. *Green v. Robertson* (1902) 30 Tex. Civ. App. 236, 70 S. W. 345.

Some statutes expressly require persons who have a record interest to be made parties. *Wheaton County v. Fairhaven Land Co.* (1898) 7 Wash. 101, 34 Pac. 563. Under such a statute a county is entitled to a judgment for taxes in an action to foreclose a lien for taxes against the owner, to whom

in open and notorious adverse possession of land cannot be made parties as unknown claimants, to an action to partition the land.<sup>62</sup> But other cases make the necessity of naming one in adverse possession of the land depend upon whether his title has been perfected by limitations; those in adverse possession of the land cannot be affected by a proceeding to foreclose a tax lien against unknown owners, where such possession has ripened into title by limitation.<sup>63</sup> If the title has not been perfected prior

they had been assessed, but who had sold the land before the commencement of the proceeding, the conveyance in question not being of record. It is stated by the court that it was not shown that any of the deeds proved to have been executed and delivered were of record; hence, the county was entitled to a decree if the defendant was the owner at the time of the assessment. But it is further stated that of how much value such a decree might be if in fact the deeds were of record, it is not for the court to determine in that action, and that if it should turn out to be of no value, because parties necessary under the statute to a final establishment of the lien and a sale were omitted, the defendant would not be harmed and no personal judgment could be taken against it.

<sup>61</sup> *Bingham v. Matthews* (1905) 39 Tex. Civ. App. 41, 86 S. W. 781; *Hollywood v. Wellhausen* (1902) 28 Tex. Civ. App. 541, 68 S. W. 329; *Pearson v. Branch* (1905) — Tex. Civ. App. —, 87 S. W. 222. See *Green v. Robertson* (1902) 30 Tex. Civ. App. 236, 70 S. W. 345, supra, note 60.

In *Hollywood v. Wellhausen* (Tex.) supra, it is stated that the fact that the land had been listed for taxation by the owner must have been known to the assessor, and it was found as a fact in the case that when the suit was brought and the affidavit made that the land belonged to some unknown owner, the assessor and county attorney knew that it was the homestead of the appellant.

In *Crosby v. Terry* (1906) 41 Tex. Civ. App. 594, 91 S. W. 652, a judgment in an action to foreclose a tax lien on land owned by a husband and wife, and occupied by them, in which the wife alone was made a party defendant, with unknown owners is held void.

Apparently the title of the owner in *Pearson v. Branch* (Tex.) supra, was of record, but that fact is not considered. The fact that the owner was in possession of the property was held sufficient to prevent an action by the state to foreclose a lien for taxes on the land against unknown owners.

<sup>62</sup> *Rodriguez v. La Cueva Ranch Co.* (1913) 17 N. M. 246, 134 Pac. 228; *Baca v. Catron* (1917) — N. M. —, 173 Pac. 862.

<sup>63</sup> In *Sellers v. Simpson* (1909) 53 Tex. Civ. App. 205, 115 S. W. 888, the unknown heirs of a former record owner of the land were also made parties, but there seems

to the bringing of the suit, those in adverse possession are bound by the judgment against unknown owners.<sup>64</sup>

In an early Massachusetts case<sup>65</sup> a judgment in an action in partition against tenants in common unknown to the plaintiff was held to preclude one who was in adverse possession of a part of the land, claiming to hold in severalty; the governing statute provided that judgment in an action in partition in case the cotenants of the petitioner are unknown to him and notice is published as required should be valid to all intents and purposes;<sup>66</sup> the one in adverse possession is stated to be interested in the partition action and to have the right to appear and defend, and not having chosen to do so, to hold him not

bound by the judgment is to permit him to take advantage of his own laches.<sup>67</sup> The argument that he was not bound by the judgment, since he did not claim as a tenant in common, and only tenants in common were bound, is answered by stating that, having been notified of the petition, in which it appears that the petitioner claimed to hold the premises with him, together and undivided, and having a legal right to appear and controvert the petition, and judgment having been rendered on his default, he is precluded from saying that he is not a tenant in common. In the Massachusetts case the court expressly referred to the fact that the subsequent action was one in which only the right of possession was being tried. This case was followed

to have been no claim that the occupants of the land fell within this description; at least part of the defendants in this case went into possession of the land adversely, thinking it a part of the public domain. While it is not expressly stated in the opinion in this case that the possession must have ripened into title by limitation, it appears that it had done so. And in *Woods v. Moore* (1916) — *Tex. Civ. App.* —, 185 S. W. 623, where the title of those in possession of real estate had not been fully protected by limitation, their rights were held foreclosed in a tax foreclosure proceeding against unknown owners. There was this further fact, however, in the *Woods Case*; the party in possession had estopped himself from claiming title by representing to the county attorney before the suit was brought that he claimed no title, whereupon he was not made a party defendant to the proceeding, as the county attorney had previously intended to do. See *Rowland v. Eskeland*, *infra*, note 79.

<sup>64</sup> *Woods v. Moore* (*Tex.*) *supra*.

It has been held that if, at the time of an action brought against unknown owners to foreclose a tax lien, parties in adverse possession had not perfected their title by limitation, a title by adverse possession could not be pleaded against a purchaser at the tax sale, although, at the time of the action brought by him to recover possession, the defendant had been in possession the requisite length of time to perfect a title. *Patton v. Minor* (1910) 103 *Tex.* 176, 125 S. W. 6.

<sup>65</sup> *Cook v. Allen* (1807) 2 *Mass.* 462. The partition was of a large parcel of land, and the court states that in the state large parcels of land are held in common, the tenants are numerous and frequently unknown to each other, and their shares unascertainable, so that some remedy other than partition at common law is necessary. In *Nash v. Church* (*Wis.*) *infra*, the partition action involved only a quarter section of land.

In *Ashley v. Brightman* (1838) 21 *Pick. (Mass.)* 285, a petitioner for partition was held not entitled to partition where he had

not published notice in the manner directed by the court, and other cotenants appeared in the action and relied upon the objection. Publication was directed for three weeks in this case, and it was shown that only two publications had been made.

In *Foster v. Abbot* (1844) 8 *Met. (Mass.)* 596, a judgment in an action in partition against persons unknown by which a part of the premises had been assigned to the petitioner was held to amount to a disseisin of the unknown parties as to this part, so that a grant thereafter by the disseised party conveyed no such title as would authorize the grantee to question the correctness of the partition judgment; that whether such judgment was erroneous or not could not be determined in a collateral attack upon it. It was alleged by the grantee that his grantors were parties in interest and were known by the petitioner in the partition so to be at the date of his petition. This evidence was ruled immaterial and incompetent.

In *Foxcroft v. Barnes* (1848) 29 *Me.* 128, a judgment in partition was held conclusive so far as it concerned the rights of persons who did not appear and become parties to the proceeding, although the finding of the jury did not conform to the issue, and through some inadvertence was not written out in form before it was affirmed.

<sup>66</sup> *Cook v. Allen* (1807) 2 *Mass.* 462. These words are stated to be of as large import as the provision of the English statute with reference to partition in such cases, where the partition is declared to include all persons, whatever may be their right or title to the premises.

<sup>67</sup> In *Cook v. Allen* (*Mass.*) *supra*, apparently the only notice the party in adverse possession received was that by publication. It is stated in the brief of the attorney for the demandant that he had personal notice of the pendency of the process. In the opinion it is stated that he was notified to appear and defend his interest, but apparently this notice was the notice by publication, nothing being said in the opinion as to any personal notice.

in a Wisconsin case<sup>68</sup> in which it does not so clearly appear that only the right of possession was being tried. In fact, in a subsequent Wisconsin case,<sup>69</sup> it is stated that to allow one sued as an unknown owner in a partition action to come in and show a paramount title in severalty to any part of the partitioned premises is in conflict with the decision in the earlier case.

In the latest Wisconsin case,<sup>70</sup> in answer to the contention by a corporation which had not been named as a party that it was not an unknown owner for the reason that its charter was a public act, the court stated that it is not probable that the plaintiff in the partition suit regarded the corporation as having any such interest in the property as required it to be made a party, as the allegations of the complaint seem to dispose of the entire title among others.

<sup>68</sup> *Nash v. Church* (1860) 10 Wis. 303, 78 Am. Dec. 678. The court in *Nash v. Church* states that the idea that under the Wisconsin statute for the partition of real estate a party in the quiet and undisturbed possession of his property could be stripped of it by a judicial proceeding of which he was entirely ignorant seems so flagrantly and enormously unjust and oppressive that it does not seem that it can be the law. The court further states that there would have been great doubt in the mind of the court about holding the one in adverse possession a party to the suit as an unknown owner, and therefore bound by the judgment, had it not been for the authority of the case of *Cook v. Allen*.

The statute involved in *Nash v. Church* conferred upon the court power to hear the case and ascertain from the proofs taken, in case of failure to answer the complaint, and "declare the rights, titles, and interests of the parties to such proceeding, plaintiffs as well as defendants, so far as the same shall have appeared; and shall determine the rights of the said parties in such land, and render judgment that partition be made according to such rights; and that such judgment shall be binding and conclusive. . . . 2. On all persons interested in the premises who may be unknown, to whom notice shall have been given by personal service or by publishing the same as thereinbefore directed."

<sup>69</sup> *Kane v. Rock River Canal Co.* (1862) 15 Wis. 179. In this case, however, the unknown parties were held not bound, because the statute had not been complied with in the suit against them.

It is stated in the *Kane Case* that it is undoubtedly true that the object of partition proceedings is to make division among tenants in common, and it is therefore necessary to allege that the land sought to be divided is thus jointly owned by the parties, and if any party claims the whole or any part of it in severalty, it is his duty to set

Continuing the court states: "Yet we think its allegations also sufficiently comprehensive to include any and all unknown owners provided title to any portion proved to be in different parties from those supposed. So that the appellant [corporation] here was bound if the proceedings were sufficient to bind unknown owners."

In some jurisdictions in proceedings to foreclose tax liens where the owner of the land is unknown, the action may be brought against the land itself. It is essential, to authorize such a proceeding on the theory that the owner is unknown, that he be in fact unknown.<sup>71</sup> The term "owner" under such statutes does not include a lien holder; hence the lien holder need not be made a party; he is bound by the proceeding against the property.<sup>72</sup> In other jurisdictions actions to foreclose delinquent tax cer-

up that fact to defeat or suspend the partition proceedings until that question can be determined. If he does not do this, the adjudication that the land is held in common by the parties and thus properly subject to a partition, being a necessary part of the judgment, concludes the unknown owner upon that point. Further it is stated that it would introduce great confusion into the settlement of titles, and substantially defeat the object of partition proceedings, if any of the parties to those proceedings might, after they were completed without having set up any claim of title inconsistent with them, bring actions against the other parties to recover their portions upon a claim of paramount title in severalty.

<sup>70</sup> *Kane v. Rock River Canal Co.* (Wis.) supra. The proceeding was held defective, however, for failure to comply with statutory requirements.

<sup>71</sup> *Miller v. Boardman* (1913) 93 Neb. 321, 140 N. W. 273. Facts were pleaded which showed that the attorney for the plaintiff had knowledge of the identity of the owner of the land.

In the opinion upon reargument of *Leigh v. Green* (1902) 64 Neb. 533, 101 Am. St. Rep. 592, 90 N. W. 255, it is stated that the owner of land is not known within the meaning of the statute whenever the holder of a tax certificate is unable with reasonable diligence and inquiry in the neighborhood of the land in question to ascertain the whereabouts of the person or persons appearing to have a legal estate therein, or to ascertain who have such estate. In the latter case he cannot know whom to make parties; in the former, he cannot know how to serve them, since he does not know, nor can he ascertain, whether they are residents or nonresidents of the state, and, if residents, where they are to be reached. Approved in *Butler v. Copp* (1903) 5 Neb. (Unof.) 161, 97 N. W. 634.

<sup>72</sup> *Leigh v. Green* (1901) 62 Neb. 344. 80 Am. St. Rep. 751, 86 N. W. 1093, rehearing

tificates are considered more strictly than in the foregoing actions to be against the land. The ownership of the land is merely an incident. The state may exercise its jurisdiction over the land for purposes of taxation irrespective of who is the owner.<sup>73</sup> While in these actions unknown owners are usually made defendants, the binding effect of a judgment is on the theory that the res is under the control of the court; the actual name of the owner is unimportant. The statute, however, in some states, makes it incumbent upon the holder of a certificate of delinquency to proceed against the party named in the certificate.<sup>74</sup> Under this theory a foreclosure has been held sufficient although the person appearing as owner upon the treasurer's rolls when the proceeding was begun, was sued as an unknown owner, where the person appearing on the rolls as owner when the certificate of delinquency was issued was named in the notice.<sup>75</sup> Where a delinquency certificate is issued without stating any owner's name for taxes for a year in which the owner's name was left blank on the tax rolls, a foreclosure may be had against unknown owners, and the owner of the property will be bound although his name appears upon the assessment rolls for other years as owner, and the taxing officials might have discovered it.<sup>76</sup> And this has been held true although the owner's name appears on the rolls for the year for which the delinquency certificate was issued, stating the owner to be unknown.<sup>77</sup> But it has been held that the holder of a tax cer-

tificate, seeking to foreclose the same, who has actually learned the true name of the owner of the property assessed to an unknown owner, and has made such owner a party defendant, cannot then be relieved from making personal service upon such known owner if he is a resident of the state and can be readily found.<sup>78</sup> While it appears in these cases that the proceedings were against unknown owners, and some importance is given to this fact by the courts, such proceedings are, as stated above, regarded as proceedings in rem. And it has been held that those in adverse possession of land, although the actual owners by reason of such possession, are bound by a tax foreclosure proceeding against the person to whom the lands are taxed.<sup>79</sup> So far as appears from the report of this case, unknown owners were not joined in the tax foreclosure proceeding.

Equitable owners of land on which a tax lien is foreclosed are bound as unknown owners.<sup>80</sup>

Although defendants sued as unknown claimants may be unknown, the reason they are unknown may be that the plaintiff does not take the trouble to inquire. Where facts appear that make it evident plaintiff might have determined the names by proper inquiry, it has been held that failure to make the inquiry is such fraud as will vitiate the judgment; at least, the judgment will be set aside upon motion of those made parties as unknown claimants, made within a year and with no unnecessary delay.<sup>81</sup>

Some statutes authorize service of

in (1902) 64 Neb. 533, 101 Am. St. Rep. 592, 90 N. W. 254, affirmed in (1903) 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390.

In *Leigh v. Green* (1901) 62 Neb. 344, 89 Am. St. Rep. 751, 88 N. W. 1093, it is held that an attachment creditor was not the owner within the meaning of the tax statute, and the proceedings for the foreclosure of the tax lien were in substantial compliance with the statute and conclusive against the whole world. The attachment proceeding was begun in the state court and removed to the Federal court, where the judgment was rendered, so that the attachment lien at least was a matter of record in the county.

<sup>73</sup> *Williams v. Pittock* (1904) 35 Wash. 271, 77 Pac. 385. See *Pritchard v. Madren* (1880) 24 Kan. 486, supra, note 44.

<sup>74</sup> This is true of the Washington statute, according to *Craver v. Wehr* (1917) 98 Wash. 56, 167 Pac. 98.

<sup>75</sup> *Spokane Falls & N. R. Co. v. Abitz* (1905) 38 Wash. 8, 80 Pac. 192.

<sup>76</sup> In *Shipley v. Gaffner* (1908) 48 Wash.

169, 93 Pac. 211, it is stated that the taxing officers are not bound to exercise reasonable diligence to learn the true ownership of property under the statutes of this state. That the proceeding is against the land itself, and not against the person of the owner, and that owners are bound to take notice of the property they own, and pay the taxes thereon, and defend against foreclosures for delinquent taxes, even though the property is assessed to unknown persons or to other persons.

<sup>77</sup> *Tacoma Gas & E. L. Co. v. Pauley* (1908) 49 Wash. 562, 95 Pac. 1103.

<sup>78</sup> *Pyatt v. Hegquist* (1907) 45 Wash. 504, 88 Pac. 933. The owner in this case occupied the property.

<sup>79</sup> *Rowland v. Eskeland* (1905) 40 Wash. 253, 82 Pac. 599. It does not appear in this case that unknown owners were made defendants in the action to foreclose the tax lien. But see notes 60 et seq. supra.

<sup>80</sup> *Plumb v. Dyas* (1905) 38 Wash. 240, 80 Pac. 432. The holders of the record title were made parties.

<sup>81</sup> *Gilbreath v. Teufel* (1906) 15 N. D.

summons upon defendants by designating them as unknown only when the names cannot, by the exercise of due diligence, be ascertained. Due diligence under such a statute requires an effort in good faith on the part of the plaintiff to ascertain the names of the parties defendant who are to be divested of interests in the property in question; as to whether the plaintiff has exercised the requisite amount of diligence is a matter depending upon the facts of the individual case.<sup>52</sup> Whether the necessary diligence has been exercised has been held to be a question for the jury.<sup>53</sup>

In a case in which the name of one designated as an unknown claimant was subsequently discovered, the court was of the opinion that it was not essential that his name be substituted in the complaint, where he appeared and not only answered the complaint, but also filed a cross complaint in which he sought affirmative relief, and this cross complaint was answered by the plaintiff, but a direction was given that the complaint be amended by substituting his name.<sup>54</sup>

The fact that the charter of a company is a public act does not prevent proceeding against the company as an unknown owner; although everyone might be chargeable with a knowledge of the provisions of the charter, no one would be bound to know that the company claimed to own or owned interest in any particular tract of land.<sup>55</sup>

*d. Who is bound by judgment against unknown heirs, unknown persons, etc.*

As pointed out above, the statutes involved in this discussion contain various provisions as to the persons who may be sued as unknown, such as the unknown heirs of a known person, or, in some statutes, unknown claimants generally. When it is sought to bind a person by a judgment in such an action, the question arises whether such person is within the class sued. It has been held that an heir of an heir is bound in an action against unknown heirs.<sup>56</sup> But the widow is not bound by a judgment

152, 107 N. W. 49. But see *Shipley v. Gaffner*, supra, note 76.

<sup>52</sup> In *Berry v. Howard* (1914) 33 S. D. 447, 146 N. W. 577, an action had been brought by name against one of the heirs of the holder of the record title who had died, but against other of the heirs without naming them; the heir named appeared and answered and the suit was dismissed as to her. No inquiry appears to have been made of this heir as to the names of the other heirs. The plaintiff was held not to have exercised the requisite amount of diligence in ascertaining the names; consequently the judgment was held void as to the remaining heirs upon collateral attack.

<sup>53</sup> *Hume v. Carpenter* (1916) — Tex. Civ. App. — 188 S. W. 707.

As to the character of inquiry as to the whereabouts of a party, necessary to sustain constructive service of process, see note to *Grigsby v. Wopschall*, 37 L.R.A.(N.S.) 206.

<sup>54</sup> *Blackburn v. Bucksport & E. River R. Co.* (1908) 7 Cal. App. 649, 95 Pac. 668. By statute in the state a defendant whose name is unknown to the plaintiff may be designated in any pleading or proceeding by any name, and when its true name is discovered, the pleading or proceeding must be amended accordingly. But where the parties are sued by fictitious names and appear and answer by their true names, and there is an omission to amend the complaint by substituting the true for the fictitious names, the cause will not be reversed, but the judgment on appeal will direct the lower court to amend the complaint as of date prior to the judgment, in order to support the judgment. See *Fayette Land Co. v. Louisville & N. R. Co.* supra, note 57.

<sup>55</sup> *Kane v. Rock River Canal Co.* (1862) 15 Wis. 179.

<sup>56</sup> *Howell v. Garton* (1910) 82 Kan. 495, 108 Pac. 844. The action in this case was against the holder of the record title "if living, or, if dead, against her unknown heirs." The holder of the record title had died intestate prior to the beginning of the action, leaving a daughter as her sole heir; the daughter had also died leaving a will in which she gave all her property to her husband, to whom all her property would have passed if she had died intestate; the husband was held bound by the judgment against the unknown heirs. Instead of applying to the court to set aside the judgment and let him in to defend under a Code provision, his grantee chose to treat the judgment as void and attacked it collaterally.

In an action to quiet title against the heirs of a certain person, the entire interest of such unknown persons may be quieted, whether that interest was derived directly from the person or from other heirs of the person who died prior to the commencement of the quiet-title proceeding, under a statute authorizing an action against the heirs of a deceased person, their heirs or legal representatives, as the heirs of their ancestor, describing them by his name, and all persons claiming by inheritance in the succession of the named person are concluded by the judgment, whether inheriting immediately from him or as successors of those so inheriting. *Sloan v. Thompson* (1893) 4 Tex. Civ. App. 419, 23 S. W. 613.

The heir of a person who appeared by the record to have some interest in the land, and who was made defendant to the action, but who had died previously thereto, was held bound, apparently on the theory that

against the unknown heirs.<sup>87</sup> The term "unknown heirs" does not include unknown devisees in remainder.<sup>88</sup>

A judgment for taxes against the unknown heirs of a former owner is void as to the owner of the land against which the taxes were adjudged, who had no notice of the suit, and who, although an heir of the former owner, held the land, not as an heir of the former owner, but by purchase long prior to the bringing of the suit.<sup>89</sup>

The heirs of a named person are bound by a judgment in an action against the person and his unknown heirs, commenced long after the ancestor's decease; such a proceeding will be treated as though the ancestor's name had been omitted therefrom.<sup>90</sup>

he was an unknown claimant, the action being against unknown claimants also, in *McClymond v. Noble* (1901) 84 Minn. 329, 87 Am. St. Rep. 354, 87 N. W. 838.

See *Priest v. Las Vegas* (1911) 16 N. M. 692, 120 Pac. 894, supra, note 58, and *PHILLIPS v. TOMPSON*, ante, 599.

On the contrary, it is stated in *State ex rel. Ross v. McLaughlin* (1881) 77 Ind. 335, in which the probate court attempted to appoint a guardian for the unknown heirs of a decedent, that, assuming the court had power to appoint a guardian for an unknown heir, a guardian appointed for the heir of a decedent did not become the guardian of anyone, where, at the time of the appointment, the only heir of the decedent had died, leaving a child surviving.

The rule excluding extrinsic evidence to impeach a judgment has no application where the evidence shows that one was not a party; such evidence is not in contradiction of the records; it goes merely to the question of the identity of the party. Where one shows that his title was of record, he in legal effect places himself outside the class of persons upon whom the judgment could operate, since he is then not an unknown owner within the meaning of the law. *Wren v. Scales* (1909) 55 Tex. Civ. App. 62, 119 S. W. 879.

As to the necessity of proof that there are heirs or that the ancestor is dead, see text to notes 1 et seq.

<sup>87</sup> *Gibson v. Oppenheimer* (1913) — Tex. Civ. App. —, 154 S. W. 694.

<sup>88</sup> *Ferriss v. Lewis* (1875) 2 Tenn. Ch. 291. In this case devisees in remainder of certain land under a will were described as the unknown heirs of the testator.

*Caplen v. Compton* (1893) 5 Tex. Civ. App. 410, 27 S. W. 24.

There is an obiter statement in *Tevis v. Richardson* (1828) 7 T. B. Mon. (Ky.) 651, to the effect that a proceeding against the unknown heirs of a person is not effectual against the unknown devisees of such a person.

The objection was made in *Thornton v. Houtze* (1878) 91 Ill. 199, that a partition

Where the "unknown heirs" of a named person are made parties to an action on the theory that the person is deceased, such person, who is in fact alive is not bound by the decree, even though it is found as a question of fact that he is dead.<sup>91</sup>

It has been held that a decree in an action for specific performance against the unknown heirs of the vendor on the theory that the vendor himself is dead is binding in favor of purchasers for value of the land against a prior vendee who failed to record his deed, when not attacked by such vendee before the expiration of the time within which unknown heirs may open a decree.<sup>92</sup>

Some statutes authorize a proceeding against unknown persons generally.<sup>93</sup>

action against the unknown heirs of a deceased person does not bind the unknown devisees, but no attention is given to this objection by the court.

<sup>89</sup> *Green v. Robertson* (1902) 30 Tex. Civ. App. 286, 70 S. W. 345.

<sup>90</sup> *Organ v. Bunnell* (1916) — Mo. —, 184 S. W. 102.

<sup>91</sup> *Burton v. Perry* (1893) 146 Ill. 71, 34 N. E. 60 (collateral attack). See *Buck v. SIMPSON*, ante, 604.

A judgment in an action against the unknown heirs of a named person, to escheat lands, is void if the person is living. *Caplen v. Compton* (1893) 5 Tex. Civ. App. 410, 27 S. W. 24. The general question of the binding effect of a judgment in escheat proceedings is not within the scope of this note. See *Hamilton v. Brown* (1896) 161 U. S. 256, 40 L. ed. 691, 16 Sup. Ct. Rep. 585, and authorities cited therein. See also note to this case in 40 L. ed. 691, upon the escheat of property.

The binding effect of administration proceedings upon the estate of one supposed to be dead, but who is in fact alive, is not considered herein.

As to the necessity of proof that the ancestor is dead, see notes 1 et seq., supra.

<sup>92</sup> *Burton v. Perry* (1893) 146 Ill. 71, 34 N. E. 60.

<sup>93</sup> In *Skinner v. Franklin County* (1893) 6 C. C. A. 118, 9 U. S. App. 676, 56 Fed. 783, an action was brought by a county which had issued bonds to enjoin state and county officers from levying and collecting taxes for the payment of the bonds or the interest thereon. In this action the holders of the bonds were described as unknown and notice was given them by publication. A part of the bonds were held valid and others invalid. From this decree the holder of some of the bonds which had been declared invalid appealed; the judgment, however, was affirmed, and in affirming the judgment the Supreme Court stated that all the bonds were invalid, but as the county had not appealed from the decision of the lower court to the effect that some of them were valid, so much of the judgment



One who purchased land while a quiet-title proceeding was pending from one who held the same at the commencement of such proceeding by mesne conveyance from the patentee was held bound in an action against the patentee "and all other persons or parties unknown, claiming any right, title, or interest in the real property described in the complaint, on file in the action, and their unknown heirs."<sup>94</sup> The heirs of one who was named as defendant to an action to determine adverse claims to land, but who had died prior to the commencement thereof, was held bound by the decree in the action, which was against certain named defendants "and all other persons or parties unknown, claiming any right, title, estate, lien, or interest" in the land.<sup>95</sup> It seems that under such a statute, the heirs of a known decedent may be made parties under the general design-

nation of unknown persons, without designating them as unknown heirs of the decedent.<sup>96</sup>

The owners of land who have appeared in a tax foreclosure proceeding against unknown owners cannot object that the proceedings were so brought against unknown owners, since they have obtained notice of the suit and become parties thereto, and are in no worse situation than if the suit had been brought directly against them.<sup>97</sup>

### c. Joinder of defendants.

A person and his unknown heirs and devisees may be joined in the same suit.<sup>98</sup> In case such person is dead at the time of the commencement of such proceedings the heirs are bound.<sup>99</sup> Even a petition describing the defendants as "A, if living, or, if dead, his unknown heirs or devisees," has been held sufficient.<sup>100</sup>

as held these bonds valid was in force. Subsequently, a holder of some of the bonds which had been declared valid appeared and asked that the injunction (already totally dissolved) be dissolved in respect to the bonds held by him, and insisted that by so doing he became a party to the original decree. Without discussion, the court holds that he was not a party to the original decree so as to be entitled to the benefit of the adjudication of the validity of the bonds.

<sup>94</sup> *Shepherd v. Ware* (1891) 46 Minn. 174, 24 Am. St. Rep. 212, 48 S. W. 773. Only a certificate of the lands for taxation to the patentee was of record in the county. Neither the patent nor subsequent deeds were of record at the commencement of the action, but were recorded while it was pending.

<sup>95</sup> *Inglee v. Welles* (1893) 53 Minn. 197, 55 N. W. 117. The court states that it is of the opinion "that the mere fact that the named defendant was dead before the action was brought did not prevent the court from acquiring jurisdiction to determine the right of 'persons or parties unknown' claiming an interest in the land described in the complaint." Accordingly the motion of the heirs to vacate the judgment rendered in the action to determine adverse claims was denied.

*McClymond v. Noble* (1901) 84 Minn. 320, 87 Am. St. Rep. 354, 87 N. W. 838. A motion to vacate the judgment rendered in the action against unknown persons was accordingly denied.

<sup>96</sup> At least, in an action to compel a purchaser to accept title to land purchased by him at a partition sale, his objection to the title being that it did not appear that a certain named person who had an interest in the property was dead, and that he was not made a party nor were his children nor his heirs at law, it is stated that there was evidence which satisfied the referee that the named person was dead, and his heirs

at law were made parties as unknown persons; consequently the title was good. The statute in this case provided that where the plaintiff demands judgment against an unknown person, he may designate that person as unknown, adding a description tending to identify him. *Goodwin v. Crooks* (1901) 58 App. Div. 464, 69 N. Y. Supp. 578.

In *Truesdell v. Rhodes* (1870) 26 Wis. 215, in a proceeding against "the unknown heirs of William Rhodes, deceased, and the unknown owners" of the land in dispute, it was objected that the unknown heirs of William Rhodes should be made defendants by name, and that the proceeding against them as the unknown heirs of William Rhodes, deceased, and the unknown owners, was unauthorized. In overruling this objection the court states that the statute under which the suit was instituted expressly authorized the proceeding against these parties as "unknown owners."

<sup>97</sup> *Watkins v. State* (1901) — Tex. Civ. App. —, 61 S. W. 532.

<sup>98</sup> *Hambel v. Lowry* (1915) 264 Mo. 168, 174 S. W. 405.

Some statutes expressly authorize such a procedure. New Jersey statute involved in *Cona v. Henry Hudson Co.* (1914) 86 N. J. L. 154, 90 Atl. 1031, Ann. Cas. 1916E, 999.

<sup>99</sup> *Organ v. Bunnell* (1916) — Mo. —, 184 S. W. 102.

<sup>100</sup> *Fleming v. Tatum* (1911) 232 Mo. 678, 135 S. W. 61. In answer to the argument that the petition did not state definitely anyone as a defendant the court cites a statute to the effect that "either party may allege any fact or title alternatively, declaring his belief of one alternative or the other, and his ignorance, whether it be the one or the other;" and states that if the named person had been living at the date of filing the petition, the publication would have been notice to him, that he could not have been misled by the reference to his un-

But on the contrary has been held as to this.<sup>101</sup> A proceeding against A, or, if dead, his heirs, etc., is, by a court taking the latter view, held to be indefinite as to the parties; without a definite averment of the death of the ancestor it is held a decree cannot be rendered against the heirs or devisees.<sup>102</sup>

An allegation in a petition that the unknown persons claimed as "heirs and devisees" has been sustained as against an objection that one cannot claim both as heir and devisee.<sup>103</sup> The court argues that "so far as concerns this contention it is clear that the omission of either the word 'heir' or 'devisee' would have left the petition good as against the class defined by the word which remained. The effect of using both terms was simply to include as defendants all persons claiming as heirs and all claiming devisees. There might have been both heirs and devisees. The same person might have claimed in both capacities. If there were both heirs and devisees, they were both included; and if there was only one class, that class was included, and the other term was simply surplusage."

In some jurisdictions actions to foreclose tax liens upon land the owner of which is unknown are against the land itself. Such an action has been sustained although there was joined with the land in the action one who held a deed to the premises in question.<sup>104</sup> The court states that the nature of the proceedings was not changed in any way by joining this defendant, that the land was properly made a party and all necessary steps

to get it before the court were duly had, and that whether the joinder of this defendant was irregular need not be decided upon collateral attack.

A tax proceeding against a former owner of the land and all persons unknown, if any, having or claiming any interest in the property, is not invalid by reason of the joinder of the former owner, who had been dead some time prior to the tax proceedings.<sup>105</sup>

The joinder in a single action to quiet title, of nonresident defendants, part of whom are interested in one portion of the land and another part interested in another portion, neither group being interested in the land in which the other group is interested, does not render the proceeding void, even if it be irregular.<sup>106</sup>

## V. Procedure.

### a. In general.

It is, of course, necessary, unless the proceeding be strictly in rem, that the unknown parties be at least constructively notified of the proceeding in order to bind them by a judgment rendered therein.<sup>107</sup> Where the land itself is made a party to a tax foreclosure suit, it is necessary that the land be described; but the proceeding will not be held invalid although the land is not accurately described, if the description can refer to only one tract in the state, although there is a tract in another state to which it might possibly apply.<sup>108</sup>

It has been held in an action in which the plaintiff sought to quiet title to sev-

known heirs in case of his death, and if he was dead at the time, the fact that the notice indicated an uncertainty as to his being alive or dead could not mislead his heirs or devisees.

See *Howell v. Garton* (1910) 82 Kan. 495, 108 Pac. 844, *supra*, note 86.

<sup>101</sup> *Gill v. More* (1917) — Ala. —, 76 So. 453, holding void a judgment in a proceeding against A, "or, if dead, his devisees, heirs, and next of kin." There were additional grounds in this case for holding the judgment void.

A petition in an action to quiet title against a named defendant "or" his unknown heirs has been held insufficient to authorize a decree quieting title. *Lamb v. Boyd* (1890) 4 Ohio C. C. 499, 2 Ohio C. D. 672. This holding apparently is made in a petition in error by the named defendant from the decree of the lower court, and is not a collateral attack.

<sup>102</sup> *Gill v. More* (Ala.) *supra*.

<sup>103</sup> *Hambel v. Lowry* (1914) 264 Mo. 168, 174 S. W. 405.

<sup>104</sup> *Leigh v. Green* (1902) 64 Neb. 533, 101 Am. St. Rep. 592, 90 N. W. 254.

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The fact that one who is named as defendant, but who is not shown to have any interest in the land, is not served, does not invalidate the judgment where the land itself is made a party. *Butler v. Copp* (1903) 5 Neb. (Unof.) 161, 97 N. W. 634.

It is stated obiter in *Bailey v. Morgan* (1855) 13 Tex. 342, that a party defendant who is joined with unknown parties defendant may object to an improper citation of the unknown parties, to avoid the payment of costs incurred through the erroneous citation.

<sup>105</sup> *Morrison v. Shipman* (1905) 37 Wash. 171, 79 Pac. 632. After the death of the party named the land had been assessed to unknown owners. Case was heard upon a motion to vacate the judgment in the action against unknown claimants.

<sup>106</sup> *Downing v. Anders* (1918) — Mo. App. —, 202 S. W. 297.

<sup>107</sup> A petition for partition of land cannot be heard, where notice has not been given to parties designated therein as unknown. *Savage v. Gray* (1902) 96 Me. 557, 53 Atl. 61.

<sup>108</sup> *Leigh v. Green* (Neb.) *supra*. The

eral tracts, in which parties who were named appeared and claimed an interest in one of the tracts, whereupon the plaintiff dismissed his action as to such parties, that by doing this he withdrew the tract in question from consideration of the court, and left the court without jurisdiction to determine any of the interests therein. Consequently the judgment rendered did not bar the interest in such tract of parties who were not named, but designated as unknown claimants.<sup>109</sup>

land in this case was described as the "northwest quarter of section 27, township 31, range 3 west, 6 principal meridian," without stating in what county or state situated, nor whether the township in question was north or south of the base line. In the petition, however, it was expressly stated that the land lay in Knox county, Nebraska, and the notice set forth the plaintiff's claim that he had purchased land for taxes at a sale held in Knox county, Nebraska.

It has been held that misdescription of the survey in an action by the state to foreclose a tax lien against unknown owners is not fatal to the validity of the proceedings where the description was accurate as to the number of acres, the abstract and certificate numbers, and as to the original grantee, the error being in the name of the patentee, giving it as William J. Clark instead William T. Crook, to whom the land was in fact patented. *Wren v. Scales* (1909) 55 Tex. Civ. App. 62, 119 S. W. 879. It was shown upon the trial that there was no such survey in the county as the William J. Clark Survey, nor one patented to William J. Clark; that the abstract and certificate numbers and grantee were as stated in the petition; and that the citation and judgment could apply to no other survey in Hartley county than the one in controversy. It also appears that in an exhibit attached to the plaintiff's petition the description was accurate in all particulars. The court concludes that the question is simply one of identity, and the misdescription relied upon could hardly have misled the owner of the survey or operated to avoid the sale.

<sup>109</sup> *Berry v. Howard* (1914) 33 S. D. 447, 146 N. W. 517.

<sup>110</sup> *Taylor v. Watkins* (1844) 4 B. Mon. (Ky.) 561; *Charles v. Morrow* (1889) 90 Mo. 638, 12 S. W. 903; *Myers v. McRay* (1893) 114 Mo. 377, 21 S. W. 730; *Eminence Land & Min. Co. v. Creacant River Land & Cattle Co.* (1905) 187 Mo. 420, 86 S. W. 145; *Davis v. Montgomery* (1907) 205 Mo. 282, 103 S. W. 979; *Shepherd v. Ware* (1891) 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773; *Downing v. Anders* (1918) — Mo. App. —, 202 S. W. 297; *Stull v. Maselonka* (1905) 74 Neb. 309, 104 N. W. 188, 108 N. W. 166; *Miller v. Boardman* (1913) 93 Neb. 321, 140 N. W. 273; *Priest v. Las Vegas* (1911) 16 N. M. 692, 120 Pac.

As in all proceedings in which the parties are served constructively, the statutory provisions as to procedure in actions against unknown claimants must be strictly followed to give the court jurisdiction.<sup>110</sup> An affidavit for publication must comply with a statutory requisite that it shall appear therein that a cause of action exists against the defendant in respect to whom the service is to be made.<sup>111</sup> The object of the action is by some statutes required to be set forth in the affidavit for service by publication.

894; *Bleidorn v. Pilot Mountain Coal & Min. Co.* (1890) 89 Tenn. 166, 15 S. W. 737; *Jenson v. Anderson* (1913) 123 Minn. 199, 143 N. W. 361; *Byrnes v. Sampson* (1889) 74 Tex. 81, 11 S. W. 1073; *Dunn v. Taylor* (1906) 42 Tex. Civ. App. 241, 94 S. W. 347; *Young v. Jackson* (1908) 50 Tex. Civ. App. 351, 110 S. W. 74; *Harris v. Hill* (1909) 54 Tex. Civ. App. 437, 117 S. W. 907; *Mecklem v. Blake* (1865) 19 Wis. 397; *Page v. Breese* (1912) 92 Neb. 241, 138 N. W. 138. See *infra*, note 153.

*Guise v. Early* (1887) 72 Iowa, 283, 33 N. W. 683, holding a judgment in an action to quiet title against unknown owners void where the provisions of the statute relating to such actions were not shown to have been followed; especially the requirement that the petition shall be sworn to, the notice approved by the court before it is published, and its publication ordered by the court in a newspaper therein designated. The court states that these provisions of the statute not having been complied with, the court acquired no jurisdiction of the unknown defendants.

Failure to describe the unknown parties in the order of publication by the character in which they are sued and by reference to the title, interest, or subject-matter of the litigation, as required by statute, is fatal to the validity of the proceeding. *Ferriss v. Lewis* (1875) 2 Tenn. Ch. 291.

It is sometimes stated that the statutory requirements must be substantially followed (*Breed v. Baird* (1907) 139 Ill. App. 15); but it does not appear that any material departure would be sustained.

Substantial compliance with a form prescribed by statute for the notice to the unknown heir is essential to the jurisdiction of the court. *Earnest v. Glaser* (1903) 32 Tex. Civ. App. 378, 74 S. W. 605.

See cases in notes 124 et seq.

<sup>111</sup> *Nelson v. Rountree* (1868) 23 Wis. 367, approving *Rankin v. Adams* (1864) 18 Wis. 292, and *Slocum v. Slocum* (1863) 17 Wis. 160. The *Slocum* Case refers to the statute generally and says that "to authorize service by publication and deposit in the postoffice, it must appear by affidavit not only that the person on whom service is to be made cannot, after due diligence, be found within the state, but it shall in like manner appear that a cause of action exists against the defendant in respect to whom the service is to be made, or that he

It is held that this may be accomplished by stating it to be one of the actions named in the statute authorizing constructive service in certain designated proceedings.<sup>112</sup> While admitting the general rule that a strict compliance with the statute is necessary, it has been stated that on collateral attack, where there is a compliance in that the facts with reference to the interests of the unknown claimants appear, the mere failure to follow the statutory order and method of statement is not a fatal defect, if a defect at all.<sup>113</sup>

A notice of a sale for taxes against unknown owners, required to be given before a decree of sale can be rendered, must comply with the statutory provisions.<sup>114</sup> So the statutory provisions authorizing special proceedings against the land in actions to foreclose tax liens where the owner is unknown must be strictly followed.<sup>115</sup>

In several actions to collect delinquent taxes, brought by the state, one affidavit that the owners and places of residence of the owners are unknown, and one general order of service of summons, may be made to apply to the several cases, in the absence of a statute requiring a special order upon this subject in each case.<sup>116</sup>

The failure of the notice in a tax proceeding to state the amount of taxes due the county and state separately, as required by statute, does not deprive the

court of jurisdiction where the several sums due the county and state are stated in exhibits attached to the petition, and the unknown owners are deprived of no substantial right by reason of the omission.<sup>117</sup>

It is not necessary for the procedure in actions to collect delinquent taxes to follow the Civil Practice Act, in matters provided for by the taxing statute, where the Civil Act is made applicable only so far as is not inconsistent with the taxing statute.<sup>118</sup> After the court has once obtained jurisdiction of the unknown parties, a liberal rule as to compliance with subsequent statutory procedure has been followed. The failure of a court in an action in partition to appoint a disinterested person to represent the unknown defendants and look after their interest does not invalidate the sale of the land where the statutes expressly refer the matter of appointing some disinterested person to the discretion of the court.<sup>119</sup> The validity of the sale is not affected by the fact that the court did not retain a sufficient amount of the fund to satisfy claims of unknown parties and invest or settle it, so that it may be forthcoming when called for, as required by statute.<sup>120</sup> One who was sued as an unknown party, may, however, appear and recover judgments against each of the other parties to the extent of the amount of her interest which had been paid them.<sup>120</sup> A decree in an action in

is a necessary or proper party to an action relating to real property in this state."

A statutory provision that, to authorize service by publication, it shall appear by affidavit that a cause of action exists against the defendant in respect to whom the service is to be made was construed in this case as requiring the affidavit for service by publication to state the cause of action.

<sup>112</sup> Leigh v. Green (1901) 62 Neb. 344, 89 Am. St. Rep. 751, 86 N. W. 1093. It is held in this case that the object of the action sufficiently appears from a statement in the affidavit that the action is one of those named in the statute authorizing constructive service in certain designated proceedings, but that the better practice is to set out the object of the action more fully. In this case the allegation that the action was one of those named in the statute authorizing constructive service was followed by the further statement, "and is an action relating to real property in said state in which the defendants have or claimed a lien or interest, actual or contingent, and the release demanded consists wholly or partially in excluding the defendants from any interests therein." This affidavit was held sufficient, especially when assailed in a collateral proceeding.

<sup>113</sup> Hambel v. Lowry (1915) 264 Mo. 168, 174 S. W. 406 (the holdings on the specific objections raised in this case are discussed below).

<sup>114</sup> Smith v. Cox (1896) 115 Ala. 503, 22 So. 78.

<sup>115</sup> Miller v. Boardman (1913) 93 Neb. 321, 140 N. W. 273.

<sup>116</sup> Moss v. Mayo (1863) 23 Cal. 421 (sued by fictitious name).

<sup>117</sup> Young v. Jackson (1908) 50 Tex. Civ. App. 351, 110 S. W. 74.

<sup>118</sup> Moss v. Mayo (Cal.) supra (collateral attack).

<sup>119</sup> Lawrence v. Hardy (1909) 151 N. C. 123, 134 Am. St. Rep. 976, 65 N. E. 766.

In Byrnes v. Sampson (1889) 74 Tex. 81, 11 S. W. 1073, the failure to appoint an attorney to defendant on behalf of one unknown heir is held to be an irregularity under a statute requiring such appointment, but whether this would have been sufficient to set aside the judgment is not clear, as there were other grounds upon which the judgment in the action against unknown heirs was set aside.

<sup>120</sup> Lawrence v. Hardy (1909) 151 N. C. 123, 134 Am. St. Rep. 976, 65 S. E. 766.

partition is not void, although that provision of the statute which make it the special duty of the court in all such cases to see that its decree protects the rights of the unknown parties thereto has not been complied with.<sup>121</sup>

As to the necessity of proof in an action against unknown heirs that there are heirs, or that the ancestor is dead, see notes 1 et seq., *supra*.

*b. Showing that parties are unknown.*

*1. In general.*

As shown above, the very basis of proceedings such as are under discussion herein is that the parties or their names

are unknown. A showing that the names of the persons sought to be made parties, or in some cases that the persons themselves, are unknown, is a very general requirement of the statutes authorizing procedure against unknown parties.<sup>122</sup> This is sometimes required to appear from the petition or complaint; under such a statute it is not sufficient that it appear in a separate affidavit.<sup>123</sup> Other statutes require this showing to be made by affidavit. It has been held generally that a strict compliance with this statutory requirement is necessary.<sup>124</sup> The absence of all allegations as to the unknown heirs is fatal to the jurisdiction

<sup>121</sup> *Pool v. Lamon* (1894) — Tex. Civ. App. —, 28 S. W. 363. The court here states that it was evidently not the purpose of the legislature to make the court's jurisdiction depend upon compliance with this provision of the statute; it directs something to be done after jurisdiction has been acquired, and not as a prerequisite to the exercise of jurisdiction.

<sup>122</sup> It has been stated upon a bill in chancery to set aside a judgment in an action against unknown parties that "to give the court jurisdiction over the person of unknown parties, all, as we think, that is necessary, is, it shall be made to appear there are unknown parties, and the notice required by the statute shall be published as to them." *Thornton v. Houtze* (1878) 91 Ill. 199.

The heirs of a defendant in an action for damages, who died while the action was pending, cannot be made parties to the proceeding as unknown heirs under a statute authorizing suit by publication against heirs when any property may have been granted or may have accrued to the heirs of a decedent and the names of such heirs are unknown, without showing that an estate descended from the decedent to his heirs, or even that he left heirs or other representatives to inherit his property. *Love v. Henderson* (1875) 42 Tex. 520.

In some jurisdictions in proceedings to foreclose tax liens where the owner of the land is unknown, the action may be brought against the land itself. In order to confer jurisdiction upon the court to proceed in rem against the land it must be made to appear that the owner is unknown. A mere naming of a defendant as "the unknown owner of said land" in the title to the action does not amount to an allegation of want of knowledge of the owner's identity. Where there is no further allegation, the court is without jurisdiction to proceed. *Miller v. Boardman* (1913) 93 Neb. 321, 140 N. W. 273. Facts were pleaded in this case which showed that the attorney for the plaintiff had knowledge of the identity of the owner of the land.

In *Pierpont v. Pierpont* (1867) 19 Tex. 227, the court was of the opinion that an allegation in the affidavit for publication of

citation that the residence of the defendant was "known to the affiant" (instead of unknown), "and that in consequence personal service cannot be had on him," was an evident mistake and immaterial, but the judgment was reversed on another ground.

When an affidavit of this fact may be made is a question upon which there is little or no judicial authority. An affidavit to obtain service by publication, in which the defendants were alleged to be unknown, made two days before the petition and affidavit were filed, is sufficient. *Leigh v. Green* (1901) 62 Neb. 344, 89 Am. St. Rep. 751, 86 S. W. 1093. The court in this case lays down the general rule that when the petition is filed within such time after making the affidavit that no presumption can fairly arise that the state of facts has changed in the interval, it is sufficient. But the attention of the court was directed more to proof of the facts necessary to obtain service by publication than to the fact as to the party being unknown. An affidavit for service by publication, made on the day preceding that on which the petition and affidavit were filed, was held sufficient in *Armstrong v. Middlestadt* (1888) 22 Neb. 711, 36 N. W. 151. The court states that, in sustaining the affidavit, it does not wish to go beyond the facts in the case and hold that an affidavit made several days before the commencement of an action would be sustained. It seems, however, that the showing that the parties sued as unknown are unknown must be made at the time of filing the petition; as in the foregoing cases relating to obtaining service by publication.

As to effect of omission of statement that owner is unknown in proceedings in rem to enforce tax, see *Gwin v. Freese*, 36 L.R.A. (N.S.) 1060, and note appended thereto.

<sup>123</sup> *McMahan v. Smith* (1901) 69 Ark. 591, 65 S. W. 459. The allegations in the affidavit filed in the case were held insufficient, however, to authorize the publication, assuming that such allegations might there be made. (Direct attack upon proceeding.)

<sup>124</sup> *Allen v. Smith* (1869) 25 Ark. 495; *Kircher v. M. Keating & Sons Co.* (1908) 145 Ill. App. 1 (writ of error in an action against unknown parties).

of the court under a statute providing for proceedings against the heirs of any decedent the names of whom are unknown, without naming them, and empowering the court to make such order in relation to notice as may be deemed proper where the complainant annexes to his bill an affidavit of his want of knowledge of the residence of such heirs.<sup>125</sup> Some statutes permit this showing to be made either under oath in the bill or by separate affidavit.<sup>126</sup> However required, the showing must be made. The affidavit required by statute is a condition precedent by the court's power to inquire into the merits of the action.<sup>127</sup> The form and contents of the petition or complaint as well as the form and contents of the required affidavit will be discussed in detail in subsequent paragraphs.

Where a bill is filed by more than one plaintiff, those made parties as unknown must be unknown to each and every one of the plaintiffs.<sup>128</sup> Whether each plain-

tiff must make affidavit to this fact is a question upon which the courts are not agreed. It has been held that in an action to vacate a judgment that in an action by two plaintiffs, an affidavit of one of the plaintiffs that the names and whereabouts of the unknown parties were unknown to the plaintiffs is sufficient.<sup>129</sup> It is sometimes held where the affidavit is made by one plaintiff and does not allege that the parties are unknown to all the plaintiffs that such an affidavit is insufficient, without deciding whether it would be sufficient if it had alleged that the parties were unknown to all of the plaintiffs.<sup>130</sup> Other cases hold that where a bill against unknown heirs is filed by more than one complainant, each complainant must make affidavit that such heirs are unknown, under a statute requiring the "complaining party" to make such affidavit.<sup>131</sup> This has been held also under a statute authorizing publication where parties are un-

<sup>125</sup> In *Allen v. Smith* (Ark.) supra, the statute involved provided that "in cases where it may be necessary to make the heirs of any decedent defendant and the names of all or part of them are unknown, and the complainant annexes to his bill an affidavit of his want of knowledge of the residence of such heirs, proceedings may be had against them without naming them." The court states that publication was had in this case against the unknown heirs, but there is no proof that the heirs were unknown, nor does it appear from the record that the court was informed in any manner as to complainant's want of knowledge of their residence or that they were nonresidents. As to just what proof is required that the heirs were unknown is not clearly stated by the court. The parties to this case who were sought to be made parties by designating them as unknown heirs were infants, and it is stated that where the rights or interests of this class of persons are involved, every step in the proceedings against them will be scrutinized. This case was heard upon appeal from the denial of a motion to set aside the decree in the action against unknown parties.

<sup>126</sup> In *Bleidorn v. Pilot Mountain Coal & Min. Co.* (1890) 89 Tenn. 116, 15 S. W. 737, the showing was required under the Tennessee statute as a condition precedent to obtaining service by publication upon the unknown heirs; there being no showing under oath that the heirs were unknown and could not be ascertained by diligent inquiry, the court was held to have no jurisdiction to render judgment against them.

The failure to state in the bill or by separate affidavit that the names and residences of the parties could not be ascertained on diligent inquiry is fatal to the proceeding. *Ferriss v. Lewis* (1875) 2 Tenn. Ch.

291. The statute was similar to that involved in the *Bleidorn* Case.

<sup>127</sup> *Stoneman v. Bilby* (1906) 43 Tex. Civ. App. 203, 96 S. W. 52.

<sup>128</sup> Cases cited in notes 129 et seq.

<sup>129</sup> *Stull v. Masilonka* (1905) 74 Neb. 309, 104 N. W. 188, 108 N. W. 166. The statute required it to appear "by the affidavit of the plaintiff" that the names of the heirs or devisees are unknown.

<sup>130</sup> *Kane v. Rock River Canal Co.* (1862) 15 Wis. 179, under a statute authorizing publication where parties are unknown and that fact is made to appear by affidavit. The court states that this statute does not expressly say to whom these owners must be "unknown," but it obviously intended that they must be unknown to the plaintiff in the suit, as nobody else's knowledge or want of knowledge on the subject would be material. As to the sufficiency of an affidavit of one plaintiff that the parties were unknown to him, the court states that the statute never intended to allow any party to be proceeded against as an unknown owner who might have been a known owner to some of the plaintiffs in the suit. The court does not hold that each one of the complainants must make affidavit that the parties are unknown, but states that probably one of the complainants could not swear to the knowledge of his coplaintiffs on the subject.

<sup>131</sup> *Jeffrey v. Hand* (1838) 7 Dana (Ky.) 89. The character of the action in this case does not appear. It seems that the decree was being attacked directly, and not collaterally, in the action. A similar decision appears in *Thruston v. Masterson* (1839) 9 Dana (Ky.) 228. And see *Hynes v. Oldham* and *Benningfield v. Reed*, infra, note 209.

known and that fact is made to appear by affidavit.<sup>132</sup>

An affidavit upon the affiant's knowledge and belief has generally been held sufficient.<sup>133</sup> An affidavit for notice by publication in an action by the state to foreclose a tax lien made by the attorney for the county is sufficient when made to the best of his knowledge and belief.<sup>134</sup>

It has been held that an affidavit for service by publication upon the unknown owner of land in a tax foreclosure proceeding which contains a direct and positive statement that the owner is unknown is not an affidavit upon information and belief, which is insufficient, although the affiant adds the further statement, "all of which I verily believe to be true."<sup>135</sup> But the court<sup>136</sup> further holds that an affidavit in such a case upon information and belief is sufficient. It is stated that, in the very nature of things, the affiant cannot have positive knowledge, at least of the fact the affidavit must show, that service cannot be had upon the defendant in the state.

An affidavit which declares that the parties are unknown to the affiant is sufficient. It is not necessary that the affidavit state generally that the parties are unknown.<sup>137</sup>

It has been held that an affidavit for

service by publication of notice in an action to remove a cloud from title need not show what or that any diligence was used to ascertain the names and residences of unknown claimants.<sup>138</sup> But where the statute requires such a showing, a different rule has been applied.<sup>139</sup> Thus, upon appeal it has been held that the failure to comply with a statutory requirement that there shall be a statement "that diligent exertions have been made without success to ascertain" the names of unknown parties renders the affidavit insufficient; although it states that the parties are unknown.<sup>140</sup> Some courts are of the opinion that while the absence of the affidavit that the parties are unknown renders the decree voidable, subject to be reversed,<sup>141</sup> such absence does not render the decree void and subject to being set aside upon collateral attack.<sup>142</sup>

Under some statutes an affidavit of the complainant's lack of knowledge of the residence of unknown heirs defendants is all that is required. The absence of such an affidavit is fatal to the jurisdiction.<sup>143</sup>

#### Form and contents of petition.

It is not a sufficient compliance with a statute requiring it to be alleged in

<sup>132</sup> *Meeklam v. Blake* (1865) 19 Wis. 397. Affidavit in an action by seven persons must be made by all of them.

<sup>133</sup> See cases cited in notes 134 et seq. and also 167 et seq.

<sup>134</sup> *Young v. Jackson* (1908) 50 Tex. Civ. App. 361, 119 S. W. 74.

<sup>135</sup> *Leigh v. Green* (1902) 64 Neb. 539, 101 Am. St. Rep. 592, 90 N. W. 255.

<sup>136</sup> *Leigh v. Green* (1902) 64 Neb. 539, 90 N. W. 255, affirming on reargument (1901) 62 Neb. 344, 89 Am. St. Rep. 751, 86 N. W. 1003.

<sup>137</sup> *Fayette Land Co. v. Louisville & N. R. Co.* (1896) 93 Va. 274, 24 S. E. 1016. The statute in this case provided that "where the bill states that there are or may be persons interested in the subject to be divided or disposed of whose names are unknown, and makes such persons defendants by the general description of parties unknown, on affidavit of the fact that the said parties are unknown, an order of publication may be entered against such unknown parties." This question arose upon a direct attack in the action against unknown parties.

<sup>138</sup> *Sloan v. Thompson* (1893) 4 Tex. Civ. App. 419, 23 S. W. 613. It does not appear, however, in this case, that the statute required the plaintiff to exercise diligence to determine the names of the unknown defendants. Apparently it did not; at any rate the court states that the affidavit, which did not show that any diligence was exercised, was in the terms of the statute.

A statute cited in a subsequent case (*Stoneman v. Bilby* (1906) 43 Tex. Civ. App. 293, 96 S. W. 52) required a statement that the persons could not be ascertained upon inquiry.

But see text to notes 27 et seq., as to the necessity of exercising diligence.

<sup>139</sup> A petition in an application to the probate court, made by an administrator, for an order to sell real estate, which made a strong showing of diligence on the part of the administrator to ascertain the names and residences of the numerous heirs at law, and which contained the allegation that the children of a deceased heir were unknown to the petitioner, but were supposed to reside near a certain place, and which contained an allegation in an amendment that the statement as to the distributees of the estate, described in the petition as the children of the deceased heir, whose names and residences and ages were unknown, "is a full statement of all the knowledge petitioner has of such persons or has been able to ascertain," is stated not to be enough to bring in these unknown heirs if the suit had been in the chancery court. *Bingham v. Jones* (1887) 84 Ala. 202, 4 So. 409.

<sup>140</sup> *Kirkland v. Texas Exp. Co.* (1879) 57 Miss. 316.

<sup>141</sup> *Teviss v. Richardson* (1828) 7 T. B. Mon. (Ky.) 654.

<sup>142</sup> See cases cited in note 209, *infra*.

<sup>143</sup> See *Allen v. Smith* (1869) 25 Ark. 495.

the complaint that the names of heirs of a person are unknown, to make the allegation in the style or caption of the complaint, since it is intended that the allegation shall be made and verified by affidavits as other allegations of the complaint are verified.<sup>144</sup>

It has been held that an allegation that the heirs of A were B and C, both of whom were reported dead, and that any and all descendants of B and C were unknown, did not authorize a warning order against the unknown heirs of A.<sup>145</sup>

Where the statute requires it to appear that the names of those sought to

be made parties are unknown, an allegation that the parties themselves are unknown has been stated to be insufficient.<sup>146</sup>

Specific examples of allegations held insufficient,<sup>147</sup> as well as those held sufficient, are given in the footnote.<sup>148</sup>

#### Form and contents of affidavit.

The necessary showing as to unknown parties is made in many cases in an affidavit. In the footnotes are shown affidavits which have been held sufficient<sup>149</sup> as well as others that have been held insufficient.<sup>150</sup>

The showing that the parties are un-

<sup>144</sup> *McMahan v. Smith* (1901) 69 Ark. 591, 65 S. W. 459 (direct attack upon proceeding). See *Miller v. Boardman* (1913) 93 Neb. 321, 140 N. W. 273, *supra*, note 122.

<sup>145</sup> *McMahan v. Smith* (Ark.) *supra*.

<sup>146</sup> Opinion of Riddick and Hughes, JJ., in *McMahan v. Smith* (Ark.) *supra*. Contra, *Battle, J.*

<sup>147</sup> *McMahan v. Smith* (Ark.) *supra*. An allegation that the plaintiff complains against "the unknown heirs of A, deceased," and that he has the right to have the equity of redemption of the unknown heirs of A foreclosed, is not an allegation that the names of the heirs are unknown to him.

A mere naming in the title to a suit to foreclose a tax lien of a defendant as "the unknown owner of said land" was in an action to cancel a deed issued in the tax proceeding, held not to amount to an allegation of want of knowledge on the part of the plaintiff as to who the owner may be. *Miller v. Boardman* (1913) 93 Neb. 321, 140 N. W. 273.

<sup>148</sup> An allegation in a petition in partition by a wife against a brother of her deceased husband and the unknown heirs of the deceased husband, that the petitioner has heard that there are descendants of deceased brothers and sisters of the said husband, but the names of any such descendants or their or any of their places of residence are and is unknown to the petitioner, was held a sufficient compliance with a statutory provision that in case one or more of the parties to an action shall be unknown, so that they cannot be named, the same shall be so stated in the petition. *Thornton v. Houtze* (1878) 91 Ill. 199 (bill in chancery to set aside judgment in action against unknown parties).

It is stated in *Butler v. Copp* (1903) 5 Neb. (Unof.) 161, 97 N. W. 634, where the owner of land is not known to the holder of a tax certificate, and cannot be found upon reasonable inquiry, the land may be made a party to an action to foreclose the tax lien, and in such a case the usual allegations in the petition and in the affidavit for service by publication, and in addition thereto a statement that the owner is unknown, are sufficient to resist a collateral attack.

<sup>149</sup> Under a statutory provision that in

suits to obtain title to land, if there be any persons interested in the same whose names are unknown, it shall be lawful to make such persons parties to such suits or proceedings by the name or description of persons unknown, or unknown heirs or devisees of any deceased person, but requiring an affidavit to be filed by the party desiring to make any unknown person a party, stating that the names of such persons are unknown, an affidavit that the "said defendants, heirs of . . . deceased . . . are interested in this suit, and that the names of such . . . heirs of said . . . are unknown to affiant, is sufficient." *Pile v. McBratney* (1853) 15 Ill. 314 (collateral attack).

<sup>150</sup> The statute involved in *Kircher v. M. Keating & Sons Co.* (1908) 145 Ill. App. 1, is not set out in full. The affidavit filed in the case, after other statements not material in this connection, stated: "Affiant further says that on due inquiry the name or names of said persons cannot be found, and on due inquiry the place or places of residence of said persons cannot be ascertained." In denying the sufficiency of this affidavit, the court states that the affidavit "does not comply with the provisions of the statute. Instead of saying that the defendants cannot be found, the affidavit states that the name or names of said persons cannot be found. Instead of saying that the place of residence of the defendants is not known, and that upon 'diligent inquiry' as required by the statute," their places of residence cannot be ascertained," the affidavit states that on 'due inquiry' the place or places of residence of said persons cannot be ascertained."

A paper entitled with the name of the state and county, and reciting that "this day personally came and appeared before A. J. E., clerk of the district court of said county, and says the names of the heirs of J. W., deceased, are unknown to affiant," signed by A. J. E. and at the lower left-hand corner thereof by "J. R. H., D. C. McL. Co., T." is insufficient as an affidavit. *Hardy v. Beaty* (1892) 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778.

A judgment in an action to foreclose a tax lien was sustained as against a collateral attack in *Butler v. Copp* (Neb.) *supra*,



known is made under some statutes in the affidavit for service by publication, but some statutes require a separate affidavit that the parties are unknown, or, according to other statutes, that the names of the parties are unknown.<sup>151</sup> It has been held where the court files were missing, but where the decree recites that the unknown persons were duly summoned, that it will be presumed the necessary affidavit was filed.<sup>152</sup>

## 2. Who may make.

It is the theory of some courts that the oath that the parties are unknown must be made by the party filing the bill; it cannot be made by an attorney.<sup>153</sup> At least an affidavit by an attorney that the parties are unknown to him is an insufficient compliance with a statute requiring that the parties be unknown

where there was an allegation in the petition and in the affidavit for service by publication that the owner of the land was unknown.

<sup>151</sup> *Wenner v. Thornton* (1881) 98 Ill. 156 (bill in chancery to set aside decree in action against unknown parties); *Breed v. Baird* (1907) 139 Ill. App. 15.

<sup>152</sup> *Wenner v. Thornton* (Ill.) supra.

<sup>153</sup> *Taylor v. Watkins* (1844) 4 B. Mon. (Ky.) 561, holding affidavit of attorney insufficient.

In *Moran v. Catlett* (1913) 93 Neb. 158, 139 N. W. 1041, it is stated that the plaintiff might know the facts as to residence and heirship, and yet his attorney be ignorant as to these very matters, and he might thus secure an undue advantage over the defendant. This decision is approved in a subsequent appeal (1917) — Neb. — 165 N. W. 946. No reference is made to a decision of the same court, made a year previously, in *Page v. Breese* (1912) 92 Neb. 241, 138 N. W. 138, where, in an action by the county against the unknown heirs of a decedent to foreclose a tax lien, the court states that a substantial compliance with the terms of the statute with reference to service by publication is sufficient. The action in *Moran v. Catlett* was by an individual to foreclose a tax lien.

At least, in an action in specific performance to compel a purchaser to accept a title depending upon proceedings against unknown heirs, an affidavit by an attorney that he verily believed that the names of these heirs were unknown to his client is insufficient, so that the title is in such doubt that the defendant will not be compelled to accept. *Tevis v. Richardson* (1828) 7 T. B. Mon. (Ky.) 654.

<sup>154</sup> *Piser v. Lockwood* (1883) 30 Hun. (N. Y.) 6. It is stated on collateral attack that if the attorney might have made the affidavit, it would have been incumbent upon him to state some reasons why diligence had not been used by the plaintiff, and to state also, inasmuch as he acted en-

"to the plaintiff."<sup>154</sup> In an action by a corporation, public or private, the affidavit may be made by an agent or attorney.<sup>155</sup> Thus in an action by the county to foreclose a tax lien against the unknown heirs of a deceased person, the county attorney may make the affidavit to obtain service by publication under a statute requiring certain facts to "appear by the affidavit of the plaintiff."<sup>156</sup>

Where the affidavit to obtain an order for service by publication in an action by a company against unknown heirs is made by an agent, the recital of the fact of the affiant's agency in the affidavit is sufficient to show his authority.<sup>157</sup> It will be presumed in such an affidavit in which the allegations are direct and positive and the affiant swears positively, and not upon information and belief, that the facts deposed to were within

tirely upon information of others, from whom he received such information.

<sup>155</sup> *Fayette Land Co. v. Louisville & N. R. Co.* (1896) 93 Va. 274, 24 S. E. 1016. In this case the action was brought by a non-resident corporation. It is stated that the affidavit of the local attorney of the corporation would seem to be more persuasive as to the facts stated, that there are parties interested who are unknown, than a like affidavit made by some officer of the plaintiff's corporation, residing, it may be, and as in this case was a fact, at a place remote from the locality in which the transactions which are set out in the bill occurred, and from the land, liens upon which were to be investigated and adjudicated. The question arose in the action against the unknown parties.

*Brickell v. Farrell* (1897) 82 Fed. 220. The objection was that the affidavit was made by the attorney in charge of the suit to collect taxes, and not by the collector himself. The affidavit stated that the names and places of residence of the heirs of the record owner were "unknown to the plaintiff." It is stated that the state was the beneficial party plaintiff, and in its corporate capacity it was unable to make an affidavit, and therefore the provisions of the statute requiring the affidavit to be made by the plaintiff could not be literally complied with. The statute making provision for an attorney to prosecute suit for delinquent taxes is referred to and it is stated that this attorney is the state's agent and the proper person to make the affidavit, as he is the one who must of necessity make or be entirely familiar with the investigation concerning the title to the land and the interests of the parties therein.

<sup>156</sup> *Page v. Breese* (Neb.) supra. The court in *Moran v. Catlett* (Neb.) supra, makes no reference to this case. See *Brickell v. Farrell* (Fed.) supra.

<sup>157</sup> *Birmingham Realty Co. v. Barron* (1907) 150 Ala. 232, 43 So. 346 (bill of review of action against unknown parties).

the affiant's knowledge.<sup>158</sup> An allegation that the names of the heirs and next of kin of a deceased person are unknown to the complainant (the company) does not make it appear that the affidavit is not upon affiant's knowledge.<sup>158</sup>

*c. Showing of interest of unknown parties.*

It has been held generally, without relying upon the provisions of a statute, that in an action against unknown claimants to quiet title or remove a cloud from the title the alleged interests of the unknown claimants must be set forth; that unless such interests are set forth, the court cannot know whether the complainant is entitled to relief.<sup>159</sup> A requirement of a statute that, before publication can be had against unknown parties, the plaintiff must allege under oath the interests of such persons and how derived, so far as his knowledge extends, has been treated as requiring this allegation in the petition.<sup>160</sup> Consequently the failure of the collector in an action to enforce the state's lien for taxes, to allege under oath in the petition the interest of the unknown defendants and how derived, so far as is known to him, prevents the court from acquiring jurisdiction.<sup>161</sup> Either the failure to describe the interest of unknown defendants,<sup>162</sup> or the failure to

verify this allegation in a petition<sup>163</sup> by the oath of the petitioner, as required by statute, prevents the court from acquiring jurisdiction in such an action.

Frequently some statement as to interest appears. It then becomes a question whether there is a sufficient compliance with the statute. The interests of the unknown defendants is sufficiently stated in an allegation in an action to foreclose a tax lien against the holder of the record title "if living, or if dead, his unknown heirs or devisees," that if the said holder of the record title be dead, the complainant verily believes there are persons interested in the subject-matter of the suit whose names cannot be inserted because they are unknown to him, and that the interest of such persons and how derived, so far as the knowledge of the affiant extends, are truly described as follows, viz.: That if the said (holder of the record title) be dead, his unknown heirs or devisees claim, or might claim, an interest or right in said land by descent, inheritance, devise, or operation of law.<sup>164</sup>

It has been held to be an insufficient allegation as to interest to merely allege that the unknown defendants derived their interest as heirs at law of a deceased ancestor, without alleging what that interest is, or that the petitioner does not know what the interest is.<sup>165</sup>

<sup>158</sup> Ibid.

<sup>159</sup> *Weilborn v. Pierce* (1918) — Fla. —, 78 So. 929 (case heard upon demurrer to bill).

<sup>160</sup> The statute is stated in *Eminence Land & Min. Co. v. Current River Land & Cattle Co.* (1906) 187 Mo. 420, 86 S. W. 145, to require the statement as to interest to be in the petition.

<sup>161</sup> *State ex rel. Petts v. Staley* (1882) 76 Mo. 158, heard upon motion of defendants to quash an execution upon the judgment upon the ground that the court acquired no jurisdiction.

*Myers v. McRay* (1892) 114 Mo. 377, 21 S. W. 730 (collateral attack). The action in the case was one for delinquent taxes by the state against "Joseph F. Pond, Estate or Heirs." It is stated that it is nowhere alleged that Pond was dead, nor that the names of the heirs could not be set out because unknown, what their interest was, or how or in what manner derived, nor was the petition sworn to.

An affidavit of nonresidence is not sufficient. *Rohrer v. Oder* (1894) 124 Mo. 24, 27 S. W. 606 (collateral attack).

<sup>162</sup> *Chilton v. Nickey* (1914) 261 Mo. 232, 169 S. W. 978 (collateral attack).

<sup>163</sup> *Charles v. Morrow* (1889) 99 Mo. 638, 12 S. W. 903 (collateral attack); *Rohrer v. Oder* (Mo.) supra.

<sup>164</sup> *Fleming v. Tatum* (1910) 232 Mo. 678,

135 S. W. 61. Substantially similar allegations in the order of publication were sustained in *Hambel v. Lowry* (1915) 264 Mo. 168, 174 S. W. 405. See *infra*, text to note 175.

But in *Brickell v. Farrell* (Fed.) supra, an affidavit that the unknown heirs of the record owner are the owners of the land, and containing a further statement that the heirs of the record owner are the owners of the real estate by descent, is held a sufficient statement of the defendants' interests. It is said that such an allegation is in effect that the unknown persons against whom the order of publication was asked were the heirs of the record owner, and that they inherited their title to the lot in controversy from him.

<sup>165</sup> *Eminence Land & Min. Co. v. Current River Land & Cattle Co.* (Mo.) supra.

But, under the Missouri statute of June 4, 1909 (Laws 1909, p. 338, § 1776, Rev. Stat. of Missouri 1909, containing a proviso that where the object of the suit is to bar the claims or interests of unknown persons in any property, and such unknown persons own or claim such property by or through any deed, will, or other written instrument, or by inheritance from any person who might so claim or have an interest, "it shall be a sufficient description of such unknown persons, and of their claims or interests in such property, and how the same are de-

So an allegation which merely states that the ancestor was the owner at the time of his death, and that his heirs are now the owners, is insufficient.<sup>166</sup>

It has been held that the verification of a petition in a quiet-title proceeding, made upon information and belief, is sufficient; at least to withstand a collateral attack.<sup>167</sup> The fact that an affidavit attached to a petition does not contain the formal statement of the state and county where made has been held immaterial where the seal and written words following the officer's signature show that the oath was administered by a named officer of a stated county and state, the presumption being that the oath was administered within his jurisdiction.<sup>168</sup>

It has been held, under a statute providing for service by publication in actions against unknown heirs when any property may have been granted or may have accrued to the heirs of any deceased person, that a showing must be made by the petition or otherwise that an estate descended from the ancestor to his heirs.<sup>169</sup>

#### *d. Order for publication.*

In the absence of a statute so requiring, no order of court for the publication of summons is necessary, to give the court jurisdiction.<sup>170</sup> But where the statute requires such an order, compli-

rived, if the plaintiff shall insert in his petition and cause to be inserted in the order of publication, a description of the property and the name or names of the person or persons to whom such title or claim was last transferred . . . with a general allegation that such unknown persons derive or claim to derive their title or claim as consort, heirs, devisees, donees, alienees, or immediate, mesne, or remote, voluntary or involuntary grantees of such named person or persons,<sup>171</sup>—a petition and order of publication disclosing that the plaintiff therein did not know whether the known defendants, whose names were given, were dead or still alive, and also that the unknown defendants could only claim an interest in some way from and under those that were known and named, using the general allegation that the unknown defendants had obtained and derived their claims to the property therein described as either heirs, consorts, devisees, donees, alienees, or immediate, mesne, remote, voluntary, or involuntary grantees of each of the named known defendants, is sufficient. *Downing v. Anders* (1918) — Mo. App. —, 202 S. W. 297.

<sup>166</sup> *Davis v. Montgomery* (1907) 205 Mo. 271, 103 S. W. 979 (collateral attack). The allegation of the petition with reference to interest was "that one Robert C. Hays was the owner at the time of his death of the

ance therewith is necessary.<sup>171</sup> An action in the nature of a quiet-title proceeding against unknown defendants has been sustained, however, although the record did not show the making of an order for the publication of notice to the defendants.<sup>172</sup> The trial court, however, found that notice had been published for the requisite time, and it is stated that it appears from this finding that the court was satisfied with the mode in which notice had been given, and adopted it; that this was in effect equivalent to a notice given in pursuance of the previous direction of the court; at least it ought to be so regarded when questioned in a collateral proceeding. The prayer of the bill asked that an order might be made for the publication of notice to the defendant, but as stated above, it does not appear that such an order was made.

One order may serve for several actions by a state to collect delinquent taxes.<sup>173</sup>

It may be stated generally that the contents of the order must comply with the statutory requisites. Failure to comply with the statutory requirement that the order of publication shall contain all the allegations of the petition in relation to the interest of unknown parties prevents the court from acquiring jurisdiction.<sup>174</sup> An allegation in an order of publication against a named person and

above-described premises and real estate, and his heirs are now the owners thereof, and they are unknown to the plaintiff, for which reason their names cannot be inserted in this petition."

<sup>167</sup> *Hambel v. Lowry* (1915) 264 Mo. 169, 174 S. W. 405. See notes 133 et seq.

<sup>168</sup> *Hambel v. Lowry* (Mo.) supra.

<sup>169</sup> *Love v. Henderson* (1875) 42 Tex. 520.

<sup>170</sup> *McClymond v. Noble* (1901) 84 Minn. 329, 87 Am. St. Rep. 354, 87 N. W. 838, heard upon a motion to vacate judgment.

<sup>171</sup> *Guise v. Early* (1887) 72 Iowa, 283, 33 N. W. 683; *Harris v. Defenbaugh* (1910) 82 Kan. 765, 109 Pac. 681.

<sup>172</sup> *Rhodes v. Gunn* (1880) 35 Ohio St. 387. The statute involved provided that, upon a petition and an affidavit that the names or residences of heirs is unknown, the court shall make such order in relation to notice as it may deem proper.

<sup>173</sup> *Moss v. Mayo* (1863) 23 Cal. 421 (sued by fictitious name).

<sup>174</sup> *State ex rel. Petts v. Staley* (1882) 76 Mo. 158. The petition itself in this case contained no allegation as to the interest of the unknown defendant.

An order of publication which fails to state that there "are persons interested in the subject-matter of the petition whose names he cannot insert therein because they

his unknown heirs and devisees that the interest of the unknown persons so far as the plaintiff's knowledge extends, is an interest as heirs and devisees of the named person, is a sufficient allegation of the interests of the unknown defendants, in the absence of a statute prescribing a set form of words for describing such interest or its derivation, or plaintiff's lack of knowledge of it.<sup>175</sup>

An order of publication which fails to describe the unknown parties by the character in which they are sued, and which does not refer to the title, interest, or subject-matter of the litigation, is insufficient.<sup>176</sup>

A general requirement common to many statutes relating to constructive service is that a paper containing the published notice be mailed to each of the defendants served constructively. In the case of service upon defendants where it is not known whether there are any such defendants in existence, it is apparent that such a requirement is inapplicable. The mailing of the papers in such cases is by some statutes required to be dispensed with in a certain manner; as, for example, that the judge be satisfied with the affidavits on which the order of publication was granted that the plaintiff could not, with reasonable diligence, ascertain the place or places where the defendants would probably receive mail matter. The mere omission of the order dispensing with the mailing to state that the judge is satisfied "by the affidavits on which the order was

granted" is not fatal, where it is stated in the order that the fact satisfactorily appears to the judge and the entire order is granted on two affidavits, which are recited, and which show that the plaintiff could not ascertain the place where mail matter would reach the unknown defendants.<sup>177</sup>

The designation for the publication of summons against an unknown party of the newspapers which the law designates as the official newspapers is a substantial compliance with the statutory provision that the publication shall be in two newspapers "designated in the order as most likely to give notice to the defendants." Obedience to the law will be treated as a designation in the order of the newspapers most likely to give the notice.<sup>178</sup>

The fact that an order of publication in an action to foreclose the tax lien is dated on the day prior to that on which the petition is filed cannot be held to outweigh the declaration in the order of publication that, on the day thereof, the plaintiff filed her petition, but the petition will be regarded as on file when the order of publication was made.<sup>179</sup>

Whether an order to an officer, commanding him to make publication, and publication by him in pursuance of the order, is a valid notice, see *infra*.<sup>180</sup>

#### *e. Publication.*

It is usually held that statutory requirements as to the publication must be met in obtaining jurisdiction of unknown parties.<sup>181</sup> Notice must be published the

are unknown to him," as required by statute, is defective. *Davis v. Montgomery* (1907) 205 Mo. 271, 103 S. W. 979.

<sup>175</sup> *Hambel v. Lowry* (Mo.) *supra*.

<sup>176</sup> *Ferriss v. Lewis* (1875) 2 Tenn. Ch. 291. See *supra*, note 88.

<sup>177</sup> *Green v. Squires* (1880) 20 Hun (N. Y.) 15, holding the foreclosure of a mortgage against the unknown devisees of the mortgagor to be valid, so that a purchaser at the foreclosure sale could be compelled to take the property. The plaintiff in the foreclosure proceeding was unable to ascertain whether or not the deceased mortgagor devised the premises by will, and accordingly, to meet the possibility of such devise, made the devisees parties defendant under the title of unknown devisees.

<sup>178</sup> *Ibid*.

<sup>179</sup> *Fleming v. Tatum* (1910) 232 Mo. 678, 135 S. W. 61.

<sup>180</sup> Text to notes 185 et seq.

A direction to an officer "to summon the unknown children of . . ." to answer the petition is not a summons under a statute requiring that the summons shall command the officer to whom it is directed "to summon the defendant named therein" to

answer the petition filed by the plaintiff, and cannot therefore support an attachment, which cannot be had until at or after the commencement of the action. Consequently the court was held to have acquired no jurisdiction of the subject of the action, and its judgment was held void. *Kellar v. Stanley* (1887) 86 Ky. 240, 5 S. W. 477.

<sup>181</sup> *Babcock v. Wolfarth* (1904) 35 Tex. Civ. App. 512, 80 S. W. 642. The notice involved in this case was defective in several particulars. It ran only in the name of the state, while the statute required it to be in the name of the state and county. It was directed to the sheriff or any constable of the county, while the statute prescribed that it be directed to all persons owning or having or claiming any interest in the land.

A citation to an unknown owner is not invalidated by the fact that it is preceded by direction to the sheriff or constable to serve it by publication, and is followed by a command for a return, showing how the writ was served. *State v. Unknown Owner* (1907) 47 Tex. Civ. App. 188, 103 S. W. 1116. This decision was made upon an appeal from an order of the lower court, dis-

statutory time.<sup>182</sup> A summons which fails to state the date of the first publication has been stated to be insufficient to confer jurisdiction.<sup>183</sup> Failure to comply with the statutory requirement that the notice shall contain a description of the property is fatal to the validity of the proceeding.<sup>184</sup> A statutory requirement that a notice in an action to

foreclose a tax lien against unknown owners be directed to all persons owning or having or claiming any interest in the land must be met. It is not complied with by a notice directed to an officer, commanding him to make publication, and a judgment rendered upon such service is void.<sup>185</sup> The fact that the notice prescribed by statute is pre-

missing the proceeding on the ground of insufficient citation.

The fact that the notice contains recitals not required by statute does not invalidate it if it contains the requisite allegations. *Young v. Jackson* (1908) 50 Tex. Civ. App. 351, 110 S. W. 74.

In *Eminence Land & Min. Co. v. Current River Land & Cattle Co.* (1905) 187 Mo. 420, 86 S. W. 145, an action involving the validity of a judgment in a prior action to collect delinquent taxes against unknown heirs, the files of which were missing, the publisher of the paper in which the notice of publication was supposed to have been given in the previous action testified that he had examined the files of his paper and that no such notice had been published. He testified that he could account for the nonappearance of the publication in the files of his newspaper only on the conjecture that it was published in a supplement. This is stated by the judge rendering the opinion not to fill the demand of the law that the order be published in a newspaper.

The judge rendering the opinion in *Eminence Land & Min. Co. v. Current River Land & Cattle Co.* (Mo.) supra, was of the opinion that service by publication directed to "The unknown heirs of Richard B. Lee, William W. Fleming, Robert F. Fleming, and David D. Mitchell was not notice to the unknown heirs of any of the named parties except Richard B. Lee, and that it being admitted that the three last named persons were dead at the time of the service, the court acquired no jurisdiction over their unknown heirs.

It is not necessary under the Texas statute for the citation to be addressed to the sheriff or constable. *Gibbs v. Scales* (1909) 54 Tex. Civ. App. 96, 118 S. W. 188.

<sup>182</sup> In *Mecklem v. Blake* (1866) 19 Wis. 398, the word "month," in a statutory provision that the notice shall be published for the space of three months, was construed to mean calendar month, in the absence of any contrary expression. A notice dated on the 20th of March, 1840, reciting that a petition would be presented to the court on the 16th day of June following, on which day the petition was presented and an order entered requiring the parties interested and parties unknown to appear and show title within three days, was held to be less than three calendar months, for which reason the court acquired no jurisdiction as to absent and unknown owners.

In a suit for delinquent taxes in which unknown owners are joined with the unknown heirs of a named person, it has been

held that the provisions of a general statute relating specifically to suits against unknown heirs, requiring publication of citation for eight weeks, should be followed, although the Tax Act providing for such suits against unknown owners provides for service for only three weeks. *Williams v. Young* (1905) 41 Tex. Civ. App. 212, 90 S. W. 940.

But the state may proceed against the unknown owners of land as such, and the service of process against them, as provided in the taxing statute, is sufficient; although they were the heirs of the patentee of the land, the notice need not be published the length of time required by a statute relating to publication against unknown heirs. *Young v. Jackson* (Tex.) supra.

See *Ashley v. Brightman* (1839) 21 Pick. (Mass.) 285, note 65.

<sup>183</sup> *Williams v. Pittock* (1904) 35 Wash. 271, 77 Pac. 385. It is held, however, in this case, that the summons in question did state the date of its first publication; the fact that the date of the first publication followed the attorney's signature was held a sufficient statement of the date. (Motion by parties sued as unknown to vacate judgment.)

<sup>184</sup> *Sanford v. White* (1873) 46 How. Pr. (N. Y.) 205, affirmed in (1874) 56 N. Y. 359. It seems, however, that no attempt was made to proceed under the statutes requiring a description of the land, but that the procedure was had under another statute which was held inapplicable.

A notice issued to the unknown owners of the A. Wetherby Survey, and published to the unknown owners of the A. Weatheraby Survey, is no notice to the owners of the A. Netherly Survey (*Harris v. Hill* (1909) 54 Tex. Civ. App. 437, 117 S. W. 907); and a judgment rendered upon such service is void.

See cases cited in notes 108 et seq.

<sup>185</sup> *Earnest v. Glaser* (1903) 32 Tex. Civ. App. 378, 74 S. W. 605. The notice in this case was directed to the sheriff or any constable of the county, and commanded him to summon by making publication, unknown owners and all persons owning or having or claiming any interest in the land. It then commanded the officer to appear and defend the suit, and show cause why judgment should not be rendered condemning the land and ordering sale and foreclosure thereof for the taxes.

A notice directed "to the sheriff or any constable of Lubbock county, greeting," which officer is commanded to summon unknown owners whose residence is unknown,

ceded by direction to the sheriff or constable to serve it by publication, and is followed by a command for a return, showing how the writ was served, does not invalidate the notice.<sup>186</sup>

But a more liberal interpretation has been given as to some matters.<sup>187</sup> Thus, a publication in an action against a named person and his unknown heirs and devisees is not void for the reason that it does not contain all the allegations of the petition concerning the interests of the unknown defendant, when it advises defendants of the identical facts the petition alleges, although it does not do so in the identical words.<sup>188</sup> A publication against unknown heirs has been held sufficient although it contains no reference to the subject-matter of the suit nor to the title or interest of the defendants therein, under a statute requiring the register, after proper affidavit has been filed, to make publication as in case of nonresidents, describing such unknown parties

as near as may be by the character in which they are sued and with reference to their title or interest in the subject-matter.<sup>189</sup>

Some general objections to the validity of the notice, that have been overruled, are shown in the footnote.<sup>190</sup>

#### **Lis pendens.**

The failure to publish a *lis pendens* with the summons, as required by statute, prevents the court from acquiring jurisdiction of unknown defendants.<sup>191</sup> Nor is this defect cured by a notice of "no personal claim" attached to the summons and published in connection therewith.<sup>191</sup> But an unknown claimant who, after a default judgment has been rendered, appears and moves to set aside the judgment, and, upon the judgment being set aside, answers and files a cross petition in the action, cannot raise any question as to the statutory requirements being met.<sup>192</sup>

It will be presumed in support of a

is defective where the statute requires such notice to be directed to all persons owning or having or claiming any interest in the land, and renders a judgment in a tax foreclosure proceeding void. *Babcock v. Wolfarth* (1904) 35 Tex. Civ. App. 512, 80 S. W. 642.

A citation by publication, in an action by a city against an unknown owner to recover taxes, addressed "to the sheriff or any constable of El Paso county, greeting," and commanding the officer, by making publication thereof, to summon the owner of said property, which is published by the officer in a newspaper in the county, is void. *Borden v. Patterson* (1908) 51 Tex. Civ. App. 173, 111 S. W. 182.

<sup>186</sup> *State v. Unknown Owner* (1907) 47 Tex. Civ. App. 188, 103 S. W. 1116.

<sup>187</sup> In *Hardy v. Beaty* (1892) 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778, a citation by publication which stated that the plaintiff had filed his petition, praying that he might have certain lands decreed to him which were granted by the state to the heirs of Joseph L. Wilson, deceased, and that Joseph Wilson agreed to convey to him a certain portion of the land for having located the same; that Joseph Wilson is dead and his heirs are unknown,—although not as full as the law requires, was held sufficient when collaterally questioned.

A notice to unknown owners in an action by the state to foreclose a tax lien under a special statute need not state the file number of the suit, as provided in a general statute regulating citations, nor need it include a statement of the amount of costs, as given in the petition. *Unknown Owner v. State* (1909) 55 Tex. Civ. App. 300, 118 S. W. 803.

<sup>188</sup> *Hambel v. Lowry* (1915) 264 Mo. 168, 174 S. W. 405.

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<sup>189</sup> *Birmingham Realty Co. v. Barron* (1907) 150 Ala. 232, 43 So. 347. The court arrives at this conclusion after comparison with a rule prevailing in chancery cases that "all orders of publication shall state distinctly the facts and objects of the bill." The action in this case was one to enforce a vendor's lien for the purchase price of real estate. The court does not distinguish between an order of publication and the publication itself, but confuses these things throughout the opinion. The case arose upon a bill of review of the judgment in the action against unknown heirs.

<sup>190</sup> A notice of publication in an action to foreclose a tax lien, which requires the defendant to answer in the forenoon of the day on which an answer might properly be required, is not invalid, since the right to answer continued during the entire day notwithstanding the notice. *Armstrong v. Middelstadt* (1888) 22 Neb. 711, 36 N. W. 151.

The words "if any," inserted in the summons to unknown owners in an action to foreclose a mortgage, do not invalidate the summons. *Abbott v. Curran* (1885) 98 N. Y. 655.

<sup>191</sup> *Jenson v. Anderson* (1913) 123 Minn. 199, 143 N. W. 361.

<sup>192</sup> *Blackburn v. Bucksport & E. River R. Co.* (1908) 7 Cal. App. 649, 95 Pac. 668. A statute in this case made the voluntary appearance of a defendant equivalent to personal service of the summons and copy of the complaint upon him. The irregularity of the proceedings alleged by the defendant was that the affidavit upon which the court ordered the publication of the summons was insufficient, that the affidavit of the publication of the summons was insufficient, and that there was nothing in the record showing that a *lis pendens* was filed in the office of the county recorder, as re-

judgment that a *lis pendens* notice was filed where the contrary is not alleged in a complaint to set aside a decree quieting title to real estate against unknown heirs.<sup>193</sup>

*f. Proof of publication.*

In the absence of any statutory requirements as to the mode of making the proof of publication, it will be presumed that evidence other than the printer's certificate was adduced, if that be necessary, where the court found that publication had been duly made.<sup>194</sup> The fact that no seal is affixed to the jurat of the officer taking the publisher's affidavit will not invalidate the proceedings, especially where the officer who took the affidavit was the clerk of the court which tried the case and was authorized to administer

oaths, and the trial judge must have known his official signature, and though no seal was affixed, must have been satisfied that the affidavit was made and the notice was published as stated therein.<sup>195</sup> When the publisher states in his affidavit that the publication was in a weekly newspaper and for four weeks successively, and gives the number of the issues, these statements are not overthrown by dates which are inconsistent with them, and apparently contradictory of each other.<sup>196</sup>

**VI. Applicability of principles governing collateral attack on judgments.**

It may be stated generally that the judgment of a court of general jurisdiction, which has jurisdiction of the parties and of the subject-matter, is not open to collateral attack.<sup>197</sup> It is also a

quired by the statute. The court expressed an opinion that the filing of the *lis pendens* was not a jurisdictional prerequisite.

<sup>193</sup> PHILLIPS v. TOMPSON, ante, 599.

<sup>194</sup> Pile v. McBratney (1853) 15 Ill. 314.

The printer's certificate in this case was to the effect that the advertisement was published "for four successive weeks, the first publication having been made on the 8th day of March, 1850," and that the last publication was "on the 26th of April, 1850." The court says that the statement as to the latter date does not contradict the previous one, but states something more, that the inference from the whole certificate is that the notice was published for eight weeks. It is then that, even if the certificate was defective, the presumption would be, in a collateral proceeding, that the court had other evidence before it that the publication was duly made.

In Young v. Jackson (1908) 50 Tex. Civ. App. 351, 110 S. W. 74, the affidavit of the publisher of the paper in which the notice was published was held sufficient although the notice itself was directed to the sheriff. The court laid down the general rule that whatever is sufficient to inform the court of the fact of publication does, when the court is so informed, authorize it to proceed to judgment in a case where notice is required, and it will be presumed, in favor of the judgment, against collateral attack, that the court found that the notice was published in the manner and for the period of time required by statute.

<sup>195</sup> Young v. Jackson (Tex.) supra.

<sup>196</sup> Fleming v. Tatum (1911) 232 Mo. 678, 135 S. W. 61.

In Tevis v. Richardson (1828) 7 T. B. Mon. (Ky.) 654, it is held in an action in specific performance to compel the acceptance of a title depending upon a proceeding against unknown heirs, that proof of the order of publication, the certificate of which is dated after the return day of the summons, and does not state when the time for

the running of the summons commenced or when it ended, is insufficient.

<sup>197</sup> Various phases of this question have been discussed in the notes in this series of reports. See L.R.A. Indexes, title, "Judgment," subtitle, "Collateral attack."

See particularly the note in L.R.A.1916E, 316, upon collateral attack upon judgment because of insufficiency of pleadings. Hall v. Melvin (1896) 62 Ark. 439, 54 Am. St. Rep. 301, 35 S. W. 1109, discussed in the note in L.R.A.1916E, at page 323, is of particular interest in connection with the present note. In that case it was held that one to whom a widow attempted to convey real estate of which a former husband died seised could not quiet title thereto against the unknown heirs of such deceased husband under a statute of descent providing that if there be no children or their descendants, father, mother, nor their descendants, nor any fraternal or maternal kindred capable of inheriting, the whole estate shall go to the wife or husband of the intestate, since, under this statute, the widow only becomes the owner in fee provided there are no heirs of the husband in existence, known or unknown. Consequently the petition shows the title which is sought to be confirmed and quieted in the petitioner to be in another.

The judgment of a court of general jurisdiction cannot be attacked in a collateral proceeding on the theory that the allegation in the complaint as to the existence and interest of parties unknown is insufficient, nor that the affidavit was not sufficient to authorize the order of publication. Nash v. Church (1860) 10 Wis. 303, 78 Am. Dec. 678.

It has been held that a decree quieting title against the unknown heirs of a certain person cannot be impeached in a collateral proceeding upon the ground that it was obtained on false and fraudulent testimony. Burton v. Perry (1893) 146 Ill. 71, 34 N. E. 60.

In a direct attack upon a sale in pursu-

general rule applicable to the judgments of a court of general jurisdiction that there are certain presumptions in favor of the regularity thereof.<sup>198</sup>

The foregoing general principles governing judgments apply to judgments against unknown parties. Where all the steps required by statute have been taken, mere failure of the affidavits as to unknown parties to state the facts showing what diligence was used to ascertain the names and places of residence of such parties does not deprive the court of jurisdiction, so as to render its decree void on collateral attack.<sup>199</sup>

Where the court finds that proper service has been made upon the defendants by publication, the judgment is conclusive upon collateral attack.<sup>200</sup> It has been held that where the court finds that due notice was given according to the statute, and that the court had jurisdiction of the parties, it is not necessary that the steps preliminary to such notice

and jurisdiction, prescribed by the statute, should be recited in the decree, and found to have been duly taken.<sup>201</sup> The recital in the judgment of a court of general jurisdiction that process of summons was duly issued against the unknown defendants is, upon collateral attack, a recital of jurisdiction which is not overcome by the fact that the record does not show that an affidavit as to unknown defendants was filed.<sup>202</sup> Nor does the recital in a judgment under a statute requiring two affidavits, one as to non-residence and another as to the defendants being unknown, that "complainant filed . . . an affidavit showing that said defendants reside out of this state," show that the affidavit that defendants were unknown was not filed.<sup>203</sup> But it has been held on direct attack, where it appears from the record that only one affidavit was filed, that the court does not obtain jurisdiction of the unknown defendants.<sup>204</sup>

ance of a judgment rendered in a tax foreclosure action against unknown owners and the unknown heirs of a certain person deceased, the purchasers, who were bona fide purchasers for a fair and adequate value, were held entitled to be protected although the service upon the defendant was insufficient. *Williams v. Young* (1905) 41 Tex. Civ. App. 212, 90 S. W. 940.

As to what is a collateral and what a direct attack upon a judgment, within the rule that a judgment that is not void cannot be attacked collaterally, see note L.R.A. 1918D, 470.

<sup>198</sup> 15 R. C. L. § 353, p. 875; 1 Freeman, *Judgm.* 4th ed. § 124.

<sup>199</sup> *Little v. Chambers* (1869) 27 Iowa, 522. The decree found that the notice in the action was duly served on the defendant, as required by law in the practice of the court, and it also appeared to the satisfaction of the court that the residences of the defendant and the owner of the land were unknown to the plaintiff or his attorney. The statutory provision in this regard is not shown. It is stated that, strictly, the affidavit for the publication and the affidavits under the statute should state the facts.

<sup>200</sup> *Sloan v. Thompson* (1893) 4 Tex. Civ. App. 419, 23 S. W. 613. In this case the judgment affirmatively recited that "proper service had been made by publication on the defendant." This was held to be conclusive of all questions as to service, such as publication of citation for the proper length of time, return, and every other essential to make complete service by publication. *Gillon v. Wear* (1894) 9 Tex. Civ. App. 47, 28 S. W. 1014.

<sup>201</sup> *Walker v. Ogden* (1901) 192 Ill. 314, 61 N. E. 403 (collateral attack).

The omission from a tax judgment of the publisher's affidavit of the publication of

the notice and list of delinquent taxes has been held to be an irregularity merely, which cannot be attacked in a collateral proceeding. *Hoyt v. Clark* (1896) 64 Minn. 139, 66 N. W. 262. There was no question raised but that the judgment in this case conformed to the statute, and the court states that it must be assumed that it contained the recital required, namely, "the notice and list required by law having been duly published as required by law." The court in *Hoyt v. Clark* distinguishes *Bennett v. Blatz* (1890) 44 Minn. 56, 46 N. W. 319, by stating that although language was used in the *Bennett* Case to the effect that publication of the notice and list must affirmatively appear, the "question of the presumption in favor of the validity of the judgment, or as to the burden of proof, does not seem to have been suggested, or in the mind of the court."

<sup>202</sup> *Wenner v. Thornton* (1880) 98 Ill. 156 (bill in chancery to set aside decrees in action against unknown owners).

The judgment of a court of general jurisdiction which recites that unknown owners have been duly cited by publication in an action by the state to foreclose a tax lien cannot be collaterally attacked by a claimant who does not show that he was in possession of the land when the foreclosure was filed. *Gibbs v. Scales* (1909) 54 Tex. Civ. App. 96, 118 S. W. 188. The attack in this case, however, seems to have been on the ground that the affidavit of the county attorney was fraudulently made, and that by reason thereof the judgment of foreclosure was void, thus attacking the judgment on the ground of fraud.

<sup>203</sup> *Wenner v. Thornton* (Ill.) *supra* (bill in chancery to set aside decrees in action against unknown owners).

<sup>204</sup> *Breed v. Baird* (1907) 139 Ill. App. 15.



Even though there is no recital as to jurisdictional facts, the judgment has been held conclusive upon collateral attack.<sup>205</sup> In order that a collateral attack upon the jurisdiction of a court and the validity of a judgment may prevail, it must affirmatively appear that the facts essential to jurisdiction did not exist.<sup>206</sup> Thus it has been held upon collateral attack that the proceedings of the court will be presumed to have been regular so far as compliance with a statutory requirement that an affidavit that the parties are unknown, as a basis for citation by publication, be filed, or that such an affidavit be attached to the petition, is concerned, where the record does not disclose the facts with reference thereto.<sup>207</sup> Whether or not an affidavit was made or notice published cannot be inquired into collaterally; at least the judgment will be presumed regular until the contrary is shown.<sup>208</sup>

It has been held that a decree in an action against unknown heirs is not void on collateral attack although no affidavit that the heirs were unknown was filed.<sup>209</sup>

But other courts hold that the statutory requisites that the name of a defendant be unknown, and that it cannot be ascertained, are essential jurisdictional facts, and if these facts do not appear either in the bill or separate affidavit, or if they are not recited as facts in any decree authorizing publication, or other-

wise in the record, the decree rendered in the proceeding is a nullity as to the unknown parties.<sup>210</sup> So, where there is no recitation of service whatever in the judgment, and the record shows as a basis of the judgment a defective citation, it has been held that the judgment may be collaterally attacked.<sup>211</sup> Likewise where there is no recitation of the filing of an affidavit or of service upon the unknown parties, but, on the contrary, the record shows an insufficient affidavit, the inference is that the service was upon the defective affidavit (the only one in the record), and the presumption of the regularity of the judgment is overcome.<sup>212</sup> It is held in some cases that although the judgment recites that there was due service upon the unknown parties, where the complete record fails to show a jurisdictional service, the record controls.<sup>213</sup>

A judgment under some statutes seems to be inconclusive. For example, some statutes require the court to make out and incorporate in the records of the case a statement of the facts proved on which the judgment is founded. The supreme court of Texas says<sup>214</sup> that the manifest object of "requiring the facts to be embodied in the decree is that, upon a review by petition therefor by the heirs, it may be determined whether the judgment was authorized by the facts established on the trial."

In setting up a decree in an action against unknown owners as a bar to the

<sup>205</sup> Kenson v. Gage (1904) 34 Tex. Civ. App. 547, 79 S. W. 605.

<sup>206</sup> Hardy v. Beaty (1892) 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778.

<sup>207</sup> Stull v. Masillonka (1906) 74 Neb. 309, 104 N. W. 188, 108 N. W. 166.

<sup>208</sup> Cole v. Hall (1842) 2 Hill (N. Y.) 625.

On the contrary, a judgment in partition against unknown defendants has been held void on collateral attack where the record failed to show that it had been made to appear to the court by affidavit that the defendants were unknown to the plaintiffs and that the prescribed statutory notice had been given. Denning v. Corwin (1834) 11 Wend. (N. Y.) 647. This case was overruled so far as it asserts the doctrine that the judgment of a superior court will be void if the record does not show jurisdiction. Foot v. Stevens (1837) 17 Wend. (N. Y.) 483; Hart v. Seixas (1839) 21 Wend. (N. Y.) 40; Bloom v. Burdick (1841) 1 Hill (N. Y.) 130, 37 Am. Dec. 299. But as it relates to proceedings against unknown parties, it does not appear to have been overruled prior to the decision in Cole v. Hall (N. Y.) supra.

<sup>209</sup> Hynes v. Oldham (1826) 3 T. B. Mon. (Ky.) 266. Such a decree is merely errone-

ous, not void, in the opinion of this court. Benningfield v. Reed (1847) 8 B. Mon. (Ky.) 102.

<sup>210</sup> Bleidom v. Pilot Mountain Coal & Min. Co. (1890) 89 Tenn. 166, 15 S. W. 737.

<sup>211</sup> Babcock v. Wolfarth (1904) 35 Tex. Civ. App. 512, 80 S. W. 642; Harris v. Hill (1909) 54 Tex. Civ. App. 437, 117 S. W. 907.

<sup>212</sup> Stoneman v. Bilby (1906) 43 Tex. Civ. App. 293, 96 S. W. 50; Borden v. Patterson (1908) 51 Tex. Civ. App. 173, 111 S. W. 182. Mote v. Thompson (1913) — Tex. Civ. App. —, 156 S. W. 1105, holding that the absence of an affidavit is fatal to the jurisdiction upon a collateral attack in case the judgment does not recite that any affidavit was made. Although there is a presumption on collateral attack that a sufficient affidavit was filed to authorize the issuance of the citation by publication, this is stated to be a rebuttable presumption unless rebutting it involves in some way the contradiction of the record.

<sup>213</sup> Moran v. Catlett (1917) — Neb. —, 165 N. W. 946 (judgment recited that affidavit of plaintiff had been filed, but record failed to show it).

<sup>214</sup> Byrnes v. Sampson (1889) 74 Tex. 81, 11 S. W. 1073. Upon a petition in error

right of one who was sued as one of the unknown owners, to the relief sought by him in a subsequent suit, it is not necessary that it be averred that the affidavit

required by statute was filed, where the court finds that due notice was given according to the statute, and the court had jurisdiction of the parties.<sup>215</sup>

filed nine years after the rendition of the judgment, by parties who had been sued in the former action as unknown heirs, the court examined the statement of facts and concluded that it was not sufficient to sup-

port a decree in favor of the plaintiff in the former action, and accordingly set aside the judgment.

<sup>215</sup> Walker v. Ogden (1901) 192 Ill. 314, 61 N. E. 403. W. A. E.

#### ARKANSAS SUPREME COURT.

STATE OF ARKANSAS EX REL. J. L. NELSON, Appt.,  
v.

W. A. MEEK, Assessor of Johnson County, et al.

(127 Ark. 349, 192 S. W. 202.)

#### Tax — valuation — constitutional requirement.

1. Assessment at full valuation is not required by a constitutional provision that all property shall be taxed according to its value, that value to be ascertained in such manner as the general assembly shall direct, making the same equal and uniform throughout the state.

*For other cases, see Taxes, I. o, in Dig. 1-52 N. S.*

#### Mandamus — to compel raising of valuation for taxation.

2. Mandamus will not lie at the suit of a judgment creditor of a county to compel raising of tax valuation of the property in the county to full value, as required by statute, if it would then be in excess of that established in other counties by the state tax commission, and the Constitution requires equality and uniformity in taxation throughout the state.

*For other cases, see Mandamus, I. d, 2, in Dig. 1-52 N. S.*

#### Courts — Federal decision — effect on state courts.

3. A decision of a Federal court in construing the Constitution and laws of a state is not binding on the state courts.

*For other cases, see Courts, V. d, in Dig. 1-52 N. S.*

#### Tax — contract as to valuation — validity.

4. County officials cannot contract to value property for taxation at a rate in excess of that prevailing in other counties, where the Constitution requires equality and uniformity in taxation.

*For other cases, see Taxes, I. o, in Dig. 1-52 N. S.*

(February 5, 1917.)

Note. — For mandamus at the instance of a creditor to compel raising of tax assessment to the full value of the property, see annotation following United States ex rel. Falls City Constr. Co. v. Jimmerson, L.R.A.1918B, 1107.

L.R.A.1918F.

**A** PPEAL by relator from a judgment of the Circuit Court for Johnson County dismissing a petition for a writ of mandamus to compel respondents to assess property for taxation at its true value. Affirmed.

The facts are stated in the opinion.

Messrs. Warner & Warner for appellant. Appellees in propria persona.

McCulloch, Ch. J., delivered the opinion of the court:

This is an action instituted in the circuit court of Johnson county in the name of the state of Arkansas, on the relation of J. L. Nelson, against W. A. Meek, the assessor of Johnson county, and against the county judge and the persons constituting the board of equalization of said county, to compel the defendants, by mandamus, to assess the property of the county for taxation at its true money valuation. It is alleged in the petition that the relator is the holder of certain warrants of the county, duly issued in pursuance to judgments of the county court; that he has obtained judgment on said warrants in the circuit court of Johnson county, and the same has not been paid; that there is a large amount of floating scrip of Johnson county which is of depreciated market value by reason of the fact that the outstanding scrip largely exceeds the possible revenues of the county under the present system of taxation; that the assessor and board of equalization have heretofore valued the property of the county for taxation at only 50 per cent of its true valuation in money, and propose to continue to do so under future assessments, unless otherwise directed. And it is further alleged that unless the assessing officers of the county be required to discharge their legal duty by assessing property at its true value in money there will be no means whereby the relator can secure payment of his said judgment against the county.

The defendants filed an answer admitting that the relator was the holder of the scrip as mentioned and described in the petition and had obtained judgment thereon, and also admitted that the assessments of valuation of property for taxation pur-

poses had been on a basis of 50 per cent of true valuation, and would remain the same in the future, but alleged that said assessments of valuation were in accordance with assessments of other property in the other counties of the state, and under the express direction of the state tax commission, which had made an order fixing 50 per cent as the proportionate valuation to be assessed on property for purposes of taxation.

The relator demurred to the answer, which was overruled, and he declined to proceed further, and suffered a judgment dismissing the petition, and he prosecutes an appeal to this court.

In the state of the pleadings just related the only question presented is whether or not the answer of the defendants set forth facts sufficient to justify them in assessing the property of Johnson county at less than its full value in money. It is contended on the part of the relator that the Constitution and laws of this state embody a specific command to the assessing officers to assess all property at its full valuation in money, and that a refusal on the part of those officers to obey that command calls for compulsory action by the courts in behalf of those who are aggrieved by such dereliction. It therefore becomes important to inquire what the commands of our laws are with respect to the taxation of property, and the relation of those commands to each other.

The only provision of the Constitution bearing upon the question at issue reads as follows: "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the general assembly shall direct, making the same equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value." Section 5, art. 16.

Counsel for relator erroneously assume that the above-quoted provision of the Constitution amounts to a command to assess property at full valuation; but a consideration of the language used by the framers of the Constitution leads to the conclusion that no such meaning was intended. The only command embraced in this provision is that the property shall be taxed "according to value." That is to say, on a valuation basis, and not on some other basis. The further provision is that the value is to be ascertained in such manner as the general assembly shall direct, which shows that it was intended to be a matter for the legislature to determine what the basis of the valuation should be and how it should be ascertained. There is no

doubt of the power of the legislature to provide for an assessment based on the full money valuation of property, nor that the legislature has so provided in the statutes which have been enacted since the adoption of the present Constitution; but it is equally clear that the Constitution itself does not compel an assessment according to full value, and it does, in fact, leave that matter entirely to the lawmakers. That is the effect of our previous decisions on that subject. In *Jonesboro Bank v. Hampton*, 92 Ark. 492, 123 S. W. 753, we said: "It is true the Constitution provides that 'all property subject to taxation shall be taxed according to its value,' but this is done when the valuation is equalized with other property of the same kind in the county."

See also *Ex parte Ft. Smith & V. B. Bridge Co.* 62 Ark. 461, 36 S. W. 1060, and *Drew County Timber Co. v. Cleveland County*, 124 Ark. 569, 187 S. W. 942, in each of which cases this court ruled that an individual taxpayer was entitled to a reduction of his assessment so as to conform to the valuations placed upon other property in the county, notwithstanding the fact that his own property was then assessed at less than full value. The same interpretation has been placed upon similar provisions in the Constitutions of other states. *Taylor v. Louisville & N. R. Co.* 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350.

The only two specific mandates contained in the Constitution are, one, that a valuation basis must be adopted, and the other, that in fixing the value the same shall be "equal and uniform throughout the state." Aside from the constitutional limitations in those two respects the legislative will is left supreme, but any action of the legislature looking to the ascertainment of the value of property for purposes of taxation, or in fixing the basis of taxation, must conform to that paramount command of the Constitution that the valuation must be equal and uniform throughout the state. In other words, the legislature can fix any basis of valuation that may be found fair or necessary, either at the full valuation in money or any less percentage of valuation, provided that the element of uniformity throughout the state is preserved. And it is also readily seen that the action of executive officers in carrying out the methods of taxation prescribed under the statutes of the state must conform to the constitutional commands of equality and uniformity. We have, then, this situation: The lawmakers have, in the statutes enacted, provided for a system of taxation in accordance with the constitutional plan of assessments "according to value," and have

provided that the assessments shall be at the true and full valuation of property in money. Kirby's Dig. § 6974. And in order to conform to the constitutional command of uniformity and equality, there has also been provided an appropriate statutory method of equalization in the counties and throughout the state of the valuations of property for purposes of taxation. The whole plan is outlined in the various sections of the statute which provide for county boards of equalization, charged with the duty of examining the assessments of all classes of property in the county and raising or lowering same so as to make the assessments uniform; and in providing for the state tax commission which performs the functions of a state equalizing board, with authority to raise or lower assessments by districts, counties, or municipalities. Act No. 257 of 1909. The powers and duties of the tax commission, as set forth in the act, so far as they relate to the question now before us, are declared in the first subdivision of § 11 of the statute referred to above, which reads as follows: "1. To have and exercise general and complete supervision over the assessment and collection of taxes and the enforcement of the tax laws of the state, and over the several county tax assessors, tax collectors, county boards of review and equalization and other officers charged with the assessment and collection of taxes in the several counties of the state, to the end that all assessments on property, privileges, and franchises in the state shall be made in relative proportion to the just and true value thereof, in substantial compliance with the law."

Also in § 12, which provides that the commission shall meet annually as a state equalization board on the second Monday in November "for the equalization of the taxable values of such personal or real property as may come before it by reason of report or otherwise;" that they "shall examine and compare the returns of the assessments of property in the several counties of the state and proceed to equalize the same, so that all the taxable property in the state shall be assessed at its true value, and that all property shall bear its equal and just proportion of the taxes of the different counties of the state."

It is further provided in the act that when the valuation of property in any county, district, or municipality is found to be out of proportion with the values assessed in other localities, the tax commission may "raise or reduce the same to its true, full, and proportionate value." It is thus seen that the most important function of the tax commission and its first duty is

to preserve uniformity in the assessments throughout the various counties of the state, and that it is to sit annually as a board of equalization. It will be observed from a consideration of the language of the statute just quoted, defining the duties of the tax commission, that it provides that the commission shall review the acts of other assessing officers to the end that the assessments of property in the state "shall be made in relative proportion to the just and true valuation thereof." It does not require complete attainment of the full valuation, nor absolute uniformity, but it recognizes the fact that valuations are merely relative, and that uniformity is only an approximation, and that perfection in neither direction can be attained. It is readily seen, however, that uniformity is the dominant idea in the performance of the duties of the tax commission.

Now, the answer of the defendants in this case, as the assessing officers of Johnson county, is a confession that they have not literally obeyed the mandate of the statute, which obviously provides for the assessment of all property at its true value, but it is also an assertion that, in disobeying the statutory command, they have done so in order to meet the constitutional requirement of uniformity, and that this was done in accordance with the specific directions of the state tax commission under whom the county assessing officers are required to act. In other words, they justify the assessments at less than true value under the plea that it was necessary to do so in order to make the assessments uniform with those in other counties, and also to conform to the directions of the tax commission. To this the relator replies that there is a double command to assess the property at full value as well as on an equality with other property in the state, and that the derelictions of the assessing officers of other counties and of the tax commissioners in permitting it to be done afford no justification as against the rights of a suffering creditor.

We are of the opinion that the answer of the defendants is a sufficient one, and that they are compelled by the plain mandate of the Constitution to assess property in the county in conformity with valuations placed on such property in other counties, regardless of the fact that it calls for an assessment at less than full value. Any other view of the matter would work an injustice to the taxpayers of that particular county, and that, too, in manifest violation of the constitutional guaranty. Such is the necessary effect of the decision of this court in *Ex parte Ft. Smith and V. B. Bridge* Co. 62 Ark. 461, 38 S. W. 1060. It

is true that in that case the court was dealing solely with the question of uniformity within a single county, but the decision was that a taxpayer whose property had been assessed at less than full value had a remedy to compel a reduction where the assessment was disproportionate with the assessments of other property in the county. Now, the constitutional guaranty with respect to uniformity is not restricted to county lines, for the express declaration is that the valuations shall be "equal and uniform throughout the state." Therefore when this court held in the case just cited that a taxpayer had the right to compel the reduction of his assessments to conform to the assessments of other property in the county, it necessarily follows therefrom that the citizens of one county are entitled to the same remedy to compel such reduction as would afford equality and uniformity with assessments of property in other counties in the state. The creation of the state tax commission was for the purpose of providing just such relief; and if this court should undertake to direct the assessing officers of Johnson county to assess the property there at full value, regardless of the assessments in other counties, it would create a conflict with the specific directions of the tax commission,—a tribunal which the lawmakers have erected for the purpose of settling all such questions.

It is urged that this view of the question might lead to a disastrous result to the creditors of a county for the reason that various assessing officers of the state might conspire together to put the assessments down to a minimum so that the revenues would be wholly inadequate to discharge the obligations of the state and county. This is a reflection on the taxation scheme of the state and on the officers who are selected to carry it out, and it cannot be taken into consideration in the solution of the question now before us. No presumption can be indulged that all of the public officials of the state in the various counties who have to do with the assessment of property for taxation will knowingly violate the duties imposed upon them by law. But even if it be conceded that hardships may occasionally result, it is one of those eventualities which one dealing with the state or its subagencies has to take into account when he accepts the obligations thereof. We do not by any means intend to say that the courts will afford no remedy for a refusal on the part of a public officer to discharge his duty, but we do say that there are some ills of a public nature

for which the courts afford no relief, and the argument just referred to relates to one of that kind. If that situation were to arise it could only be dealt with as a political or legislative matter, and could not be corrected by the courts.

The relator relies principally upon the decision of the United States circuit court of appeals for the eighth circuit, in the case of United States ex rel. Fall City Constr. Co. v. Jimmerson, L.R.A.1018B, 1102, 138 C. C. A. 85, 222 Fed. 497, where, in a case identical with the facts of the present case, that court held that a creditor of a county was entitled to the relief which we now deny to the relator in this case. It is regrettable that there should be a conflict in the decisions of courts exercising jurisdiction over the same territory, but we are very firmly convinced that the learned court rendering that decision reached the wrong conclusion.

This court is the final arbiter in the construction of the Constitution and laws of this state, and is not influenced in those matters by the decisions of other courts further than the persuasiveness of the views expressed in those decisions. We do not know how far, if at all, the Federal court was influenced in its decision by the fact that there was an express stipulation in the contract which was signed between the county and the complaining creditor that the property of the county should thereafter be assessed at its full and true value, but that was an element in the case which does not appear in the present one. We do not, however, think that fact alters the law on the subject as herein declared. The officers of the county who entered into the contract could create no greater obligation with regard to future assessments than the law itself imposed, and we are of the opinion that whether there was any such contract or not, the creditors have no right to compel the assessing officers to value the property in the county at such a percentage as would make the assessments in excess of the rate of valuation placed on similar property in other counties.

Mandamus is the appropriate remedy to compel a public officer to perform all duties prescribed by law, but the remedy cannot be used, as is asked in this case, for the purpose of compelling an officer to do that which he is required by the constitutional mandate and by the express direction of a superior tribunal not to do.

We are of the opinion that the Circuit Court was correct in refusing the relief sought, and the judgment is therefore affirmed.

## INDIANA SUPREME COURT.

ERICKSON ELSEY, Appt.,  
v.  
FIDELITY & CASUALTY COMPANY OF  
NEW YORK.

(— Ind. —, 120 N. E. 42.)

**Insurance — against sunstroke — accidental means.**

A sunstroke while riding on a street car to insured's place of employment is within a policy insuring against sunstroke suffered through accidental means, although the exposure was not brought about by circumstances giving it the character of an accident.

*For other cases, see Insurance, VI. b, 3, a, in Dig. 1-52 N. S.*

(Harvey, J., dissents.)

(June 18, 1918.)

**A** PPEAL by plaintiff from a judgment of the Superior Court for Marion County overruling a motion for new trial of an action brought to recover the amount alleged to be due on an accident insurance policy. Reversed.

The facts are stated in the opinion.

Messrs. Charles F. Remy and James M. Berryhill, for appellant:

If, in the act which precedes the injury, something unforeseen or unusual occurs which produces the injury, then the injury has resulted through accidental means.

Schmid v. Indiana Travelers' Acci. Asso. 42 Ind. App. 483, 85 N. E. 1032; Southard v. Railway Pass. Assur. Co. 34 Conn. 574, Fed. Cas. No. 13,182; Standard Life & Acci. Ins. Co. v. Schmaltz, 66 Ark. 588, 74 Am. St. Rep. 112, 53 S. W. 49; United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; 1 Am. & Eng. Enc. Law, 292.

Where a person suffers a sunstroke as a result of receiving both the direct and indirect rays of the sun, or by reason of the heat coming suddenly and unexpectedly upon him, the sunstroke thus received is an accident.

Morgan v. The Zenaida, 25 Times L. R. 446; Ismay, I. & Co. v. Williamson [1908] A. C. 437, 24 Times L. R. 881, 77 L. J. P. C. N. S. 107, 99 L. T. N. S. 595, 52 Sol. Jo. 713; Bryant v. Continental Casualty Co. 107 Tex. 582, L.R.A.1916E, 945, 182 S. W.

**Note.** — The risks covered by insurance against sunstroke are considered in the notes to Continental Casualty Co. v. Johnson, 6 L.R.A.(N.S.) 609, and Pack v. Prudential Casualty Co. L.R.A.1916E, 957; and see later case, Continental Casualty Co. v. Clark, post, 1007.

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673, Ann. Cas. 1918A, 517, reversing — Tex. Civ. App. —, 145 S. W. 636; Higgins v. Midland Casualty Co. 281 Ill. 431, 118 N. E. 11; Continental Casualty Co. v. Johnson, 74 Kan. 129, 6 L.R.A.(N.S.) 609, 118 Am. St. Rep. 308, 85 Pac. 545, 110 Ann. Cas. 851; Pack v. Prudential Casualty Co. 170 Ky. 47, L.R.A.1916E, 952, 185 S. W. 496; Gallagher v. Fidelity & C. Co. 163 App. Div. 556, 148 N. Y. Supp. 1016.

Where an insurance policy indemnifies against bodily injuries suffered through accidental means, and expressly includes disability caused by sunstroke, the insurance company is estopped from denying liability on the ground that sunstroke is a disease.

Railway Officials and E. Acci. Asso. v. Johnson, 109 Ky. 261, 52 L.R.A. 401, 95 Am. St. Rep. 370, 58 S. W. 694.

Messrs. S. J. Carter and D. P. Williams, for appellee:

The contract or policy sued on insures only against bodily injuries sustained through accidental means. The bodily injury, the sunstroke, suffered by plaintiff, is the result. The means through or by which such result was produced must have been accidental in order to cast any liability on defendant under such contract or policy.

Schmid v. Indiana Travelers' Acci. Asso. 42 Ind. App. 483, 85 N. E. 1032; Bryant v. Continental Casualty Co. — Tex. Civ. App. —, 145 S. W. 636; Shanberg v. Fidelity & C. Co. 19 L.R.A.(N.S.) 1206, 85 C. C. A. 343, 158 Fed. 1; Clidero v. Scottish Acci. Ins. Co. 29 Scot. L. R. 303, 19 Sc. Sess. Cas. 4th series, 355; Dozier v. Fidelity & C. Co. 13 L.R.A. 114, 46 Fed. 446; United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755.

Bodily injuries caused by vicissitudes of climate are not bodily injuries suffered through accidental means, within the purview of an insurance policy, unless the exposure is brought about by acts or circumstances which are unforeseen, unexpected, unusual, and fortuitous.

Schmid v. Indiana Travelers' Acci. Asso. 42 Ind. App. 483, 85 N. E. 1032; Bryant v. Continental Casualty Co. — Tex. Civ. App. —, 145 S. W. 636; Dozier v. Fidelity & C. Co. 13 L.R.A. 114, 46 Fed. 446; Sinclair v. Maritime Pass. Assur. Co. 3 El. & El. 478, 121 Eng. Reprint, 521, 30 L. J. Q. B. N. S. 77, 7 Jur. N. S. 367, 4 L. T. N. S. 15, 9 Week. Rep. 342; Bliss, Ins. § 399; May, Ins. 3d ed. § 519.

Even though the sunstroke which plaintiff suffered was, in and of itself, unexpected and unforeseen by him, nevertheless such sunstroke was the natural and direct result of acts intentionally and voluntarily done and conditions intentionally and voluntarily

assumed by him, and therefore such sunstroke was not suffered through accidental means, within the purview of the policy sued on.

*Schmid v. Indiana Travelers' Acci. Asso.* 42 Ind. App. 483, 85 N. E. 1032; *Lehman v. Great Western Acci. Asso.* 155 Iowa, 728, 42 L.R.A. (N.S.) 562, 133 N. W. 752; *Feder v. Iowa State Traveling Men's Asso.* 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252; *Fidelity & C. Co. v. Carroll*, 5 L.R.A. (N.S.) 657 and note, 74 C. C. A. 409, 143 Fed. 271, 6 Ann. Cas. 955; *Niskern v. United Brotherhood, C. & J.* 93 App. Div. 364, 87 N. Y. Supp. 640; *Cobb v. Preferred Mut. Acci. Asso.* 96 Ga. 818, 22 S. E. 976; *Smouse v. Iowa State Travelling Men's Asso.* 118 Iowa, 436, 92 N. W. 53; 3 *Joyce, Ins.* § 2863; 4 *Cooley, Ins.* pp. 3156-3160.

Sunstroke or heat stroke is not an accident within the meaning of the British Workmen's Compensation Act.

*Robson, E. & Co. v. Blakey*, 49 Scot. L. R. 254, 5 B. W. C. C. 536; *Rodger v. School Bd.* 49 Scot. L. R. 413, 5 B. W. C. C. 547.

*Lairy, J.*, delivered the opinion of the court:

This is an action by appellant upon an accident insurance policy issued by appellee. The policy provided, among other things, for an indemnity of \$12.50 per week "against bodily injury sustained through accidental means, and resulting directly and exclusively of other causes in immediate, continuous, and total disability," and also that "sunstroke . . . suffered through accidental means . . . shall be deemed a bodily injury within the meaning of the policy." A trial was had by the court without the intervention of a jury, resulting in a finding and judgment for appellee, and from that judgment appellant appeals, assigning as error the action of the court in overruling his motion for new trial. The controlling question in this appeal is presented by appellant's first and second specifications for a new trial,—that the decision of the court is contrary to law and not sustained by sufficient evidence. The evidence shows that on July 5, 1911, appellant, while going from the postoffice in the city of Indianapolis to his place of employment on East Michigan street, was riding upon an open street car, and as the car proceeded in a northeasterly direction along Massachusetts avenue it left the shaded portion of the street, when appellant, by reason of his position in the car, was subjected to the direct and indirect rays of the sun. It appears that he was about to alight from the car at East Michigan street at a place where there was no shade when he suffered the

sunstroke which rendered him unable to perform his daily labor from that time until the bringing of this suit on the 30th day of August, 1912. Appellant duly notified the company of his disability and of his having suffered a sunstroke while a passenger on a street car. Appellee, however, refused settlement on the ground that sunstroke, when suffered by a person while intentionally performing the ordinary and usual duties of his daily occupation in the ordinary and usual manner, is not a bodily injury suffered through accidental means within the terms of the policy.

A construction of the provision of the policy that "sunstroke . . . suffered through accidental means . . . shall be deemed a bodily injury within the meaning of this policy" will be decisive of the only question of importance in this case. The contention of appellee is that in the term "accidental means," as therein used, some violence, casualty, or vis major is necessarily involved, and that disability or death engendered by exposure to the sun's heat, or other atmospheric influences, cannot properly be said to be accidental, unless the exposure is itself brought about by circumstances which give it the character of an accident. In other words, if the exposure to the heat of the sun was intentionally encountered in the ordinary performance of a person's usual duties of life or occupation, it is not accidental; but if a person should, by reason of shipwreck or other like occurrence, be left in a position in the heat of the sun, and thereby suffered sunstroke, the means would be accidental. This is the view taken in the case of *Sinclair v. Maritime Pass. Assur. Co.* 3 EL. & EL. 478, 121 Eng. Reprint, 521, 30 L. J. Q. B. N. S. 77, 7 Jur. N. S. 367, 4 L. T. N. S. 15, 9 Week. Rep. 342, and that case is followed to a great extent by the following cases: *Dozier v. Fidelity & C. Co. (C. C.)* 13 L.R.A. 114, 46 Fed. 446; *Somancik v. Continental Casualty Co. (1914)* 56 Pa. Super. Ct. 392; *Continental Casualty Co. v. Pittman (1916)* 145 Ga. 641, 89 S. E. 716; and *Bryant v. Continental Casualty Co. — Tex. Civ. App. —*, 145 S. W. 636.

The purpose of accident insurance is to protect the insured against accidents that occur while he is going about his business in the usual way, without any thought of being injured or killed, and when there is no probability, in the ordinary course of events, that he will suffer injury or death. The reason men secure accident insurance is to protect them from the unforeseen, unusual, and unexpected injury that might happen to them while pursuing the usual and ordinary routine of their daily vocation, or the doing of the things that men do in the common everyday affairs of life. We are

of opinion that the better reasoning points out, and the weight of authority holds the true test to be, that if in the act which precedes the injury, though an intentional act, something unusual, unforeseen, and unexpected occurs, which produces the injury, it is accidental; but if, in the act which precedes the injury, something usual, foreseen, and expected occurs, which produces the injury, it is not accidentally effected. We are supported in our holding by the following cases, which involve the question of whether sunstroke, suffered while engaged in the usual daily duties, is accidental: *Continental Casualty Co. v. Johnson*, 74 Kan. 129, 6 L.R.A.(N.S.) 609, 118 Am. St. Rep. 308, 85 Pac. 545, 10 Ann. Cas. 851; *Pack v. Prudential Casualty Co.* (1916) 170 Ky. 47, L.R.A.1916E, 952, 185 S. W. 496; *Higgins v. Midland Casualty Co.* (1917) 281 Ill. 431, 118 N. E. 11; *Bryant v. Continental Casualty Co.* (1916) 107 Tex. 582, L.R.A.1916E, 945, 182 S. W. 673, Ann. Cas.

1918A, 517. The last case above cited overrules the holding of the lower court in the same case reported in — Tex. Civ. App. —, 145 S. W. 636, upon which the *Pittman Case*, 145 Ga. 641, 89 S. E. 716, and *Semanick Case*, 56 Pa. Super. Ct. 392, were largely based.

We are constrained to hold that the injury here in question, as shown by the evidence, was caused by "accidental means," that the decision of the court is contrary to law and the evidence, and that the court erred in overruling appellant's motion for a new trial.

The other questions presented under the motion for new trial probably will not arise upon another trial of this cause, and are therefore not considered.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

Harvey, J., dissents.

#### SOUTH DAKOTA SUPREME COURT.

MAUDE STRONG, Resp't.,  
v.

SEBASTIAN SCHAFFER et al., Appts.,

(39 S. D. 250, 163 N. W. 1035.)

#### Pleading — sufficiency — objection to evidence.

1. A complaint may be sufficient to withstand an objection to introduction of evidence, although, upon timely objection, amendment would have been required.

*For other cases, see Pleading, I. g, in Dig. 1-52 N. S.*

#### Evidence — of intent to support family — sufficiency.

2. That if a man could not have procured intoxicating liquor he would have used his earnings for the support of his family may be found from the facts that it was his duty to do so, and that he in fact did so use them before liquor was furnished to him.

*For other cases, see Evidence, XII. k, in Dig. 1-52 N. S.*

#### Intoxicating liquor — civil damage — basis for damages.

3. In determining the damages to be allowed under the Civil Damage Act for loss to a family because of diminished earning capacity of the husband, due to the sale of liquor to him, the earning capacity when the first sales were made to him must be used as a basis for comparison, unless it is shown that the sales prevented him from

**Note.** — As to basis for determining earning capacity in action under Civil Damage Act, see annotation following this case, post, 654, and references therein to annotations on related questions.

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getting greater returns than he then received.

*For other cases, see Damages, III. e, in Dig. 1-52 N. S.*

#### Same — liability for sales by others.

4. One sued under the Civil Damage Act for loss of support to a family by the sale of intoxicating liquors to the husband and father cannot be held liable for loss caused by sales by others which occurred before he began selling to the person in question.

*For other cases, see Intoxicating Liquors, IV. b, in Dig. 1-52 N. S.*

#### Same — joint liability.

5. There is no joint liability upon bonds given by liquor dealers under the Civil Damage Act.

*For other cases, see Bonds, II. a, in Dig. 1-52 N. S.*

(McCoy and Polley, JJ., dissent.)

(August 7, 1917.)

**A**PPEAL by defendants from a judgment of the Circuit Court for Brown County in plaintiff's favor and from an order denying a new trial in an action brought to recover damages for alleged wrongful sale of intoxicating liquor to plaintiff's husband. Reversed.

The facts are stated in the opinion.

Messrs. George H. Fletcher and W. A. Hazle for appellants.

Mr. Amos N. Goodman, for respondent: If the alleged defect in the complaint is not cured by the answer, it might have been cured by amendment at the trial. It, therefore, is not such a defect as will be



reversible, if the facts are supplied in the evidence.

Johnson v. Burnside, 3 S. D. 230, 52 N. W. 1057; Anderson v. Alseth, 6 S. D. 566, 62 N. W. 435; DeLuce v. Root, 12 S. D. 141; 80 N. W. 181; Sherwood v. Sioux Falls, 10 S. D. 405, 73 N. W. 913; Martin v. Graff, 10 S. D. 592, 74 N. W. 1040; Woodford v. Kelley, 18 S. D. 615, 101 N. W. 1069; J. F. Anderson Lumber Co. v. Spears, 25 S. D. 624, 127 N. W. 643; Strait v. Eureka, 17 S. D. 326, 96 N. W. 695; Roberts v. Jacobs, 37 S. D. 27, 156 N. W. 589.

In actions of this kind, it is incumbent upon the wife to show the ability of her husband to, and the extent to which he did, render such support under normal conditions.

Merrinane v. Miller, 148 Mich. 412, 111 N. W. 1050, 157 Mich. 279, 25 L.R.A. (N.S.) 585, 118 N. W. 11, 122 N. W. 82.

It being incumbent upon her to show the approximate amount by some evidence tending to show the amount necessary to support herself and family, evidence of the amount of rent, grocery bills, etc., is admissible.

Joyce, Intoxicating Liquors, §§ 478, 481; Manzer v. Phillips, 139 Mich. 61, 102 N. W. 292; Weiser v. Welch, 112 Mich. 134, 70 N. W. 438; Faivre v. Mandercheid, 117 Iowa, 724, 90 N. W. 76; Eastwood v. Klamm, 83 Neb. 546, 120 N. W. 149; Acken v. Tinglehoff, 83 Neb. 296, 119 N. W. 456; Campbell v. Johnson, 25 S. D. 458, 127 N. W. 468; Fox v. Wunderlich, 64 Iowa, 187, 20 N. W. 7.

The saloon keeper is absolutely forbidden to sell to such a person as plaintiff's husband.

1 Enc. Pl. & Pr. 816, 830, 831; Sutherland, Code Pl. Pr. & Forms, §§ 407, 409; Tower v. McFarland, 1 Neb. (Unof.) 893, 96 N. W. 172; 23 Cyc. 317; Joyce, Intoxicating Liquors, §§ 485, 486; Huff v. Altman, 69 Iowa, 71, 58 Am. Rep. 213, 28 N. W. 440; Sandige v. Widmann, 12 S. D. 101, 80 N. W. 164.

Retail dealers who violate the statute as complained of are severally liable for all damages resulting from injury to the wife's means of support.

Kennedy v. Garrigan, 23 S. D. 265, 121 N. W. 783, 21 Ann. Cas. 392; Dickmann v. Thomas, 36 S. D. 283, 154 N. W. 811.

Mr. Thomas L. Arnold also for respondent.

Whitting, J., delivered the opinion of the court:

Defendants Schaffer Brothers were saloon keepers. As such they gave bonds under the provisions of § 2839, P. C. The other defendant, a surety company, was the

surety on such bonds from July 1, 1913, until after the commencement of this action, which was in May, 1915. Plaintiff sought to recover on such bonds damages which she claimed to have suffered through the sale of intoxicating liquors to her husband, Leon Strong, by Schaffer Brothers. In trial court there were verdict and judgment for plaintiff. From such judgment, and an order denying a new trial, all the defendants appealed.

Appellants question the sufficiency of the complaint. This question was raised in the trial court by objections to introduction of evidence. If it had been raised before trial, the trial court might properly have required the complaint to have been amended; but the complaint was not so lacking in substance as to justify the trial court in sustaining the objection to introduction of evidence. J. F. Anderson Lumber Co. v. Spears, 25 S. D. 624, 127 N. W. 643.

Respondent alleged that her husband was in the habit of getting intoxicated; that repeatedly, and on divers days and dates from July 1, 1913, until the commencement of this action, the Schaffers had sold him intoxicating liquors; that by reason of the above she had been and was deprived of the support and maintenance for herself and children to which she was justly and legally entitled from her husband. By the instructions of the trial court we are relieved from any necessity of discussing what respondent had to prove to establish her cause of action. Such court limited respondent's right of recovery to "damages, if any, suffered by the plaintiff, occasioned to her means of support for herself and children." Respondent is correct in saying: "The question is: Did he support his family? If not, did the sale of liquor by the defendants enter into his reason for not doing so, and to what extent?"

There was no evidence to show that Strong was ever in the Schaffer saloon prior to September, 1913. The evidence is undisputed that he became addicted to the use of intoxicating liquors in 1912; that in September, 1913, he was capable of and was earning 35 cents an hour, and continued capable of and did earn this amount up to the time this action was brought; that he had quit giving his family any material assistance before September, 1913; that he was drunk a good share of the time after September, 1913, and bought a part, at least, of his liquor in the Schaffer saloon. The jury, if it were not for the evidence to the contrary, might have presumed that Strong was, through his drunkenness, rendered less capable of earning money than he was on September 1, 1913.

The jury may have found that, owing to such drunkenness, he actually lost time from his work, though there was no direct evidence that he ever lost an hour's time from his work on account of such drunkenness. Inasmuch as it is usual and natural for the husband and father to, and in fact is his legal duty to, provide for his family, and inasmuch as there was evidence showing that, before he became addicted to the use of intoxicants, he did provide for his family, the jury were undoubtedly warranted in finding that, if he could not have got intoxicating liquors, he would have used his earnings for the benefit of his family. Therefore, though we believe it should have been possible for respondent to have furnished better evidence of some of the necessary elements of her cause of action, we would hardly feel justified in reversing the judgment upon the ground, as urged by appellants, that the verdict was unsupported by the evidence.

Appellants contend that certain evidence was improperly received. Conceding that there was evidence properly received, which furnished answers, favorable to respondent, to the questions, "Did he support his family?" and "Did the sale of liquor by the defendants enter into his reason for not doing so . . . ?" we need still inquire whether there was error in the receipt of certain evidence which we must presume the jury considered in determining "to what extent" respondent was damaged. The greatest possible earning capacity upon which respondent's claim for damages could be based would be Strong's earning capacity in September, 1913, if he had not then been addicted to the use of intoxicating liquors. There was no competent evidence that such earning capacity exceeded \$90 per month—35 cents per hour. There was received, over appellants' objections, evidence in relation to his earning capacity during a period from November, 1910, to August, 1912. This evidence related to his earning capacity as an employee of a railway company, and showed that, until discharged for drunkenness, he earned from \$125 to \$135 per month. There seem to be two theories, finding support in the decisions of the courts. In Michigan it has been held, in a case such as the one now before us, that the plaintiff could not base her damages on the earning capacity of her husband as a sober man. The court says that the wife cannot claim damage for "the loss of a sober husband when she has only a drunken one." *Friend v. Dunks*, 39 Mich. 733. Therefore it was held that the jury should consider that, before the defendant made the sales, the plaintiff's husband was already an habitual drunkard.

The second theory seems to be that, although the plaintiff's husband may have been an habitual drunkard previous to the wrong complained of, yet, unless somebody furnished him liquor after that time, he would cease to be a drunkard; that, if defendant furnished him liquor, he was guilty of continuing such habit; that the defendant cannot show, as a matter of defense, that the husband was a drunkard prior to the sales; and that the plaintiff is entitled to recover from such defendant to the extent to which his sales caused the injury complained of. *League v. Ehmke*. 120 Iowa, 464, 94 N. W. 938. If the husband is an habitual drunkard, the sale to him is unlawful. If he is not yet an habitual drunkard, while the sale is lawful, yet the sales assist in rendering him incompetent to, or else unwilling to, properly supply his family. Under this theory plaintiff's recovery is based upon the earning capacity of the husband immediately prior to the sales complained of, such earning capacity being itself based upon the mental and physical powers which the jury finds such husband would have been possessed of if he had refrained from the use of intoxicants from that time on. It does not prevent the defense proving a diminished earning capacity resulting from permanent mental or physical weaknesses, even though such weaknesses may have been the result of former use of intoxicants. With evidence in relation to the extent of the husband's earnings just prior to the sales complained of, it cannot be presumed that, if such sales had not been made, his earning capacity would have been that possessed by him a year or more previous thereto. If so, then it would be competent to show how much the husband was capable of earning at a time when perhaps he was physically a much better man than he would have been at the time of the wrongful sales, even though he had then been free from the use of liquor. Furthermore, a person's capacity to earn may be weakened through the use of liquor, so that, even if he ceases the use of liquor entirely, he would not be able to earn what he had previously been able to earn.

If evidence of his earnings of two years before would in any manner have tended to show what his earning capacity as a sober man was at the time of these sales, then such evidence was competent. But the plaintiff was not entitled to recover anything on account of the difference in her husband's earning capacity when he was working for the railroad company and what his earning capacity was, if a sober man, at the time of these sales. To illustrate: If he could earn \$100 a month

two years prior, but his earning capacity when sober was only \$80 a month at the time of the first sale complained of, the jury would have no right to base any recovery upon the \$20 difference. The sole and only question for determination under the second theory, which is certainly the more favorable to plaintiff, is: What was plaintiff's husband earning capacity, as a sober man, at the time of the first sale complained of? The only competent evidence upon that point was that in relation to his earning capacity as a mason's helper—35 cents an hour. If, in addition to the testimony that was received in relation to his earning capacity as a railroad employee, there had been any evidence that he was yet, if he would cease the use of liquor, capable of holding such a job, the jury would have a right to have used such evidence of former earning capacity as the basis upon which to fix damages. *Woollen & T. Intoxicating Liquors*, § 1065. There was absolutely no evidence that Strong, if not addicted to intoxicating liquors, could in September, 1913, or later, have got back his old job with the railway company, or that, if he could, it would have paid him the old wages. Defendants were in no manner liable for damages resulting from the loss of this job; therefore, in the absence of any proof that the sale of liquors to Strong kept him from getting a job giving greater returns than \$90 per month, the court should not have allowed evidence to go before the jury, from which evidence the jury may have used \$135 a month as its basis for computing damages, when such basis would not properly have exceeded \$90.

Our colleagues are of the opinion that this evidence was competent. They stand upon the theory that defendants can be held for all the injury that had been done plaintiff through sales by other parties than defendants, even though such sales occurred prior to the period in which it is alleged that defendants made their wrongful sales. Our colleagues cite *Cooley on Torts*, p. 510. The law there announced is as follows: "Neither is it a defense that others also sold liquors to the husband; but, where several are liable, there can be but one recovery for the injury. If the defendant sold liquor which contributed to the intoxication in question, it is sufficient to establish liability, and all who contribute are jointly and severally liable, and, in the latter case, a release of one is a release of all. The damages cannot be apportioned among the defendants, but each is liable for the entire amount."

We have examined all the authorities cited by *Cooley* in support of such propo-

sition. All such cases are from Illinois. An examination of these Illinois cases discloses that they are all based on the express provisions of a statute of that state under which several defendants may be joined as joint tort-feasors. A reading of these cases discloses that, even under that statute, a party could not be held liable for an injury done, or contributed to, by another, unless the contribution was a contribution to the very intoxication complained of. Thus in *Hackett v. Smelsley*, 77 Ill. 117, cited in the minority opinion, an instruction was complained of which advised the jury that the mere fact that the husband drank intoxicating liquors at other places than the saloons of defendants "*within the time alleged in the declaration*" was a fact which the jury could not consider in reduction or mitigation of damages. This instruction was held to be correct as an abstract proposition, in view of the provisions of the statute; but it will be noticed that this instruction limited the joint tort proposition to sales that were made *during the period complained of* in the complaint. In *Hackett v. Smelsley*, supra, it appeared that some of the parties who were joined as defendants were those who contributed to the husband's habitual drunkenness, while the other defendants were those who contributed to the particular intoxication complained of, and the court held that all of these could not be joined as tort-feasors,—that the only ones who could be held as joint tort-feasors, even under the peculiar statute of Illinois, were those who contributed to the particular intoxication that formed the basis of the claim for damages. Thus it will be seen that, even under statutes such as that of Illinois, one can be held for the acts of another only when such acts occurred and thus contributed *within the time complained of*. It follows that in Illinois a defendant would not be held liable for the tort of some other party occurring prior to the time charged in the complaint against defendant, and our attention has not been called to any authority so holding. The minority also cite *Werner v. Edmiston*, 24 Kan. 147. We believe that a careful reading of the opinion therein discloses that the court recognized the very distinction which we have noted above.

If the theory of the dissenting opinion be correct, every person who ever sold the plaintiff's husband a drink during his whole lifetime is a joint tort-feasor, and equally and jointly liable with every other person or persons who may have sold him liquors at any time up to the beginning of the action, and the limitations upon the rule of damages involved in the doctrine

of causation would be entirely removed. We cannot concur in a view which would logically result in such an extension of the rule of damages. It would seem to us to be a complete answer to the position taken by our colleagues to suggest that, if defendants could be holden as joint tort-feasors with all who, in years prior to the time complained of, had aided in making plaintiff's husband a drunkard, then, inasmuch as a recovery from defendants would stand as a bar to any recovery against such joint tort-feasors, the complaint herein should cover the time during which all the joint wrongs were committed.

But even if our colleagues were correct, and the defendants, Schaffer Brothers, could be holden as the joint tort-feasors of those who had sold liquor to plaintiff's husband prior to the time of defendants' sales, yet such rule of law can avail plaintiff nothing in this action. This is an action upon contract,—the bond, and not a tort action. This court has held that there is no joint liability upon such bonds. *Kennedy v. Garrigan*, 23 S. D. 265, 121 N. W. 783, 21 Ann. Cas. 392; *Dickmann v. Thomas*, 36 S. D. 283, 154 N. W. 811.

We do not deem it necessary to consider the other assignments of error.

The judgment and order appealed from are reversed.

**McCoy, J.**, dissenting:

The principal reason assigned by the majority opinion for the reversal of the judgment relates to the admission of certain testimony upon the question of damages. It is my view that this testimony was properly admitted, and furnishes no possible ground for a reversal of the judgment. I am of the view that my learned associates have entirely overlooked the general rules applicable to joint tort-feasors. If the defendants contributed towards giving to plaintiff a drunken husband, they are liable for the entire damages resulting therefrom. The evidence in this case clearly shows that defendants did contribute towards making the husband of plaintiff a drunkard, the result of which was to destroy his earning capacity. Damages of this character are recoverable against the bondsmen of a licensed saloon keeper under the present statute of this state. Pol. Code, § 2839. In this class of cases the measure of damage is the diminution, or decrease in value, of the earning capacity of the husband, that produces the injury to the means of support of plaintiff. One of the ways by which this class of damages may be established is by showing what was the prior or antecedent earning capacity of the husband. *Black, Intoxicating*

*Liquors*, 308-329; *Woollen & T. Intoxicating Liquors*, § 1066. Not for the purpose of showing the primary cause of action, but for the purpose of showing the extent of the damage sustained to the means of support, antecedent circumstances may be shown. What the husband was capable of earning in any capacity prior to plaintiff's injury is competent and proper evidence. *Flynn v. Fogarty*, 106 Ill. 263; *Weiser v. Welch*, 112 Mich. 134, 70 N. W. 438; *Thomas v. Dansby*, 74 Mich. 398, 41 N. W. 1088. In *Thomas v. Dansby*, plaintiff was permitted to go back over ten years previous to the time of the sales of the liquor charged, and show in what particular kinds of work the husband was engaged and what wages he received therefor, for the purpose of ascertaining what was his earning capacity previous to the injury—to ascertain, if you please, what injury has resulted from the fact that he is a drunkard, to which defendants have contributed in making him. What the husband worked at and what wages he received therefor prior to becoming addicted to the excessive use of intoxicants, as compared with what he earned after becoming a drunkard, is about the only reliable means of actually ascertaining the injury to the means of support. In *Flynn v. Fogarty*, the court said that evidence of this character was highly proper.

The evidence in question was not proper for the purpose of showing that the husband had lost a job by reason of the acts of defendants, and if it had not been competent for any other purpose, the admission thereof was erroneous. But it seems to me that it was highly proper for the purpose of showing the antecedent earning capacity of plaintiff's husband before he became a drunkard, as compared with what his earning capacity was after he became addicted to the use of intoxicating liquors, which the defendants contributed to bring about. It may have taken several years to have made plaintiff's husband a drunkard, and many persons may have taken part in selling him the liquors that produce that condition; all those who contributed to the result may not have struck their blow at the same instant, but at different instants of time contributed to the result of making him a drunkard. The testimony in this case shows beyond any doubt that defendants contributed to the result that produced plaintiff's injury—that made her husband a drunkard. Some of the earlier decisions in cases of this character held that where plaintiff had nothing but a drunken husband to lose at the time the particular defendants sold him intoxicants was a matter to be taken

into consideration as affecting the liability of such defendants; but that doctrine has been exploded by the application of the joint tort-feasor rule. Under this rule there cannot be a division of damages as between those who contributed to the finished product, each and every one is liable for the whole damages, and a plaintiff has the election of suing one or all. In this case there might have been others who sold intoxicants to plaintiff's husband prior to the sales made by the defendants; but it is clear from the evidence that the defendants put on the "cap sheaves"—the defendants contributed to and finished the job of making a drunkard of plaintiff's husband, and were liable for the entire damage, regardless of whether or not some others might also have contributed thereto. The making of a drunkard of plaintiff's husband was but a single injury. *Hackett v. Smelsley*, 77 Ill. 109; *O'Halloran v. Kingston*, 16 Ill. App. 659; *Werner v. Edmiston*, 24 Kan. 147; *Cooley, Torts*, p. 510.

But it is urged that the decisions cited by *Cooley* sustaining the rule are based solely upon Illinois decisions, which are based upon an express statute to that effect. That is true; but the Illinois statute was nothing more than an enactment or a declaration of the previously existing common-law rule. The same rule is similarly stated in 38 Cyc. 488, and is sustained by decisions cited from many jurisdictions where no such express statute exists. The principle here involved is clearly illustrated by the case of *Day v. Louisville Coal & Coke Co.* 60 W. Va. 27, 10 L.R.A.(N.S.) 167, 53 S. E. 776, where a number of persons, acting independently of each other and at different times, cast slags and slops and other refuse matter into a flowing stream, thereby polluting the same, to the injury of plaintiff, in which it was held that plaintiff might sue any one or all of those contributing to such injury for the entire damages; that, while those causing the injury acted independently and at different instants of time, the effect and result of their acts existed concurrently in producing the injury of which plaintiff complained. So in the case present the defendants, along with others, acting independently and at different instants of time, cast intoxicating slags, slops, and refuse into the life stream of plaintiff's husband, thereby polluting the same with drunkenness, to plaintiff's injury. The effect and consequential result of the acts of all those who so contributed existed concurrently along with what defendants did towards making a drunkard of plaintiff's husband.

It was but a single joint injury that was produced, and defendants are liable for the whole injury as joint tort-feasors. The great weight of judicial authority, as I read it, sustains this position, irrespective of the decisions in Illinois, which are based upon a statute of that state. *Clinger v. Chesapeake & O. R. Co.* 128 Ky. 736, 15 L.R.A.(N.S.) 998, 109 S. W. 315.

This case must be distinguished from cases where the husband was injured by reason of some particular intoxication, as where he was run down by a train while in a state of intoxication. In such cases the injury results solely from liquors supplied to him on that occasion. In this case the plaintiff complains of a drunken condition, which from its very nature could only result from long and continued sales to him. It is a matter of common knowledge that those who become habitual drunkards do not secure the intoxicants all from the same saloon, but that they become "rounders," who make the rounds from "joint" to "joint." It is not the theory of the dissenting opinion that every person who ever sold plaintiff's husband a drink during his whole lifetime would be a joint tort-feasor with every other person who may have sold him liquor prior to the beginning of this suit. But we do maintain that, where the injury complained of is the result of general drunkenness, habitual excessive use, every one who contributes towards producing that effect is a joint tort-feasor, liable for the entire injury, and that the evidence cannot be divided up into portions tending to show that each individual joint tort-feasor damaged the plaintiff, because there is but a single injury that cannot be so divided. It is the combined effect of the different sales that produced the single injury. Wherever the effect of different acts concurrently exists, all of which acts, taken together, produce a certain injury, all those who commit such acts are jointly liable as joint tort-feasors. A man in his youth, when 21 years of age, might become addicted to the excessive use of intoxicating liquors, and at the age of 25 he might become a total abstainer, and so remain for 25 years, and the effect of liquor drank in his youth might wholly disappear, and then, after he reached the age of 50, he might again become a drunkard. All those who contributed to the effect which brought about this last drunkenness would be joint tort-feasors under the theory of the dissenting opinion, while those who sold to him prior to his becoming 25 years of age would not be joint tort-feasors, because the effect of the prior sales before he became 25 would not concurrently exist with the

effect of the sales made after he became 50 years of age.

Again, to further illustrate: A person might be the owner of a valuable well of water. A number of other persons, each acting independently of all the others, at different instants of time, might cast stones into such well, until its utility became destroyed, to the injury of the owner. Each and every one who so contributed to the filling up of the well would be jointly liable for the whole injury as joint tortfeasors, although the effect of the particular stone that each cast into the well would by itself produce but little injury. Although each stone was cast into the well at a different time from all the others, still the effect of each act of casting a stone into the well concurrently existed with the effect of each and every other stone so cast into such well, and all of which produced but a single injury. It could not be said that every one who, at any prior time during the existence of such well, had ever cast a

stone into said well, would be a joint tortfeasor, because stones that might have been cast therein at some prior time might have been removed therefrom, and their effect did not contribute to the injury complained of. Under the majority opinion, evidence could only be offered as to the injury caused by each particular stone cast into the well. The joint tortfeasor rule exists by reason of the fact that it is practically impossible to sever the damages caused by each act from the whole of the acts which produced one injury. The law never requires impossibilities. There is but one injury in such cases, and each contributor thereto is liable for the entire damage.

The judgment appealed from should be affirmed.

Polley, J., concurs in the dissent.

Petition for rehearing denied November 2, 1917.

### **Annotation—Basis for determining earning capacity in action under Civil Damage Act.**

For excessive damage under Civil Damage Act for death through intoxication, see the note to *Whipple v. Rosenstock*, L.R.A.1916D, 943.

It will be observed that in *STRONG v. SCHAFFER*, ante, 648, it is held that the basis for determining earning capacity in actions under the Civil Damage Act is the condition when the sales complained of commenced, so that if at that time the earning capacity has already been diminished by the immoderate use of liquor, the defendant is only liable for further diminution, and not for diminution prior to such sales; while the dissenting opinion takes the view that the plaintiff may show earning capacity before any excess of drinking, although, long prior to the sales complained of, there had been a diminishing earning capacity, caused by excess of drink. Upon this question the courts are not agreed. The decision in *STRONG v. SCHAFFER*, seems to be supported by the courts of Illinois and Michigan, and perhaps Nebraska, while in Iowa an opposite view is taken.

*STRONG v. SCHAFFER* is followed in *Strong v. Wagner* (1917) 39 S. D. 262, 163 N. W. 1040.

In Illinois the early cases apparently take the view that there can be no damages for loss of support in selling liquor to an habitual drunkard who contributes nothing to the support of his family;

but later cases seem to consider that there will be a liability for continuing the habits of an habitual drunkard, while recognizing that the measure of damages may be different.

In *Fentz v. Meadows* (1872) 72 Ill. 540, the court said and held: "The statute gives the wife a right of action only in cases where, by the selling liquor to a drunken husband, the wife has been injured thereby in person or property or means of support. No injury is proved in either of these respects, and no foundation appears for the verdict. There is no proof sufficient to sustain it. The husband is proved to be a chronic drunkard, contributing nothing to the support of his wife. For selling to such a person a glass of whisky the seller may be indicted and punished criminally for the violation of a public law, but it is rank injustice to require him to pay to the wife \$500, she failing to show any injury to her in person, property, or means of support in consequence of such selling. If this was allowed, it might be a very desirable acquisition, to a certain class of women, to have a confirmed inebriate for a husband. She could not fail to make money out of him."

In *Brantigam v. While* (1874) 73 Ill. 561, the court said: "This record may be searched in vain for proof that appellee was injured in her person, in her

property, or in her means of support, by the act of appellant. We would infer, from her testimony, that although her husband was a miller by occupation, he worked but seldom, and contributed very little to her support; that she, in fact, had always supported him by her art and skill as a hair dresser. Her husband was an encumbrance, it would seem, and not a useful member of her household. There is no proof whatever that appellee has been injured in either of the respects specified in the statute."

In *Buck v. Maddock* (1897) 167 Ill. 219, 47 N. E. 208, an action for damages for the death of the plaintiffs' father the court instructed the jury to the effect that whatever may be the legal duty of a father, the plaintiffs could be allowed only for such loss as they had sustained in view of the character, habits, and ability of their father, as shown by the proof.

But in *Lloyd v. Kelly* (1892) 48 Ill. App. 564, it was held that the fact that the husband, when the sales began, was already a drunkard, will not permit the defendant to escape liability for enabling him to continue his drinking habits, the court recognizing that the measure of damages might be different in the case of one whose habits were good before the sales complained of.

And in *Lane v. Tippy* (1893) 52 Ill. App. 532, the court said: "The fact that Tippy may have been an habitual drunkard for years before the time sued for is not a bar to this action. In such case the victim has the right to reform. The law prohibits sales to him upon the theory that if he cannot obtain liquor, he cannot become intoxicated, and that in the course of time he may recover his normal condition of body and mind to such an extent as to be able to resist the temptation. Appellants are not charged with creating the appetite, but with fostering it. If they kept appellee's husband in a state of habitual intoxication for one or two years, they are responsible for the injury to the wife's means of support thereby caused, even though the husband may have been an habitual drunkard before they began to sell to him."

In Michigan the decisions are clear. Where, since some two years before the passage of the statute, the plaintiff's husband had been intemperate, and she had supported herself and partly supported him, it was held to be error to instruct the jury to the effect that the defendants were liable for as much damages as they would have been if they had

reduced him from sobriety to sottishness. *Ganssly v. Perkins* (1874) 30 Mich. 492.

In *Friend v. Dunks* (1878) 39 Mich. 733, referred to in *STRONG v. SCHAFER*, ante, 648, the court said: "Instructions to the jury would sufficiently apprise them not to give the wife damages for the loss of a sober husband, when she had only lost a drunken one."

In reversing on several grounds a judgment in an action brought by a father on account of injuries to his adult son, rendering him helpless, and which were suffered while he was drunk from liquor procured at the defendant's tavern, the court said: "There was a double error in allowing the son's probabilities of life to be based on the standard applied to sound and healthy lives, instead of upon his own actual condition and prospects." *Clinton v. Laning* (1886) 61 Mich. 355, 28 N. W. 125.

In *Brookway v. Patterson* (1898) 72 Mich. 122, 1 L.R.A. 708, 40 N. W. 192, an action for damages for the death of the plaintiff's husband, the court said: "In cases of this kind it must be considered that the loss to the wife of a sober and industrious husband must necessarily be greater in a pecuniary sense than the loss of one who is the opposite."

In *Ford v. Cheever* (1895) 105 Mich. 679, 63 N. W. 975, the court considered that the charge as given confined the damages to the defendant's own acts, and that therefore there was no error in refusing an instruction that "you must take the husband of plaintiff just as you find him by the testimony at the time the defendant first sold him liquor (if he ever did sell to him), and must consider that question in the light of his then condition; and, if you find him at that time a confirmed drunkard, then you can assess damages only for selling to such a man, and not to a sober and industrious man. Defendant would not be liable as for making him a drunkard."

(In *Rouse v. Melsheimer* (1890) 82 Mich. 172, 46 N. W. 372, the court said and held: "As the husband could not continue an habitual drunkard unless liquor was furnished to him by someone, the person thus furnishing the liquor or any part thereof for gain is holden to the wife, under the statute, for what money or property he receives from the husband in exchange for such liquor. To hold otherwise would permit the liquor seller to prevent the reformation of an habitual drunkard, and at the same time to escape all responsibility to the

wife and family for continuing and hastening the husband along the downward path to ruin and death.”)

In *Weiser v. Welch* (1897) 112 Mich. 134, 70 N. W. 438 (cited in the dissenting opinion in *STRONG v. SCHAFFER*), while it was said that it was competent for the plaintiff to show the amount earned by her son before he became addicted to the use of intoxicating liquors, it does not appear that his drinking habits were due to anyone but the defendant.

In *Posch v. Lion Bonding & Surety Co.* (1917) 137 Minn. 169, 163 N. W. 131, where the plaintiff's husband's death was due to intoxication, the court sustained a verdict for \$2,000, although, as the trial court said, the jury would have been justified in finding his life of little pecuniary value to the plaintiff, owing to his apparently firmly fixed habit of getting drunk. He had a life expectancy of twenty-six or twenty-seven years, was strong, and worked when sober. The court said: “Had he lived, we do not know how soon it would have been impossible for him to obtain the poison that made his life of so little value to anybody.”

In *Nebraska* it was held in *Uldrich v. Gilmore* (1892) 35 Neb. 288, 53 N. W. 135, that it was error to instruct the jury that habits prior to the sales in question were immaterial, as such habits may be considered as affecting the measure of damages. The court does not refer to *Jones v. Bates*, *infra*.

In *Jones v. Bates* (1889) 26 Neb. 693, 4 L.R.A. 495, 42 N. W. 751, where the earning power of the plaintiff's husband before he became addicted to the habitual use of intoxicating liquors was shown, it was held that it could not be considered, even in mitigation of damages, that he, prior to the sales by the defendants, had become so addicted to the use of intoxicating liquors as to be incapable of earning a support for his wife and family. The court said: “It will not do for the parties to say, ‘That man was a partial wreck when we commenced to sell him intoxicating liquor, and he so continued while we supplied him with the means to be such.’ Had they ceased supplying him with intoxicating drink, it is probable that he would soon have regained his usual vigor; and having failed to do so, and thereby kept him incapacitated for earning a livelihood, they must answer for the value of his labor as if he had been able to perform it.”

In *Iowa*, the court appears to take a

view similar to that of the dissenting opinion in *STRONG v. SCHAFFER*, ante, 648.

In *Woolheather v. Risley* (1874) 38 Iowa, 486, the court approved the refusal to instruct the jury that, “if the plaintiff was in no worse condition after or by reason of the sale of liquors to her husband by the defendant, than she was before, she has not suffered in her means of support, and cannot recover therefor,” and said: “The effect of it would have been to direct the jury that if, before the defendant sold plaintiff's husband any liquor, he was a drinking man, and did not support his wife or family, but that the plaintiff alone did so, and continued to do so for two years or less, during which time the defendant was selling her husband liquors and causing his intoxication, and causing him to neglect to provide for his family, she would not be entitled to recover if she was no poorer at the end of that time than she was at its commencement, although she had been compelled to support herself and family by her own personal labor. It is quite clear that if the defendant deprived the plaintiff of the assistance of her husband in the support of herself and family, by causing his frequent intoxication, her means of support would be thereby injured to that extent, without reference to her condition before and after such injury. The wife relies, as she has the right to do, upon her husband as her main, and frequently her only, support. The person who deprives her of this support by converting her husband into a drunkard and an idle vagabond most materially injures her means of support. She is thereby deprived of that to which she had a right, and which, when taken away, inflicts upon her a great wrong, for which the statute gives her a remedy.”

In an action to recover damages for the death of the plaintiff's husband, it was held proper to exclude evidence on the part of the defendant that the husband of the plaintiff had been an habitual drunkard for twenty years before his death. *Huff v. Altman* (1886) 69 Iowa, 71, 58 Am. Rep. 213, 28 N. W. 440 (citing *Woolheather v. Risley* (*Iowa*) supra).

In *League v. Ehmke* (1903) 120 Iowa, 464, 94 N. W. 938, cited in *STRONG v. SCHAFFER*, it was held that although, prior to the sale of liquor by the defendant, the plaintiff's husband failed to furnish her any support, on account of habitual intoxication, the defendant was liable for causing the condition of habit-



ual intoxication to continue, and that, as it appeared that until the plaintiff's husband formed the habit of becoming intoxicated, he provided fully and satisfactorily for the support of his wife, the jury were justified in finding that he would have done so during the time covered by the action, had not this habit of intoxication been continued by reason of the sales to him of intoxicating liquor.

In an action for damages for the death of the plaintiff's husband, where there was no direct evidence of sales of liquor by the defendant to the deceased except on the day previous to his death, it was claimed by the defendant that, as the plaintiff's husband failed to furnish his wife support prior to any sales made by the defendant, she lost nothing through his death, but really was better off in consequence thereof. The court said: "This argument is answered, we think, by what is said in *League v. Ehmke* (1903) 120 Iowa, 464, 94 N. W. 938, wherein it is held, in effect, that, although the husband may have been a hard drinker before he purchased liquor of the defendant, it did not follow that he would continue to be, or that he would have met his death notwithstanding defendant's sales. And we may remark parenthetically that the doctrine contended for by appellant is not sound either in morals or in law. One is not justified in causing loss of human life because that life may not apparently be of much consequence either to his friends or to his family. But for defendant's sales, the husband might have reformed, and returned to his old manner of living. Of course, reformation from the drink habit, after it becomes fixed, are infrequent; but this the jury was authorized to consider in making up its verdict as to damages. Plaintiff was entitled in law to the support of her husband, and, no matter how worthless that husband may seem to be, neither a saloon keeper nor anyone else is justified in taking his life, and then saying it was of no consequence anyway." *Knott v. Peterson* (1904) 125 Iowa, 404, 101 N. W. 173.

But in an action by a child for damages on account of the death of his father, it was held to be error not to take into account the father's habits. *Lee v. Hederman* (1913) 158 Iowa, 719, 130 N. W. 893, where the court said: "In *Woolweather v. Risley* (1874) 38 Iowa, 486, followed in *Huff v. Altman* (1886) 69 Iowa, 71, 58 Am. Rep. 213, 28 N. W. 440, the rule was laid down

that, if a husband had been addicted to drink, and failed to support his wife prior to the time defendant had furnished him intoxicating liquors, this could not be considered as bearing on the measure of damages in the loss in means of support claimed by the wife during the period defendant was furnishing him liquors. This was tantamount to saying that, because the husband had formerly obtained liquors elsewhere, it afforded defendant no justification for selling or giving him liquors during the period alleged, and thereby causing his intoxication and depriving his wife of the support to which she was entitled. Here the injury was in causing death, and all the probabilities of the future were open to inquiry, and, of course, might be estimated only from the life deceased had lived in the past."

The dissenting opinion in *STRONG v. SCHAFER*, ante, 648, takes an erroneous view of *Thomas v. Dansby* (1889) 74 Mich. 398, 41 N. W. 1088. In that case the court points out that the recovery for the loss of the wages of a husband who had broken his leg was no more than their actual decrease after the injury. Such dissenting opinion also misreads *Flynn v. Fogarty* (1883) 106 Ill. 263. That was an action for damages for the death of the plaintiff's husband, caused by his intoxication. He was a farmer, in good health, and the court said that "it was highly proper to show what the deceased himself had done in his lifetime, the character of his business, his habits of industry and thrift, income, and all that sort of thing, with a view of determining what he probably would have done in the future had he not been killed." *Weiser v. Welch* (1897) 112 Mich. 134, 70 N. W. 438, also cited in said dissenting opinion, is referred to above among the Michigan cases. B. B. B.

#### TENNESSEE SUPREME COURT.

TRI-STATE FAIR  
v.  
MRS. SUSIE F. ROWTON.

SAME  
v.

G. T. ROWTON.

(140 Tenn. 304, 204 S. W. 761.)

Charity — agricultural society — liability for injury.

1. A corporation organized for general

welfare, and not for profit, is not, in conducting an annual fair for the exhibit of agricultural products, which is financed by gate receipts, contributions, and charges for space and concessions, and the mission of which is educational, a charitable organization so as to be exempt from liability for injuries to a patron, due to negligence of its officers in the maintenance of a grand stand.

*For other cases, see Charities, I. b, in Dig. 1-52 N. S.*

**Agriculture — exemption of fair corporation — state agency.**

2. The mere fact that a corporation organized to conduct an annual fair for the exhibition of agricultural products receives appropriations from the state toward its support does not make it a state agency which will clothe it with the immunity of the state from liability for negligent acts of its officers.

*For other cases, see Agricultural Societies, in Dig. 1-52 N. S.*

(July 3, 1918.)

**P**ETITIONS for writs of certiorari to review judgments of the Court of Civil Appeals, reversing judgments of the Circuit Court for Shelby County in plaintiffs' favor and dismissing actions brought to recover damages for personal injuries to the plaintiff wife and for the loss of her services. Reversed.

The facts are stated in the opinion.

Messrs. **Wilson & Armstrong**, for petitioners:

The fact that the defendant is incorporated under the General Welfare Statute, and not for individual profit, does not make it a charitable corporation, or exempt it from liability for negligence.

*Mersey-Docks v. Gibbs*, L. R. 1 H. L. 93, 11 H. L. Cas. 686, 35 L. J. Exch. N. S. 225, 14 L. T. N. S. 677, 12 Jur. N. S. 571, 14 Week. Rep. 872; *Gilbert v. Trinity House*, L. R. 17 Q. B. Div. 705, 56 L. J. Q. B. N. S. 85, 35 Week. Rep. 30; *Winch v. Thames Conservators*, L. R. 7 C. P. 458; *Hordern v. Salvation Army*, 139 Am. St. Rep. 898 note; *Bruce v. Central M. E. Church*, 147 Mich. 230, 10 L.R.A.(N.S.) 74, 110 N. W. 951, 11

Ann. Cas. 150; *Phillips v. St. Louis & S. F. R. Co.* 211 Mo. 419, 17 L.R.A.(N.S.) 1167, 124 Am. St. Rep. 786, 111 S. W. 109, 14 Ann. Cas. 742; *Donnelly v. Boston Catholic Cemetery Asso.* 146 Mass. 163, 15 N. E. 505; *Brown v. La Société Française*, 138 Cal. 475, 71 Pac. 516, 13 Am. Neg. Rep. 251; *Haggerty v. St. Louis, K. & N. W. R. Co.* 100 Mo. App. 424, 74 S. W. 456.

In a great many cases, organizations similar to defendant have been held not to be charitable, and have been held liable in actions for negligence.

*Logan v. Agricultural Soc.* 156 Mich. 537, 121 N. W. 485; *Chapin v. Holyoke Y. M. C. A.* 165 Mass. 280, 42 N. E. 1130; *Trevett v. Prison Asso.* 98 Va. 332, 50 L.R.A. 564, 81 Am. St. Rep. 727, 36 S. E. 373; *Scott v. University of Michigan Athletic Asso.* 152 Mich. 684, 17 L.R.A.(N.S.) 234, 125 Am. St. Rep. 423, 116 N. W. 624, 15 Ann. Cas. 515; *Gartland v. New York Zoological Soc.* 135 App. Div. 163, 120 N. Y. Supp. 24; *Davis v. Central Cong. Soc.* 129 Mass. 367, 37 Am. Rep. 368; *Smith v. Cumberland Agri. Soc.* 163 N. C. 346, 79 S. E. 632, Ann. Cas. 1915B, 544; *Graffam v. Saco Grange*, P. H. 112 Me. 508, L.R.A.1915C, 632, 92 Atl. 649; *Platt v. Erie County Agri. Soc.* 164 App. Div. 99, 149 N. Y. Supp. 520; 8 N. C. C. A. 198; *Roper v. Ulster County Agri. Soc.* 136 App. Div. 97, 120 N. Y. Supp. 644; *Oakland City Agri. & Industrial Soc. v. Bingham*, 4 Ind. App. 545, 31 N. E. 383; *Selinas v. Vermont State Agri. Soc.* 60 Vt. 249, 6 Am. St. Rep. 114, 15 Atl. 117; *Phillips v. Wisconsin State Agri. Soc.* 60 Wis. 401, 19 N. W. 377; *Plaskett v. Benton-Warren Agri. Soc.* 45 Ind. App. 358, 89 N. E. 968, 90 N. E. 908; *Texas State Fair v. Britain*, 56 C. C. A. 499, 118 Fed. 713; *Texas State Fair v. Marti*, 30 Tex. Civ. App. 132, 69 S. W. 432, 12 Am. Neg. Rep. 199; *Thornton v. Maine State Agri. Soc.* 97 Me. 108, 94 Am. St. Rep. 488, 53 Atl. 979, 13 Am. Neg. Rep. 302; *Higgins v. Franklin County Agri. Soc.* 100 Me. 565, 3 L.R.A.(N.S.) 1132, 62 Atl. 708, 19 Am. Neg. Rep. 257; *Bernier v. Woodstock Agri. Soc.* 88 Conn. 558, 92 Atl. 160; *Agricultural & M. Asso. v. Gray*, 118 Md. 600, 85 Atl. 291.

**Note.** — The liability of charitable institutions for personal injuries is discussed in the notes to *Farrigan v. Pevear*, 7 L.R.A.(N.S.) 481; *Bruce v. Central M. E. Church*, 10 L.R.A.(N.S.) 74; *Thornton v. Franklin Square House*, 22 L.R.A.(N.S.) 486; *Hordern v. Salvation Army*, 32 L.R.A.(N.S.) 62; *Basabo v. Salvation Army*, 42 L.R.A.(N.S.) 1144; and *Schloendorff v. Society of New York Hospital*, 52 L.R.A.(N.S.) 505; and see later cases, *Tucker v. Mobile Infirmary Asso.* L.R.A.1915D, 1167; *Nicholson v. Atchison, T. & S. F. Hospital Asso.* L.R.A.1916D, 1029; *Loeffler v. Shepard &*

*E. P. Hospital*, L.R.A.1917D, 967; *Gamble v. Vanderbilt University*, L.R.A.1918C, 875; *Cook v. John N. Norton Memorial Infirmary*, L.R.A.1918E, 647; and *Zoulalian v. New England Sanatorium & Benev. Asso.* ante, 185.

The liability of one maintaining a place of amusement for safety of patrons is discussed in the note to *Johnson v. Hot Springs Land & Improv. Co.* L.R.A.1915F, 690, and the earlier notes there referred to. These notes include cases dealing with the liability of agricultural societies for the condition of grand stands.

In holding these amusements for profit, defendant was clearly not acting as a charitable corporation, and, for this reason, is liable.

*Gamble v. Vanderbilt University*, 138 Tenn. 616, L.R.A.1918C, 875, 200 S. W. 510.

The Tri-State Fair is a corporation chartered under the General Corporation Laws by a voluntary act of the incorporators; is controlled by its own directors and officers; and cannot escape liability on the theory that it is a department or arm of the state.

*Trevett v. Prison Asso.* 98 Va. 332, 50 L.R.A. 564, 81 Am. St. Rep. 727, 36 S. E. 373; *Gartland v. New York Zoological Soc.* 135 App. Div. 163, 120 N. Y. Supp. 24; *Dunn v. Brown County Agri. Soc.* 46 Ohio St. 93, 1 L.R.A. 754, 15 Am. St. Rep. 556, 18 N. E. 496; *Lane v. Minnesota State Agri. Soc.* 62 Minn. 175, 29 L.R.A. 708, 64 N. W. 382, 1 R. C. L. 786.

Mr. Lee Winchester, for respondent:

Defendant is a corporation organized as a public charity, and therefore not answerable in suits of the character of that filed by the plaintiffs.

*Abston v. Waldon Academy*, 118 Tenn. 24, 11 L.R.A.(N.S.) 1179, 102 S. W. 351; *Gamble v. Vanderbilt University*, 138 Tenn. 616, L.R.A.1918C, 875, 200 S. W. 510; *Cumberland Lodge v. Nashville*, 127 Tenn. 248, 154 S. W. 1141; *Book Agents v. Hinton*, 92 Tenn. 188, 19 L.R.A. 289, 21 S. W. 321; *Heriot's Hospital v. Ross*, 12 Clark & F. 507, 8 Eng. Reprint, 1508; *Duncan v. Findlater*, 6 Clark & F. 894, 7 Eng. Reprint, 934; *Macleay & R.* 911, 9 Eng. Reprint, 339; *Holliday v. St. Leonard*, 11 C. B. N. S. 192, 142 Eng. Reprint, 769, 30 L. J. C. P. N. S. 361, 8 Jur. N. S. 79, 4 L. T. N. S. 406, 9 Week. Rep. 694; *Duncan v. Nebraska Sanitarium & Benev. Asso.* 92 Neb. 162, 41 L.R.A.(N.S.) 973, 137 N. W. 1120, Ann. Cas. 1913E, 1127; *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 1 L.R.A. 417, 6 Am. St. Rep. 745, 15 Atl. 553; *Parks v. Northwestern University*, 218 Ill. 381, 2 L.R.A.(N.S.) 556, 75 N. E. 991, 4 Ann. Cas. 103; *Thornton v. Franklin Square House*, 200 Mass. 465, 22 L.R.A.(N.S.) 486, 86 N. E. 909; *Currier v. Dartmouth College*, 105 Fed. 886; *Conklin v. John Howard Industrial Home*, 224 Mass. 222, 112 N. E. 606; *Williamson v. Louisville Industrial School*, 95 Ky. 251, 23 L.R.A. 200, 44 Am. St. Rep. 243, 24 S. W. 1065; *Downes v. Harper Hospital*, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Vermillion v. Woman's College*, 104 S. C. 197, 88 S. E. 649; *Farrigan v. Pevear*, 193 Mass. 147, 7 L.R.A.(N.S.) 481, 118 Am. St. Rep. 484, 78 N. E. 855,

8 Ann. Cas. 1109; *Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453; *Gable v. Sisters of St. Francis*, 227 Pa. 254, 136 Am. St. Rep. 879, 75 Atl. 1087, 2 N. C. C. A. 381.

As defendant receives state aid, it is in effect an arm of the state government, and therefore not responsible under the doctrine of respondeat superior.

*State ex rel. Custer County Agri. Soc. & L. S. Exch. v. Robinson*, 35 Neb. 401, 17 L.R.A. 383, 53 N. W. 213; *Ford v. Kendall School Dist.* 121 Pa. 543, 1 L.R.A. 607, 15 Atl. 812; *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495; *Williamson v. Louisville Industrial School*, 95 Ky. 251, 23 L.R.A. 200, 44 Am. St. Rep. 243, 24 S. W. 1065; *Farrigan v. Pevear*, 193 Mass. 147, 7 L.R.A.(N.S.) 481, 118 Am. St. Rep. 484, 78 N. E. 855, 8 Ann. Cas. 1109; *Hern v. Iowa State Agri. Soc.* 91 Iowa, 97, 24 L.R.A. 655, 58 N. W. 1092; *Melvin v. State*, 121 Cal. 16, 53 Pac. 416.

*Williams, J.*, delivered the opinion of the court:

The first of these suits was instituted by Mrs. Rowton to recover of the Tri-State Fair, a body corporate, for personal injuries sustained by her while she was attending a fair held by the defendant, and the second action is that of her husband for the loss of her services. Both plaintiffs recovered judgments, based on favorable verdicts, in the circuit court, but in the court of civil appeals, on appeal, the judgments were reversed and the actions dismissed. Petitions for writs of certiorari to bring under review the rulings of the appellate court have been granted by this court.

The actions are predicated upon negligence of the fair association in allowing a grand stand used by it to fall into disrepair, with result that a rotten plank in the floor, on which Mrs. Rowton was standing, broke, and personal injuries were suffered by her. Both plaintiffs had paid the fee charged for general admission, and also the fee charged for reserved seats in the grand stand, and from which they witnessed the automobile races and airplane flights which were features of the day.

There was evidence warranting the verdicts, the court of civil appeals holds, if the defendant was subject to the ordinary rules of liability for torts. The defendant association, however, endeavors to renew in this court its insistence in the two lower courts that Mrs. Rowton was guilty of proximate contributory negligence, but the effort is ineffectual, since the defendant has filed no petition for certiorari, assigning as error this ruling of the appellate court. Cincin-

nati, N. O. & T. P. R. Co. v. Brock, 132 Tenn. 477, 178 S. W. 1115, and cases cited.

The court of civil appeals was of opinion that the defendant was a corporation so far conducting a charitable enterprise as not to be liable to respond for the negligence of its officers and employees. It therefore becomes necessary to ascertain the powers and duties of defendant under the charter granted it by this state. It was organized under the provisions of the General Incorporation Laws (Act 1875, chap. 142, § 1, ¶ 4; Shannon's Anno. Code, § 2513 [5]) as a corporation for general welfare, and not for profit; and was given power to hold and sell real estate, to establish by-laws, rules, and regulations, to appoint subordinate officers and agents, to compensate officers, to borrow money to improve its buildings. The board of directors, it is stipulated, shall determine what amount of money shall be paid as a prerequisite to membership, and directors are to be elected by the members. The members "are not stockholders in the legal sense of the term, and no dividends or profits shall be divided among the members;" and the members may, at any time, voluntarily dissolve the corporation by the conveyance of its assets to any other corporation holding a charter from this state for purposes not of individual profit. The means, assets, and income of the corporation shall not be employed "for any other purpose whatever than to accomplish the legitimate objects of its creation." The entire corporate property shall be liable for the claims of creditors.

The defendant has but one salaried officer, its secretary.

(A) Is the defendant entitled to immunity from liability for the negligence of its agents on the ground that it is a corporation engaged in a work of charity? We answer in the negative.

(a) The first insistence of the defendant is that it must be deemed to be a public charity, since it is a corporation organized and operated for the promotion of public welfare, and not for the private profits of its members.

The fact that private profit is excluded is not the true test of a charitable corporation or of the grant of the immunity here asserted. The defendant's charter was obtained under the sections of the Code which provide for the organization of general welfare corporations, it is true; but those provisions are broad enough to include gun clubs, gymnasium clubs, boards of trade, and other associations which are yet more patently not charitable in their nature or purposes, and it cannot be soundly argued that the claimed immunity from liability for negligence may be invoked by all of

these. If the test proposed by defendant were the determinative one, the case of Gamble v. Vanderbilt University, 138 Tenn. 616, L.R.A.1918C, 875, 200 S. W. 510, was incorrectly decided, since the university was a corporation for public welfare, and notwithstanding that fact it was held liable.

(b) On the contrary, the Gamble Case demonstrates that the immunity is not always grantable to a corporation which is, broadly speaking, one which administers charity; the true test being whether in the given case it may be deemed to be acting in the promotion of its charitable design.

In the pending case there appears no gift of a founder for the perpetual distribution of bounty to beneficiaries. The chief sources of income for the conduct of the association's business are in receipts from admission fees, charges made for concessions, and entrance fees to exhibitors. It is true that business men of the city of Memphis make donations towards the defendant's current expenses, from time to time, as motives of patriotism or self-interest may prompt, and this fact appears to be unduly stressed by the court of civil appeals as a factor deflecting its ruling in favor of the fair association.

The strongest argument in defendant's behalf is that its mission is educational, and therefore that it must be treated as a public charity. It appears that exhibitions of live stock, farm products, handicraft, machinery, etc., are among the purposes of the association, and such do doubtless tend, in one sense, to educate or instruct certain members of the public. But so also do many other promotions along the line of athletics, theatricals, etc. The primary object, however, is not to educate, but to amuse and afford recreation.

In the case of Gartland v. New York Zoological Soc. 135 App. Div. 163, 120 N. Y. Supp. 24, an effort to escape liability for tort was made by an association organized for the purpose of furnishing instruction and recreation to the people in the maintenance of an aquarium which should be open to the public, without charge or gratuity, on a portion of each day. It was there said: "To avoid liability, the appellant claims, first, that it is a charitable corporation, and not liable in an action of this kind. . . . We should have great difficulty in determining that this corporation, under its act of incorporation, its enabling act, and its contract with the city, was a charitable organization within the classification of any of the corporations which, from time to time, for one reason or another, have been relieved of responsibility for the torts of their employees. It dispenses no alms; it relieves no suffering;

it cares for no sick. While it is true it is not a money-making institution" and its managers and members may not receive salaries or any monetary returns, "this is not controlling. Its purposes and its work are to amuse and to instruct, and, if we were called upon to classify it, we should say that it came closer to an institution for recreation, with incidental education, than any other recognized classification."

In *Logan v. Agricultural Soc.* 156 Mich. 337, 121 N. W. 485, a fair association was held not to be a charitable or eleemosynary institution, and not to be free from liability for a tort, which was a counterpart of the one involved in the pending suits. See also *Scott v. University of Michigan Athletic Asso.* 152 Mich. 684, 17 L.R.A.(N.S.) 234, 125 Am. St. Rep. 423, 116 N. W. 624, 15 Ann. Cas. 515.

The appellate court pressed the doctrine of immunity from tort liability to an unwarranted extent.

The corporate purpose of the defendant was not to make money for its members, but it was to make money for itself, to be used in carrying forward and enlarging its enterprise. This could only be done by inducing the public to patronize its exhibitions; and when members of the public attend, they are entitled to demand the exercise of ordinary care on the part of the association in the keeping safe of such grand stands as its officers may see fit to provide. If the rule of immunity were applied in the circumstances here appearing, a corporation created for public welfare might become one for public detriment, should its negligence go to the point where a grand stand was permitted to become so insecure as to fall, causing the deaths of a large number of spectators.

The income of the defendant, especially from admission fees, should be held to accrue subject to the risks of the negligent management of the corporate agencies which affect the patrons, who furnish the lifeblood of the institution in the payment of those fees.

(B) Is defendant to be held not liable on the ground that it was discharging a duty imposed solely for the benefit of the public, and therefore was clothed with the immunities claimable by the state and governmental agencies?

It appears that the defendant association received appropriations towards its support of \$10,000 per annum from the state of Tennessee for several years, prior to and including the year of the accident in question; and upon this fact, combined with the general welfare scope of the cor-

poration, is based the argument that the association is not subject to the rule of respondeat superior.

It is the settled rule that where the legislature of a state constitutes a state board of agriculture or a board of managers an agency of the state, and devolves directly upon them the duty of conducting a state fair, there is so far exercised by them a governmental function that the institution is not liable for injuries sustained as a result of negligence of officers or employees. *Morrison v. Fisher* (Morrison v. McLaren) 160 Wis. 621, L.R.A.1915E, 460, 152 N. W. 475, and several cases cited in the opinion and note.

But we have no such case before us. We deal with a corporation brought into existence at the volition of the incorporators; the state has not undertaken to name the members of a board to exercise any imposed governmental function belonging to it. The control of the affairs of the defendant association as to admission fees, choice of officers and servants, was in the hands of a board of directors named by its own members; these directors had the power to purchase ground and erect new structures, or to lease an existing fair ground with defective structures, as it chose to do, and to repair the same or not. No state official had power to direct in those regards. The association may dissolve at the will of its members, and the state would not receive its property or have any claim against it or the corporation's property in the absence of a contract so providing. The distinction is clearly and properly made in two Minnesota cases,—the one dealing with and holding liable a voluntary, state-aided fair association (*Lane v. Minnesota Agri. Soc.* 62 Minn. 175, 29 L.R.A. 708, 64 N. W. 382), the other with the same society after the legislature had by subsequent enactment made it in effect a department of the state government (*Berman v. Minnesota State Agri. Soc.* 93 Minn. 125, 100 N. W. 732).

See also *Dunn v. Brown County Agri. Soc.* 46 Ohio St. 93, 1 L.R.A. 754, 15 Am. St. Rep. 556, 18 N. E. 496; *Gartland v. New York Zoological Soc.* supra; in each of which, though the state or city aided the corporation, the holding was against the claim of immunity here advanced.

We have no difficulty in following these decisions. The immunity awarded the state and state agencies should not shield an institution which the state does not control, and which came into existence at the volition of its incorporators, not of the legis-

lature. For the liabilities of such the state is not liable in law or morals.

The result of our consideration of the causes is that we are not satisfied with the

judgments of the Court of Civil Appeals. Reversed, with judgments here affirming those rendered in the Circuit Court.

**WASHINGTON SUPREME COURT.**  
(Department No. 2.)

**WILLIAM McDONALD, Appt.,**

**v.**

**M. A. WARD, Respt.**

(99 Wash. 354, 169 Pac. 851.)

**Covenant — warranty — railroad — breach.**

1. An existing railroad across the property, known to the grantee, is a breach of a covenant of warranty in a conveyance of real estate.

*For other cases, see Covenants and Conditions, III. b, in Dig. 1-52 N. S.*

**Limitation of action — breach of covenant of warranty.**

2. The Statute of Limitations begins to run against an action for breach of covenant of warranty in a conveyance of real estate by the eviction of grantees from a strip claimed as a railroad right of way across the property, at the time of eviction.

*For other cases, see Limitation of Actions, II. b, in Dig. 1-52 N. S.*

**Covenant — eviction — possession of right of way — extent.**

3. A railroad company having a right of way across a tract of land will be held to be in possession of the land between its track and a line of telegraph poles which are on its right of way, so as to constitute an eviction of a grantee at the time he received a deed with covenant of warranty, although a portion of such strip is cultivated by the owner of the adjacent land.

*For other cases, see Covenants and Conditions, III. b, in Dig. 1-52 N. S.*

(January 9, 1918.)

**A** PPEAL by plaintiff from a judgment of the Superior Court for King County in favor of defendant in an action brought to recover damages for breach of a covenant of warranty in a deed. Reversed.

The facts are stated in the opinion.

Mr. J. H. Gordon, for appellant:

Plaintiff is not estopped by reason of his knowledge of the existence of the right

**Note.**—The questions whether the existence of a public highway, private way, or railroad right of way across land at the time of conveyance is a breach of covenant is treated in the notes to *Van Ness v. Royal Phosphate Co.* 30 L.R.A.(N.S.) 833, and *Sandum v. Johnson*, 48 L.R.A.(N.S.) 619; and see later case, *Schwartz v. Black*, L.R.A. 1915D, 898.

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of way at the time of the delivery of the deed to him.

*West Coast Mfg. & Invest. Co. v. West Coast Improv. Co.* 25 Wash. 627, 62 L.R.A. 763, 66 Pac. 97; 8 Am. & Eng. Enc. Law, 2d ed. 86-88; *O'Connor v. Enos*, 56 Wash. 448, 105 Pac. 1039; *Williams v. Hewitt*, 57 Wash. 62, 135 Am. St. Rep. 971, 106 Pac. 496; *Barlow v. Delaney*, 40 Fed. 97.

Plaintiff is not barred by the Statute of Limitations.

11 Cyc. 1125; *West Coast Mfg. & Invest. Co. v. West Coast Improv. Co.* supra.

Messrs. Roberts, Wilson, & Skeel and J. L. Runner, for respondent:

The property within the right of way was excluded from the covenants of the deed, and therefore there has been no breach.

*Van Ness v. Royal Phosphate Co.* 60 Fla. 284, 30 L.R.A.(N.S.) 833, 53 So. 381; *Hoyt v. Rothe*, 95 Wash. 369, 163 Pac. 925; *Whitbeck v. Cook*, 15 Johns. 483, 8 Am. Dec. 272; *Wilson v. Cochran*, 46 Pa. 229; *Brown v. Young*, 69 Iowa, 625, 29 N. W. 941; *Janas v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300; *Pomeroy v. Chicago & M. R. Co.* 25 Wis. 641; *Patterson v. Arthurs*, 9 Watts, 152; *Bennett v. Booth*, 70 W. Va. 264, 39 L.R.A.(N.S.) 618, 73 S. E. 909; *Desvergers v. Willis*, 56 Ga. 515, 21 Am. Rep. 289; *Smith v. Hughes*, 50 Wis. 620, 7 N. W. 653; *Jordan v. Eve*, 31 Gratt. 1; *Killen v. Funk*, 83 Neb. 622, 131 Am. St. Rep. 658, 120 N. W. 189; *Hymes v. Estey*, 116 N. Y. 501, 15 Am. St. Rep. 421, 22 N. E. 1087; *Memmert v. McKeen*, 113 Pa. 315, 4 Atl. 542.

Plaintiff is barred by the Statute of Limitations.

*Wood, Limitations*, 4th ed. § 174; *Eustis v. Cowherd*, 4 Tex. Civ. App. 343, 23 S. W. 737; *Re Hanlin*, 17 L.R.A.(N.S.) 1190 note; *Durand v. Williams*, 53 Ga. 76; *Pevey v. Jones*, 71 Miss. 647, 42 Am. St. Rep. 486, 16 So. 252; *Watson v. Heyn*, 62 Neb. 191, 86 N. W. 1064; *Ilsley v. Wilson*, 42 W. Va. 757, 26 S. E. 551; *Grist v. Hodges*, 14 N. C. (3 Dev. L.) 200; *Shankle v. Ingram*, 133 N. C. 254, 45 S. E. 578.

**Chadwick, J.**, delivered the opinion of the court:

On May 4, 1903, respondent conveyed to appellant a certain legal subdivision of land in Benton County, Washington. The main line of the Northern Pacific Railway

was constructed across the land at the time of the conveyance. The deed contains full covenants of warranty, without exception or reservation. Respondent had been in possession of the land, and had cultivated approximately all of it other than that actually occupied by the railway. Appellant entered into possession, and he, too cultivated all of the land except that which is actually occupied by the roadbed, its banks and borrow pits. Appellant fixes the width of this strip in his pleadings as from 16 to 20 feet. Appellant remained in possession and cultivated the land for a period of twelve or thirteen years, when he was ousted by the Northern Pacific Railway Company, under its superior title to a strip of land 200 feet in width, on either side of its main line. See *Northern P. R. Co. v. McDonald*, 91 Wash. 113, 157 Pac. 222.

Appellant then began this action upon the covenants of his deed. At the close of plaintiff's case the court granted a motion for judgment on account of the insufficiency of the evidence. We are not apprised as to the particular ground, but presume, from the tenor of the briefs, that it was the opinion of the trial judge that appellant could not recover for the loss of land included in the right of way of the railroad, the bounds of which were defined by public statute (Act July 2, 1864, chap. 217, 13 Stat. at L. 367), and which was occupied in part at the time the conveyance was made, and for the further reason that the Statute of Limitations had run.

It is the contention of the respondent that the right of way of a railroad company is no more than an easement, of such a public and notorious character that a party having knowledge of the existence of the roadbed and the operation of trains will be held to have contracted with reference to it and to its limits and bounds.

We held in *Hoyt v. Rothe*, 95 Wash. 369, 163 Pac. 925, that a public highway is impliedly exempted from covenants of seisin and warranty and against encumbrances. Although there is a division of authority upon this question, our holding is in line with the great weight of authority. Whether a railroad built and in operation across a piece of land, at the time it is conveyed, is notice to the grantee of the nature and extent of the right of way under which it is operated, thus impliedly binding him and preventing a recovery upon the covenants of a deed of general warranty, is the main question calling for discussion and decision.

The weight of authority is that a right of way of a railroad does not fall within

the exception worked by the courts as to existing highways; that a grantee may maintain an action upon his covenants, although he had knowledge of the existence of the right of way at the time he took his deed. *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *Wadhams v. Swan*, 109 Ill. 46; *Burk v. Hill*, 48 Ind. 52, 17 Am. Rep. 731; *Douglass v. Thomas*, 103 Ind. 187, 2 N. E. 562; *Quick v. Taylor*, 113 Ind. 540, 16 N. E. 588; *Barlow v. McKinley*, 24 Iowa, 69; *Flynn v. White Breast Coal Co.* 72 Iowa, 738, 32 N. W. 471; *Pilcher v. Atchison, T. & S. F. R. Co.* 38 Kan. 516, 5 Am. St. Rep. 770, 16 Pac. 945; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426; *Williamson v. Hall*, 62 Mo. 405; *Whiteside v. Magruder*, 75 Mo. App. 364; *Huyck v. Andrews*, 113 N. Y. 81, 3 L.R.A. 789, 10 Am. St. Rep. 432, 20 N. E. 581; *Farrington v. Tourtelott (C. C.)* 39 Fed. 738.

A lesser number of the courts have held to the contrary. *Van Ness v. Royal Phosphate Co.* 60 Fla. 284, 30 L.R.A.(N.S.) 833, 53 So. 381, Ann. Cas. 1912C, 647; *Ex parte Alexander*, 122 N. C. 727, 30 S. E. 336; *Goodman v. Heilig*, 157 N. C. 6, 36 L.R.A.(N.S.) 1004, 72 S. E. 866; *Smith v. Hughes*, 50 Wis. 620, 7 N. W. 653.

We shall not go into the reasoning of the courts, but content ourselves with holding to the weight of authority. This brings us to the question whether the action is barred by the Statute of Limitations. The solution of this problem compels an inquiry into the nature and extent of the covenant. If time is taken to look into the cases we have cited, it will be noticed that in almost all of them the right of way of a railway company is treated as an easement, and the courts discuss the question of the right to recover as a covenant against encumbrances, and this, too, whether the right of way has been acquired under eminent domain or by a deed of general warranty. A covenant against encumbrances operates upon existing things, and would be broken at the time it is made. It gives an immediate right of action and starts the statute running. But we think the facts take the case out of that rule. The theory upon which the cases proceed is that, notwithstanding the character of the title, whether taken under the sovereign power of the state or by deed, there is a reversion to private ownership in case the railway company should cease to use it for railway purposes.

But here the property occupied by the railway company, and to which it is entitled under the Federal grant, was never

the subject of private ownership. It was not taken by the railway company in the exercise of its public functions through the instrumentality of the sovereign power of the state, but was made the subject of an independent grant. In other words, the effect of the act of July 2, 1864, granting a right of way to the Northern Pacific Railway Company, reserved in the government for the use of the Northern Pacific Railway Company a strip of land across the public domain, to be defined by a filing of a map of definite location. In *Northern P. R. Co. v. Townsend*, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671, the extent of the grant was a subject of inquiry. The court said: "Manifestly the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way, or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms, to have and to hold the same so long as it was used for the railroad right of way. In effect, the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

Subsequent decisions of the Supreme Court in *Northern P. R. Co. v. Ely*, 197 U. S. 1, 49 L. ed. 639, 25 Sup. Ct. Rep. 302, and *Northern P. R. Co. v. Concannon*, 239 U. S. 382, 60 L. ed. 342, 36 Sup. Ct. Rep. 156, make it clear that the reversion is in the United States, and that the right of way is not, in the absence of specific legislation, a subject of sale by the railway company, and that it cannot become a subject of private ownership by adverse use or occupation. From these later decisions it is clear that the court meant, when it said in the *Townsend Case*: "The grant was of a limited fee, made on an implied condition of reverter, in the event that the company ceased to use or retain the land for the purpose for which it was granted," that the reversion is in the United States, and not in the owner of any contiguous property.

Considering, then, the nature of the grant, and the ultimate resting place of the title in the event that the company should cease to use or retain it for railway

purposes, the conclusion is compelled that we have a case of failure of title rather than a suit upon a covenant against encumbrances. "The covenant of warranty is a covenant in futuro, runs with land, and is broken at the time of the eviction." *West Coast Mfg. & Invest. Co. v. West Coast Improv. Co.* 25 Wash. 627, 62 L.R.A. 763, 66 Pac. 97.

"The obligation in a general warranty of title is not that the covenantor is the true owner, or that he is seised in fee with right to convey, but that he will defend and protect the covenantee against the rightful claims of all persons." 7 R. C. L. 1144.

Appellant having been evicted by the assertion of a superior title, respondent is bound on his covenant of warranty, and, the action having been begun within the period of limitation after the eviction, he is entitled to recover.

Appellant admits that he is barred of a recovery for the loss of the land actually occupied by the railroad, upon the true theory that possession by the railroad company at the time the deed was executed and delivered was a constructive eviction. Appellant fixes the amount of land occupied by the railroad company as from 16 to 20 feet. His testimony shows that, at the time he entered into possession of the land there was a line of telegraph poles about 40 feet from the center line of the railroad track. A telegraph line is incident to the track of the railway company, and is essential to the operation of the road. The land occupied by the telegraph line, and all the land lying between it and the main track, was land occupied by the railroad company, and appellant should be held, as a matter of law, to have been evicted therefrom at the time he received his deed, notwithstanding the fact that he cultivated some of the land lying between the line of poles and the track for some years thereafter. Appellant's right of recovery, therefore, will be limited to damages for loss of the land occupied by the respondent, less the amount of land occupied by the railway company and the telegraph line. The court will determine the amount of this from the testimony in the case.

Reversed, and remanded for further proceedings.

Ellis, Ch. J., and Mount, Holcomb, and Morris, JJ., concur.

Petition for rehearing denied.



WEST VIRGINIA SUPREME COURT  
OF APPEALS.

F. C. NEIKIRK

v.

W. T. WILLIAMS, Plff. in Err.

(— W. Va. —, 94 S. E. 947.)

**Contract — consideration — surrender of check.**

Return of a life insurance policy by the agent of the insurer at the request of the insured and surrender of his check drawn to the agent's order for the first annual premium is no consideration for the insured's promise to pay such agent a certain sum of money in lieu of commissions, to which he would have been entitled from his principal if the policy had been consummated, and creates no legal liability.

*For other cases see Contracts, I. a, 2, in Dig. 1-52 N. S.*

(January 29, 1918.)

**E**RROR to the Circuit Court for Mercer County to review a judgment in favor of plaintiff in an action brought to enforce an alleged promise to pay for defendant's release from an agreement made with plaintiff as insurance agent. **Reversed.**

The facts are stated in the opinion.

Messrs. Sanders & Crockett, for plaintiff in error:

There was no promise on the part of defendant to pay, hence, no recovery could be had for the premiums; and this being so, any contract for a cancelation of the policy would be without consideration and void.

New York L. Ins. Co. v. Statham, 93 U. S. 24, 23 L. ed. 789; Clark v. Schromeyer, 23 Ind. App. 565, 55 N. E. 785; 14 R. C. L. 974; Blackwell v. Mutual Reserve Fund Life Asso. 141 N. C. 117, 5 L.R.A.(N.S.) 771, 115 Am. St. Rep. 677, 53 S. E. 833; Heiman v. Phoenix Mut. L. Ins. Co. 17 Minn. 153, Gil. 127, 10 Am. Rep. 154; Hogben v. Metropolitan L. Ins. Co. 69 Conn. 503, 61 Am. St. Rep. 53, 38 Atl. 214; Abell v. Penn. Mut. L. Ins. Co. 18 W. Va. 400.

Messrs. Lee & Tanner for defendant in error.

Williams, J., delivered the opinion of the court:

In the circuit court, on appeal from the

Headnote by WILLIAMS, J.

**Note.** — As to consideration for promise to pay for securing release from a unilateral contract, see annotation following this case, post, 666, and references therein to annotations on related questions.

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judgment of a justice, plaintiff recovered a judgment for \$300, and defendant has brought the case here on writ of error. No written pleadings were filed before the justice or in court, and plaintiff's testimony is the only evidence in the case. His claim is based on defendant's promise to pay him \$500 in consideration for his release from an agreement made with plaintiff, as agent of the Equitable Life Assurance Company, to purchase an annuity policy, the annual premium on which was \$1,984, the \$500 being in lieu of commissions which plaintiff would have been entitled to retain out of the premium, if it had been paid. The case was tried by a jury in the absence of defendant, and a verdict returned for plaintiff in accordance with a peremptory instruction by the court. Counsel moved for a continuance on account of defendant's absence, and the court overruled the motion, and he excepted. But, as the evidence in support of the motion is not made a part of the record, that exception is abandoned in brief of counsel.

The principal assignments of error are the giving of the peremptory instruction and the refusal of the court to set aside the verdict and grant plaintiff a new trial, on the ground that it is contrary to the law and the evidence. The verdict is certainly supported by the evidence, for plaintiff swears that after defendant had agreed to take the insurance, and had delivered to him his check for the amount of the premium, he thereafter, before the check had been presented for payment, agreed to pay plaintiff \$500 if he would release him from that agreement, and did actually pay him \$200 of that amount. At the time of the alleged promise, plaintiff says, the policy had not been forwarded to the insurance company, and he had the right to cancel and did cancel it.

Counsel for defendant insist that the verdict is contrary to law because the promise sued on is without any consideration. The \$500 represented approximately the commissions which plaintiff was entitled to retain out of the premium, if it had been paid, as compensation for his services as agent of the insurance company; and, if defendant was under no legal obligation to pay the premium, it follows that he was not bound to pay plaintiff any part of his commissions, and the promise to pay would be nudum pactum. No contractual relation existed between plaintiff and defendant. Plaintiff was performing no services for defendant in his efforts to sell him the insurance, and therefore no promise to compensate him could be implied. Defendant was not legally bound to pay the premium, and, notwithstanding he had drawn

his check for the amount of it and delivered it to plaintiff, he could have countermanded it without violating any legal right of the insurance company or of its agent the plaintiff. The insurance company was fully protected, in case of nonpayment of premium, by its right to forfeit the policy, even if the policy had been approved by it, and this seems to be its only remedy. Contracts of insurance being unilateral, the insurer has no right, generally, to maintain a suit for premiums due, and the insured, if he has not expressly promised to pay, is at liberty to refuse to make payment, as it is generally only a condition precedent to his protection under the policy. By his failure to pay the insured simply loses his benefit. He has the option to pay or not, and thus continue the insurance company's obligation or terminate it at his pleasure. 2 Bacon Ins. 4th ed. § 456; 1 Cooley's Briefs on Ins. 82; 2

Cooley's Briefs on Ins. 990; New York L. Ins. Co. v. Statham, 93 U. S. 24, 23 L. ed. 789; and Clark v. Schromeyer, 23 Ind. App. 565, 55 N. E. 785. Plaintiff had not assumed payment of the premium for defendant, and was not liable to the insurance company for any part of it. The contract of insurance had not been consummated, and in declining to pay the premium defendant simply exercised his legal right. Hence, when plaintiff canceled the policy, which is the only consideration for defendant's promise, he neither surrendered any legal right nor benefited the situation of defendant, and therefore defendant's promise was without consideration, and, for that reason, is not enforceable. That every promise must be supported by a valuable consideration, before recovery can be had on it, is a principle too well recognized to need any citation of authorities.

The judgment will be reversed, and the cause remanded for a new trial.

### **Annotation—Consideration for promise to pay for securing release from a unilateral contract.**

Of course, something of benefit to one party or of detriment to the other party to a contract is essential to its validity. Ordinarily, a unilateral contract, that is, a contract purporting to bind only one of the parties thereto, is not enforceable or binding upon either of the parties. It is, therefore, of no legal benefit to either of the parties to be released therefrom. Neither is the release a matter of legal detriment to either party. Hence, as pointed out in *NEIKIRK v. WILLIAMS*, ante, 665, such a release is not a valid consideration for a promise to pay something of value to secure the same.

For the cancellation of an invalid contract as consideration for a promise, see note appended to *Brown v. Jennett*, 5 L.R.A.(N.S.) 725.

The holding of the court in *NEIKIRK v. WILLIAMS*, ante, 665, that a promise by the insured in a life insurance policy to pay the agent a part of his commission if he would secure the cancellation of the policy was unenforceable, because the contract was unilateral and of no binding effect on the promisor, and hence there was no consideration for the promise, appears to be in conflict with the holding in *Perry v. Buckman* (1860) 33 Vt. 7, that a promise in consideration of the promisor's release from the obligation of a contract is valid, although

the contract was terminable at the will of the promisor. The court said that after, choosing to contract with the other party for the surrender of the latter's rights under the contract, the promisor could not defeat his subsequent contract on the ground that the original contract was terminable at his pleasure.

An agreement by a person intending to purchase real estate, to pay the commission of a broker having it for sale if he made no further effort to sell it and permitted the promisor to deal directly with the owner, was held to be valid and enforceable, where the promisor purchased the real estate. *Siegel v. Rosenzweig* (1908) 129 App. Div. 547, 114 N. Y. Supp. 179. But where the broker had already renounced his right to any commission, a promise of this character was held not to be based upon a sufficient consideration. *Galitzka v. Fields* (1912) 137 N. Y. Supp. 828.

A promise by a third person to pay one party to a contract a designated sum if he would cancel and release his contract, thereby permitting the promisor to obtain a contract covering the same subject-matter, was held to be valid, although the original contract was invalid, the question of its validity not having been raised by the other party thereto. *Wile v. Wilson* (1883) 93 N. Y. Supp. 255.

A. G. S.

## ALABAMA SUPREME COURT.

MOBILE ELECTRIC COMPANY, Appt.,  
v.  
CITY OF MOBILE.

(— Ala. —, 79 So. 39.)

**Contract — by municipal corporation — execution — effect.**

1. The re-execution by a municipal corporation with changes, of an ultra vires contract for light supply to its inhabitants after statutory authority to enter into such contract has been conferred, renders the contract enforceable.

For other cases, see *Municipal Corporations*, II. d, in Dig. 1-52 N. S.

**Public service corporation — contract obligation — impairment.**

2. A contract entered into by a municipal corporation fixing the rates for furnishing electricity to its inhabitants under a statute empowering it to contract for a supply of electricity is within the constitutional protection against impairment of obligation of contract.

For other cases, see *Constitutional Law*, II. g, 1, a, (2), in Dig. 1-52 N. S.

**Same — contract for perpetual service — validity.**

3. A contract by a municipal corporation for a perpetual rate for the furnishing of electricity to its inhabitants is invalid in so far as it transcends a reasonable period of time.

For other cases, see *Municipal Corporations*, II. d, in Dig. 1-52 N. S.

**Same — duration — constitutional limitation.**

4. Where public franchises are limited by the Constitution to thirty years, contracts for rates for public service will not be permitted to exceed that period.

For other cases, see *Public Service Corporations*, in Dig. 1-52 N. S.

**Injunction — to enforce specific performance — continuing contract.**

5. A bill to enjoin an electric light company from shutting off current to consumers in breach of a contract with the municipality as to rates for service cannot be dismissed as being without equity, on the

**Note.** — The question whether a municipal contract for a longer period than is authorized can be sustained as a contract for the period authorized is treated at page 512 of the note to *Spengler v. Sonnenberg*, 52 L.R.A.(N.S.) 510, on the general question whether a contract by an agent who exceeds his authority may be enforced against the principal to the extent to which it was authorized.

The right to raise the rates of a public service corporation fixed by franchise is treated in the note to *State ex rel. Webster v. Superior Ct.* L.R.A.1915C, 287; and see later case, *Woodburn v. Public Service Commission*, L.R.A.1917C, 98.

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theory that it invokes specific performance of a contract for continuous reciprocal duties, since its object will be attained by preventing the shutting off of the supply of current.

For other cases, see *Specific Performance*, I. c, in Dig. 1-52 N. S.

**Parties — bill for injunction — right of municipality.**

6. A municipal corporation which has contracted for a rate for the furnishing of electric current to its inhabitants may maintain a bill to enjoin breach of the contract notwithstanding the inhabitants might maintain a bill to redress their own wrongs.

For other cases, see *Parties*, I. a, 2, c, in Dig. 1-52 N. S.

(May 9, 1918.)

**A**PPEAL by defendant from a decree of the Circuit Court for Mobile County overruling demurrers to a bill filed to enjoin it from cutting off its electrical supply or otherwise interfering with the use thereof by complainant or its citizens on account of their failure to pay a rate in excess of that specified in the contract. Affirmed.

The facts are stated in the opinion.

Messrs. Inge & Kilborn, Harry T. Smith, and William G. Caffey, for appellant:

Municipal corporations can fix the rates of public service corporations by contract only where they have express legislative authority to do so; and the statute conferring this power will be strictly construed against the power.

*Posey v. North Birmingham*, 154 Ala. 513, 15 L.R.A.(N.S.) 711, 45 So. 663; *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 274, 53 L. ed. 183, 29 Sup. Ct. Rep. 50.

The power conferred to contract for a future service cannot include a power to ratify a past transaction.

*Atlantic City Waterworks Co. v. Read*, 50 N. J. L. 665, 15 Atl. 10; *Leavenworth v. Rankin*, 2 Kan. 357; *Wichita Water Co. v. Wichita*, 234 Fed. 415; 1 Elliott, Contr. § 277; *Clark v. Janesville*, 13 Wis. 414; 20 Am. & Eng. Enc. Law, 2d ed. 1181.

The contract by the city, being wholly unauthorized when made, was contrary to public policy, and was therefore null and void.

*Eufaula v. McNab*, 67 Ala. 588, 43 Am. Rep. 118; *Wichita Water Co. v. Wichita*, 234 Fed. 415; *Clark v. Janesville*, 13 Wis. 414; *Handy v. St. Paul Globe Pub. Co.* 41 Minn. 188, 4 L.R.A. 466, 16 Am. St. Rep. 695, 42 N. W. 872; 2 Elliott, Contr. § 686; *Puckett v. Alexander*, 102 N. C. 95, 3 L.R.A.

343, 8 S. E. 767; *Ludlow v. Hardy*, 38 Mich. 690.

But even when the power is given to a city to contract for rates for its citizens, this power is always limited to a reasonable period, and never authorizes a contract for all time.

*McQuillin*, Mun. Corp. pp. 3718, 3719.

A contract by a city with a public service corporation for the supply of electricity at given rates forever is *ultra vires* and absolutely null and void.

*Westminster Water Co. v. Westminster*, 98 Md. 551, 94 L.R.A. 630, 103 Am. St. Rep. 424, 56 Atl. 990; *State ex rel. St. Paul v. Minnesota Transfer R. Co.* 80 Minn. 108, 50 L.R.A. 656, 83 N. W. 32; 28 Cyc. 655, 656; *McBean v. Fresno*, 112 Cal. 159, 31 L.R.A. 794, 53 Am. St. Rep. 191, 44 Pac. 358.

Where parties enter into a contract that one will serve another, but fail to stipulate the duration of the service, the presumption is that it will continue during the mutual pleasure of the two parties, unless the service is from month to month or from year to year.

*Greenville v. Greenville Waterworks Co.* 125 Ala. 641, 27 So. 764; *Christian & C. Grocery Co. v. Bienville Water Supply Co.* 106 Ala. 124, 17 So. 352.

The court cannot change the terms of a void contract so as to give it validity.

*Westminster Water Co. v. Westminster*, 98 Md. 551, 94 L.R.A. 630, 103 Am. St. Rep. 424, 56 Atl. 990; *Wellston v. Morgan*, 59 Ohio St. 147, 52 N. E. 127; *Gaslight & Coke Co. v. New Albany*, 156 Ind. 406, 59 N. E. 176; *Manhattan Trust Co. v. Dayton*, 8 C. C. A. 140, 16 U. S. App. 588, 59 Fed. 327; *Weller v. Gadsden*, 141 Ala. 653, 37 So. 682, 3 Ann. Cas. 981; *Greenville v. Greenville Waterworks Co.* 125 Ala. 625, 27 So. 764; *Montgomery v. Montgomery Waterworks*, 79 Ala. 233.

It is one of the essential principles of equitable relief that the subject-matter dealt with must be such that it can be disposed of permanently by one decree. No contract will be enforced in piecemeals.

*Tombigbee Valley River Co. v. Fairford Lumber Co.* 155 Ala. 590, 47 So. 88; *T. B. Harms & Francis, Day & Hunter v. Stern*, 145 C. C. A. 2, 229 Fed. 42.

A court of chancery cannot undertake supervision of the performance of a contract extending over a period of years.

*Bromberg v. Eugenotte Constr. Co.* 158 Ala. 323, 19 L.R.A.(N.S.) 1175, 48 So. 60; *South & North Ala. R. Co. v. Highland Ave. & Belt R. Co.* 98 Ala. 400, 39 Am. St. Rep. 74, 13 So. 682; *Bienville Water Supply Co. v. Mobile*, 112 Ala. 264, 33 L.R.A. 59, 57 Am. St. Rep. 28, 20 So. 742; *Tom-*

*bigbee Valley R. Co. v. Fairford Lumber Co.* 155 Ala. 575, 47 So. 88; *Louisville & N. R. Co. v. Williams*, 183 Ala. 138, 62 So. 679, Ann. Cas. 1915D, 483, 4 N. C. C. A. 182; *York Haven Water & Power Co. v. York Haven Paper Co.* 119 C. C. A. 508, 201 Fed. 278; *New Decatur v. American Teleph. & Teleg. Co.* 176 Ala. 492, 58 So. 613, Ann. Cas. 1915A, 875.

The enforcement of any duty by injunction is discretionary with the court, and the discretion will not be exercised except where it is consistent with conscience, fairness, and a decent public policy.

*Alabama C. R. Co. v. Long*, 158 Ala. 305, 48 So. 363; *Cowan v. Sapp*, 81 Ala. 523, 8 So. 212; *Perkerson v. Snodgrass*, 85 Ala. 137, 4 So. 752; *Tombigbee Valley R. Co. v. Fairford Lumber Co.* 155 Ala. 575, 47 So. 88.

Defendant has a perfectly adequate and complete remedy at law.

*Gulf Compress Co. v. Harris, C. & Co.* 158 Ala. 352, 24 L.R.A.(N.S.) 399, 48 So. 477; *Gulf Compress Co. v. Jones Cotton Co.* 159 Ala. 670, 48 So. 481; *Southern P. Co. v. Colorado Fuel & Iron Co.* 42 C. C. A. 12, 101 Fed. 783.

No specific performance, either of the contract or of the public duty, can be decreed unless the conditions are such that the remedy could be mutually enforced on behalf of either party.

*Electric Lighting Co. v. Mobile & S. H. R. Co.* 109 Ala. 195, 55 Am. St. Rep. 927, 19 So. 721; *Iron Age Pub. Co. v. Western U. Teleg. Co.* 83 Ala. 510, 3 Am. St. Rep. 758, 3 So. 449; *Tombigbee Valley R. Co. v. Fairford Lumber Co.* 155 Ala. 575, 47 So. 88; *Bentley v. Barnes*, 171 Ala. 512, 55 So. 130.

Mr. Robert H. Smith for appellee.

Anderson, Ch. J., delivered the opinion of the court:

While the city of Mobile had the authority, under its charter powers, given by the Act of 1900-01, p. 2342, to contract with the respondent corporation for supplying lights for public purposes, it may be conceded that it had no authority thereunder to contract for supplying lights to the citizens, and that the part of the contract as dealt with, supplying lights to the citizens, was *ultra vires* the municipality and void. The original contract, however, was modified, and executed as changed or modified after the enactment of § 1260 of the Code of 1907, and the new or modified contract was authorized by said statute.

The doctrine is well established that acts *ultra vires* a corporation, as distinguished from those *ultra vires* the agents, cannot be ratified, but we think that the contract

made in 1910 was more than a mere ratification of the old contract. It involved a change in the original contract and there was a re-execution of same as changed, and, while the change may have been slight, it was deemed of importance to the contracting parties, and produced benefits or detriment to the one or the other. "An agreement, when changed by the mutual consent of the parties, becomes a new agreement, which takes the place of the old and consists of the new terms and as much of the old agreement as the parties have agreed shall remain unchanged." 13 C. J. p. 535, § 615; *Shriner v. Craft*, 166 Ala. 146, 28 L.R.A. (N.S.) 450, 139 Am. St. Rep. 19, 51 So. 884; 3 Elliott, Contr. §§ 1859 and 1987.

Section 1260 of the Code of 1907, among other things, authorizes the municipality to contract for furnishing electricity to the city or town, and statutes quite similar to this one have heretofore been construed as authorizing a municipality to contract for water for its inhabitants for a fixed and reasonable period, and such contracts are protected under the inviolable contract clauses of the Constitution, state and Federal. *Bessemer v. Bessemer City Waterworks*, 152 Ala. 391, 44 So. 663; *Mitchell v. Gadsden*, 145 Ala. 137, 40 So. 350; *Weller v. Gadsden*, 141 Ala. 642, 37 So. 682, 3 Ann. Cas. 981; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; *Los Angeles v. Los Angeles Water Co.* 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736.

The appellant contends that while the word "perpetually" means forever or eternal, it also means continually, uninterrupted, etc.; and that as a holding that the word "perpetually," as used in the contract, meant forever, would render it void, it should be so interpreted as to render the contract legal in its entirety, and that the word as used meant that the rate should be maintained continuously and uninterruptedly during the ten year period of the contract, and not that the rate was to be maintained for all time.

The contract in question first provides for furnishing the city certain lamps and current to light the same, "for the term of ten years, beginning on the 1st day of November, 1907, and ending with the 31st day of October, 1917;" second, to light the market house of the city of Mobile "during the term of this contract;" third, to furnish certain electric current on the twenty-four-hour incandescent circuit on a meter basis, "during the life of this contract." It will be observed that in dealing with what is to be furnished the city for public purposes, that is, arc lamps lighting

the market house and the current on the incandescent circuit, the period is specifically fixed for the ten-year term of the contract. But when dealing with maximum rates for supplying the citizens, we find no specifications limiting the period to ten years, or during the term of the contract. This clause of the contract provides: "In further consideration of the said payments by the said city of Mobile, the Mobile Electric Company does hereby agree to the establishment of the following maximum rates for the sale and distribution of electricity over a system of poles and wires throughout the city of Mobile, to remain in force perpetually."

Therefore, in dealing with the service to be given the city for public lights, the time limit is fixed as ten years, or during the life of the contract; but in dealing with the rate for furnishing the inhabitants with electricity it is to be maintained, not for ten years, but "perpetually." It is true that following the schedule of rates there is a clause in the contract providing for a discount in the following language: "A discount of 2 cents per K. W. H. to be allowed on the above rates if bills are paid within ten days after the said bills have been rendered, except that during the ten years of this contract the rate mentioned above from 0 to 50 shall be 10 cents per K. W. H. less a discount of 3 cents per K. W. H. if paid within ten days after the rendering of the bill therefor."

This was in no sense a limitation on the time for maintaining the rate and supplying the lights, but merely a provision for a discount of 3 cents as to a certain item during the limited period of ten years, referring, of course, to the ten year period for service to the city, indicating that the discount should be but 2 cents thereafter as to the entire schedule. It did not limit the maintenance of the rate to ten years, or terminate the entire contract in ten years, but applied the ten-year period only to the exception by allowing a 3-cent discount as to a certain item. It is manifest that the words used, "except during the ten years of this contract," were intended to except the discount rate as to a certain item from a longer term and carved out a ten-year period from this longer term. We are of the opinion that the contract negatives any intention of limiting the period of maintaining rates to the citizens to the ten-year period applicable to the service to the city, and that the parties thereto contemplated that the rate should continue "perpetually," or so long as they could lawfully contract for the maintenance of same.

The statute (§ 1260 of the Code of 1907) authorized the contract in question, and

provides no limitation upon the duration of same though it is the policy of the law to declare contracts of this character unenforceable for an indefinite time and unreasonable period, upon the theory that, while there may be no statutory inhibition, the municipality cannot, in the exercise of its delegated contractual right, perpetually or for an unreasonable time fasten upon the taxpayers and inhabitants rates and obligations that cannot be changed or regulated during reasonable intervals so as to meet changed conditions and thereby avoid extortion and oppression. *McQuillin, Mun. Corp.* pp. 3718, 3719; *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; *Bessemer v. Bessemer Water Works*, *supra*. Such contracts are not specially prohibited or made void in toto by any statute of this state, but are deemed invalid under the policy of our law to the extent to which they may transcend a reasonable and lawful period. Nor do they belong to that class which are void because contrary to public morals, etc. It is only the excess which offends against the policy of the law, and which will be separated from the valid period and declared unenforceable. *Robertson v. Hayes*, 83 Ala. 290, 3 So. 674; *Trammell v. Chambers County*, 93 Ala. 388, 9 So. 815; *Weller v. Gadsden*, 141 Ala. 642, 37 So. 682, 3 Ann. Cas. 981.

In the *Robertson Case*, *supra*, the court dealt with a lease for a term beyond the period fixed by the statute, and held that the statute operated only against the excess, and that the lease was valid for the term authorized, distinguishing our statute from the New York one. The *Trammell Case*, *supra*, involved a contract for the hire of convicts extending beyond the period authorized by the statute, and the court, citing the *Robertson Case*, held that the contract was not void in toto, and if void to any extent was only so as to the excess. The *Weller Case*, 141 Ala. 642, 37 So. 682, 3 Ann. Cas. 981, is directly in point, except that the contract there was for water, instead of lights, and the opinion of *Tyson, J.*, states, in effect, that should the contract cover a prohibited period it would be declared invalid for the excess beyond the permissible period. It is true the conclusion, rather than the opinion, was adopted by the court, but said opinion was subsequently practically approved and adopted in the case of *Mitchell v. Gadsden*, 145 Ala. 137, 40 So. 350.

It is therefore manifest, regardless of the views of some of the other courts, that our own court has uniformly held that such contracts are separable, and have enforced them when not prohibited or void in toto, to

the extent that they are not prohibited, striking down only the excess, or the part which is prohibited. We, of course, realize that courts cannot make contracts for parties, and that the enforcement of one materially different from the one they made would be the equivalent of making a new contract, but upholding the present contract to the extent of its legality, and declining to enforce the same beyond a lawful period, does not result in making a new contract, or the enforcement of obligations not incurred. It is evident that the parties intended that the rate provided should be maintained for all time, and which included any lawful period of duration, and that it was expected that each party to the contract would live up to same so long as they were legally permitted to do so. We hold that this clause of the contract is still binding upon the parties thereto and requires them to live up to same for the maximum period fixed by law for the life of such contract, and which seems to be thirty years. While no fixed period has been heretofore announced as to the duration of contracts like the one under consideration, it has been several times intimated by this court that, as § 228 of the Constitution of 1901 limits certain franchises to thirty years, this should create, by way of analogy, a rule to be applied to contracts of this character. *Bessemer Case*, *supra*, we therefore, think, and accordingly hold, that the contract, in so far as it applies to furnishing electricity to the inhabitants as distinguished from the city for public purposes, and fixing a rate for same, terminates thirty years from the execution of the new contract, modifying the old one, to wit, 1901, unless the respondent's franchise sooner expires. If the franchise expires before the thirty-year period, the present contract shall terminate therewith.

We are not unmindful of the fact that the rule in this state of holding contracts not *malum in se*, invalid only as to the time unauthorized, is not in accord with several cases by other courts, notably the case of *Westminster Water Co. v. Westminster*, 98 Md. 551, 64 L.R.A. 630, 103 Am. St. Rep. 424, 56 Atl. 990. We are supported, however, by the Kansas court in the case of *Columbus Waterworks v. Columbus*, 48 Kan. 99, 15 L.R.A. 354, 28 Pac. 1097, and the United States Supreme Court in the case of *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315. See also *McCullough v. Smith*, 156 C. C. A. 335, 243 Fed. 823, and many cases there cited. And just what our holding would be as an original proposition matters not as the present rule was announced in the *Robertson* and *Trammell Cases*, *supra*, more than

a quarter of a century ago, and operated as notice to contracting parties that, although they made contracts for a period beyond the lawful limit, the excess would be disregarded and the contract upheld for such period as was authorized. True, the Robertson Case dealt with a lease, but the doctrine was applied in the Trammell Case to a contract of hire.

The cases of *Greenville v. Greenville Water Works*, 125 Ala. 626, 27 So. 764, and *Montgomery v. Waterworks*, 79 Ala. 233, have but little bearing upon the question here the one way or the other. They in effect proceeded upon the assumption that whether the contract was void or not, it could be enforced as to the executed part of same from year to year, or, if void in toto when the water was furnished and consumed, the transaction would be treated as renewed from month to month and year to year. Neither of these cases involved an enforcement of the contract for the full period, or the determination of the question now under consideration.

It is insisted that the bill is without equity because it invokes the specific performance of a contract involving the performance of continuous reciprocal duties: that the citizens have a plain and adequate remedy at law; and that the municipality cannot maintain such a bill. There is no merit in this contention as the bill has equity upon the authority of *Bienville Water Supply Co. v. Mobile*, 112 Ala. 260, 33 L.R.A. 59, 57 Am. St. Rep. 28, 20 So. 742, and the well-considered case by the Maryland court of *Washington County Water Co. v. Hagerstown*, 116 Md. 497, 82 Atl. 826, Ann. Cas. 1913C, 1022. While the bill is in the nature of a bill for specific performance of a contract, it does not call for the continuous performance of same by all the parties thereto, running through a series of years; it seeks by the negative means of injunction the enforcement of a public duty by preventing the respondent from shutting off the lights of the citizens who comply with the terms of an existing

contract placing upon the respondent the discharge of a public duty.

The city has the authority to file the bill, notwithstanding the citizens could redress the wrong individually or collectively. Authorities, *supra*. The suit is not to recover loss or injury suffered by an individual, but is brought by the municipality, representing the inhabitants, to prevent a possible loss or inconvenience to them by a noncompliance on the part of the respondent with the contract made by it with the complainant. The contract was made by the city as the representative of the consumers, and it is in that capacity that the city is now acting to protect the inhabitants from the breach by the respondent of a public duty. It is true that the contract is a continuing one, and is the sort of contract that cannot be decreed to be specifically performed in the sense in which the word is generally used; but it is quite clear that the court may exercise jurisdiction by injunction to deter the respondent from openly breaking it by failing to perform a public duty thereby assumed. Hence this cause is unlike the Alabama cases cited and relied upon by appellant's counsel. The case of *Gulf Compress Co. v. Harris, C. & Co.* 168 Ala. 354, 24 L.R.A.(N.S.) 399, 48 So. 477, is not in conflict with the present holding, for while holding that the compress was not a "public service" corporation in the case of a railroad serving as a public carrier (we may add that a corporation like this respondent is a "public service" corporation), the opinion in the *Gulf Compress Case*, *supra*, expressly guards the holding by stating that "equitable remedies might be sought and applied in the former when they would not be in the latter."

The trial court did not err in overruling the demurrers to the bill of complaint, and the decree is affirmed.

McClellan, Sayre, and Gardner, JJ., concur.

## KANSAS SUPREME COURT.

S. S. HAWKS

v.

ATCHISON, TOPEKA, & SANTA FE  
RAILWAY COMPANY, Appt.

(103 Kan. 390, 173 Pac. 922.)

### Highway — obstruction — liability.

Where a resident lot owner's only means of ingress and egress to and from his garage,

situated at the back part of his lot, is through an alley, which is totally obstructed by a railway company in the operation of its cars on a railway track in the alley and in permitting its cars to stand in the alley, such person may maintain an action for

Note. — The liability of a railroad company for interference with an abutter's right of access is treated at page 764 of the note to *Rasch v. Nassau Electric R. Co.* 36 L.R.A.(N.S.) 673, on the general subject of an abutter's right to compensation for railroads in streets.

Headnote by DAWSON, J.

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damages, and in such action it is no excuse for the railway company that the railway track itself was properly constructed, and that it had obtained permission from the city to construct it.

*For other cases, see Highways, II. d, in Dig. 1-52 N. S.*

(July 6, 1918.)

**A** PPEAL by defendant from a judgment of the District Court for Sedgwick County in favor of plaintiff in an action brought to recover damages for alleged depreciation of his property from the construction and operation of a spur track by defendant. Affirmed.

The facts are stated in the opinion.

Messrs. William R. Smith, Owen J. Wood, and Alfred A. Scott, for appellant:

The damage to or depreciation in the plaintiff's property was due solely to the construction and operation, in a lawful manner, of the track in the alley, for which there can be no recovery.

Atchison & N. R. Co. v. Garside, 10 Kan. 552; Central Branch Union P. R. Co. v. Twine, 23 Kan. 585, 33 Am. Rep. 203; Central Branch Union P. R. Co. v. Andrews, 30 Kan. 590, 2 Pac. 677; Ottawa, O. C. & C. G. R. Co. v. Larson, 40 Kan. 301, 2 L.R.A. 59, 19 Pac. 661; Kansas, & D. R. Co. v. Cuykendall, 42 Kan. 234, 16 Am. St. Rep. 479, 21 Pac. 1051; Wichita & C. R. Co. v. Smith, 45 Kan. 264, 25 Pac. 623; Kansas, N. & D. R. Co. v. Mahler, 45 Kan. 565, 26 Pac. 22; Leavenworth, N. & S. R. Co. v. Curtan, 51 Kan. 432, 33 Pac. 297; Chicago, K. & W. R. Co. v. Union Invest. Co. 51 Kan. 600, 33 Pac. 378; Battese v. Union P. R. Co. 102 Kan. 468, 170 Pac. 811.

Messrs. George W. Adams and S. S. Hawks, for appellee:

The law presumes that when a railroad company builds a track it intends to operate its cars, engines, and trains thereon, and that such track is a permanent appropriation of the space occupied for railroad purposes, unless proof is offered to the contrary, that it is to be soon removed.

Central Branch Union P. R. Co. v. Twine, 23 Kan. 585, 33 Am. Rep. 203; Haynes v. Thomas, 7 Ind. 38; Elizabethtown L. & B. R. Co. v. Combs, 10 Bush, 382, 19 Am. Rep. 67; Jeffersonville, M. & I. R. Co. v. Esterle, 13 Bush, 667; Stetson v. Chicago & E. R. Co. 75 Ill. 74; Cincinnati & S. G. A. Street R. Co. v. Cumminsville, 14 Ohio St. 523; Central Branch Union P. R. Co. v. Andrews, 26 Kan. 702; Corby v. Chicago, R. I. & P. R. Co. 150 Mo. 457, 52 S. W. 282; Ottawa, O. C. & C. G. R. Co. v. Peterson, 51 Kan. 604, 33 Pac. 606.

L.R.A.1918F.

Dawson, J., delivered the opinion of the court:

This action is for damages sustained by plaintiff through the obstruction of the alley at the back of his residence lot in Wichita. The defendant built a railway track in the alley. The construction was proper, and done with permission of the city of Wichita. But when the defendant's railway freight cars were being operated or were standing on this alley track—and that was a good share of the time—they completely obstructed the alley, so that the plaintiff could not get into the alley or out of it with his automobile, and deprived him of the only access to his garage, which was situated on the back part of his residence lot.

The jury gave plaintiff a verdict for \$300 and answered certain special questions: and it is defendant's chief contention that it was entitled to judgment thereon. Some of these read: "Q. 9. When cars are standing or being run in the alley in the rear of plaintiff's property, can an ordinary vehicle pass such car or cars in said alley? A. No."

Defendant's questions:

"Q. 5. If the ingress or egress to plaintiff's property was obstructed by the construction of defendant's track, state how and in what manner the obstruction was caused. A. (No answer returned by the jury.)

"Q. 6. If the construction of said track in said alley caused damage to and depreciation in the value of plaintiff's property, state in what respect or manner the property was thus damaged. A. In the appropriating of the center of the alley for track purposes and the operating thereon.

"Q. 7. Was plaintiff's ingress and egress to and from his premises materially interfered with by the track in question, except when cars were left in the alley both north and south of plaintiff's barn and in the same block? A. No.

"Q. 9. If you find for plaintiff, what amount do you allow, if any, for damage caused by reason of defendant negligently leaving cars standing in the alley in question since the commencement of his suit, March 4, 1916? A. Not any.

"Q. 11. If you find for plaintiff, how much do you allow for obstruction to plaintiff's ingress and egress to his property by defendant's cars being on the track in said alley? A. Nothing, save only as explained in answer to question No. 6."

It is defendant's contention that the findings show that both the construction of the track and the operation thereon were in a lawful manner, and familiar decisions are cited which hold that damages are not re-



coverable under those circumstances. But we cannot agree that the findings show that the operation of the cars was lawful. The petition charged that defendant "took possession of said alley and confiscated the same to its own use and benefit by . . . leaving its cars stand on its track in said alley, so that the same entirely blocked, obstructed, and shut off the use of said alley to this plaintiff; that . . . by reason of cars being left standing thereon plaintiff's ingress and egress from his said property to and from and through said alley has been entirely blocked, obstructed, and shut off; that plaintiff bought said lot for a homestead and built his barn or garage with reference to his outlet for ingress and egress through said alley; and that he has no other opening or outlet for ingress or egress to his said barn or garage except to and from and through said alley."

The proof tended to establish these facts; and some of the jury's findings are a conclusive determination of the matter. Indeed, defendant's seventh question is couched in a form which practically concedes the wrong complained of. And surely it cannot be said that the complete and total obstruction of the alley for a considerable portion of the time is lawful, unless some compensation be given to those specially injured thereby. No Kansas decision is cited which goes so far, and even in the pioneer case cited by defendant, *Atchison & N. R. Co. v. Garside*, 10 Kan. 552, it was said: "But where the property is a street or highway, the railway company will be liable to any person who may receive actual injury from the illegal or unnecessary blocking up or obstructing of such street or highway by the railroad company, whether the obstruction be permanent or only temporary." (Syl. ¶ 3.)

Again, in *Central Branch Union P. R. Co. v. Twine*, 23 Kan. 585, 33 Am. Rep. 203: "Or, if [the railway company] unnecessarily and unreasonably leaves its cars standing on the track so as to interfere with approach to the lot, the lot owner may recover damages therefor." (Syl. ¶ 1.)

In *Ottawa O. C. & C. G. R. Co. v. Larson*, 40 Kan. 301, 2 L.R.A. 50, 19 Pac. 661, it was said: "But such a company cannot, any more than an individual wrongfully and unnecessarily block up or obstruct a street without being liable therefor." (Syl. ¶ 1.)

The later cases all recognize this principle. *Kansas, N. & D. R. Co. v. Cuykendall*, 42 Kan. 234, 16 Am. St. Rep. 479, 21 Pac. 1051; *Wichita & C. R. Co. v. Smith*, 45 Kan. 264, 25 Pac. 623; *Kansas, N. & D. R. Co. v. Mahler*, 45 Kan. 565, 26 Pac. 22; *Leavenworth, N. & S. R. Co. v. Curtan*,

51 Kan. 432, 33 Pac. 297; *Chicago, K. & W. R. Co. v. Union Invest. Co.* 51 Kan. 600, 33 Pac. 378. See also *Stephenson v. Atchison, R. Light & P. Co.* 88 Kan. 794, 129 Pac. 1188; *Marshall v. Wichita & M. Valley R. Co.* 96 Kan. 470, 152 Pac. 634.

The findings make it clear that there was a total appropriation of the alley for the occupancy of railway cars, either standing or operating, and a complete obstruction of the alley, which wholly deprived plaintiff of ingress and egress to and from his garage and back lot for a considerable part of the time. The recovery was not for partial obstruction, but for complete obstruction for part of the time. Certainly this wrong entitled plaintiff to some legal or equitable redress. *Longnecker v. Wichita R. & Light Co.* 80 Kan. 413, 102 Pac. 492; *Jackson v. Kiel*, 13 Colo. 378, 6 L.R.A. 254, 16 Am. St. Rep. 207, 22 Pac. 504. See also extended note in 36 L.R.A.(N.S.) 673, at pages 764 et seq.

The jury's answers to plaintiff's question 9 and to defendant's questions 6 and 11 render immaterial their failure to answer question 5; and, moreover, question 5 is rather misleading, for plaintiff's grievance was not the mere construction of the track, but the exclusive use of the alley for railway purposes, to the special damage of plaintiff in the deprivation of access to his garage.

Complaint is made of the trial court's instructions, but nothing serious can be discerned therein. Moreover, in this case, in view of the jury's findings, the plaintiff was entitled to damages, and the instructions criticized were not very material. The only damages allowed were for those already sustained when the action was filed (defendant's Q. 9), and the amount of the recovery, \$300, is no greater than the damages sustained, measured by any rule of law.

The judgment is affirmed.

#### KENTUCKY COURT OF APPEALS.

HENRY S. BARKER et al., Appts.,  
v.

FRANK CRUM et al.

(177 Ky. 637, 198 S. W. 211.)

**State institution — admitting selected student free in state university.**

1. The legislature cannot permit the counties of the state to send selected students to the State University free of tuition and

**Note.** — As to free tuition in state educational institutions, see annotation following this case, post, 681.

dormitory fees, under a Constitution forbidding the granting of exclusive public privileges, except in consideration of public services.

*For other cases, see Constitutional Law, II. a, 1, in Dig. 1-52 N. S.*

**Contract — consideration — payment of taxes.**

2. The payment of taxes by a county is no consideration for an agreement by the state to permit it to send selected students to the State University free of expense.

*For other cases, see Contracts, I. c, 2, in Dig. 1-52 N. S.*

**State institution — free tuition — constitutional sanction.**

3. A proviso in a constitutional provision requiring consent of the electors to the collection of money for education, that the tax now imposed for the State University shall remain until changed by law, does not ratify statutory authorization of free tuition in such university for selected students from counties, contrary to a constitutional provision that special privileges shall not be conferred, except for public service.

*For other cases, see State Universities, in Dig. 1-52 N. S.*

**Constitutional law — classification — free tuition in state university.**

4. A statute allowing counties to send a select list of students to the State University, free of charge, cannot be upheld on the theory of classification because only students who pass certain examinations may be sent, if the county is to send not all who pass such examinations, but certain students selected therefrom.

*For other cases, see Constitutional Law, II. a, 1, in Dig. 1-52 N. S.*

**Same — contemporaneous construction — effect.**

5. That the public officials have, for a long time, acted upon an unconstitutional statute, permitting counties to send selected students to the State University free of charge, does not validate the statute, on the theory of contemporaneous construction.

*For other cases, see State Universities, in Dig. 1-52 N. S.*

(Sampson, J., dissents.)

(November 9, 1917.)

**A** PPEAL by plaintiffs from a judgment of the Circuit Court for Fayette County in favor of defendants in an action brought to test their right to attend the State University without the payment of certain fees and expenses. Reversed.

The facts are stated in the opinion.

Messrs. **M. M. Logan**, Attorney General, and **Henry S. Barker**, for appellants:

The receiving of separate public emoluments or privileges by any man or set of men, except in consideration of public

service, is forbidden by the state Constitution.

*Bosworth v. Harp*, 154 Ky. 559, 45 L.R.A. (N.S.) 692, 157 S. W. 1084, Ann. Cas. 1915C, 277; *Ferguson v. Landram*, 1 Bush. 548.

The court pays no attention to the doctrine of contemporaneous construction in construing the Constitution.

*Bosworth v. State University*, 166 Ky. 430, L.R.A.1917B, 808, 179 S. W. 403.

Messrs. **Charles Carroll** and **T. C. Carroll** for appellees.

**Miller, J.**, delivered the opinion of the court:

This case was instituted by the appellant, and tried upon an agreed statement of facts, for the purpose of testing the right of the appellees, who are students in the State University, to attend that institution without paying tuition, matriculation fees, room rent, fuel and lights, or their traveling expenses in going to and returning from the University. The right to so attend the University without paying these fees and expenses is claimed under § 7 of the Act of 1908 (Laws 1908, chap. 31, which is incorporated into the Kentucky Statutes as subsection 7 of § 4636a. and reads as follows: "Each county in the state, in consideration of the incomes accruing to said institution, under the present laws, for the benefit of the said Agricultural and Mechanical College, be entitled to select and send to said University each year one or more properly prepared students, as herein-after provided for, free from all charges for tuition, matriculation fees, room rent, fuel and lights, and to have all the advantages and privileges of the said University, one white pupil for every three thousand, and one for each fraction thereof over fifteen hundred of white school children, based upon the last official census preceding said appointment: Provided, however, that every county shall be entitled to at least one annual appointment. Said students shall be entitled, free of any cost whatever, to the benefits enumerated above for the term of years necessary to complete the course of study in which he or she matriculates for graduation, or during good behavior. All beneficiaries of the state who continue students for one consecutive, collegiate year, or ten months, unless unavoidably prevented, shall also be entitled to their necessary traveling expenses in going to and returning from said college. The selection of the beneficiaries shall be made by the superintendents of common schools in their respective counties, upon competitive examination, on subjects prepared by the faculty of the University and trans-

mitted to said superintendents before the first day of June, of each year. Said competitive examinations shall be open to all persons between the ages of fourteen and twenty-four years. Preference shall be given, other things being equal, to those who have passed with credit through the public school, persons of energy and industry, whose means are small, to aid whom in obtaining a good education, this provision is intended. Said competitive examination shall be held, and the successful competitor appointed between the first day of June and the first day of August of each year. It shall be the duty of the county superintendent to make known the benefits of this provision to each common school district under his superintendency, with the time and place, when and where such competitive examination shall be held. He shall, for this purpose, appoint a board of examiners, whose duty it shall be to conduct the examination. This shall not interfere with any appointment already made to said college."

It is conceded that the five appellees are students attending the State University; that each of them was selected from the county of his residence in the manner prescribed by the statute and has the qualifications and was appointed in the manner and upon the terms therein prescribed: and that he is entitled to attend said institution free of all charges for tuition, matriculation fees, room rent, fuel and lights, and to have his necessary traveling expenses paid in going to and returning from said University, provided that the statute above quoted is constitutional. It is further agreed that the Agricultural and Mechanical College of Kentucky, the predecessor of the present State University, was established by an act of the general assembly of Kentucky approved February 22, 1865 (Laws 1865, chap. 968), for the purpose of taking advantage of the act of Congress, approved July 2, 1862, chap. 130, 12 Stat. at L. 503, and entitled "An Act Donating Public Lands to the Several States and Territories Which May Provide Colleges for the Benefit of Agriculture and the Mechanic Arts." 2 Fed. Stat. Anno. p. 850. It is further stipulated that from 1865 to the present time students from the various counties in the state have attended, free of certain charges, and with certain rights and privileges, the college thus established by the state of Kentucky under the provisions of the statute of that year and subsequent acts of the general assembly, extending said college and consolidating it with other colleges, and that said students so attended by virtue of the general laws enacted by the general assembly of Kentucky, giving

them that right. Finally, it is agreed that a large number of students so attending the University studied branches taught therein, other than those pertaining to agriculture and the mechanic arts.

The appellees contend that subsection 7 of § 4636a of the Kentucky statutes, above quoted, is constitutional: (1) Because it is the result of a contract between the state and the various counties thereof that, in consideration of the levying of a tax to support the college, certain selected students from each county can attend free of the charges in question; (2) because under § 184 of the Constitution the general assembly was given the power to establish a higher school of training than common schools, and it was also given discretion as to the manner in which it should be conducted, and who should attend it; (3) because the students appointed under the statute to attend the State University constitute a class to which § 3 of the Bill of Rights does not apply; and (4) that the statute will be upheld under the doctrine of contemporaneous construction. On the other hand, the appellants, the officers of the State University contend that all students attending the State University must be treated alike and placed upon the same footing with regard to charges for tuition fees, room rent, fuel and light, and traveling expenses, and that to exempt the appellees, under the statute above quoted, would do violence to § 3 of the Bill of Rights of the Constitution of Kentucky, which provides that "No grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services."

The circuit court held the statute was constitutional: and it accordingly entered a judgment directing the State University officers to receive the defendants as students, and to provide them with tuition, room rent, fuel and light, and traveling expenses, free of charge. From that judgment the plaintiffs prosecute this appeal.

The circuit judge stated the reasons for the conclusions reached by him in a written opinion, in which he concedes that the enjoyment of these advantages by the students without paying therefor is a privilege or emolument which is not enjoyed by other students at the University; that the appellees have not and are not now rendering any service to the state of Kentucky which would entitle them to any such special privileges; that, if the granting of such rights is to be upheld, it must be upon some ground other than that of services rendered by the students who receive the bounties; and that, if the case shall be

decided solely upon the rule and principle as laid down in § 3 of the Bill of Rights, *supra*, it must be adjudged that the appellees are not entitled to the privileges in question.

The opinion of the circuit judge stated more than once that the claim of the appellees could not be sustained under § 3 of the Bill of Rights alone; that it could only be sustained upon the principle that there is an obligation upon the part of the state to aid in the education of its citizens; and that the statute, under which the University is supported and the appellees are receiving special privileges, can only be upheld upon the idea that the state is justified in taxing all of its citizens for the purpose of giving a select few instruction in the higher branches of a college education. The circuit court further gave some effect to § 184 of the Constitution, which provides for the preservation of the common school fund of the state as follows: "The tax now imposed for educational purposes, and for the endowment and maintenance of the Agricultural and Mechanical College, shall remain until changed by law."

And stress was laid upon the fact that when the present Constitution, containing § 184, *supra*, was adopted, certain statutes for the maintenance of the Agricultural and Mechanical College, the predecessor of the State University, and carrying some of the privileges now claimed by the appellees, were upon the statute book, and their provisions presumably were well known to the members of the constitutional convention and possibly to the voters who approved the Constitution. In this way the circuit court applied the rule of contemporaneous construction, and held that, although the exemptions constituted special privileges and emoluments denounced by the Bill of Rights, in view of the fact that they had been recognized for many years by the legislature and the state officers in disbursing funds under the act, it must be treated as valid.

We cannot agree with the conclusions reached by the circuit court. If the statute relied on grants any exclusive privileges to these students, it is to that extent in direct violation of § 3 of the Bill of Rights, and cannot be upheld, upon any ground, if the Constitution is to remain the paramount law of this commonwealth. The Constitution is the organic law by which the people, among other things, have put certain clearly expressed limitations upon the power of the legislature. It is the embodied will of the people, by which they govern their governors. If the legislature may ignore or explain away a provision of the Constitution, in order that

some conceded or fancied good may be accomplished in individual cases, then § 3 of the Bill of Rights was adopted in vain.

The constitutional declaration against the granting of special privileges to any man or set of men states the sweeping prohibition and the only exception thereto. They can be granted to no one, except in consideration of public services theretofore rendered. It is immaterial who the man is, or where the set of men reside, or how they are distributed throughout the state: unless they earn them in the manner pointed out in the Constitution, to wit, by the rendition of public services, they are prohibited. The statute under consideration can, therefore, be sustained only upon the theory that these students have rendered such public service as would entitle them to something more at the hands of the state than the thousands of other worthy girls and boys in precisely the same situation. But they make no such claim, and cannot truthfully do so. It would seem, therefore, that the case against them stands confessed, and that it is unnecessary to define the terms "public emoluments or privileges," or "public services," as used in the Bill of Rights. The prohibitory words are so elementary as to need no explanation or definition. If the privilege granted is not conferred on all alike, it is special or exclusive, and therefore prohibited, unless granted in consideration of services theretofore rendered to the state.

There is some difficulty in defining "public services," as here used, with a satisfactory degree of precision. However, we are not without authority directly in point. In 1865 (Acts 1865, chaps. 950, 648) the legislature passed acts authorizing the county courts of Boone and Gallatin counties, respectively, to issue county bonds for the purpose of raising and paying money, in procuring volunteers and substitutes in the place of men drafted in those counties for service in the Army of the United States. The constitutionality of these statutes was before this court in *Ferguson v. Landram*, 1 Bush, 548, and in holding the statute unconstitutional, Chief Justice Peters and Judges Robertson and Williams wrote separate opinions. In the opinion by Judge Williams he defined "separate emoluments and privileges" as follows: "Nor can such tax be imposed by virtue of § 1, Bill of Rights, in our state Constitution, because the 'separate emoluments or privileges' therein named is not for contemplated service to be rendered, but is allowed when the person shall, by heroic deeds, inventive genius, or great mental endowments, and a life of public virtue, become, in the judgment of the legislature, a public benefactor."

This definition was approved by this court in *Bosworth v. Harp*, 154 Ky. 559, 45 L.R.A. (N.S.) 692, 157 S. W. 1084, Ann. Cas. 1915C, 277, in an opinion sustaining the Confederate Pension Statute. That statute was sustained only upon the ground that the Confederate soldiers of Kentucky had rendered such public service to the state as would uphold the grant of a pension. But, as heretofore stated, the appellees do not contend that they have rendered any such public services as would entitle them to the special privilege of having their tuition, room rent, fuel and light, and traveling expenses paid out of the public treasury, while other students, equally as worthy, are required to pay for those privileges out of their individual funds. It would seem that the inevitable conclusion must follow that the statute is a manifest violation of the Constitution.

Appellees, however, urge four propositions in support of the constitutionality of the act. We will examine them briefly. The first contention is that the act should be sustained because it was the result of a contract between the state and the various counties thereof that, in consideration of the levy of a tax to support the University, certain selected students of each county could attend it, free of these charges. This proposition is not supported by any authority and, in our opinion, is wholly untenable. This argument is based upon the language of the statute, which recites that "each county in the state, in consideration of the incomes accruing to said institution," shall be entitled to select a specified number of pupils to attend the University, free of the charges therein specified. We have not, however, been referred to any facts existing between the state and the counties which constitute a contract that could be binding upon either the state or the counties. And, indeed, there is no claim that any formal contract was made or attempted. The state levies taxes upon all the people of the state, and without the consent of the counties. We fail to find a single element of contract, either binding upon the state or otherwise, and the mere recital in the statute that the counties may send pupils to the University in consideration of taxes levied by the state and paid by the counties did not constitute a contract of any kind. It is a mere legislative avowal, not a contract. Furthermore, the Constitution of 1850 contained substantially the same prohibition against special privileges; and, if the Statutes of 1865 or any subsequent statute attempted to create the contract claimed by appellees, it violated the Constitution of 1850.

Appellees' next contention is that the

statute is constitutional because, under § 184 of the Constitution, the general assembly was given power to establish a higher school of training than the common school, and it was also therein given discretion as to the manner in which it should be conducted, and who should attend it. Section 184 of the Constitution, in so far as it relates to the subject in hand, reads as follows: "No sum shall be raised or collected for education other than in common schools until the question of taxation is submitted to the legal voters, and the majority of the votes cast at said election shall be in favor of such taxation: Provided, the tax now imposed for educational purposes, and for the endowment and maintenance of the Agricultural & Mechanical College, shall remain until changed by law."

It is true the power of the legislature to create the State University has been directly and indirectly recognized by this court. See *Higgins v. Prater*, 91 Ky. 6, 14 S. W. 910; *Agricultural & M. College v. Hager*, 121 Ky. 1, 87 S. W. 1125; *Marsee v. Hager*, 125 Ky. 445, 101 S. W. 882; *James v. State University*, 131 Ky. 156, 114 S. W. 767. But § 184, *supra*, is in no way in conflict with § 3 of the Bill of Rights. It merely declares that the tax then levied for the endowment and maintenance of the Agricultural and Mechanical College (the predecessor of the State University) should remain until changed by law. It made no declaration as to the expenditure of the money so raised. It is not concerning the collection of the taxes that appellants are complaining. On the contrary, they doubtless favor the continuance of the tax for the endowment and maintenance of the University, but they are opposed to the use of the taxes thus collected for the purpose of endowing certain students rather than the University. As we read it, § 184 of the Constitution has no application to the question before us, which relates to the apportionment and application of the tax, and not to its exaction.

Thirdly, the appellees would sustain the constitutionality of the statute upon the ground that the students appointed under the statute constitute a class, and that § 3 of the Bill of Rights does not apply, for that reason. In support of this contention, they cite *Owen County Burley Tobacco Soc. v. Brumback*, 128 Ky. 137, 107 S. W. 710; and *Louisville R. Co. v. Louisville Fire & Life Protective Asso.* 151 Ky. 644, 43 L.R.A. (N.S.) 600, 152 S. W. 799, Ann. Cas. 1915A, 89. It is true that the statute in question creates a class, but it does not treat all of that class alike; and its vice is found in that omission. If the statute had provided that all students of a certain

age, who pass the required examination, should be entitled to enter the University, upon equal terms and conditions as to the payment of fees and other expenses, it might be said that the statute was unobjectionable. But here there is no such provision, since the class is first selected under an examination, and from that class another class is selected by the county superintendent, and the fortunate students thus arbitrarily selected are given money from the state treasury, where others who have likewise passed the required examination are required to pay their fees and traveling expenses. The cases relied upon have no application.

In *Dawson v. Lee*, 83 Ky. 49, it was attempted to sustain the constitutionality of an act establishing a uniform system of schools for the colored children of the state, which, by implication, excluded the negro children from any participation in the privileges of the common school fund set apart by the Constitution. In holding this act unconstitutional this court said "that state taxation for purposes of education should be provided for by general laws, applicable to all classes and races alike, and that all the children of the state are entitled to an equal share of the proceeds of the 'common school fund,' and of all state taxation for purposes of education."

The same general principle of equality in the participation of the school fund was announced in *Underwood v. Wood*, 93 Ky. 181, 15 L.R.A. 825, 19 S. W. 405.

Finally, it is contended that the statute should be sustained under the doctrine of contemporaneous construction; and, in support of this proposition, appellees rely upon *Clark's Run & S. River Turnp. Road Co. v. Com.* 96 Ky. 525, 29 S. W. 360, and *Agricultural & M. College v. Hager*, 121 Ky. 1, 87 S. W. 1125. As we understand the doctrine of contemporaneous construction as applied in the cases cited, it means that, in the interpretation of a statute ambiguous in meaning, the contemporaneous and long-continued construction placed upon it by those that have been called upon to carry it into effect is entitled to great respect in ascertaining the meaning of the statute. The rule is stated as follows in 36 Cyc. 1139: "Primarily it is the function and duty of the courts to interpret the meaning of a statute, and where they can ascertain the legislative intent by the use of intrinsic aids alone, resort to its contemporaneous construction by other persons is both unnecessary and improper. But where the language of the statute itself is ambiguous or uncertain, the opinions entertained by contemporaries as to its meaning are frequently the best guides to the legislative

intent. On the principle of contemporaneous exposition, common usage and practice under the statute, or a course of conduct indicating a particular understanding of it, will frequently be of great value in determining its real meaning, especially where such usage has been acquiesced in by all parties concerned, and has been extended over a long period of time. But no matter how long the usage has been established, or how general the acquiescence in the customary construction, it will not be permitted to vary or to defeat the real intention of the legislature, as expressed in the statute and interpreted by the court."

*Nichols v. Wells, Sneed* (Ky.) 255; *Louisville v. Louisville School Bd.* 119 Ky. 574, 84 S. E. 729; *Louisville v. Louisville Water Co.* 105 Ky. 754, 49 S. W. 766; *Com. ex rel. Louisville v. Ross*, 136 Ky. 315, 122 S. W. 161; *Com. v. Kentucky Distilleries & Warehouse Co.* 143 Ky. 314, 136 S. W. 1032, and *Louisville v. Board of Education*, 154 Ky. 319, 157 S. W. 379, are to the same effect.

But, in this case, neither the statute nor the Constitution is of doubtful meaning. Moreover, when a statute conflicts with a plain provision of the Constitution, the rule of contemporaneous construction is not applicable; otherwise, it would mean that a violation of the Constitution would be upheld, providing it had continued long enough to give it dignity. The statute which violates the Constitution is never effective for any purpose; it cannot be made constitutional by repeated violations of that instrument. This precise question was before this court in *Louisville v. Vreeland*, 140 Ky. 401, 131 S. W. 195, where it was attempted to sustain an unconstitutional act providing for the appointment of a gas inspector, upon the ground that it had been in operation for more than fifteen years, and that the city had paid out \$3,000 each year as salary for the inspector. In answer to that argument the court said: "No effect can be given the fact that since 1892 gas inspectors have been appointed for the city, and have been paid \$3,000 a year. Contemporaneous construction by the city authorities cannot override a mandatory provision of the Constitution of the state, which is expressed in no uncertain language, and has been several times construed by this court."

The reasons for this strict rule in the construction of constitutions is well stated in Lieber's excellent and interesting work entitled *Hermeneutics* (Hammond's ed.) p. 174, as follows: "Constitutions should, in ordinary cases, be construed closely, because their words have been well weighed, and because they form the great contract or agreement between the people at large,

or between the people and their ruling race. . . . As we may interpret a will with greater freedom than a contract, and a contract, if it relates to a few who concede, more comprehensively than a law which has general effect, so we may construe a law with more freedom (provided no party be injured thereby) than a constitution, for the latter contains the most general rules applying to all. It is calculated for relations in which everyone has a common interest; and, as the interests common to all in a large community must be less in number than those which may be equally shared between a few persons, a strict adherence to the constitution is necessary to maintain the universality of its application and secure uniformity in its effect."

See also *Kelly v. Fields*, 167 Ky. 796, 181 S. W. 657, where it was said that the rule of contemporaneous construction applied only to statutes, and not to the mandatory provisions of the Constitution.

We conclude, therefore, that neither of the grounds relied upon is maintainable, and that so much of subsection 7 of § 4636a of the Kentucky Statutes as exempts the appellees from paying matriculation and tuition fees, room rent, fuel and light, and traveling expenses, violates § 3 of the Bill of Rights, and is void. Provisions substantially identical with § 3 of our present Bill of Rights have been incorporated into all the previous Constitutions of Kentucky, and the conclusion here reached is reinforced by a notable legislative incident in the early history of the state in connection with the pension of \$300 per year granted to Chief Justice George Muter in 1806. *Acts 1806*, p. 363.

It was the first pension to a retired judge ever granted in the United States. *Baldwin's American Judiciary*, p. 326. And the earliest discussion upon the subject, of which we now have a record, is found in the legislative proceedings in connection with the repeal of that statute in 1809. *Acts 1808-09*, chap. 28. At that time there seems to have been quite a difference of opinion as to the meaning of the words "public service" as used in the Bill of Rights, and the prevailing opinion was radically different from our modern ideas upon the subject. The facts were of so striking a nature as to bring the case sharply to the attention of the public, as well as to the legislature, and presented a most meritorious case for an application of the constitutional exception, as we now understand it.

George Muter was chief justice of the Kentucky court of appeals from 1792 to 1806. He was a Scotchman, and had grown old in the military and judicial services of

Virginia and Kentucky. By 1806 he had practically become incapacitated from performing his duties as chief justice; but, on account of his exalted character and distinguished public services, the legislature of that year appointed a committee to call upon Judge Muter, and to know of him if he would resign, expressing a high sense of his past services, and declaring that a comfortable subsistence, in case of his resignation, ought to be provided for him by a generous people. At the same time the committee presented to Judge Muter a resolution of respect adopted by the House of Representatives, reading as follows:

"Resolved, that those who have devoted the best part of their lives to the public service, and from age and infirmity have become unable to discharge the important duties assigned them, with requisite ability and despatch, or to procure for themselves a comfortable subsistence, ought to be provided for by a generous people; whereas it appears to this legislature that the Honorable George Muter, Esq., chief justice of this commonwealth, is a person of this description, and for whom such provision should be made, if he would gratify the wishes of his country, by resigning the important office he now holds: but in order to prevent any misapprehension of their views or sentiments on this subject, and in justice to their own feelings, the legislature deem it their sacred and indispensable duty to declare they entertain a very high sense of his integrity and attachment to liberty and his country, and they recollect with gratitude his patriotic exertions in our revolutionary contest. And they beg leave further to assure him that neither this, nor any measure that has taken place or been attempted during the present session, has been dictated by any design or wish to cast odium or censure upon his character; but every measure has been and will be the result of sincere desire to promote the happiness and welfare of their constituents.

"Resolved, that a committee be appointed to wait on the Honorable George Muter with the foregoing resolution."

In reply to the committee Judge Muter said: "Gentlemen, my country first called me into her service: I will retire when she no longer needs my services. I will make no agreement as to any particular sum for resigning my office. Let the proceedings which have already been or may be spread on the journals of the house on this subject be erased, and I promise you to resign, trusting to the justice and generosity of the legislature to make what provision for my support they may think right."

The proceedings relating to the resolution

were erased, Judge Muter resigned his office of chief justice of this court, and the legislature promptly passed the Act of December 22, 1806, providing him with a modest pension as above indicated, the preamble reciting the facts relating to his distinguished services to the state, his resignation, his age and infirmity, and his poverty. Acts 1806, p. 363. Notwithstanding all this, in 1809 the legislature repealed the Pension Act of 1806, over the objection of the governor; and it is from the veto message of Governor Scott that we glean the prevailing view of that day (in which he did not concur) as to the meaning of the words "public service."

In the course of his veto message, Governor Scott, who disclaimed being a lawyer, stated the case as follows:

"But it may be objected that the expression 'public service' in the Constitution means only a compensation or salary for services, to be given to a public officer while performing the duties of his office. It turns, then, not upon any precise and absolute prohibition, but upon a mere point of construction. But if the Constitution intended to prohibit the legislature from giving a shilling to the most illustrious citizen, who should have sacrificed his all in the service of his country, beyond the ordinary pay allowed to one who had the same duty assigned to him and who had barely escaped censure; if it had intended to cut up by the roots national generosity and national bounty, to one who may have saved the state by his extraordinary exertions; if it told the legislature, You shall not give to the disabled soldier who has lost his limbs in the battles of his country a cent or an inch of ground after he has received the ordinary pay, but he shall return and trust to ordinary charity, or have the privilege to die in poverty at home; if it has been declared that, in case he falls, you shall extend no relief as a public body to his widow and orphan children; if it has told you, in short, that it was intended to exclude from our government what it should possess above any other on earth, the disposition and means of rewarding merit—I have not been able to find it in language intelligible to my mind, or so clear as to convince me that the framers of the Constitution intended to outrage human feeling, and prostrate the strongest motives to public service. For a belief that our country will take care of our best interests makes the soldier and the patriot. Far different is the conclusion which I have drawn from this section of the Constitution. Taking it all together, which appears to be the better way to understand it, while it is abolishing those exclusive privileges which are at-

tached to nobility and titles, as well as proscribing the abominable practice of pensioning favorites who have deserved nothing of their country, all of which prevail in kingly governments, the only order retained is that of merit, and the only claim to public emoluments is public service; but it has opened the road to public honor, emolument, and privilege, to all who may deserve them.

"Illusive, indeed, would be the invitation of the state to her citizens to persevere in devoting themselves, at every hazard, to her service, if she has told the legislature that a man who has spent the prime of his life in her service, in both civil and military capacity, who is called upon, in consequence of his age and infirmity, for public good, to resign, because he has not retained all the intellect and vigor of youth, because the office found him poor, and he has not enriched himself by speculating whilst a judge, and is now too poor to support himself, he shall be abandoned to die in want, or charitably be provided for amongst other beggars of a county.

"But the general sense of the people of this country, and many practical expositions of the legislature, are opposed to this construction of the Constitution; however, some of them, from correct motives no doubt, and principally from not having understood the circumstances of this case, may desire a repeal of this law. For if the legislature have a right to give by law \$10 to a man for public service, which has already been when that sum was not a part of the proposed or stipulated compensation, they have a right to give \$300 and they have as much right in my apprehension, to give it for twenty years, or during life, as for one year. Giving land for public services already performed must be as much prohibited as money; it is an emolument. And I beg leave to refer you to the objections made by my predecessor to a bill similar to this during the last session for a list of unconstitutional laws, if this be one.

"If, indeed, the principle be correct that the service, having been rendered, takes it out of the power of the legislature to grant any compensation for it, or to add to that which has been granted, scarce a session has elapsed, but an unconstitutional law has been passed." Sen. Jour. 1808-09, p. 150.

The repealing statute passed in the house of representatives, notwithstanding the veto, by a vote of 56 to 11, and in the senate, by a vote of 17 to 10.

From this narrative it will be seen that a century ago the opinion prevailed that emoluments in consideration of "public service," as used in the Bill of Rights, meant only compensation or salary for a public officer while performing the duties of his



office; and, the services having been rendered and paid for, the power of the legislature to grant any compensation by way of pension, or otherwise, or to add to that which has been granted, no longer existed. And it must not be overlooked that the Pension Act of 1806 was repealed after Governor Scott had called the legislature's attention to the fact that it partook of the nature of a contract.

While we do not say that the words "public service," as used in the present Bill of Rights, should be given the narrow meaning attributed to them by the legislature a century ago, that action is at least interesting and instructive, particularly in view of the scarcity of precedents upon the subject.

There is also a line of cases decided under constitutional provision similar to § 184 of our Constitution, and dealing with attempted appropriations of the state school fund to purposes which bear more or less resemblance to educational purposes, and which have been held invalid because they violated § 184 of the Constitution. See also § 180, Kentucky Constitution, prohibiting taxes collected for one purpose from being devoted to any other purpose. *Underwood v. Wood*, supra; *Halbert v. Sparks*, 9 Bush, 259; *Auditor v. Holland*, 14 Bush, 147; *Collins v. Henderson*, 11 Bush, 74; *Williamstown Graded Free School Dist. v. Webb*, 89 Ky. 265, 12 S. W. 298; *Board of Education v. Public Library*, 113 Ky. 243, 68 S. W. 10, and *Public Library v. Board of Education*, 25 Ky. L. Rep. 341, 75 S. W. 225, are illustrative cases upon this subject.

There is also another line of cases holding that statutes of the character of subsection 7 of § 4636a violate the constitutional requirement that taxes shall be levied and collected for public purposes only, and that this constitutional provision applies to an appropriation of taxes as well as to their collection. See § 171, Ky. Const. *State ex rel. Garth v. Switzler*, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245, is directly in point. In that case it was held that the maintenance of a state university, established by the state Con-

stitution, was a public purpose, but that the maintenance of free scholarships therein for the support of those students who were dependent upon their own exertions for their education, and were financially unable to obtain it otherwise, and who should pass the most meritorious examinations, constituted a use of public funds for private purposes, and a statute appropriating public moneys therefor violated the Missouri Constitution prohibiting grants in aid of any individual. To the same general effect, see *Kingman v. Brockton*, 153 Mass. 255, 11 L.R.A. 123, 26 N. E. 998; *People ex rel. Detroit & H. R. Co. v. Salem*, 20 Mich. 452, 4 Am. Rep. 400; *Citizens' Sav. & L. Asso. v. Topeka*, 20 Wall. 655, 22 L. ed. 455; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Feldman v. Charleston*, 23 S. C. 57, 55 Am. Rep. 6; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Curtis v. Whipple*, 24 Wis. 350, 1 Am. Rep. 187; and *Deal v. Mississippi County*, 107 Mo. 464, 14 L.R.A. 622, 18 S. W. 24. In each of these cases it was held that the fact that the state might be incidentally benefited by rebuilding a burned city, the establishment of manufactories, schools, libraries, etc., would not sustain the tax, and that the indirect good which arises in this way furnishes no basis for taxing other business and people to build up such occupations. But since these features of the case were not raised or discussed in the argument, we pass them without further discussion, and without deciding them, and rest our decision upon the point that the statute in question violates § 3 of the Bill of Rights, in that it confers special privileges and emoluments to the appellees, who have rendered no public service within the meaning of that section of the Constitution.

Judgment reversed, and action remanded, with instructions to the Circuit Court to set aside the judgment appealed from, and to enter a judgment denying the appellees the privileges awarded to them by the judgment of the Circuit Court.

*Sampson, J.*, dissenting.

Petition for rehearing denied

### Annotation—Free tuition in state educational institutions.

State educational institutions are, of course, under the control of the law-making power of the state. The great weight of authority holds, or assumes, that it is within the power of the law making body to provide for free tuition in such educational institutions to all residents of the state, or to such of them

as may hold scholarships, to be gained in a manner pointed out.

*M'Donald v. Hagins* (1845) 7 Blackf. (Ind.) 525 (construing provision that each county of the state may send a certain number of students to the State University, and holding that students might be sent to the law department);

State ex rel. Little v. University of Kansas (1895) 55 Kan. 389, 29 L.R.A. 378, 40 Pac. 656 (state may provide for free tuition to all residents of the state); Rutgers College v. Morgan (1904) 70 N. J. L. 460, 57 Atl. 250 (free tuition to those found entitled thereto by competitive examination); Connell v. Gray (1912) 33 Okla. 591, 42 L.R.A.(N.S.) 336, 127 Pac. 417, Ann. Cas. 1914B, 399 (free tuition to students, to be determined by competitive examination; provision does not bar college authorities from imposing charge for incidental expenses); State ex rel. Taylor v. Blease (1911) 90 S. O. 412, 73 S. E. 769 (construing provision for free tuition to students, to be determined by competitive examination); State ex rel. Priest v. University of Wisconsin (1882) 54 Wis. 159, 11 N. W. 472 (holding that the statute entitling students to free tuition does not prohibit the board of regents from imposing a charge for incidental expenses).

The validity of such a provision is also recognized in People ex rel. Hill v. Wicks (1886) 1 N. Y. S. R. 604, holding that, where the scholarships were to be granted by each academy and public school, normal schools were included. It is also recognized in People ex rel. Hill v. Crissey (1887) 45 Hun (N. Y.) 19, which, however, holds that normal schools are not included in the term academies and public schools.

In New Orleans v. Tulane Educational Fund (1909) 123 La. 550, 49 So. 171, an agreement by a university to furnish free tuition to a certain number of students appointed by the mayor of a certain city was enforced, and the university was held not entitled to make a charge against students for registration or laboratory fees.

Compare, on this point, with BARKER v. CRUM, ante, 673, holding that a statutory provision granting free tuition and other expenses to a designated number of students chosen from each county of the state, in part by competitive examination and in part by the exercise of discretion on the part of the examining board, is violative of the constitutional provision against granting exclusive special public emoluments or privileges.

To the same effect, see State ex rel. Garth v. Switzler (1898) 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245, holding that the maintenance of free scholarships in the State University, for the support of those students who are dependent upon their own exertions for education, and are financially

unable to attain it otherwise, and who shall pass the most meritorious examinations, is the use of funds for a private purpose, and a violation of the constitutional provision against granting special privileges to any individual.

In support of its decision in the latter case, the court reasoned: "The same authority is found in the Constitution to levy taxes to clothe and feed the children who may desire to attend the free public schools, as there is to raise money by taxation to hand over to young men and young women to support them, while they acquire what is termed 'the higher or university education'; but we find no warrant for either in the organic law of this state, or in the character of our government. It is one thing to provide for the establishment and maintenance of a state university and a system of free public schools,—the state, through its own officers, agencies, and municipalities, constructing and owning the buildings and apparatus, and employing the teachers as public functionaries, responsible under her own laws for the discharge of their duties,—and a wholly different thing to support private individuals who attend the university and public schools, by public taxation. But it is said that nothing is more common than the endowment of free scholarships as a part of the endowment of a university. This may be true of the universities of Europe, and individual instances are to be found in this country where some great benefactor of the race has, out of his own bounty, provided such scholarships; but these examples furnish no guide to the free states of this Union."

A. G. S.

#### WASHINGTON SUPREME COURT. (Department No. 1.)

LOUIS HENSEN, Appt.,

v.

W. H. PETER, Resp't.

(95 Wash. 628, 164 Pac. 512.)

#### Limitation of actions — against judgment lien — effect of injunction.

1. The running of the limitation period against the continuance of a judgment lien is suspended, pending the existence of an

Note. — As to effect of injunction to prevent running of Statute of Limitations, see annotation following this case, post, 688, and references therein to annotations on related questions.

injunction against selling the property under an execution levied under it.  
For other cases, see *Limitation of Actions*, IV. b, in *Dig. 1-52 N. S.*

Judicial sale — time — laches.

2. Selling property under execution within sixty-seven days after dissolution of an injunction against such sale is timely.  
For other cases, see *Limitation of Actions*, I. b, 2, in *Dig. 1-52 N. S.*

Same — return of writ — subsequent proceedings.

3. The return of an execution which has been levied, when proceedings under it are enjoined, will not prevent a sale under it after the injunction is dissolved.  
For other cases, see *Judicial Sale*, II. in *Dig. 1-52 N. S.*

(April 13, 1917.)

**A**PPEAL by plaintiff from an order of the Superior Court for King County denying a motion to confirm an execution sale of certain real property. Reversed.

The facts are stated in the opinion.

Messrs. McBurney & O'Connor, for appellant:

Defendant cannot now come into court and take advantage of his own wrong and be heard to say that plaintiff has lost his rights under his judgment and levy, to the benefit of defendant.

1 Black, *Judgm.* 2d ed. § 395, p. 625; 2 Freeman, *Judgm.* 4th ed. § 394, pp. 696, 697; 2 High, *Inj.* § 1536, p. 1519; 1 Joyce, *Inj.* § 670; Work v. Harper, 31 Miss. 107, 66 Am. Dec. 549; Overton v. Perkins, Mart. & Y. 367; Knox v. Randall, 24 Minn. 479; Steele v. Bliss, 166 Mich. 593, 37 L.R.A.(N.S.) 859, 132 N. W. 345, Ann. Cas. 1912D, 1020; Wilkinson v. Flowers, 37 Miss. 579, 75 Am. Dec. 78; Pulteney v. Warren, 6 Ves. Jr. 73, 31 Eng. Reprint, 944, 5 Revised Rep. 226; Smith v. Everly, 4 How. (Miss.) 178; Lynn v. Gridley, Walk. (Miss.) 548, 12 Am. Dec. 591; Marshall v. Minter, 43 Miss. 666.

• Messrs. Cochran & Plummer and Van Dyke & Thomas, for respondent:

The lien was discharged by the running of the Statute of Limitations.

Morgan v. Morgan, 10 Wash. 99, 38 Pac. 1054; Wood v. Carpenter, 101 U. S. 135, 25 L. ed. 807; Shellenberger v. Ransom, 31 Neb. 61, 10 L.R.A. 810, 28 Am. St. Rep. 500, 47 N. W. 700, 41 Neb. 631, 25 L.R.A. 564, 59 N. W. 935; State ex rel. Young v. Superior Ct. 43 Wash. 34, 85 Pac. 980; Seattle Brewing & Maltine Co. v. Donofrio, 59 Wash. 98, 109 Pac. 335; Hemen v. Rinehart, 45 Wash. 1, 87 Pac. 953; Murray v. Briggs, 29 Wash. 245, 69 Pac. 765; Humphries v. Sorenson, 33 Wash. 583, 74 Pac. 690; Tipton v.

Martzell, 21 Wash. 273, 75 Am. St. Rep. 838, 57 Pac. 806; 23 Cyc. 1402.

Webster, J., delivered the opinion of the court:

This is an appeal from an order denying a motion to confirm an execution sale of real property. The pertinent facts are these: On the 30th day of July, 1908, appellant Louis Hensen obtained a judgment against respondent W. H. Peter in the superior court of King county, in the sum of \$560. On the 20th day of November, 1913, appellant caused an execution to be issued upon the judgment, directed to the sheriff of Clallam county. On the 21st day of November, 1913, the execution was levied upon certain real property in Clallam county, belonging to respondent. Thereafter the property was duly advertised to be sold on January 10, 1914. On the 9th day of January, 1914, a temporary injunction was sued out of the superior court of Clallam county by respondent, restraining the sheriff and appellant from proceeding to sell the property under the execution. Upon trial, the injunction was dissolved and the action dismissed, whereupon respondent appealed to this court and superseded the judgment. The appeal was thereafter heard, and the judgment of the lower court affirmed. Peter v. Hensen, 86 Wash. 413, 150 Pac. 611. On the 4th day of January, 1916, the remittitur in the cause was filed in the office of the clerk of the superior court of Clallam county. On the 11th day of March, 1916, the property formerly levied upon was sold by the sheriff, and return of sale was duly made to the superior court of King county. Appellant thereafter moved for a confirmation of the sale, to which respondent objected upon the ground that, at the time the property was sold, more than six years had elapsed since the rendition of the judgment upon which the execution was based, and that, by virtue of the provisions of Rem. Code, § 459, the lien of the judgment had expired, and the sale was consequently void. This objection was sustained, and appellant's motion for confirmation denied, from which order this appeal is prosecuted.

Respondent urges that notwithstanding the injunction, upon the expiration of the statutory period of six years, the judgment ceased to be a lien upon his property, and that the sale under the execution was a nullity. Appellant contends that, inasmuch as the sale would have been made well within the six-year period but for the injunction which was subsequently dissolved, respondent cannot be heard to say that the lien has been discharged by the

running of the statute. The effect of an injunction, which is subsequently dissolved, on the lien upon real estate of a judgment which expires by limitation during the time the injunction is kept in force, is an important question, of first impression in this jurisdiction, and one upon which the courts are not in entire accord. Therefore, we have carefully examined the authorities in an effort to ascertain and adopt the correct rule.

Freeman, in his work on Judgments, 4th ed. vol. 2, § 394, after discussing the question at some length, concludes that the better view is that the issuing of an injunction which is subsequently dissolved does not destroy the judgment lien; that if the judgment debtor procures an injunction, and thereby prevents the enforcement of the judgment within the time limited by law, and the injunction is thereafter dissolved, he is, upon equitable grounds, not permitted to take advantage of his own wrong by urging that the lien has been lost by the delay caused by his writ.

In 1 Black on Judgments, 2d ed. § 395, the same view is expressed in the following language: "Where the execution of a judgment is restrained by injunction until the lien is lost by limitation, the party proceeding by injunction, upon its dissolution, cannot take advantage of such loss of the lien."

In 1 Joyce on Injunctions, § 670, the following rule is announced: "Equity will regard a judgment debtor, applying for an injunction to restrain the execution of the judgment, as consenting that if the injunction be improvidently granted, he will put his adversary in the same condition he was at the time it was granted, and therefore, if, while an execution has been unjustly restrained, the judgment has been barred at law by the Statute of Limitations, equity will furnish a remedy by enjoining the judgment defendant from pleading such statute."

High, in his Treatise on Injunctions, 4th ed. vol. 2, § 1536, announces this rule: "The effect of a decree dissolving an injunction against the enforcement of an execution at law is to restore the execution creditor to the same position which he occupied before the granting of the writ, and he may proceed to enforce his execution as if no injunction had been granted."

In the course of the opinion in *Pulteney v. Warren*, 6 Ves. Jr. 73, 31 Eng. Reprint, 944, Lord Eldon said: "I consider these persons as plaintiffs, asking an injunction, and impliedly saying they ask it upon the terms of putting this plaintiff [the defendant in the injunction proceedings] in exactly the same situation as if it had been

determined they were not entitled; for otherwise there is no color of justice calling upon the court to discuss the question whether they are entitled to equitable relief."

In *Work v. Harper*, 31 Miss. 107, 66 Am. Dec. 549, a case where a judgment creditor was prevented from enforcing his execution until after the expiration of the time prescribed by statute, in consequence of an injunction granted on application of a mortgagee of the property, the lien of whose mortgage was, at the time of the issuance of the injunction, secondary to that of the judgment, and the injunction was subsequently dissolved upon the failure of the mortgagee to establish his right to the writ, it was held that he could not take advantage of the fact that the lien of the judgment was lost. Mr. Justice Handy, speaking for the court, said: "Upon the first point, it appears that the judgment of the appellee was rendered on the 21st of October, 1846, and on the 16th of January, 1847, the appellant's bill was filed, by which the appellee was enjoined from proceeding to execution upon his judgment, until such time as the lien of the judgment was barred by the Statute of Limitations. The appellant now seeks to avail himself of the expiration of the lien, in order to protect his title under the mortgage. And the question is, whether he is entitled to do so, under the sanction of a court of equity. It is not and cannot properly be denied that the judgment was a valid lien upon the property at the time the execution was levied, and that it was superior to the claim of the appellant under the mortgage. That this just legal right has been prevented from being enforced until it is impaired or lost, and that, by the litigation which has been commenced and carried on by the appellant. And when he has failed to establish the claim to protection upon which the litigation was commenced, and it appears that he has improperly prevented the judgment creditor from enforcing his execution, he cannot be permitted to take advantage of the accidental circumstances occasioned by himself, that the lien of the judgment is lost. The loss of the lien has been occasioned by himself, against the will of the appellee, and without any fault on his part: and upon no principle of equity could he be held to lose his right, to the benefit of the appellant."

In *Sugg v. Thrasher*, 30 Miss. 135, the same court, in discussing the question, uses this language. "The general rule, as argued by counsel, that the Statute of Limitations, in all cases where it is applicable, is regarded as a meritorious defense, may, to the fullest extent, be admitted. The same

may be said in respect to the argument that it is a defense which may avail a party as well in equity as at law; and it may further be admitted that a court of equity will not lend its aid to deprive a party of the advantage of this defense, if fairly obtained. It may also be conceded that if the advantage of this defense has arisen from the laches of the creditor, and not from the conduct of the debtors, that it is their privilege to make it, and it is not within the province of the court to question its propriety, on the score of morality. But while these principles must be admitted as general rules, there are others of equal, if not of greater, potency, which must not be overlooked under the peculiar circumstances of this case. It is a familiar principle of equity that a man shall not be allowed to avail himself of an unconscientious advantage acquired over his adversary. The inquiry in this case naturally forces itself upon the mind. Why was it that the plaintiff at law delayed, this long period, to enforce his judgment? The response is that the debtors, by the means which they employed, forced him to delay. It was not an act of choice on his part, but one of legal compulsion. He but obeyed the process of the court, issued and kept in operation by the debtors, in the fruitless litigation which they carried on for this long period of time. That which is forced upon a party cannot be said to be his voluntary act. He ceased to prosecute his remedy on his judgment, because such was the command of the process, which issued in pursuance of the prayer of the debtors. . . . But it is not necessary to dwell on this point. It is sufficient to know that the plaintiff only obeyed the process in refraining from enforcing his judgment; and it certainly comes with a bad grace from parties who availed themselves of all the means known to the law, to continue this process in full operation, now to complain of the plaintiff's obedience to that which he dared not, under what ought to have been heavy penalties, to disobey. The question then simply resolves itself into this. If the plaintiff voluntarily omitted to prosecute his remedy until the bar of the statute attached, it is his misfortune, and the debtor is at liberty to set up the defense, as in any other case. If, on the contrary, the plaintiff's failure in this respect must be attributed to the obedience which he was bound to pay to the injunction, the failure must be regarded as the legitimate result of the act of the debtors, and they cannot, in conscience, interpose the statute as a defense. Not a doubt can exist that it was alone the injunction which caused the delay in issuing execution on the judgment; and, such being

the fact, the case falls completely within the rule of equity already stated."

Later in the opinion, in answer to the argument that courts should not, by construction, ingraft upon statutes exceptions that have not been clearly expressed by the legislature, it is said: "This rule is admitted to the fullest extent. The question is not one of either legislative or judicial exception, arising by construction of the statute, but whether, under the facts of the case, it is a defense of which the defendants can conscientiously avail themselves. It is admitted to be a defense at law, but such a defense as a court of equity, acting upon the consciences of the parties, will not permit them to make. Not that the defense of the Statute of Limitations is, of itself, unconscientious or immoral, but that it is rendered so by the facts and peculiar circumstances of the case. The right asserted was as clear as it was when the plaintiffs first encountered the injunction, and the object is to leave the parties, with respect to their rights, where they stood when the debtors commenced their litigation in the superior court of chancery. No principle upon which the Statute of Limitations rests is violated by this course. Admit that it is what counsel say it is, a statute of repose, every principle of justice and sound policy forbids that parties should by improper means, or by abusing the process of the law intended for salutary purposes, bring themselves with its operation, and enjoy the advantage thus unrighteously acquired. To sustain such a principle would be but holding out inducement to litigants to commence and protract, by artifice or other unauthorized means, vexatious litigation, with a view of finding immunity ultimately under the statute. When parties have fairly acquired this defense by regular course of things, they are entitled to the benefit of it, if they choose to make it, but they ought never to be encouraged to start prematurely in search of it, by protracting either unfounded or useless litigation."

In *Overton v. Perkins*, Mart. & Y. 367, the supreme court of that state held that the lien of a judgment, upon which execution has issued and been fixed by levy on the lands of the debtor, will not be defeated by the debtor's obtaining an injunction which is afterwards dissolved; that the injunction suspends but does not destroy the lien. In the course of the opinion the court said: "When property is once levied upon, either real or personal, the creditor has a right to have his judgment satisfied by the sale of the same, unless he be guilty of some default, by which he loses his lien. *Clerk v. Withers*, 1 Salk. 322, 91 Eng. Reprint, 286;

*Cooper v. Chitty*, 1 Burr. 34, 97 Eng. Reprint, 166, 1 W. Pl. 65, 96 Eng. Reprint, 36; *Lusk v. Ramsay*, 3 Munf. 441. This is a general rule, and to which no exception is found in the present case, as we will endeavor to show. What is an injunction? A writ issued upon the ex parte statement of the defendant at law, made to a court of equity, which admits the validity of the legal rights of the plaintiff at law, but relies upon a statement of facts which could not be there heard; and upon this the injunction is, in the first instance granted. If the facts are proved true, the injunction is made perpetual on a final hearing. But suppose they turn out false and fraudulent, merely intended to hinder and delay the creditor in the collection of his just debt? The creditor resists the pretended equity at great trouble and expense; and after years of litigation (fifteen years, in this instance) he procures the bill to be dismissed. Is he then to be told, his lien upon the property levied upon before the injunction restrained its sale is gone; the debtor has sold it in the meantime, and is now insolvent. Has the creditor been in any default? None. He has used all possible vigilance to collect his debt for the last fifteen years; is now contending with the second injunction; throughout has been vigilant, and only hindered and delayed in the collection of his debt by the acts of the debtor. Will not, then, the acts of the debtor do an injury to the creditor, in the enforcing of his judgment, if it is declared that the injunction destroyed the lien? If this would be the consequence of such a decision, it will be illegal to make it."

In *Wakefield v. Brown*, 38 Minn. 361, 8 Am. St. Rep. 671, 37 N. W. 788, it was held that the time during which a judgment creditor was, upon motion of the judgment debtor, enjoined by the court from enforcing his judgment, is to be excluded from the computation of the time within which the creditor is allowed to enforce his judgment. In that case the court said: "We are clearly of opinion that it must be held that the lien of the judgment was in life at the time of the issuing of the third execution, in October, 1863, upon the ground that the time from July 8, 1857, to October 21, 1858, during which execution was stayed by the court at the instance of the judgment debtor, must be excluded from the computation of the five years allowed by the statute. If so, then, of course, the second execution was issued and returned in time to preserve the lien of the judgment. At common law, the right to sue out an execution in a personal action was limited to a year and a day from the entry

of judgment. If the party had slipped his time, he was put to his action upon the judgment. This limitation of the common law was as inflexible and as positive as that of our statute: yet it was well established at common law that when the plaintiff had judgment with stay of execution, or execution was stayed by injunction the plaintiff might sue out an execution within one year after the stay terminated or the injunction was dissolved. On the same principle, if the defendant brought a writ of error, and thereby hindered the plaintiff from taking his execution within a year, and the plaintiff in error was nonsuited or the judgment affirmed, the defendant in error might proceed to execution after the year, without *scire facias*, because the writ of error was a *supersedeas* to the execution, and the plaintiff must acquiesce until he hears the judgment above. The reason for this is that, the stay of execution being with the consent and for the benefit of the judgment debtor, and the injunction or writ of error being his own act, he should not take advantage of them, nor could he be surprised or prejudiced by the delay, because that delay was in fact referable to himself. It would be unreasonable and inconsistent for the law to present to a party, in one hand, a command to do an act within a certain time under the penalty of losing his rights, and, with the other hand, restrain him from doing the act. For this reason, the time during which the plaintiff was thus prevented by the law from issuing execution was, at common law, excluded from the year allowed for that purpose."

See also *Knox v. Randall*, 24 Minn. 479.

In 1911 the supreme court of Michigan, considering the precise question presented by the case now before us, declared that it was one of first instance in that state, and, after examining numerous authorities, concluded that on both reason and authority the injunction operates as an interruption of the running of the Statute of Limitations, and will so operate as long as it is maintained in force. *Steele v. Bliss*, 166 Mich. 593, 37 L.R.A.(N.S.) 859, 132 N. W. 345, Ann. Cas. 1912D, 1020. As bearing upon the question, see also *United States v. Wiley*, 11 Wall. 508, 513, 20 L. ed. 211, 213; *Braun v. Sauerwein*, 10 Wall. 218, 223, 19 L. ed. 895, 897; *Amy v. Watertown*, 130 U. S. 320, 32 L. ed. 953, 9 Sup. Ct. Rep. 537; *Anderson v. Tydings*, 8 Md. 427, 63 Am. Dec. 708; *Wilkinson v. Flowers*, 37 Miss. 579, 75 Am. Dec. 78; 1 High. Inj. § 87; 19 Am. & Eng. Enc. Law, 2d ed 215; 10 R. C. L. 1269.

We cannot, without unduly extending this opinion, undertake to discuss in detail the cases holding to the contrary doc-

trine. Suffice it to say that every argument advanced in those cases is considered in the authorities already cited. We are convinced that the rule announced in the decisions and texts to which we have referred is sustained by the overwhelming weight of authority, both numerically and upon principle, and is founded in natural and moral justice.

This view is not open to the criticism of being judicial legislation in that it amounts to reading exceptions into a statute that the legislature has not seen fit to make. Nor does it rest upon the thought that the Statute of Limitations is inherently an unconscionable defense. Nor does it carry the implication that a litigant is to be penalized beyond the burdens ordinarily imposed by law for failing to maintain his position in a lawsuit. It merely declares that one shall not, by waging unfounded litigation, be rewarded at the expense of his unwilling opponent. It is based upon the equitable principle that a party will not be permitted to avail himself of an unconscientious advantage, obtained by his own wrongful act and without fault on the part of his adversary. It is sustained by the wholesome consideration that a party should not be permitted to profit by the abuse or misuse of legal process, or by imposing upon judicial tribunals litigation without merit. It is also fortified by that sound public policy which sets its face against putting a premium upon unrighteous and vexatious litigation, commenced and prosecuted by a party for the ulterior purpose of obtaining, by indirection, an advantage which in equity and good conscience he is not entitled to enjoy. In a number of states it is provided by statute in varying forms of words that the time during which the execution of a judgment or decree is enjoined or stayed shall not be computed as any part of the period of limitation; but the cases to which we have referred are not based upon such statutes.

It will not be necessary in this case to go into the question of whether, by suspending the right to proceed under the execution, the lien of the judgment was continued in force during such suspension and, in addition, for a period corresponding to the unexpired portion of the six years at the time the injunction was served, or that the judgment debtor must proceed within a reasonable time after the dissolution of the injunction. Appellant, at the time he was enjoined by respondent, had more than eight months in which to enforce his judgment. The property was sold under the execution sixty seven days after the filing of the remittitur in the superior court. Under either view, this was timely.

Upon the day following the service of the temporary injunction the sheriff of Clallam county made his return of the execution to the superior court of King county, attaching thereto a copy of the order of injunction. It is now urged that the sale was void for the reason that it was made after the return of the writ. This contention is without merit. It is well settled that, in the absence of a statute to the contrary, an officer who has entered upon the service of an execution by levying the same upon the property of the debtor before the return day may, after the return day and after the actual return, continue to hold the property and prosecute such further proceedings as may be necessary to convert the property, whether real or personal, into money for the purpose of satisfying the judgment. This is especially so where the sheriff has been interrupted by an injunction issued at the instance of the judgment debtor. 1 Freeman, Executions, 2d ed. §§ 58, 106; 1 Joyce, Inj. § 669; Knox v. Randall, supra; Corbin v. Pearce, 81 Ill. 461; Johnson v. Bemis, 7 Neb. 224; Moomey v. Maas, 22 Iowa, 380, 92 Am. Dec. 395; Savings Inst. v. Chinn, 7 Bush, 539; Van Gelder v. Van Gelder, 26 Hun, 356; Rose v. Ingram, 98 Ind. 276; Spang v. Com. 12 Pa. 358; Pettingill v. Moss, 3 Minn. 222, Gil. 151, 74 Am. Dec. 747; Wheaton v. Sexton, 4 Wheat. 503, 4 L. ed. 626; Clerk v. Withers, 2 Ld. Raym. 1073, 92 Eng. Reprint, 211.

The order appealed from will be reversed, with direction to confirm the sale.

Ellis, Ch. J., and Chadwick, and Main, JJ., concur.

A petition for rehearing having been filed, the following Per Curiam response was handed down on August 17, 1917 (97 Wash. 702, 166 Pac. 1119):

Respondent has filed a petition for a rehearing en banc of this case, and suggests that, in the event his petition should be denied, the court should fix a reasonable time, not less than thirty days, within which respondent may redeem the property affected by this litigation, by paying to appellant the amount of the judgment, with interest and costs. Our attention is directed to the fact that, during the pendency of the case in this court, and prior to the filing of the opinion, the period of redemption provided by § 594, Rem. Code, expired, the time limited by that statute beginning to run from the date of the execution sale.

We have again considered the question presented by this appeal, and are satisfied with the opinion heretofore filed in the case, and reported in 95 Wash. 628, ante, 682,

164 Pac. 512. The appeal was prosecuted from an order of the superior court, denying appellant's motion for confirmation of an execution sale of real property. The right of the respondent to redeem the property from the sale, in the event the judg-

ment of the lower court should be reversed, is not presented by the record, and therefore is not properly before the court for consideration. Respondent's remedy, if any, is by application to the superior court.

The petition is denied.

### **Annotation—Effect of injunction against legal proceedings to prevent running of Statute of Limitations.**

Earlier cases on this question are collected and discussed in notes appended to *Hunter v. Niagara F. Ins. Co.* 3 L.R.A. (N.S.) 1187, and *Lagerman v. Casserly*, 23 L.R.A. (N.S.) 673.

As to pendency of suit by third person as suspending the running of the Statute of Limitations, see note to *Hutchinson v. Hutchinson*, 52 L.R.A. (N.S.) 1165.

As to suspension of operation of Statute of Limitations as incident to grant or denial of equitable relief, see note to *Macke v. Jungels*, L.R.A.1918C, 123.

It will be observed, from perusal of the cases cited in the present and earlier notes, that the authorities are not in harmony on the question of the effect of an injunction on the running of the Statute of Limitations. The holding in *HENSEN v. PETER*, ante, 682, that the running of the limitation period against the continuance of a judgment lien is suspended during the existence of an injunction against selling the property under an execution levied under it, seems in line with those authorities cited in the earlier notes, which hold that the running of Limitation Statutes is suspended, during the pendency of an injunction preventing enforcement of the right.

To a similar effect as *HENSEN v. PETER*, ante, 682, and cited therein, is *Steele v. Bliss* (1911) 166 Mich. 593, 37 L.R.A. (N.S.) 859, 132 N. W. 345, Ann. Cas. 1912D, 1020, holding that the running of a statute, making void a lien secured by levying an execution on real estate if the property is not sold within a specified time, is tolled by the granting of an injunction restraining the sale of the property. The court said: "Where courts have held that the running of the statute is interrupted by injunction, it has generally been upon the ground that the statute was not intended to bar a remedy because it was not exercised within the limited time, if such a state of affairs existed as rendered it impossible for the party to act within that time. . . . This doctrine has been accepted by the Supreme Court of the

United States. . . . The weight of authority holds that the running of the statute is interrupted by an injunction. A few of the states hold to the contrary."

And the doctrine that the running of the Statute of Limitations is suspended during the pendency of an injunction preventing suit, obtained by the debtor, is supported also by *Peek v. Murphy* (1915) — *Tex. Civ. App.* —, 184 S. W. 542, and apparently by *Yza-guirre v. Garcia* (1916) — *Tex. Civ. App.* —, 172 S. W. 139, the decisions, so far as appears, not being based on special statutory provisions.

Also in *Carney v. Carney* (1918) 138 *Tenn.* 647, 200 S. W. 517, it was held that limitations did not run against enforcement of a decree in favor of a wife for alimony in certain land of the husband, during the pendency of an injunction which prevented the wife's taking possession of the land during the lifetime of the husband's grantor, because of a provision in the deed for the latter's support.

It was said in *Lagerman v. Casserly* (1909) 107 *Minn.* 491, 23 L.R.A. (N.S.) 673, 131 Am. St. Rep. 506, 120 N. W. 1086, that the rule that, whenever a person is prevented from exercising his legal remedy by some paramount authority, the time during which he was thus prevented must not be counted against him in determining whether the Statute of Limitations has barred his right, applies only when such paramount authority is invoked by the debtor. This statement is criticized, however, in *Hutchinson v. Hutchinson* (1914) 92 *Kan.* 518, 52 L.R.A. (N.S.) 1165, 141 Pac. 589, as being too broad, since the paramount authority might, under some circumstances, be the state itself, acting in its sovereign capacity.

In *Cox v. Montford* (1880) 66 *Ga.* 62, it was held that the running of a Statute of Limitations against a fieri facias is suspended, during the time enforcement thereof is prevented by an injunction obtained by the judgment debtor.



Also, in *State ex rel. Young v. Royse* (1902) 3 Neb. (Unof.) 262, 91 N. W. 559, affirmed on rehearing in (1902) 3 Neb. (Unof.) 269, 97 N. W. 473, it was held that, in determining whether a judgment against a city was dormant, the time during which its enforcement was prevented by an injunction afterwards dissolved, obtained by a taxpayer, should be excluded.

And where execution is prevented by an injunction, the creditor may obtain execution on the judgment within a year after the removal of the injunction, without seire facias, although more than a year has elapsed after the recovery of the judgment. *Porter v. Vaughn* (1852) 24 Vt. 211.

So, in *Noland v. Seekright* (1818) 6 Munf. (Va.) 185, it was held that, in an action of ejectment, a writ of possession could be sued out more than a year after judgment, without a seire facias, where the issuance of the writ had been prevented by an injunction obtained by the defendant, if a year had not elapsed after the injunction was dissolved.

The cases of *Work v. Harper* (1856) 31 Miss. 107, 66 Am. Dec. 549, and *Sugg v. Thrasher* (1855) 30 Miss. 135, from which the court quotes in *HENSEN v. PETER*, ante, 682, hold that, in equity, one who has obtained an injunction, preventing enforcement of a judgment, cannot take advantage of the delay so caused by setting up the Statute of Limitations, which has run during the period the injunction was in force. And *Wakefield v. Brown* (1888) 38 Minn. 361, 8 Am. St. Rep. 671, 37 N. W. 788, from which also the court quotes in the *HENSEN CASE*, holds that the time during which execution was stayed by the court, at the instance of the judgment debtor, should be excluded in computing the period allowed by statute for enforcing the judgment.

On the other hand, it has been held, in some cases, that the courts should not make an exception to the Statute of Limitations by holding that it is suspended by an injunction. Cases of this kind are cited in the earlier notes above referred to. And this view was taken also in *Kilpatrick v. Byrne* (1853) 25 Miss. 571, where a statute provided that no judgment theretofore rendered should operate as a lien on the property of the defendant for more than two years after the passage of the act. And it was held that where execution was levied on land conveyed by the judgment debtor after the recovery of the judgment, and the

purchaser enjoined a sale of the land under the execution, the injunction remaining in force during all of the two-year period and being afterwards dissolved, the lien was not, by reason of the injunction, extended beyond the statutory period.

And the doctrine that a court of law will not recognize the period during which an injunction prevents enforcement of a claim as an exception to the running of a Statute of Limitations, where the statute contains no such exception, is approved in *Davis v. Andrews* (1895) 88 Tex. 524, 30 S. W. 432, 32 S. W. 513, although the court stated also that, in equity, a defendant who procures the issuance of an injunction restraining the bringing of an action will not, after the injunction is dissolved, be permitted to avail himself, on the plea of limitations, of the period of time during which the injunction was in force, provided the plaintiff has not been guilty of laches.

A mere ex parte emergency order, restraining collection of the judgment until notice and hearing, no further proceedings being taken in the case for eleven years after issuance of the order, was held in *Hemen v. Rinehart* (1906) 45 Wash. 1, 87 Pac. 953, not to extend the duration of a judgment lien beyond the statutory period of five years.

If it appears that the party seeking to avoid the bar of the Statute of Limitations because of the pendency of an injunction was not, in fact, thereby restrained from maintaining the action, he cannot successfully invoke it as tolling the statute; as, for example, where he was not a party to the injunction suit. *West Michigan Park Asso. v. Pere Marquette R. Co.* (1912) 172 Mich. 179, 137 N. W. 799.

So, as against a purchaser from the judgment debtor, it was held in *Tucker v. Shade* (1874) 25 Ohio St. 355, that the fact that the creditor, in a suit instituted by the judgment debtor, was enjoined from suing out execution, did not have the effect of prolonging the judgment lien beyond the statutory period; the court saying that the purchaser was not a party to the suit in which the injunction was allowed, that that suit operated only on the parties personally, and had no reference to the property in controversy, and that, to the extent that the rights of the judgment creditor to legal process for the enforcement of the judgment were prejudiced by the injunction, he must look for redress to the injunction bond.

And in *Miller v. Estill* (1835) 8 Yerg. (Tenn.) 452, where the judgment debtor enjoined collection of the judgment, the court stated that the injunction operated on the person of the creditor, not on the judgment, the lien of which continued; but that, if no levy or sale were made within twelve months, a purchaser from the debtor took title superior to the judgment lien.

The Statute of Limitations is not tolled unless the injunction prevents the enforcement of the particular right against which the statute would otherwise run. Thus, where the plaintiff, an assignee of a judgment, was not prevented by the injunction from maintaining an action against the sheriff for failure to levy and return an execution on the judgment, but the injunction was granted after the issuance and return day of the execution, and its effect was merely to enjoin the levy of any execution which the sheriff then might have in his hands, or the issuance and levy of any subsequent execution, it was held, in *Peck v. Murphy* (1916) — Tex. Civ. App. —, 184 S. W. 542, that the injunction did not toll the running of the Statute of Limitations.

So, the pendency of an injunction suit brought by one against whom a decree had been rendered for payment of a certain sum, to enjoin the sale of his home place, in which the decree was not assailed nor the issuance of execution thereunder in any degree affected, was held, in *Serles v. Cromer* (1891) 88 Va. 426, 13 S. E. 859, not to toll the statute limiting the time for revival of a judgment or decree, and providing that the time during which the right to sue out execution thereon is suspended by legal process should not be included.

And in *Douglas County v. Grant County* (1917) 98 Wash. 355, 167 Pac. 928, it was held that the running of the Statute of Limitations as to a claim of one county against another was not suspended by the pendency of injunction proceedings, brought by the claimant to prevent enforcement of an unauthorized settlement between the creditors of the two counties, for the reasons that the right to begin the action in question was not affected by the injunction, and the injunction was in favor of and not against the county which brought the later action.

And an injunction against the sale of land deeded in trust to secure notes in favor of a third party, obtained by the grantor in the trust deed against the trustee, was held in *Davis v. Andrews*

(1895) 88 Tex. 524, 30 S. W. 432, 32 S. W. 513, reversing (1894) — Tex. Civ. App. —, 27 S. W. 1033, not to prevent the bringing of an action by the third party on the notes, and therefore not, in equity, to suspend the running of the Statute of Limitations against such an action, during the period the injunction was in force.

And in *State Bank v. Byrd* (1854) 14 Ark. 496, it was held that an injunction against the sale of mortgaged premises, obtained by a third party who claimed to be the owner thereof, did not suspend the running of the Statute of Limitations against an action on the note secured by the mortgage, under a statute providing that, whenever the commencement of any suit is stayed by an injunction, the time during which such injunction is in force shall not be deemed a part of the time limited for the commencement of such suit, as it was the remedy in rem only that was enjoined.

The decisions in the following cases, also, that Statutes of Limitations were not tolled by injunctions, are on the ground, apparently, that the injunctions did not prevent enforcement of the claims against which the statutes were invoked: *Wood v. Currey* (1881) 57 Cal. 208; *Van Wagoner v. Terpenning* (1890) 122 N. Y. 222, 25 N. E. 254; *McQueen v. Babcock* (1863) 41 Barb. (N. Y.) 337.

The following cases, among others, present statutory provisions expressly excluding the time during which an injunction prevents the bringing of an action or enforcement of a right, in computing the period for the running of Statutes of Limitations: *Gottlieb v. Thatcher* (1893) 151 U. S. 271, 38 L. ed. 157, 14 Sup. Ct. Rep. 319 (Colorado statute providing for exclusion of time during which enforcement of judgment was prevented by injunction in computing duration of judgment lien); *Pensacola State Bank v. Thornberry* (1915) 141 C. C. A. 367, 226 Fed. 611 (holding that the dismissal, without prejudice, by the plaintiff of a former action on the same note as that in question, at the suggestion of the trial judge, after his intimation that the action could not be maintained, did not toll the Statute of Limitations, under the Kentucky statute, providing that where the doing of an act necessary to save any right or benefit is "restrained or suspended by injunction or other lawful restraint," the time covered by such injunction or restraint shall not be included in applying Limitation Statutes, as the dismissal

was voluntary and involved no general inhibition); *Applegate v. Edwards* (1873) 45 Ind. 329 (statute making final judgments for recovery of money a lien on real estate for ten years, exclusive of the time during which proceedings thereon may be restrained by injunction); *Berrien v. Wright* (1857) 26 Barb. (N. Y.) 208 (intimating that an injunction, though not served on the defendant, may be "in force," within the meaning of a statute providing that the time during which an injunction "shall be in force" shall not be deemed any portion of the time limited for the bringing of an action); *Marshall-Wells Hardware Co. v. Title Guarantee & Surety Co.* (1916) 89 Wash. 404, 154 Pac. 801 (statute providing that when the commencement of an action is stayed by injunction, the time of the continuance of the injunction shall not be a part of the time limited for the commencement of the action); *Delle v. Boss* (1916) 164 Wis. 392, 160 N. W. 179 (statute making a judgment a lien on the debtor's real estate for ten years, except in cases where its enforcement is suspended by an injunction, or otherwise by law, and the judgment creditor causes the fact of such suspension to be entered on the judgment docket).

Under the Minnesota Statute of 1913, the period of limitation is not extended

for more than five years by an injunction staying an action, nor, in any case, for more than one year after disability ceases. *Christian v. Chicago, St. P. M. & O. R. Co.* (1916) 135 Minn. 45, 159 N. W. 1082, holding that an action to recover freight overcharges was barred by the statute, where more than a year had elapsed after the dissolution of the injunction against the lower rate, before the action was brought, and more than six years, the statutory period of limitations, had elapsed after payments of the higher rate.

The case of *Marshall v. Minter* (1870) 43 Miss. 666, supports the proposition stated in the earlier notes that, even in those jurisdictions in which an injunction is held not to suspend the running of the Statute of Limitations, it is held that the plaintiff may obtain an injunction restraining the defendant from setting up the statute as a defense.

It was held in *Chilton v. Scruggs* (1880) 5 Lea (Tenn.) 309, that the fact that one in good faith believed he had been enjoined from enforcing a claim, when in fact he had not been, the mistake not being due to any act or word of the debtor, was not sufficient to warrant a court of equity in interfering with the latter's legal right to rely on the Statute of Limitations. R. E. H.

WASHINGTON SUPREME COURT.  
(Department No. 2.)

J. SCHOMMERS, Resp't.,  
v.

GREAT NORTHERN RAILWAY COMPANY, Appt.

(— Wash.— 172 Pac. 848.)

**Railroad — killing trespasser — last clear chance.**

A railroad company is not liable, under the doctrine of last clear chance, for killing a trespasser sitting unconscious beside its

track if the train had reached a point, before the engineer realized the peril or should have done so because of its evident character, so near the person that it could not be stopped in time to avoid the accident.

For other cases, see *Negligence, II. f, in Dig.* 1-52 N. S.

(May 7, 1918.)

**A**PPEAL by defendant from an order of the Superior Court for Spokane County granting a motion for new trial of an action brought to recover damages for the

**Note.**—Deferring for the moment the consideration of the possible effect of the failure of the engineer to sound the crossing warning, one of the necessary conditions precedent to the doctrine of last clear chance was negated by the court's holding that there was no negligence on the engineer's part in failing to realize, before he did, that the object on the track was a person in an unconscious condition, and that his conduct after realizing the situation was not negligent. (In this connection, see notes cited in L.R.A. Indexes under the title, "Railroads," subtitle, "Injuries to persons on or near track.")

The function of the doctrine of last clear chance being merely to determine whether or not the original negligence of the injured person was a proximate cause of the injury, and so properly to be characterized as contributory negligence, it is obvious that the doctrine cannot be invoked for the purpose of raising a duty on the part of the defendant. Upon the other hand, the existence of such a duty, independently determined, is a necessary condition of the application of the doctrine. Assuming that the engineer was not negligent in failing sooner to realize the danger, and that there was no other negligence chargeable to him

wrongful killing of plaintiff's son, alleged to have been caused by the negligent operation of defendant's train. Reversed.

The facts are stated in the opinion.

Messrs. Charles S. Albert and Thomas Balmer, for appellant:

Plaintiff is ~~not~~ entitled to recover for the death of a trespasser, where the claim of

or to any other of the defendant's employees, it is obvious that there could have been no recovery, even if the injured person had been altogether free from negligence. Upon this assumption the case falls within the fourth class enumerated in the note to *Bourrett v. Chicago & N. W. R. Co.* 36 L.R.A.(N.S.) 957, and there is no necessity or occasion for considering either the doctrine of contributory negligence or its qualification, the doctrine of last clear chance.

It will be observed, however, that the court assumed that the engineer was negligent in that he sounded no warning for the crossing. In view of the fact that the deceased was a trespasser and was not at the crossing, it is doubtful whether the court meant to assume that the omission of the crossing signal was a breach of duty, owing to him, which might be regarded as a proximate cause of the accident. (See note in L.R.A.1915D, 962, and earlier notes there referred to as to the duty of a railroad company to give crossing signals for the benefit of persons, including trespassers, near the crossing, but not about to use the same.) The assumption, however, if indulged, would have supplied one of the indispensable conditions of the doctrine of last clear chance, and since, on this hypothesis, the negligence chargeable to defendant would have been the omission of a duty before the actual discovery of the danger, the question would at once have been presented as to whether or not the stupor or unconsciousness of the deceased was to be regarded as interrupting his negligence. If it did not, his negligence, of course, continued until the instant he was struck, and in that case he, and not the defendant, had the last clear chance to avoid the accident. An elsewhere shown, the question of the concurring negligence on the part of deceased would not have been important, if defendant had been chargeable with negligence in failing to exercise proper care after the danger was actually discovered, and was, or ought to have been, realized.

It is frequently stated, in broad terms, that the doctrine of last clear chance only applies where the danger is actually discovered, and the doctrine is sometimes referred to as the doctrine of "discovered danger." When proper distinctions are observed, however, it will be found that the breach of a duty owing to the injured person before the discovery of the danger, if it may properly be regarded as a proximate cause of the injury, is as effectual to sustain the doctrine of last clear chance as is a breach of duty after the discovery of the danger, if the original negligence of the injured person (i. e., his ability, by the exercise of due care, to escape the danger)

had in the eyes of the law, been interrupted and had ceased before the termination of the defendant's negligence (i. e., while it was still possible for defendant, by the performance of the duty incumbent upon it, to discover the danger and avert the accident)," and that a breach of duty after the actual discovery of the danger, as distinguished from a breach of duty before its discovery, is indispensable to the doctrine of last clear chance, only when the injured person's negligence was continuing and concurrent (i. e., when his ability, by the exercise of proper care, to have escaped the danger, continued at least as long as the defendant's ability, by the exercise of proper care, to avert the danger). See *Herrick v. Washington Water Power Co.* 48 L.R.A.(N.S.) 640. It is true that in some cases, even where the injured person's negligence is not regarded as continuing until the instant of the catastrophe, the doctrine of last clear chance cannot be invoked unless his danger was actually discovered, for the reason that, otherwise, there was no duty incumbent upon the defendant, upon the omission of which negligence could be predicated. To illustrate in some states there is no duty on the part of a railroad company to keep a lookout for trespassers upon the track (see note in 41 L.R.A.(N.S.) 264), and, if the danger of such a trespasser is not discovered, there is no negligence or fault chargeable to the defendant, and, of course, no opportunity to invoke the doctrine of last clear chance, even though the trespasser, by his antecedent negligence, had put himself in a position of danger from which he could not escape; if, however, as is true in some states, there is a duty incumbent upon the railroad company to keep a lookout, even for trespassers, the performance of which would have disclosed the danger in time to have averted the accident, the failure to perform such duty will support the doctrine of last clear chance, if the trespasser was in a place of danger from which he could not escape by the exercise of the care incumbent upon him, so that his negligence was not concurrent with that of the company in failing to discover the danger. The difference here is not between a duty before, and a duty after, the discovery of the danger, but between a case where there was a duty before the discovery of the danger and a case where there was no such duty.

Many phases of the doctrine of last clear chance are discussed in the note to *Bourrett v. Chicago & N. W. R. Co.* 36 L.R.A.(N.S.) 957, and other notes there referred to. Later cases and editorial comments on the doctrine may be found by consulting the L.R.A. Indexes, under the title, "Negligence."

negligence rests upon the ground that the engine bell was not rung or whistle blown for a crossing 450 feet nearer the engine, or upon the ground that, had the engineer looked for the trespasser, he could have seen him.

*Ricker v. Oregon-Washington R. & Nav. Co.* 97 Wash. 183, 166 Pac. 71; *McCarthy v. New York, N. H. & H. R. Co.* 153 C. C. A. 406, 240 Fed. 602; *Newport News & M. Valley Co. v. Howe*, 3 C. C. A. 121, 6 U. S. App. 172, 52 Fed. 362; *Baltimore & O. R. Co. v. Hellenenthal*, 31 C. C. A. 414, 60 U. S. App. 156, 88 Fed. 116; *Kansas City, Ft. S. & M. R. Co. v. Cook*, 28 L.R.A. 181, 13 C. C. A. 364, 31 U. S. App. 277, 66 Fed. 115; *New York, N. H. & H. R. Co. v. Kelly*, 35 C. C. A. 571, 93 Fed. 745; *Denver City Tramway Co. v. Cobb*, 90 C. C. A. 459, 164 Fed. 41; *Little Rock R. & Electric Co. v. Billings*, 31 L.R.A.(N.S.) 1031, 98 C. C. A. 467, 173 Fed. 903, 19 Ann. Cas. 1173, 110 C. C. A. 80, 187 Fed. 960; *Chunn v. City & Suburban R. Co.* 207 U. S. 302-309, 52 L. ed. 219, 222, 28 Sup. Ct. Rep. 63; *St. Louis & S. F. R. Co. v. Summers*, 97 C. C. A. 328, 173 Fed. 358; *Iowa C. R. Co. v. Walker*, 121 C. C. A. 579, 203 Fed. 685; *Dunworth v. Grand Trunk Western R. Co.* 62 C. C. A. 225, 127 Fed. 307; *Matson v. Port Townsend & S. R. Co.* 9 Wash. 453, 37 Pac. 705; *Reynolds v. Northern P. R. Co.* 22 Wash. 165, 60 Pac. 120; *West v. Shaw*, 61 Wash. 229, 112 Pac. 243.

Omission to blow the whistle or ring the bell for the crossing constituted negligence, so far as applicable to the class only intended to be reached by the statute, and was not negligence to a person outside of that class.—a trespasser, a block and a half away from the crossing.

*Everett v. Great Northern R. Co.* 100 Minn. 309, 9 L.R.A.(N.S.) 703, 111 N. W. 281, 10 Ann. Cas. 294; *Harty v. Central R. Co.* 42 N. Y. 469; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *O'Donnell v. Providence & W. R. Co.* 6 R. I. 211; *St. Louis & S. F. R. Co. v. Payne*, 29 Kan. 166; *Reynolds v. Great Northern R. Co.* 29 L.R.A. 695, 16 C. C. A. 435, 32 U. S. App. 577, 69 Fed. 808; *Shackleford v. Louisville & N. R. Co.* 84 Ky. 43, 4 Am. St. Rep. 189; *Spicer v. Chesapeake & O. R. Co.* 34 W. Va. 514, 11 L.R.A. 385, 12 S. E. 553; *Bell v. Hannibal & St. J. R. Co.* 72 Mo. 50; *Elwood v. New York C. R. Co.* 4 Hun, 808; *Lynch v. Great Northern R. Co.* 38 Mont. 511, 100 Pac. 616; *Seymour v. Illinois Southern R. Co.* 173 Ill. App. 326; *Hutto v. Southern R. Co.* 100 S. C. 181, L.R.A. 1915D, 962, 84 S. E. 719; *Wheeler v. Oregon R. & Nav. Co.* 16 Idaho, 375, 102 Pac.

347; *Burrow v. Idaho & W. N. R. Co.* 24 Idaho, 652, 135 Pac. 838.

Mr. Carl Ultes, Jr., for respondent:

The evidence was sufficient to call for the submission to the jury of the question of defendant's negligence, under the last clear chance rule.

*Colorado Springs & Interurban R. Co. v. Merrill*, 27 Colo. App. 382, 149 Pac. 843; *Gilbert v. Erie R. Co.* 38 C. C. A. 408, 97 Fed. 752; *Hartley v. Lasater*, 96 Wash. 407, 165 Pac. 106.

Negligence "is terminated by unconsciousness."

*Herrick v. Washington Water Power Co.* 75 Wash. 149, 48 L.R.A.(N.S.) 640, 134 Pac. 934.

Defendant had sufficient time in which to sound its whistle or bell.

2 *Thomp. Neg.* § 1737; *Denbeigh v. Oregon-Washington R. & Nav. Co.* 23 Idaho, 663, 132 Pac. 112; *Scharf v. Spokane & I. E. R. Co.* 92 Wash. 561, 159 Pac. 797.

It is the duty of the railroad to exercise reasonable care to avoid injuring a trespasser upon its tracks, laboring under some disability, after his presence is discovered.

2 *Thomp. Neg.* §§ 1709, 1738; *Willett v. Oregon-Washington R. & Nav. Co.* 94 Wash. 71, 162 Pac. 14; 3 *Elliott, Railroads*, 2d ed. § 1250; *Baltimore & O. R. Co. v. Hellenenthal*, 31 C. C. A. 414, 60 U. S. App. 156, 88 Fed. 116; *Cleveland, C. C. & St. L. R. Co. v. Tartt*, 49 L.R.A. 98, 39 C. C. A. 568, 99 Fed. 369; *Grand Trunk R. Co. v. Ives*, 144 U. S. 429, 36 L. ed. 493, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659; 2 *Shearm. & Redf. Neg.* 6th ed. § 464; *St. Louis Southwestern R. Co. v. Allen*, 35 Tex. Civ. App. 355, 80 S. W. 240.

A parent, under the common law, can recover for loss of service of his child during minority.

*Mesher v. Osborne*, 75 Wash. 439, 48 L.R.A.(N.S.) 917, 134 Pac. 1092.

*Chadwick, J.*, delivered the opinion of the court:

Ray Schommers, son of the respondent, aged sixteen years, had attended a dance at Elmira, Washington, on the night of August 14, 1915. He left the dance between the hours of 4 and 5 o'clock in the morning. There is a public road running west from the town of Elmira parallel with and adjoining the railroad right of way. The road crosses the track about a half a mile west of Elmira, as nearly as the distance can be estimated from the testimony. The boy left Elmira, going west on the railroad track. He crossed the highway and went 450 to 500 feet beyond, and sat down on the edge of the track—the end of a tie—where

he was seen by an early passer-by, who drove his team over the track at the crossing and turned west on the highway. This witness says that the boy was sitting in a kind of stupor, holding his head between his hands. At that time the witness had turned west and was about 100 feet from the crossing. His attention was attracted by the steam popping off and the brakes coming on. The first thing he thought of was, "what they were stopping for." This witness heard the rumble of the train about three minutes before the accident. He says that the engineer did not whistle for the crossing, but that he began to set the brakes about 100 feet east of the crossing, which would be approximately 600 feet from the point where the boy was killed. He estimated the speed at which the train was going at 30 miles an hour. A locomotive engineer testified that a train going 30 miles and slightly down grade could make an emergent stop in "2,000 to 2,500, maybe 3,000, feet." By deduction and calculation, the train was stopped in 600 feet plus the length of two coaches and the engine, approximately 800 feet. The court entertained a motion for a nonsuit and directed a judgment accordingly. Thereafter the court granted a motion for a new trial, and defendant has appealed.

The motion for a nonsuit was granted evidently upon the theory that the deceased was a trespasser, and that defendant owed no duty to the deceased other than to refrain from wantonly or wilfully injuring him. The motion for a new trial was granted evidently upon the theory that the case fell within the doctrine of the last clear chance, for it is argued here that, although the deceased was a trespasser, the engineer should have seen the boy in time to avoid striking him, and that it was at least for the jury to say whether the engineer might have seen him in time to appreciate the fact that he was not conscious of his danger and in time to stop his train.

That the rule upon which the nonsuit was granted governs, and that respondent cannot recover, will not be gainsaid or denied, unless the rule of the last clear chance intervenes to save a right to recover. The rule of the last clear chance is never dogmatic or self-assertive. It arises out of the facts and as a legal consequence of other rules of law. It is no more than a rule of proximate cause (*Mosso v. E. H. Stanton*, Co. 75 Wash. 220, L.R.A.1916A. 943, 134 Pac. 941), and is applied or rejected as the facts of the particular case warrant its application or rejection. Accepting the doctrine, does it apply in the case at bar? We think that it does not, and for reasons which we shall undertake to make plain.

The doctrine assumes, as we shall assume, that the engineer was negligent, in that he sounded no warning for the crossing. It matters not in what the negligence consisted, whether of omission or commission. The premise upon which the last clear chance doctrine rests is that both parties are negligent; that one of them is unconscious of his peril; and that the one charged saw or should have seen and appreciated the situation of the one injured in time to have avoided the accident. In time, the last clear chance arose when the engineer realized, and should, considering all the facts, have realized, that deceased was in a situation of peril, from which he was not likely to extricate himself. We have the time that the engineer realized that the boy was not going to get out of the way fixed to a moral certainty. It was when he cut off the steam and set the emergency.

"The instinct of self-preservation and the instinct to refrain from harming others are always present in emergent situations affecting personal security. These impulses prompt that which is done." *Hartley v. Lasater*, 96 Wash. 407, 414, 165 Pac. 109.

We have the place fixed by the only eyewitness, testifying that it was about 100 feet east of the crossing, or 550 or 600 feet east of the place where the boy was sitting. The distance may have been 50 or 60 feet further. The testimony is not clear, in that it takes no account of the width of the public road. So that it is certain that the engineer began to stop his train when a distance of about two city blocks away. To hold him to the last clear chance would be to hold, as a matter of law, that the engineer of every train would have to slow down or stop his train whenever he saw a trespasser on the track, whereas the law imposes no such burden. On the contrary, the driver of a locomotive over a track fenced to protect those who operate or travel by train, and wholly intended for the use of the railroad, may assume that one who is upon the track will take some account of his own safety, at least to the extent of keeping a lookout for passing trains.

Every man who goes upon a railroad track courts danger, but it is not such a danger as will in and of itself invite the doctrine of the last clear chance, for men are not presumed, nor will the law presume, that men will walk or sleep or sit down with head bowed on knees and become unconscious in such places. The mere presence of the deceased would not therefore charge the engineer, when 2,000 to 3,000 feet away—plaintiff's argument rests on the assumption that he could have seen the boy when 2,000 to 3,000 feet away, and it

would have taken that distance to stop his train—that deceased was asleep or unconscious and unable to take care of himself. His duty began when he did realize it, and, considering all the facts and the authority of our own cases, we think the engineer exercised reasonable care to avoid the accident. He acted when the peril became evident and imminent. It must be borne in mind that this accident did not happen at a crossing or in a city street, where rights are reciprocal and where a duty commensurate with the dangers of legitimate passing traffic was upon the engineer, nor was deceased on a trestle or in any extremity where it could be said that he would not be likely to extricate himself.

Reduced to its lowest terms, to hold the appellant to the rule of the last clear chance would be to say that the engineer should have known of the presence of the boy, and that he might be asleep or unconscious, when the train was at least 2,000 to 3,000 feet away. We can only say, considering all the facts, and inference from facts, as revealed by the testimony—the fact that deceased was a trespasser, the noise of the train which could have been heard for three minutes before the accident, the grinding of the wheels and the popping and hiss of escaping steam when 600 feet away, and the legitimate assumption that one in the situation of the deceased would take some care of his own safety, and the emergent stop made by the engineer—that if the engineer is to be held to the doctrine of the last clear chance he took that chance; that is, he did all that could be done in the time left to him to avoid the accident. In so holding we grant that a railroad is liable, even to a trespasser who is in a situation of evident peril, if those in charge of the train discovered the party killed or injured in time to have avoided the accident, for an injury under such circumstances would be classed as wilful, but the mere presence of a trespasser, although seen, is not enough to set the doctrine in motion, nor will it move until it can be said as a matter of law that the danger was so evident as to charge an engineer with a duty to stop his train in time to have avoided the accident.

The case of *San Antonio & A. P. R. Co. v. McMillan*, 100 Tex. 562, 102 S. W. 103 [cited in] 11 N. C. C. A. p. 473, note, is as nearly like this one as can be found. The one who was killed was sitting on the track and failed to get off when the train came along. The train was running about 35 miles an hour. He was seen, but not recognized as a human being, when the train was about 400 feet away, by the fireman who rang the bell. The engineer saw him

when about 300 feet away. He blew the whistle and set the brakes when about 200 feet away. It was then too late to avoid the injury, and decedent, who was sitting with "his head bowed with his face in his hands, was oblivious to the approach of the train." The facts there, as here, contradicted any suggestion that if the train had been checked he would have gotten off the track, for he was evidently not in a condition to do so, whether asleep or unconscious. It was contended that the company was liable on the ground of discovered peril: "In applying the doctrine of discovered peril the railroad company cannot be held liable because the servant was negligent in failing to discover the person or in failing to recognize his peril, but it must appear from the evidence that the servant actually saw the man, realized his peril, and that he would not get off the track. *Texas & P. R. Co. v. Breadow*, 90 Tex. 28, 36 S. W. 410. It must also appear that the discovery of the peril was in time for the trainmen by the use of the means at hand to stop the train before coming in collision with the man."

In *Southern R. Co. v. Stewart*, 153 Ala. 133, 45 So. 51, [cited in] 11 N. C. C. A. p. 475, note after holding that a railroad company is under no duty to keep a lookout for trespassers, the court said: "There was no evidence of the speed of the train, none as to the position of the engineer on the train, none that the train could have been stopped any quicker than it was stopped, and none that the deceased could have been seen by the engineer in time to have stopped. The facts that the track at the place of the injury was straight for a mile and a half and that the day was bright and clear, alone, are not sufficient to authorize a reasonable inference that the engineer in fact discovered the deceased in time to have avoided the injury. The evidence shows that the deceased was lying down on the track between the rails, and there is no evidence that the engineer was looking forward at a time and place when the deceased could have been discovered in time to have stopped the train and avoided the accident, and it is a matter of common knowledge that engineers, in the operation of engines, have other duties to perform besides that of looking out, and, for aught that can be said, the engineer was at the time engaged in performance of some other of such duties. It would be an unwarranted speculation to leave it to the jury to say whether or not the engineer was at the time looking forward and did discover, or could have discovered, the deceased on the track in time to have avoided the injury by the exercise of due care."

Other cases and texts bearing upon the question presented are: *Imler v. Northern P. R. Co.* 89 Wash. 527, L.R.A.1916D, 702, 154 Pac. 1086, Ann. Cas. 1917A, 933; *Scharf v. Spokane & I. E. R. Co.* 92 Wash. 561, 159 Pac. 797; *Dotta v. Northern P. R. Co.* 36 Wash. 506, 79 Pac. 32; *Kroeger v. Grays Harbor Constr. Co.* 83 Wash. 68, 145 Pac. 63; *Hamlin v. Columbia & P. S. R. Co.* 37 Wash. 448, 79 Pac. 991; *Moore v. Great Northern R. Co.* 58 Wash. 1, 28 L.R.A. (N.S.) 410, 107 Pac. 852; *McCarthy v. New York, N. H. & H. R. Co.* 153 C. C. A. 406, 240 Fed. 602.

The appellant being under no duty to an-

ticipate the presence of the deceased on the tracks, being only bound to exercise reasonable care to avoid injuring him after discovering his peril, we are constrained to hold that the engineer did all that he could do within reasonable limits and within the time he had at his command.

Reversed and remanded, with instructions to overrule the motion for a new trial.

**Ellis, Ch. J., and Holcomb, Mount, and Webster, JJ., concur.**

Petition for rehearing denied.

### OKLAHOMA SUPREME COURT.

BANK OF COMMERCE OF SULPHUR,  
OKLAHOMA, Plff. in Err.,  
v.

C. J. WEBSTER et al.

(— Okla. —, 172 Pac. 942.)

**Bills and notes — additional signer — alteration.**

Under §§ 4174 and 4175, Revised Laws 1910, which provide that any alteration made without the assent of the party or parties liable thereon which changes the number or relation of the parties to a negotiable instrument avoids the instrument as to such parties, the procuring of an additional signer to a promissory note by the holders thereof without the assent of parties who have guaranteed the payment of said note, and subsequent to the execution of the guaranty, discharges the guarantors from liability on their guaranty as between them and the holders.

*For other cases, see Alteration of Instruments, II. b, in Dig. 1-52 N. S.*

(April 30, 1918.)

**ERROR** to the District Court for Murray County to review a judgment in favor of defendants in an action brought to recover on a guaranty. Affirmed.

The facts are stated in the Commissioner's opinion.

**Mr. John A. McClure**, for plaintiff in error:

The addition to the instrument of descriptive words which do not alter its legal effect is not a material alteration, and does not avoid the instrument.

*Stiles v. City State Bank*, — Okla. —,

Headnote by PRYOR, C.

Note. — For adding another party to negotiable instrument after its execution and delivery as a material alteration, see annotation following this case, post, 698.

156 Pac. 622; *Mersman v. Werges*, 112 U. S. 139, 28 L. ed. 641, 5 Sup. Ct. Rep. 65; *Montgomery R. Co. v. Hurst*, 9 Ala. 513; *Rudolph v. Brewer*, 96 Ala. 189, 11 So. 314; *Stone v. White*, 8 Gray, 589; *McCaughy v. Smith*, 27 N. Y. 39; *Brownell v. Winnie*, 29 N. Y. 400, 86 Am. Dec. 314; *Wallace v. Jewell*, 21 Ohio St. 163, 8 Am. Rep. 48; *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306; *Gano v. Heath*, 36 Mich. 441; *Keith v. Goodwin*, 31 Vt. 268, 73 Am. Dec. 345; *Barnes v. Van Keuren*, 31 Neb. 165, 47 N. W. 848; *Ives v. McHard*, 2 Ill. App. 176; *Holthouse v. State*, 49 Ind. App. 178, 97 N. E. 130; *Taylor v. Acorn*, 1 Ind. Terr. 436, 45 S. W. 130.

**Mr. George M. Nicholson**, for defendants in error:

The addition of a maker under the circumstances shown by the evidence releases the guarantor.

*Palmer v. Blanchard*, 113 Me. 380, 94 Atl. 220, Ann. Cas. 1917A, 809; *Taylor v. Johnson*, 17 Ga. 521; *Nicholson v. Combs*, 90 Ind. 515, 46 Am. Rep. 229; *Oneale v. Long*, 4 Cranch, 60, 2 L. ed. 550; *Dickerman v. Miner*, 43 Iowa, 508; *Rhoades v. Leach*, 93 Iowa, 337, 57 Am. St. Rep. 281, 61 N. W. 988; *Berryman v. Manker*, 56 Iowa, 150, 9 N. W. 103; *Windle v. Williams*, 18 Ind. App. 158, 47 N. E. 680; *Ford v. First Nat. Bank*, — Tex. Civ. App. —, 34 S. W. 684; *Wallace v. Jewell*, 21 Ohio St. 163, 8 Am. Rep. 48; *Brown v. Johnson Bros.* 127 Ala. 292, 51 L.R.A. 403, 85 Am. St. Rep. 134, 28 So. 579; *Shipp v. Suggett*, 9 B. Mon. 5; *Farmers' Bank v. Myers*, 50 Mo. App. 157; *Handsaker v. Pedersen*, 71 Wash. 218, 128 Pac. 230; *Fowler v. Lachenmyer*, 193 Ill. App. 547; *Chappell v. Spencer*, 23 Barb. 584; *McVean v. Scott*, 46 Barb. 379; *M. Rumley Co. v. Wilcher*, 23 Ky. L. Rep. 1745, 66 S. W. 7; *Citizens' State Bank v. Grant*, 52 Okla. 256, 152 Pac. 1082; *Commonwealth Nat. Bank v. Baughman*, 27 Okla. 175, 111 Pac. 332; *Voris v. Birdsall*,



— Okla. —, 153 Pac. 673, 162 Pac. 951; Wayne County Nat. Bank v. Kneeland, — Okla. —, 161 Pac. 193; Evatt v. Dulaney, 51 Okla. 81, 151 Pac. 607; Farmers & M. Bank v. Scoggins, 41 Okla. 719, 139 Pac. 959.

Where the guaranty is for the debt of a certain party, and credit is extended to additional parties, the guarantor is thereby discharged; and this is true though the sum guaranteed is not thereby enlarged.

Lamm & Co. v. Coleord, 22 Okla. 493, 19 L.R.A.(N.S.) 901, 98 Pac. 355; Scott v. Alton Bkg. & T. Co. — Mo. —, 175 S. W. 920; Bomar v. Gahagan, — Tex. Civ. App. —, 152 S. W. 689.

**Pryor, C.**, filed the following opinion:

The plaintiff in error, the Bank of Commerce of Sulphur, Oklahoma, commenced this action in the district court of Murray county against C. J. Webster and T. E. Molacek, defendants in error, to recover on a written guaranty as follows:

Sulphur, Okl., 6—19—11.

For value received we hereby guarantee to the Bank of Commerce of Sulphur, Okl., payment of one note of D. A. Crafton, dated 2—6—11, \$1,450, and one note of D. A. Crafton, dated 1—30—11, \$204, both of said notes made payable to the Security State Bank.

C. J. Webster.  
T. E. Molacek.

The notes named in the written guaranty were transferred from the Security State Bank to the Bank of Commerce, and at that time the defendants executed and delivered to the Bank of Commerce the above set forth guaranty. At the time of such transfer the Security State Bank was in the hands of the banking board, which was liquidating the bank's assets. The defendants interposed the defense to said action that the notes which were guaranteed by the defendants were altered, after the execution and delivery of said guaranty, by the plaintiff's having Lizzie M. Crafton, wife of the maker of said notes, to sign the same. The trial court held that the signing of said notes by Lizzie M. Crafton at the instance of the plaintiff, without the consent and knowledge of the guarantors, the defendants, was an alteration which defeated the guaranty, and rendered judgment for the defendants. From this judgment the plaintiff appeals.

The only question presented on appeal is whether or not the plaintiff's procuring the signing of said notes by Lizzie M. Crafton after the execution and delivery of the contract of guaranty, without the con-

sent and knowledge of the defendants, released and discharged the defendants from their contract of guaranty.

As to what constitutes material alteration of a negotiable instrument without the assent of the parties thereto, and avoids the guaranty, § 4175, Revised Laws 1910, provides: "Any alteration which changes . . . (4) the number or the relations of the parties." It seems that this court has never construed this provision relative to questions of the character presented here. The supreme court of the state of Washington, in construing a provision identical with the one above, held: "Under Rem. & Ball. Code, § 3515, providing that an alteration that changes the number or the relation of the parties is a material alteration, the addition of new signatures to procure their discount is a material alteration, which discharges an accommodation indorser who had no notice of the alteration." *Handsaker v. Pedersen*, 71 Wash. 218, 128 Pac. 230.

The authorities on this question, independent of the statute, seem to be in conflict; but the greater weight of authority is to the effect that the adding of an additional party to a negotiable instrument subsequent to its execution and delivery discharges the original parties when such change is made without their knowledge or consent. *Taylor v. Johnson*, 17 Ga. 521; *Nicholson v. Combs*, 90 Ind. 515, 46 Am. Rep. 229; *Dickerman v. Miner*, 43 Iowa, 508; *Berryman v. Manker*, 56 Iowa, 150, 9 N. W. 103; *Windle v. Williams*, 18 Ind. App. 158, 47 N. E. 680; *Ford v. First Nat. Bank*, — Tex. Civ. App. —, 34 S. W. 684; *Wallace v. Jewell*, 21 Ohio St. 163, 8 Am. Rep. 48; *Brown v. Johnson Bros.* 127 Ala. 292, 51 L.R.A. 403, 85 Am. St. Rep. 134, 28 So. 579; *Fowler v. Lachenmyer*, 193 Ill. App. 547; *McVean v. Scott*, 46 Barb. 379; *M. Rumley Co. v. Wilcher*, 23 Ky. L. Rep. 1745, 66 S. W. 7.

In the case of *Taylor v. Johnson*, 17 Ga. 521, the supreme court of Georgia said: "The rule of law is not disputed that the liability of a surety cannot be extended beyond the actual terms of his engagement, and that his liability will be extinguished by any act or omission which alters the terms of the contract, unless it be with his consent. And for myself I am satisfied that the uniform doctrine of the books, supported by numerous decisions, is that it matters not that the alteration be for the benefit of the surety, because he has a right to stand upon the very terms of his agreement. And it is no answer to a surety to say that the alteration is not material. He has a right to determine for himself whether he will or will not consent to the

alteration,—whether he thinks it material or immaterial. No power of man can alter his engagement, and his liability to be retained. He has a right to stand upon the very terms of his contract, and without his consent any variation of it is fatal.”

In discussing the proposition as to how the addition of the name of another to an instrument might materially alter its character and change the identity of such instrument, the supreme court of Texas in *Ford v. First Nat. Bank*, — Tex. Civ. App. —, 34 S. W. 684, uses the following language: “The reason why the addition of a name to a note, as a joint maker, after its issuance, materially alters it, is because it changes the number of parties and their relative rights; it changes the rate of contribution; and it changes the character and description of the instrument. The original obligor may thereby be subjected to a suit in a county other than that of his residence, and suffer inconvenience and injury, as was done in this very case.”

The supreme court of Ohio, in *Wallace v. Jewell*, 21 Ohio St. 163, 8 Am. Rep. 48, holds: “Adding the name of a person as maker of a joint and several promissory note after delivery, without the knowledge or consent of the original signers, is a material alteration, and vitiates the note as to such original signers.”

And in the body of the opinion the court says:

“Such an addition gives a different legal character to the instrument. The defendants might, by the altered condition of the note now in question, have been subjected to change of jurisdiction in the event of any litigation arising in relation to it between the parties. . . .

“If the legal operation of the instrument in its altered condition is different from the one they executed, it is sufficient for them to say of the contract evidenced by the altered instrument, into this we never entered. . . .

“If the parties intended to do what they have apparently done,—added a new party to the note in the character of maker,—its

vitiating effect cannot be avoided by the conceptions of the plaintiff as to the character of the act, nor by his design in respect to the future use of the note.”

It seems, therefore, that the alteration complained of, independent of the statutes and the construction placed thereon by the supreme court of Washington, by the great weight of authority, discharged the guarantors—the defendants herein—from any liability on the said instrument.

“Whether an alteration is material does not depend upon whether it increases or diminishes the maker's liability. The test is whether the instrument, after the alteration, expresses the same contract,—whether it will have the same operation and effect after the alteration as before. If the change enlarges or lessens the liability, it is material, and vitiates the contract.” *Commonwealth Nat. Bank v. Baughman*, 27 Okla. 175, 111 Pac. 332.

Section 1043, Revised Laws of 1910, provides: “A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended.”

It is clear, in the light of the statutes and the great weight of authority, that the addition of the name of Lizzie M. Crafton to the note, payment of which the defendants guaranteed, changed the identity of said note and its effect and operation, and such alteration being made without the assent or knowledge of the defendants, the guarantors, operated to discharge the defendants from any liability on their guaranty.

Therefore the judgment of the trial court is affirmed.

**Per Curiam:**

Adopted in whole.

Petition for rehearing denied May 21, 1918.

### **Annotation—Adding of another party to negotiable instrument after its execution and delivery as a material alteration.**

It is the general theory of some cases that the addition of another party or parties to a negotiable instrument after

its execution and delivery is a material alteration thereof,<sup>1</sup> and extinguishes the instrument as to parties who did not

<sup>1</sup> *Brown v. Johnson Bros.* (1899) 127 Ala. 292, 51 L.R.A. 403, 85 Am. St. Rep. 134, 28 So. 579 (addition of comaker); *Soaps v. Eichberg* (1891) 42 Ill. App. 375 (addition of comaker); *Henry v. Coats* (1861) 17 Ind. 161; *Bowers v. Briggs* (1863) 20 Ind. 139; *Nicholson v. Combs* (1883) 90 Ind.

515, 46 Am. Rep. 229; *Windle v. Williams* (1897) 18 Ind. App. 158, 47 N. E. 680; *Dickerman v. Miner* (1876) 43 Iowa, 508; *Hamilton v. Hooper* (1877) 46 Iowa, 515, 26 Am. Rep. 161; *Sullivan v. Rudisill* (1884) 63 Iowa, 158, 18 N. W. 856.

The mere interlineation in a note in-

consent to the addition, or who had no knowledge thereof.<sup>3</sup> In fact, the addition of a party to an instrument before its delivery, but after the execution by the party seeking release, has been held to be a material alteration, and, being made without his knowledge or consent, to discharge him from liability on the instrument.<sup>4</sup> The effect of an addition before delivery has, however, not been considered generally in the present note; this note has been confined to the addition of parties after the final delivery of the instrument and its inception as a legal obligation. It has been stated to be the law that "if one party to a written contract procures a third person to become a joint obligor therein, or makes

any change on the face of the paper which varies its legal operation and effect, such alteration invalidates the contract in toto." But it is held that "a collateral contract of guaranty does not affect the relations or obligations of the parties to the principal contract, nor in any way vary its effect. Hence, the indorsement of such an undertaking on the writing, though without the consent of one of the parties, is without legal significance or prejudicial effect."<sup>4</sup>

**Necessity of increase or change of liability of original parties.**

According to one line of authorities the fact that the addition of parties may not have increased the liability of the

dorsed by a third person of the name of such third person, above the name of the payee, has been held not to amount to an alteration. *Granite R. Co. v. Bacon* (1834) 15 Pick. (Mass.) 239. The name of the original payee was not erased, and the court states that it cannot be considered that the name of another payee was inserted: the most that can be inferred is that it was a proposal to insert the name of another payee, never acceded to, and so the note was not altered.

It has been held that the parties to a written instrument are released from liability on the instrument by the addition, after its execution and delivery, of other parties thereto, without their knowledge or consent, without characterizing the addition as an alteration. *Harper v. State* (1843) 7 Blackf. (Ind.) 61.

The addition of the abbreviation "cash." to the name of the indorsee of a draft which was intended for the bank of which the indorsee was cashier does not amount to a material alteration. *Birmingham Trust & Sav. Co. v. Whitney* (1904) 95 App. Div. 280, 88 N. Y. Supp. 578, affirmed without opinion in (1905) 183 N. Y. 522, 76 N. E. 1089.

But in *Citizen's State Bank v. Grant* (1915) 52 Okla. 256, 152 Pac. 1082, the addition of the abbreviation "Pres." to the name of the payee, both in the body of the note and after the name as indorsed thereon, after the execution and delivery of the note, is held to be a material alteration.

The addition of the words "guardian of P. Malcom" after the name of the payee of the note does not amount to a material alteration thereof. *Casto v. Evinger* (1897) 17 Ind. App. 298, 46 N. E. 648.

The addition of the proper or Christian names of the members of a partnership after the acceptance of a bill of exchange drawn by the partnership has been held to be not a material alteration thereof, and not to affect the validity of the bill. *Blair v. Bank of Tennessee* (1850) 11 Humph. (Tenn.) 83.

In *Clerk v. Blackstock* (1816) Holt, N. P. (Eng.) 474, 17 Revised Rep. 667, it is held

that a note is not binding without an additional stamp, where it is signed by a surety after its delivery.

<sup>3</sup>*Brown v. Johnson Bros.* (1889) 127 Ala. 292, 51 L.R.A. 403, 85 Am. St. Rep. 134, 28 So. 579, holding the maker of a note discharged by the act of the payee in procuring another to sign as comaker without the knowledge, consent, or authority of the original maker.

*Soaps v. Eichberg* (1891) 42 Ill. App. 375 (maker discharged by addition of comaker); *Fowler v. Lachenmyer* (1915) 193 Ill. App. 547; *Henry v. Coats* (1861) 17 Ind. 161; *Bowers v. Briggs* (1863) 20 Ind. 139; *Nicholson v. Combs* (1883) 90 Ind. 515, 46 Am. Rep. 229; *Windle v. Williams* (1897) 18 Ind. App. 158, 47 N. E. 680; *Dickerman v. Miner* (1876) 43 Iowa, 508; *Hamilton v. Hooper* (1877) 46 Iowa, 515, 26 Am. Rep. 161; *Sullivan v. Rudisill* (1884) 63 Iowa, 158, 18 N. W. 856.

Accommodation indorsers of a note signed by a member of a firm are relieved of their liability thereon by the addition of "& Co." to the signature of the maker. *Haskell v. Champion* (1860) 30 Mo. 136.

<sup>4</sup>*Montgomery v. Crossthwait* (1889) 90 Ala. 553, 12 L.R.A. 140, 24 Am. St. Rep. 832, 8 So. 498, holding the payee who had indorsed a note released from liability on his indorsement by the addition of "& Co.," thus changing what was previously an individual note into a partnership note.

An accommodation indorser of a note has been held released by the addition to the note of other makers. Such an addition is held to be a material alteration within the provision of the Negotiable Instrument Law that an alteration which changes the number or the relations of the parties is material. *Handsaker v. Pedersen* (1912) 71 Wash. 218, 128 Pac. 230. In this case notes were made payable to the accommodation indorsers; one of the indorsers took the notes to a bank, which refused to discount them without additional security, whereupon the names of two additional parties were signed to the instrument as makers.

<sup>4</sup>*Baker v. Lehman, W. & Co.* (1914) 186 Ala. 493, 65 So. 321.

prior parties in any way does not prevent the addition being a discharge of the prior parties from liability on the instrument.<sup>5</sup> This is especially true where the prior parties were indorsers<sup>6</sup> or sureties.<sup>7</sup> In a case in which an indorser was seeking to be discharged, it is stated to be "idle to say that the defendant was not injured by the addition of another name as maker of the note. The character and identity of the instrument indorsed by the defendant were changed by the alteration. The alteration left in existence no instrument indorsed by the defendant; that instrument was destroyed."<sup>8</sup> It has been stated generally that it cannot be said that no injury results from the addition of a party to an instrument.<sup>9</sup>

According to another line of authorities, not every addition of names to a written instrument is material as affect-

ing the principal obligor; that if the addition does not in any way increase or vary his liability, he is not discharged by the addition of parties after the execution and delivery of the instrument, without his knowledge or consent.<sup>10</sup> It has been stated that "unless the principal's liability is in some way affected by the addition [of a surety], it cannot be material."<sup>11</sup> It has been stated generally that the addition of a maker is not an alteration.<sup>12</sup>

Some courts hold that the addition of a surety or guarantor is not a material alteration.<sup>13</sup>

**Effect of fact that added party is not liable.**

It has been held that where no consideration moves to the additional party who signs after the execution of the original contract,<sup>14</sup> or if the additional

<sup>5</sup> *Brown v. Johnson Bros.* (1899) 127 Ala. 202, 51 L.R.A. 403, 85 Am. St. Rep. 134, 28 So. 579; *Dickerman v. Miner* (1876) 43 Iowa, 508; *Citizens' State Bank v. Grant* (1915) 52 Okla. 256, 152 Pac. 1082.

<sup>6</sup> *Henry v. Coats* (1861) 17 Ind. 161.

<sup>7</sup> See *Montgomery v. Croasthwait* (1889) 90 Ala. 553, 12 L.R.A. 140, 24 Am. St. Rep. 832, 8 So. 498, *supra*, note 3. The court concludes, in the *Montgomery* Case, however, that it could not safely be assumed that the change from an individual to a partnership note was beneficial to the indorser.

<sup>8</sup> According to the court in *Anderson v. Bellenger* (1888) 87 Ala. 334, 4 L.R.A. 680, 13 Am. St. Rep. 46, 6 So. 82, a surety is released by a material alteration, whether such alteration results to the advantage or the detriment of the surety. In this case, however, the surety on a statutory claim bond was held not released by the addition of another surety after the bond had been approved and accepted by the sheriff, because the sheriff, who procured the additional name, and the person thus signing as surety, were treated as strangers to the instrument, an alteration by a stranger not being regarded as affecting the original instrument in any way.

<sup>9</sup> See *Gardner v. Walsh* (1855) 5 El. & Bl. 83, 119 Eng. Reprint, 412, 24 L. J. Q. B. N. S. 285, 1 Jur. N. S. 828, 3 Week. Rep. 460, *infra*, note 19.

<sup>10</sup> *Henry v. Coats* (Ind.) *supra*.

<sup>11</sup> *Singleton v. McQuerry* (1887) 85 Ky. 41, 2 S. W. 652.

<sup>12</sup> *Montgomery R. Co. v. Hurst* (1846) 9 Ala. 513, holding the maker of a note not relieved of liability thereon by the addition of two parties as sureties thereto, to enable the payee to negotiate the paper. The court states that the addition of these names did not "in the slightest degree affect or in any manner increase or vary, the liability of the defendant. His promise

still continued to be several, and was neither increased nor diminished. The names might have been put on the back of the note, with impunity, and perform in effect the same office there that they did below the signature of the defendant. In either position they were sureties for [the payee] and not for the defendant."

But the authority of the case is doubted in *Brown v. Johnson Bros.* (1899) 127 Ala. 202, 51 L.R.A. 403, 85 Am. St. Rep. 134, 28 So. 579.

<sup>13</sup> *Miller v. Finley* (1872) 26 Mich. 249, 12 Am. Rep. 306.

<sup>14</sup> *Ives v. McHard* (1878) 2 Ill. App. 176, affirmed without reference to this point in (1882) 103 Ill. 97, where, some time after the execution of a note and delivery to the payee, it was signed by another person immediately under the signature of the maker, as security. The court states that "some judges think that such a signing is an alteration which destroys the note as to the other makers, if done without their consent. In our judgment, however, this is not the law." In this case the party signing the note was treated as a guarantor, against whom the holder of the note was entitled to judgment, if there was a consideration for his signing.

But see *Soaps v. Eichberg*, *supra*, note 1.

<sup>15</sup> *Taylor v. Acom* (1898) 1 Ind. Terr. 436, 45 S. W. 130.

And see further as to addition of guarantor or indorser, *infra*.

<sup>16</sup> *Sousa v. Lucas* (1909) 156 Cal. 460, 105 Pac. 413, holding that the signature by the wife of the maker of a note as surety subsequent to its execution, without any consideration passing to her, is of no effect. The action in this case was to foreclose a chattel mortgage securing the note, and the court concludes that "in any event, the additional name of the wife on the note after the execution of the mortgage, the alteration not being material, would not affect

party has not capacity to contract,<sup>15</sup> such signing is immaterial. On the contrary, it has been held that the fact that the parties, the addition of whose names constitutes the alteration are not in fact bound by the instrument does not prevent such addition from being a material alteration.<sup>16</sup>

**Right to recover upon original consideration.**

The right to recover other than upon the instrument is not within the scope of the present note. It may be stated, however, that the fact that no recovery can be had upon the instrument does not necessarily mean that the parties are discharged of all liability. In a majority of the cases the question of the liability upon the original consideration was not raised; but in some of them

this question was considered, and it was held that, in the absence of a fraudulent alteration, a recovery upon the original consideration is not precluded by the addition.<sup>17</sup> The signing by such new party does not, by way of novation, discharge the debt for which the note was originally given, and create a new one for which the additional signer is alone liable.<sup>18</sup>

**Effect upon liability of maker of note — theory that maker is relieved.**

The foregoing general theories lead to different results when applied to the addition of particular parties. According to one theory, a maker of a note is relieved of liability thereon by the addition of another maker without his knowledge or consent, after the execution and delivery of the instrument.<sup>19</sup>

or impair the lien of the mortgage, nor affect the right of the plaintiff in seeking relief by foreclosure of the mortgage to proceed only against the principal and the property covered by the mortgage."

<sup>15</sup> *Williams v. Jensen* (1882) 75 Mo. 681, holding that the addition of the name of a married woman to a note upon the procurement of the principal maker and the payee does not discharge a surety thereon, where it is not shown that the married woman had capacity to contract by reason of having a separate estate.

<sup>16</sup> *Brown v. Johnson Bros.* (Ala.) supra.

<sup>17</sup> *Soaps v. Eichberg* (1891) 42 Ill. App. 375 (note given for borrowed money); *Sullivan v. Rudisill* (1884) 63 Iowa, 158, 18 N. W. 856 (note given for borrowed money; recovery allowed against party borrowing money, not against a surety on the note).

<sup>18</sup> *Sullivan v. Rudisill* (Iowa) supra.

<sup>19</sup> *Brown v. Johnson Bros.* (Ala.) supra; *Soaps v. Eichberg* (1891) 42 Ill. App. 375; *Fowler v. Lachenmeyer* (1915) 193 Ill. App. 547 (names of two makers added after delivery, but by whom or why did not appear); *Nicholson v. Combs* (1883) 90 Ind. 515, 46 Am. Rep. 229 (additional signature procured by payee who was suing on the note); *Windle v. Williams* (1897) 18 Ind. App. 158, 47 N. E. 680 (see infra, note 20); *Hall v. McHenry* (1865) 19 Iowa, 521, 87 Am. Dec. 451 (dictum that comaker, who claimed to be surety, was released by procuring an additional surety); *Dickerman v. Miner* (1876) 43 Iowa, 508.

*Hamilton v. Hooper* (1877) 46 Iowa, 515, 26 Am. Rep. 161, holding the joint makers of a note discharged where an agent of the payee procured an additional signature after its execution and delivery, but before delivery to the payee, who had no knowledge of the obtaining of the additional signature.

*Sullivan v. Rudisill* (Iowa) supra, holding that a promissory note signed by two persons, one of whom claimed to be a surety, is defeated by the subsequent sign-

ing after its maturity by a third person, who also signed as surety.

*Browning v. Gosnell* (1894) 91 Iowa, 448, 59 N. W. 340, holding that the maker of a note is relieved of liability thereon by the addition, after delivery to the payee, of another maker, and also that such other maker is relieved of liability by the subsequent addition of a third maker.

*Singleton v. McQuerry* (1887) 85 Ky. 41, 2 S. W. 652; *Farmers' Bank v. Myers* (1892) 50 Mo. App. 157 (dictum).

*Allen v. Dornan* (1894) 57 Mo. App. 288, holding the makers of a note discharged by the addition, after the decease of one of them, of the name of an heir, as evidence of his good faith and intention to pay the note out of the assets of the decedent's estate.

*Wallace v. Jewell* (1871) 21 Ohio St. 163, 8 Am. Rep. 48; *Harper v. Stroud* (1874) 41 Tex. 367, approved in *Bolt v. State Sav. Bank* (1915) — Tex. Civ. App. —, 179 S. W. 1119; *Ford v. First Nat. Bank* (1896) — Tex. Civ. App. —, 34 S. W. 684.

*Gardner v. Walsh* (1855) 5 El. & Bl. 84, 119 Eng. Reprint, 413, 24 L. J. Q. B. N. S. 285, 1 Jur. N. S. 828, 3 Week. Rep. 460, holding that the maker of a promissory note, who is in fact surety for the other maker, is released by the addition of another co-obligor, who signs also as surety for the principal maker.

*Carrique v. Beaty* (1897) 24 Ont. App. Rep. 302, holding that the joint maker of a note, who is in fact a surety for the other joint maker, is released by the addition of another joint maker, who signs as security also.

It has been held that it cannot be said that the addition of a maker to a note can be but beneficial to the other makers. *Soaps v. Eichberg* (1891) 42 Ill. App. 375.

Sureties who signed a promissory note after its execution and delivery to the payee, and without the consent of the principal, were held liable in *Hughes v. Littlefield* (1841) 18 Me. 400, in an action

He is relieved by the addition of a surety or sureties.<sup>20</sup> The makers of a joint and several note are relieved of liability thereon by the addition of another maker.<sup>21</sup> It has been held, however, that if the object in adding the party is "to guaranty payment, or to furnish additional security otherwise than by becoming or assuming to become a joint maker, there could be no objection to the accomplishment of such object. The new agreement, in such case, would be a collateral one, and it would leave the integrity of the original note unaffected. Nor do we suppose the case would be altered if, in giving such security, the new party, should, by mistake or inadvertence, sign the note in such way as to indicate, *prima facie*, that he was an original promisor, the real intention being otherwise."<sup>22</sup>

of assumpsit on the note. The court stated that if they became sureties contrary to the wish of the principal, his relations would not be altered thereby, nor would any new responsibility attach to him in consequence of such signing. But in *Palmer v. Blanchard* (1915) 113 Me. 380, 94 Atl. 220, Ann. Cas. 1917A, 809, the addition of the signature of a firm of which the maker of a promissory note was a member is stated to be a material alteration that would defeat a recovery upon the note.

In *Morgan v. Vandermark* (1877) 1 Tex. App. Civ. Cas. (White & W.) 253, the signing by the payee of a promissory note as a security thereon was held not to be a material alteration, on the theory that it had the legal effect to bind the payee merely as an indorser, and was evidently made with that purpose, and not for any fraudulent purpose. However, in this case the payee had signed not only on the face of the note as security, but had also indorsed the note by writing his name on the back.

<sup>20</sup> *Windle v. Williams* (1897) 18 Ind. App. 158, 47 N. E. 680, holding that one of the makers of a note was released from liability thereon by the addition, without his knowledge or consent, of the names of additional makers. It was held not material in this case to determine whether such maker, thus released, occupied the relation of surety or principal. The parties who were added in this case were in fact sureties.

*Chappell v. Spencer* (1857) 23 Barb. (N. Y.) 584, holding a note avoided as to the makers thereof by the subsequent addition of the name of the payee as a maker of the instrument, upon a transfer thereof. It is stated in *Burton v. Baker* (1857) 31 Barb. (N. Y.) 241, that the signing of a note by the payee as maker discharges the original maker, if made without his consent. But see New York cases *contra* *infra*.

See *Hall v. McHenry* (1865) 19 Iowa, 521, 87 Am. Dec. 451, *supra*, note 19.

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That the maker of a note is relieved of liability thereon is especially true if he is in fact a surety,<sup>23</sup> and the addition is without his knowledge;<sup>24</sup> and it has been so held although the payee and principal maker agreed at the time the note was delivered that the additional sureties were to sign it.<sup>25</sup>

In the case of an instrument in form joint and several, but executed by one maker only, it has been held that the execution of a note in such form is such evidence of authority or assent to the procurement of an additional signature as to require the maker who would discharge himself on the ground of an unauthorized addition of a co-obligor after its execution and delivery to the payee, to show an actual dissent, or circumstances equivalent thereto.<sup>26</sup> But where a joint and several obligation has been

<sup>21</sup> *Bowers v. Briggs* (1863) 20 Ind. 139, holding the makers of a joint and several note discharged of liability thereon by the act of the payee in procuring another maker, in order to enable him to bring suit upon the note in a county other than that in which the original makers resided.

<sup>22</sup> *Wallace v. Jewell* (1871) 21 Ohio-St. 163, 8 Am. Rep. 48.

<sup>23</sup> Holding the sureties on a note discharged of liability thereon by the addition of another obligor. *M. Rumley Co. v. Wilcher* (1902) 23 Ky. L. Rep. 1745, 66 S. W. 7. *Merchants' Bank v. Bussell* (1897) 16 Wash. 546, 48 Pac. 242.

*Wallace v. Jewell* (Ohio) *supra*, holding indorsers who were held to occupy the relation of original makers as sureties for the principal maker to have been released by the addition of another party as maker.

<sup>24</sup> In *Owens v. Tague* (1891) 3 Ind. App. 245, 20 N. E. 784, the note was delivered to an agent of the payee, but the payee refused to receive it from his agent when he presented it with only one surety, and the name of the additional surety was thereafter obtained by the agent. This fact was held not to affect the question as to the liability of the first surety, the court stating that when the note was delivered to the agent, the contract was completely executed so far as the first surety was concerned, and it could not be altered afterwards without his assent.

<sup>25</sup> *Berryman v. Manker* (1881) 56 Iowa, 150, 9 N. W. 103.

<sup>26</sup> *Lilley v. Evans* (1843) 3 B. Mon. (Ky.) 417.

It is further held in this case that the authority implied in the form of the note, to obtain an additional signature, would pass with the note itself to an assignee, so that the fact of his having procured such signature after the assignment of the note to him did not invalidate it as to the original obligor. The original maker pleaded simply that the signature of the co-obligor

executed by a plurality of persons, the addition of another maker avoids the instrument as to nonconsenting parties.<sup>27</sup>

If, in adding a party, there is an alteration in the body of the note, this fact has been emphasized in holding that prior parties have been released.<sup>28</sup>

—theory that maker is not relieved.

According to other cases, the addition of another maker or makers to a note without the knowledge or consent of the prior makers does not release such prior makers, where the additional maker is in fact a surety.<sup>29</sup> It is held in other cases in which the additional signer or signers did in fact sign as sureties that the maker is not released, without, however, making any point of the fact that they so signed.<sup>30</sup> In one case<sup>31</sup> the court, after referring to the doctrine holding the addition of a new person as a principal maker to be a material alteration, states: "However that may be, yet where the signature added, although

had been procured by the assignee without the knowledge, consent, or approbation of the maker, and that he had not since approved of it. It is apparently the theory of the court that, upon learning of the signature, it was his duty to disapprove of it.

<sup>27</sup> *Shipp v. Suggett* (1848) 8 B. Mon. (Ky.) 5.

<sup>28</sup> In *Bank of Limestone v. Penick* (1825) 2 T. B. Mon. (Ky.) 98, 15 Am. Dec. 136, one who had an accommodation note at a bank, secured by the indorsement of two indorsers, deposited a note drawn by him, payable to one of the indorsers, and indorsed by the payee and the other indorser, to be filled in in renewal of the transaction by the bank. Instead of filling in, as intended by the parties, the bank altered the note by making it payable to the bank, and had it signed by the indorsers as comakers. This was held to avoid the note as to the original maker. The note having been signed by the first indorser as maker, and subsequently, without his knowledge, by the second indorser also as maker, the note was held voided also as to the first indorser; or rather, the second maker, the position he then occupied. This, however, is treated as more in the nature of an alteration than as a mere addition of a party. The action was one against the second maker only, so that his liability is the only question involved in the case. Upon what seems to have been a second appeal of this case, reported in (1827) 5 T. B. Mon. (Ky.) 25, the court held, contrary to its decision in the first case, that the first or original maker was not relieved by the alteration in the note, but that the second maker was relieved by inserting the name of the second indorser as a co-obligor unless such act had been confirmed or ratified.

in form that of a joint promisor, is in fact that of a surety or guarantor only, the original maker is, as between himself and the surety, exclusively liable for the whole amount; and his ultimate liability to pay that amount is neither increased nor diminished; and, according to the general current of the American authorities, the addition of the name of a surety, whether before or after the first negotiation of the note, is not such an alteration as discharges the maker." The court in another case<sup>32</sup> in which the additional party signed as co-obligor with the maker of the note, but was treated as a surety, states that "it is very difficult to see how such a change can affect him [the original maker] in any but a mere technicality, which neither changes, increases, nor diminishes his liability. Where there is no surety, the principal is liable to be sued severally, and made to pay the whole debt, if he has any property liable to execution. His liability on a joint judgment is pre-

<sup>29</sup> *Mersman v. Werges* (1884) 112 U. S. 139, 28 L. ed. 641, 5 Sup. Ct. Rep. 65; *Thorn v. Davis* (1917) 131 Ark. 178, 198 S. W. 283.

*Taylor v. Acorn* (1898) 1 Ind. Terr. 436, 45 S. W. 130, holding a husband who had made a note not released by the signing thereafter, at the procurement of the payee, by the wife as security therefor.

*Miller v. Finley* (1872) 26 Mich. 249, 12 Am. Rep. 306 (one person signed as co-obligor for the maker); *Royse v. State Nat. Bank* (1896) 50 Neb. 16, 60 N. W. 301. See *Barnes v. Van Keuren* (1891) 31 Neb. 165, 47 N. W. 848, *infra*, text to note 55.

The court in *Stone v. White* (1857) 8 Gray (Mass.) 589, in holding that the addition of the name of a surety to a promissory note upon a collateral agreement between the payee and the surety did not constitute an alteration of the contract of the original parties, states that "it did not in any way change or affect their right. It was a new and independent contract, made on a sufficient consideration with a third party, to which their assent was unnecessary." The appeal in this case, however, was by the additional signer, against whom a judgment had been rendered under instructions that, to entitle the plaintiff to recover, it must have been proved that defendant signed with the consent of the makers or one of them.

<sup>30</sup> *Montgomery R. Co. v. Hurst* (1846) 9 Ala. 513. But the authority of the *Hurst Case* is doubted in *Brown v. Johnson Bros.* (1899) 127 Ala. 292, 51 L.R.A. 403, 85 Am. St. Rep. 134, 28 So. 679.

<sup>31</sup> *Mersman v. Werges* (U. S.) *supra*.

<sup>32</sup> *Miller v. Finley* (1872) 26 Mich. 249, 12 Am. Rep. 306.

cisely the same. His property is primarily liable, and if he has enough to pay the judgment, and it is paid by him, or out of his property, he has no further concern with the surety, as he can have no right of contribution for his own debt. The fact that he may not pay does not in any way affect the nature or extent of his judgment obligation. A surety, may, perhaps, in some cases, be injuriously affected by an addition to the number of sureties, where there is more than one already; as, in case of the bankruptcy of any of them his obligation to pay may be increased, and his right of prosecution against cosureties diminished, by the change. But as the principal is bound to pay the whole debt without contribution, his liability cannot possibly be changed by the addition of sureties."

The maker of a several note has been held not released by the addition of a party who, so far as appears from the report of the case, was a co-obligor, nothing being said as to suretyship.<sup>33</sup> In an action against the payee of a several note, who, upon a transfer thereof, signed the instrument as maker, the foregoing theory that such an addition does not amount to an alteration which releases the original maker has been adhered to.<sup>34</sup> In one such case<sup>35</sup> the court, after referring to a case in which joint and several notes were held to be discharged by the addition of party, continued: "But I have found no case, and none has been cited, holding that a name added to a several note is such a material alteration as avoids it, and upon principal I can perceive no reason why it should be so held. A note written, 'I promise to pay,' etc., can never be made a joint contract, however many names may be added to it. The law permits an action against the makers, as upon a joint or several contract, but

the contract itself is not changed. The liability of the first signer is the same, however many may be joined in the action with him. The note continues to be payable on the same day, at the same place, and to the same person, and for precisely the same amount; and if there are any other parts of the obligation which can be considered material in the sense that an alteration in that respect vitiates the note, I am unable to comprehend it. . . . But it may be said that in the case of notes and bills, the contract, although in form several, yet, when signed by two or more persons, it may be sued upon as a joint or several paper, is a rule of law which becomes a part of the contract, and the contract is to be construed in reference to it. This consideration does not change it. It is still a several contract, and is joint only for the purpose of the remedy upon it." The court concludes by referring to the fact that in the case at bar the party who had last signed the note was trying to avoid it, and concludes that he, at least, was not entitled to avoid the note.

The signing of a note by the principal debtor after its delivery to the payee has been held not to be a material alteration which releases the previous signer.<sup>36</sup>

The foregoing rule that there is no release by the addition of a party has been applied even where the party claiming a release by reason of the addition claims to have occupied the relation of surety. Thus, a joint maker, who claimed to have been a surety, has been held not released by the addition of another maker, who signed for the accommodation of the payee.<sup>37</sup>

#### Effect upon liability of indorser.

It has been held that the indorser of a note is relieved of liability on his in-

<sup>33</sup> Card v. Miller (1874) 1 Hun (N. Y.) 504 (payee procured another maker).

<sup>34</sup> Brownell v. Winnie (1864) 29 N. Y. 400, 86 Am. Dec. 314, holding liable the payee of a promissory note who had signed the same as maker upon a transfer thereof, upon the insistence of the transferee that the payee became responsible to pay the note.

An action against all makers in favor of the transferee of a note which the payee signed as maker upon the transfer was sustained in Partridge v. Colby (1855) 19 Barb. (N. Y.) 248.

In Denick v. Hubbard (1882) 27 Hun (N. Y.) 347, the makers of a note are held not to be relieved of liability thereon by the addition of the signatures of the payee, and

a succeeding holder of the note as makers of the instrument. The payee signed immediately under the signatures of the two makers, while the subsequent holder signed immediately over such signatures, and at the end of the note.

<sup>35</sup> Brownell v. Winnie (1864) 29 N. Y. 400, 86 Am. Dec. 314.

<sup>36</sup> Union Bkg. Co. v. Martin (1897) 113 Mich. 521, 71 N. W. 867.

<sup>37</sup> Rudolph v. Brewer (1891) 96 Ala. 189, 11 So. 314, decided upon authority of Montgomery R. Co. v. Hurst (Ala.) supra; Gano v. Heath (1877) 36 Mich. 441, decided upon authority of Miller v. Finley (Mich.) supra. See Sousa v. Lucas (1909) 156 Cal. 460, 105 Pac. 413, supra, note 14.



dorsement by the addition of parties to the instrument.<sup>38</sup>

#### **Addition of guarantor or indorser.**

In some cases, although the additional party signed on the face of the instrument, he has been held to occupy the relation of guarantor<sup>39</sup> or indorser,<sup>40</sup> and the addition of the name of a guarantor or indorser is held not to amount to a material alteration.<sup>41</sup>

In one such case, holding that the addition of a guarantor to a note does not discharge a nonconsenting maker, who seems to have been a surety, it is stated that the contract of guaranty is a separate and independent liability, distinct from any existing in favor of the holder

of the note against the maker and surety thereon.<sup>42</sup>

It has been held under the Negotiable Instrument Law, that an indorsement on the back of a note, under that of the payee, will be conclusively presumed to be that of a subsequent indorser, and not that of a joint maker or surety; hence, that such an indorsement cannot be considered an alteration of the instrument.<sup>43</sup>

#### **Liability of original party who consents to or ratifies addition.**

The rule that the instrument is invalidated by the addition of parties does not apply to relieve a party who consents to the addition,<sup>44</sup> or who ratifies the addition.<sup>45</sup>

<sup>38</sup> *Henry v. Coats* (1861) 17 Ind. 161, holding that a third party, who had indorsed a note for the accommodation of the payees, to enable them to sell it, was relieved of liability thereon by the addition of another maker, and the change in the body of the note from "I promised" to "we promise." The change in this case was made with the consent of the maker, but without the knowledge or consent of the indorser.

See *Montgomery v. Crossthwait* (1889) 90 Ala. 553, 12 L.R.A. 140, 24 Am. St. Rep. 832, 8 So. 498, *supra*, note 3, and *Wallace v. Jewell* (1871) 21 Ohio St. 163, 8 Am. Rep. 48, *supra*, note 23.

<sup>39</sup> *Ives v. McHard* (1876) 2 Ill. App. 176, affirmed without reference to the point in (1882) 103 Ill. 97, stating that such a signer is a guarantor "unless such signing was originally intended." See *Soaps v. Eichberg* (1891) 42 Ill. App. 375.

The inadvertent signing by the payee of a note upon a transfer of the same, immediately under the signature of the maker, intending to sign the note as a mere guarantor, was held not to invalidate the note, in *Cason v. Wallace* (1868) 67 Ky. 386. The payee was held not to have become a maker by this inadvertent signing.

*First Nat. Bank v. Weidenbeck* (1899) 38 C. C. A. 131, 97 Fed. 896, holding that the addition of the name of a guarantor on the face of the note, and its subsequent erasure therefrom, did not amount to a material alteration of the note.

In *McCaughy v. Smith* (1863) 27 N. Y. 39, the indorser of a promissory note was held not discharged by the signing, upon the procurement of the holder, of a third party as maker of the note. Emott, Judge, was of the opinion that by thus signing, the party could not become a maker of the note, since it had already been made and delivered; that if he could be held at all, it must have been in the capacity of guarantor; and this being so, the case is taken out of the rule as to alteration, for a guaranty of a note is held not to be an alteration of it or of the maker's contract

on it. A majority of the court concurred in the decision merely, without passing upon the question as to the character of the liability of the party thus signing the instrument.

<sup>40</sup> One who signed on the face of the instrument immediately under the signatures of the makers, intending merely to indorse the instrument, was held in legal effect an indorser in *Ryan v. First Nat. Bank* (1894) 148 Ill. 349, 35 N. E. 1120, and it is stated that no one would pretend that an indorsement amounted to an alteration of the instrument.

*Ex parte Yates* (1859) 2 De G. & J. 190, 44 Eng. Reprint, 961, 27 L. J. Bankr. N. S. 9, 4 Jur. N. S. 649, 6 Week. Rep. 178, holding that one who signed on the face of a note at the lower left hand corner was established by the evidence to have intended an indorsement, and the addition of his name in this form did not constitute him a new maker of the note, or alter the note in any way.

See *Morgan v. Vandermark* (1877) 1 Tex. App. Civ. Cas. (White & W.) 253, *supra*, note 19.

<sup>41</sup> See cases cited in notes 39, 40. See *Baker v. Lehman, W. & Co.* (1914) 186 Ala. 493, 65 So. 321, *supra*, text to note 4.

<sup>42</sup> *Anderson v. Hall* (1903) 4 Neb. (Unof.) 494, 94 N. W. 981. See *Wallace v. Jewell* (1871) 21 Ohio St. 163, 8 Am. Rep. 48, *supra*, note 22, text thereto.

<sup>43</sup> *Ensign v. Fogg* (1913) 177 Mich. 317, 143 N. W. 82.

<sup>44</sup> *Voiles v. Green* (1873) 43 Ind. 374, holding the estate of a surety not released by the addition of another surety, where the executor of the original surety's estate consented to the addition. See *Houch v. Graham*, *infra*, note 47.

*Handsaker v. Pedersen* (1912) 71 Wash. 218, 128 Pac. 230.

In *Catton v. Simpson* (1838) 8 Ad. & El. 136, 112 Eng. Reprint, 788, the maker of a note which was signed by another as security, who procured an additional security in order to obtain an extension of the time, was denied the right, in an action by the

**Liability of added party.**

The question of the consideration for such added party's agreement has already been discussed in this series of reports.<sup>45</sup> Apart from the question of consideration, it is held in some cases that the person whose signature is added is liable on the instrument.<sup>47</sup> The added

party has been held liable where there was no fraud or misrepresentation in procuring his signature, although he signed upon the faith of the liability of the original maker, who may have been released by the addition of another party.<sup>46</sup>

first security, who, with the added security, had paid the note, to recover the half paid by him, to set up the defense that the note was vitiated by the addition of the second security, the court stating that, in the absence of all authority, it would hold that this was not an alteration of the note, but merely an addition which had no effect. It seems, however, the claim was here that the note was void because no fresh stamp was put upon it when signed by the second security. The decision in *Catton v. Simpson* (Eng.) supra, is disapproved in *Gardner v. Walsh* (1855) 5 El. & Bl. 84, 119 Eng. Reprint, 413, 24 L. J. Q. B. N. S. 285, 1 Jur. N. S. 828, 3 Week. Rep. 460. Why it was necessary to disapprove of the *Catton* Case, in view of the fact that the party who consented to the alteration was the party who was making the defense, is not clear.

<sup>45</sup> *Owens v. Tague* (1891) 3 Ind. App. 245, 20 N. E. 784; *Emerson v. Opp* (1895) 9 Ind. App. 581, 34 N. E. 840, 37 N. E. 24; *Browning v. Gosnell* (1894) 91 Iowa, 448, 59 N. W. 340; *Pulliam v. Withers* (1839) 8 Dana (Ky.) 98, 33 Am. Dec. 479.

<sup>46</sup> *Note to Bank of Carrollton v. Latting* 44 L.R.A.(N.S.) 481, and supplement thereto to *Fidelity & D. Co. v. O'Bryan*, L.R.A. 1918E, 574.

<sup>47</sup> *Hochmark v. Richler* (1891) 16 Colo. 263, 26 Pac. 818, holding that the last signer of a promissory note is not relieved of liability thereon from the fact that one of the previous signers signed as an accommo-

dation maker for the other, and did not know that the note was to be signed by the party thus seeking to be relieved.

A surety on a note, who may have been released by the addition of other sureties, without his knowledge and consent, but who had, notwithstanding, paid the note, may enforce contribution from sureties who have subsequently signed. *Houck v. Graham* (1886) 106 Ind. 195, 55 Am. Rep. 727, 6 N. E. 594.

*Dickerman v. Miner* (1876) 43 Iowa, 508. The court here states that the effect of such a signing was to execute a new note, and as the maker of such note, the party signing should be held liable.

*Hamilton v. Hooper* (1877) 46 Iowa, 515, 26 Am. Rep. 161; *Browning v. Gosnell* (1894) 91 Iowa, 448, 59 N. W. 340.

In *McNeill v. Sanford* (1842) 42 Ky. 11, one who signed as surety upon the procurement of the maker, after the note had become due, was held liable for contribution to a surety who was on the note at the time of its delivery, and who had paid it, but there is no discussion of the release of prior parties by such signing.

*Evans v. Partin* (1900) 22 Ky. L. Rep. 20, 56 S. W. 648; *Hughes v. Littlefield* (1841) 18 Me. 400 (see supra, note 19); *McVean v. Scott* (1866) 46 Barb. (N. Y.) 379. See *Brownell v. Winnie and Partridge v. Colby*, supra, note 34.

<sup>48</sup> *Crandall v. First Nat. Bank* (1878) 61 Ind. 349. W. A. E.

**KANSAS SUPREME COURT.**

J. F. LESLIE, Appt.,

v.

J. S. COMPTON.

(103 Kan. 92, 172 Pac. 1015.)

**Limitation of actions — guaranty of note.**

One who guarantees the payment of a note by a contract made with the payee, without the request or knowledge of the maker, and by reason of such guaranty is required to make payment, may thereby acquire a valid claim against the maker for

Headnote by MASON, J.

**Note.**—As to rights, as against principal debtor, of one who becomes surety or guarantor without his knowledge or consent, see annotation following this case, post, 709.

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reimbursement. But in such a case his attitude is that of a virtual purchaser of the note rather than of a surety in the ordinary sense, and if five years elapse after the maturity of the note without the maker recognizing the guaranty, or even being informed of it, the Statute of Limitations may bar the guarantor's claim, notwithstanding that action is brought upon it shortly after his payment was made.

For other cases, see *Limitation of Actions*, III. j, in *Dig. 1-52 N. S.*

(May 11, 1918.)

**A**PPEAL by plaintiff from a judgment of the District Court for Pawnee County in favor of defendant in an action brought to recover the amount of a note which plaintiff was compelled to pay as guarantor. Affirmed.

The facts are stated in the opinion.

Messrs. C. M. Williams, W. G. Fairchild, H. S. Lewis, and W. H. Vernon, Jr., for appellant:

Plaintiff was entitled to recover, as his claim was not barred by the Statute of Limitations.

Dan. Neg. Inst. 3d ed. § 1768; Noble v. Beeman-Spaulding-Woodard Co. 65 Or. 93, 46 L.R.A.(N.S.) 162, 131 Pac. 1006; 12 R. C. L. § 42, p. 1089; Bank of Carrollton v. Latting, 44 L.R.A.(N.S.) 481, and note, 37 Okla. 8, 130 Pac. 144.

An accommodation indorser who is a stranger to the note has the right of reimbursement from the maker.

Lill v. Gleason, 92 Kan. 754, 142 Pac. 287; 12 R. C. L. § 54, p. 1098; Noble v. Beeman-Spaulding-Woodard Co. 65 Or. 93, 46 L.R.A.(N.S.) 162, 131 Pac. 1006; Teberg v. Swenson, 32 Kan. 224, 4 Pac. 83; Arnold v. Green, 116 N. Y. 566, 23 N. E. 1; Davis v. Schlemmer, 150 Ind. 472, 50 N. E. 373; Leslie v. Harrison Nat. Bank, 97 Kan. 22, 154 Pac. 209; Anthony Invest. Co. v. Law, 62 Kan. 194, 61 Pac. 745; Firman v. Blood, 2 Kan. 497; Sarbach v. Jones, 20 Kan. 499; Fullerton v. Hill, 48 Kan. 558, 18 L. R. A. 33, 29 Pac. 583; Fuller v. Scott, 8 Kan. 25.

The Statute of Limitations did not run until Leslie paid the claim.

Mentzer v. Burlingame, 78 Kan. 219, 18 L.R.A.(N.S.) 585, 97 Pac. 371.

Mr. G. Polk Cline and Miss Nellie Cline, for appellees:

If a stranger volunteers to guarantee the payment of the debt of another, and does so for valid consideration, he may bind himself, but not the maker of the note, except under circumstances that do not exist in this case.

Briggs v. Latham, 36 Kan. 206, 13 Pac. 129.

Compton never heard of this guaranty till this suit was brought and more than fifteen years had elapsed.

The Statute of Limitations commences to run the moment the cause of action exists.

Ramsdell v. Hulett, 50 Kan. 440; First Nat. Bank v. Peck, 8 Kan. 661; Lewis v. Lewis, 58 Kan. 563, 50 Pac. 454; Poole v. French, 83 Kan. 282, 111 Pac. 488.

The cause of action exists the moment the liability is fixed.

Underhill v. Spencer, 25 Kan. 71.

If a judgment is necessary to fix the absolute liability of surety or guarantor, his right of action against the principal is simultaneous with the judgment. He has three years in which to commence suit against his principal. If he tarries that length of time, the bar is up.

Stitcher v. Cox, 52 Neb. 532, 72 N. W. 848; 12 Am. & Eng. Enc. Law, 726; Lower

v. Miller, 66 Iowa, 408, 23 N. W. 899; Stout v. Folger, 34 Iowa, 74, 11 Am. Rep. 138; Locke v. Homer, 131 Mass. 93, 41 Am. Rep. 199.

In this case the three years' statute governs.

Green v. Goble, 7 Kan. 297.

Mason, J., delivered the opinion of the court:

On October 24, 1899, J. S. Compton executed a note to the Zeb Crider Commission Company, due April 24, 1900. About thirty days later J. F. Leslie signed a writing guaranteeing the payment of the note. In June, 1901, the holder of the note sued Leslie, and in time obtained a judgment against him, which he paid on April 16, 1916. On May 29, 1916, Leslie brought the present action against Compton for indemnity. He was denied relief on the ground that he had been guilty of laches; that the claim was stale and was barred by the Statute of Limitations. He appeals.

The rule is that a cause of action in favor of a surety against the principal debtor does not accrue, and therefore the Statute of Limitations does not begin to run thereon, until payment has been made. Mentzer v. Burlingame, 78 Kan. 219, 18 L.R.A.(N.S.) 585, 97 Pac. 371; 25 Cyc. 1113, 1114. And ordinarily this rule is applicable to a guarantor. Here, however, the rights of the parties are affected by the fact that Leslie became a guarantor not only without any request on the part of Compton (as the court specifically found), but also without any knowledge of the fact on his part until this action was brought (as he testified and the court must be deemed to have found). It is true that by a contract with a creditor, made without the request or knowledge of the debtor, a person may bind himself as a guarantor of the payment of the debt. 20 Cyc. 1412. But he does not thereby become a surety in the ordinary sense; his rights are not the same in all respects as those of a guarantor who has become such at the express or implied request of the principal. If he is compelled to pay the debt, he may have a remedy over against the original debtor, but it is not based upon the principles of ordinary suretyship.

"It seems to be necessary as between the surety and his principal, but not as between the surety and the creditor, that the principal should have notice of and accept the surety's offer to assume the relation." 32 Cyc. 30.

"A surety cannot ordinarily recover indemnity from the principal unless he became surety at the request of the principal,

either express or implied." 1 Brandt, Suretyship & Guaranty, § 231.

The following text from a recent work is borne out by the cases there cited: "But in order to claim reimbursement of his principal, it is generally held that the surety must become such at the express or implied request of the former; otherwise he will be deemed a mere volunteer under the rule that one who, without authority, intermeddles with the affairs of another even by paying his debts, cannot thus make himself the creditor of him whose debt he pays." Spencer, Suretyship, § 118.

Reference is made in the note thereto, and in a subsequent section (§ 139), to a conflict of authority on the subject; but whatever want of harmony there may be in the results reached is largely due to the fact that different grounds of liability were invoked and considered. Where it has been held that a guarantor who has become such without the request of the debtor has no claim to be reimbursed if he is compelled to pay, the reason given has been that the case is not one of ordinary suretyship. Where the right of reimbursement has been sustained, it has not been because the guarantor was a surety in the usual sense, but because he was found to be entitled to be regarded as a virtual purchaser of the debt. It has been said that: "the fact that the guaranty was made at the request of the creditor and without the knowledge of the principal does not affect the liability of the principal. The guarantor in such a case is not an officious intermeddler having no remedy." 12 R. C. L. 1099.

The meaning clearly is, in view of the decision cited in support of the statement, that ignorance of the guaranty on the part of the debtor does not prevent his becoming liable to reimburse the guarantor. The statement that his liability is not affected thereby, if regarded as meaning more than that his liability is not prevented, goes beyond what is decided in the case referred to. There Jones had executed a bond (note) to Smith, with Black as surety. Smith sold it to Boyd, Carter guaranteeing it without the knowledge of the makers. Carter was required to pay it, and sued Jones and Black. In the opinion it was said: "The plaintiff Carter is clearly entitled to a decree against the defendants, unless their objections that Carter was an officious intermeddler, and for that reason not entitled to relief and to the bill, on account of Boyd's being a party plaintiff, can avail them. . . . But it is said that Carter was an officious intermeddler, and on that account can have no claim to the interference of a court of equity. It is true that he paid the amount of the bond to Boyd

without any request, express or implied, from the defendants Jones and Black, or either of them. He could not then have recovered at law, as was decided in a suit at law brought by him against them. Carter v. Black, 20 N. C. 561 (4 Dev. & B. L. 425). But in this court the plaintiff Carter stands in a very different situation. He is not suing here for money paid for the use of the defendants at their request. He became bound on the bond at the instance of the plaintiff Boyd and the defendant Smith, and, having paid the amount of it to Boyd, he claims as an equitable purchaser of it, and seeks here to recover on it . . . in the same manner as Boyd might do. . . . From what has been before said in considering the objection that Carter was an officious intermeddler it is to be deduced that Boyd must be regarded here as bound to assign the bond to Carter." Carter v. Jones, 40 N. C. (5 Ired. Eq.) 196, 198, 199, 200, 49 Am. Dec. 425.

In a similar case B. & H. Boynton, as principals, and Jedediah Boynton, as surety, made a note to John A. Place. At the request of Place, without the knowledge of the Boyntons, Dorwin also signed it. The court said: "The act of Dorwin in signing that note at the request of Place did not create the relation of principal and surety between him and the Boyntons; but, as the money was raised for their benefit, very slight acts, recognizing that relation on their part, would place him in the light of surety for them. Without some evidence, however, of that character, the relation does not exist, and Dorwin, on payment of the note, could not have sustained an action against them for money paid; for no one can make another his debtor, by paying his debt, without a request, either express or implied. . . . If Dorwin, before the contract for delay was made, had been called upon by the plaintiff [the purchaser of the note], and had paid the note, he would have been entitled, by subrogation, to all the rights and remedies of the creditor against the other parties thereon, and would stand as a purchaser of the note. This right of subrogation exists in equity, not only where the strict relation of principal and surety is formed, 'but where one is compelled to pay the debt in order to protect his own interests.'" Peake v. Dorwin, 25 Vt. 28.

These cases are regarded as establishing the doctrine that a guarantor who becomes such without the knowledge of the debtor, and is required to make payment, has a valid claim for reimbursement. But they go no further than to hold that such a voluntary guarantor is not deprived of recourse against the principal debtor upon

the ground that he is a mere intermeddler. They proceed upon the theory that it is competent for the guarantor to become such by contract with the creditor alone; that when, by virtue of the liability so assumed, he is required to make payment, he becomes virtually the purchaser of the claim against the debtor, or entitled to the rights of a purchaser. In that view it is proper that he should have all the remedies of the original creditor, but no reason is apparent why he should have any added right, or why he should be privileged to keep alive in this manner a claim which, so far as the debtor could know, had long since ceased to have any validity. In *Teberg v. Swenson*, 32 Kan. 224, 4 Pac. 83, this aspect of the matter is emphasized by the fact that the guarantor was given a formal assignment of the debt. The opinion concludes with the words: "In the present case, however, the plaintiffs did not volunteer to discharge the obligation of the defendant. They were bound by their written guaranty to pay the debt of the defendant; and when they paid the same they took a written assignment of such debt from the creditor. This gave them the same right to recover the debt from the defendant which the creditor previously had." p. 229.

In the present case Leslie was not a surety for Compton in any sense that implied a contractual relation between them. He had made an agreement with the owner of the note to see that it was paid. On being compelled to make payment in fulfillment of that obligation he had a remedy against Compton, but it was by virtue of his being subrogated to the rights of the payee, or of his having become the virtual purchaser of the note. If Compton had requested the execution of the guaranty, or if he had known of it and recognized it in any way,—if Leslie had been his surety in the ordinary sense,—he would have been chargeable with notice that, although no action had been brought against him within five years of the maturity of the note, proceedings might have been taken against Leslie, resulting in a payment which he might be called upon later to make good.

But, as Leslie merely acquired the rights of a holder of the note, the Statute of Limitations protected Compton against him to the same extent as against any other purchaser. If it be objected that, as a result of this view, the Statute of Limitations had prevented a recovery by Leslie against Compton before his right of action against him accrued, a sufficient answer is that no cause of action ever accrued in favor of Leslie; he is in the attitude of one who has bought an outlawed claim. Compton was not at fault in the matter.

A surety may acquire a claim for reimbursement by paying a debt which is alive as to him, but outlawed as to the principal. *Reed v. Humphrey*, 60 Kan. 155, 76 Pac. 390. A guarantor who has become such at the request of the principal has the benefit of an implied promise of indemnity, and a new and independent cause of action arises thereon whenever he is compelled to make a payment, irrespective of the time of maturity of the original debt. But a guarantor who becomes such by an agreement with the creditor, to which the debtor is not a party, and is compelled to make payment, has no claim based upon an implied promise of reimbursement; his rights are equivalent to those of a purchaser of the debt, and his remedy is lost whenever an action on that is barred. No inequity results from this view in the present case. Compton was justified in believing that the note had been fully paid from the proceeds of mortgaged cattle, or that all claims upon it had been abandoned. Leslie could probably have protected himself by giving Compton notice of his relation to the matter, and causing him to be made a party to the action on the note. At all events, the running of the statute in favor of Compton was not prevented by dealings between Leslie and the holder of the note of which he had no knowledge, actual or constructive.

While not material to the decision, it may be pertinent to add that the defendant claimed a meritorious defense apart from that here considered.

The judgment is affirmed.

**Annotation—Rights, as against principal debtor, of one who becomes surety or guarantor without his knowledge or consent.**

The courts agree with the actual holding in *LESLIE v. COMPTON*, ante, 706, that one who has become a guarantor without the knowledge or request of the principal debtor cannot, by paying the debt, tell the Statute of Limitations so as to entitle him to sue the principal obligor after the statute has run on the instru-

ment, as in the case of an ordinary surety or guarantor. In *Marsh v. Hayford* (1888) 80 Me. 97, 13 Atl. 271, the owner of a note payable to the order of another, and not indorsed by the payee, sold and delivered it and guaranteed its payment without the request, assent, or knowledge of the maker, subsequently

he was compelled to pay by judgment of law upon his contract of guaranty the amount of the note after the same was barred by the Statute of Limitations, but within six years of the date of the action in the case at bar. In the action at bar, which was one of *assumpsit* for money paid by the plaintiff at the defendant's request, and for money had and received by the defendant to the plaintiff's use, the defendant pleaded the general issue and the Statute of Limitations. Recovery was denied to the plaintiff. The court stating that an action at law could not be maintained upon the note, which had not been indorsed by the payee, so that the plaintiff could not recover upon the note, even though his action had not been barred by the Statute of Limitations. It is stated that the plaintiff's sale and guaranty of the note was a separate and independent contract of his own; that it could not affect the defendant, who was neither party nor privy to it; that the defendant's liability upon the note was barred six years after the same fell due; that the plaintiff might have seasonably paid his guaranty and caused a suit to be brought upon the note before it became barred by the statute, but this he did not do, and for his want of vigilance he must suffer. Discussing further the effect of the guaranty, the court states that "it is an independent, collateral contract apart from the note, and has no more relation to it than it would have had if the same had not been negotiated, and should not charge the defendant with a liability that he did not authorize the plaintiff to assume in his behalf. One can charge another only for money paid to the latter's use at his request, express or implied; and a request is implied when the payment is compelled by the violation of some promise or duty of the latter to the former. . . . The plaintiff was not compelled to pay this note; he was compelled to pay his voluntary promise to pay it, given without request or authority from the defendant. If this plaintiff can recover, any man who may guarantee or insure the payment of a stranger's debt may enlarge the statute bar from six to twelve years without the latter's consent, and in violation of the terms of his contract. No case has been cited to authorize such doctrine."

The assumption in *LESLIE v. COMPTON* that the guarantor has the right to recover is based upon the theory that he has, by paying the debt, become a virtual purchaser of the instrument, and may recover upon the principle of sub-

rogation. His rights, however, are not the same as those of the ordinary surety or guarantor, as may be seen from the foregoing paragraph denying the right to keep the claim alive as against the Statute of Limitations. A majority of the courts allow a recovery of the principal maker by one who has assumed to guarantee payment of the instrument, or who has assumed the relation of surety thereon, after payment by him, although he became surety or guarantor without the request of the principal maker. Other elements have entered into the recovery, however. For example, in *Teberg v. Swenson* (1884) 32 Kan. 224, 4 Pac. 83, a case relied upon in *LESLIE v. COMPTON*, the fact that there was as stated in *LESLIE v. COMPTON*, an assignment of the instrument to the guarantor, was regarded as an important factor. In the *Teberg* Case, an agent for machinery, who had a contract with the manufacturer thereof to guarantee the collection of notes taken for machinery sold by the agent, and who paid one such guaranteed note, and took an assignment thereof from the manufacturer, was held entitled to recover from the maker of the note. The theory on which a recovery was allowed in this case can best be understood from the contentions of the parties and the answer of the court. The maker contended that plaintiff was not entitled to recover, for the reason that he guaranteed the collection of the note and afterwards paid the same without the knowledge or consent of the maker. In answer to this contention the court states: "Now, if the plaintiffs had guaranteed the notes and then paid the same without the knowledge or consent of the defendant, and without any assignment, legal or equitable, of the debt due from the defendant to [the manufacturer and payee of the note] then we think the claim of the plaintiff in error, defendant below, would be correct; for, as a general rule, the law does not allow one person to make himself the creditor of another by volunteering to discharge such other's personal obligation. In the present case, however, the plaintiffs did not volunteer to discharge the obligation of the defendant. They were bound by their written guaranty to pay the debt of the defendant; and when they paid the same they took a written assignment of such debt from the creditor. This gave them the same right to recover the debt from the defendant which the creditor previously had."

In *Carter v. Jones* (1848) 40 N. C. (5 Ired. Eq.) 196, 49 Am. Dec. 425, which

is quite fully set out in the opinion in *LESLIE v. COMPTON*, ante, 706, recovery was allowed only because the action was in equity.

The consent of the principal maker of a note to the erasure of the name of one surety and the substitution of another was presumed from all the circumstances of the case in *Powers v. Nash* (1853) 37 Me. 322, but the court adds that "even without assent it would be a grave question whether the plaintiff [surety] would not be entitled to recover, the defendant having received the benefit of his name as surety and the execution upon which he was liable having been paid by him. The rights of a surety who enters into that relation without the request or knowledge of his principal are protected and enforced by the civil law."

In *Darrah v. Osborne* (1822) 7 N. J. L. 71, the maker of a note to whom a third person was owing a sum of money proposed to his debtor that a note be given by him directly to the maker's creditor in discharge of the maker's note; pursuant to the plan a note was drawn with surety and taken to the creditor of the maker of the original note; he refused to make the exchange unless the maker of the original note would also put his name upon the note thus tendered, whereupon the maker signed his name to the note under the names of the makers already thereon; subsequently he was compelled to pay one half the note, whereupon he brought an action against the surety to recover the amount thus paid. It was held that he might recover. The court said that he added his name to the note only as a further assurance that the note was genuine and the parties worthy the credit they sought, and not to release them from payment of the note or any part of it, but merely as a pledge that the note would be paid; and that, having redeemed the pledge, and the surety not having redeemed his, an obligation arose which might be enforced by action.

In *Wright v. Garlinghouse* (1858) 27 Barb. (N. Y.) 474, one who had signed a draft as surety for the surety thereon, and who had paid the same, was held entitled to recover the amount thus paid from the surety, notwithstanding the fact that he had put his name to the bill as surety for the previous surety without the request and knowledge of the latter. The court states that this fact can make no difference; that he was liable on the draft, and a compulsory payment, or a payment without action, of a legal liability, is equivalent to a payment by request, in a case where a

request by the person to be benefited by the payment, or who is legally discharged from an obligation by such payment, is necessary to render the person thus benefited or discharged liable to an action for the amount paid. This case was reversed by the court of appeals upon a ground which made it unnecessary to consider this question. (1863) 26 N. Y. 539.

In *Lathrop v. Wilson* (1858) 30 Vt. 504, where a bail bond signed by two persons, one of whom affixed the words "surety" to his signature, was afterwards at the instigation of the person designated as surety, signed by a third person, who also added the word "surety" to his signature, and such last signer was compelled to pay a judgment obtained on the bond, he was held entitled to recover one half the amount so paid from the first signer, who had no knowledge of the addition of his signature. The court states that the additional party could not make himself a surety for the first signer without any request and without his knowledge, but adds that the question was wholly one of fact for the trial court, and that court found that the plaintiff and the defendant stood in the same relation upon the note. The court adds that it did not appear but that the county court gave all proper legal force to the addition of the word "surety" to the plaintiff's name, and that there is no reason to doubt that its *prima facie* effect was fully overcome by the proofs in the case.

*Peake v. Dorwin* (1852) 25 Vt. 28, is sufficiently set out in *LESLIE v. COMPTON*, ante, 706. See *Hecker v. Mahler* (Ohio) *infra*.

In *Snell v. Warner* (1872) 63 Ill. 176, an action on an appeal bond by a surety who had been compelled to pay a part of the judgment thereon, to recover the amount paid, the principals in the bond were not permitted to avoid liability on the ground that they did not request the surety to sign the bond. The court stated that from the fact that they appeared in the appellate court and defended a suit, it will be presumed that they requested the surety to sign the appeal bond for them; and that, having availed of the benefits of the appeal to procure a new hearing in the appellate court, they would not be permitted to object that they never requested the surety to sign the bond.

The act of one of several makers in requesting another to guarantee the note has been held to be the act of all, so that those who did not know of the guar-

anty cannot avoid liability to the guarantor who paid the note. Thus it has been held that the joint makers of a note who are in fact sureties for the principal maker cannot escape liability to the guarantor, who was compelled to pay the note, on the theory that they did not request him to become a guarantor, where the principal maker did in fact make the request. *Hamilton v. Johnston* (1876) 82 Ill. 39. That the request of one of several joint makers of a note that another sign the note as guarantor is the request of all is held in *Hecker v. Mahler* (1901) 64 Ohio St. 398, 60 N. E. 555, but that case goes further and holds that the maker of a promissory note is bound to reimburse one who signed as guarantor without his knowledge and consent, and who was thereafter compelled to pay the note. The court states that "the original makers were bound to reimburse the defendant in error [the guarantor], whether they were, before the delivery of the note to the bank, without knowledge that the defendant in error had signed it as security or guarantor for them, or whether they had such knowledge."

The surety on a note who signs a renewal note without the knowledge or request of the maker, and who has paid the renewal note, is entitled to recover of the principal maker. *Thorn v. Davis* (1917) 131 Ark. 178, 198 S. W. 283.

There are expressions in some cases indicating a theory that one who has become a guarantor or surety without the knowledge or consent of the principal debtor, and who has paid the debt, cannot maintain an action against the principal debtor. It is stated in *McPherson v. Meek* (1860) 30 Mo. 345, an action by a surety who had paid a bond, against the principal obligor thereon, that "unless the fact appear from the instrument itself, as executed by defendant, proof must be given that the plaintiff became a party at the instance of the defendant, in the character of surety, or that he assented to it." In *Ricketson v. Giles* (1878) 91 Ill. 154, an action by a guarantor who had been compelled to pay a note, against the principal debtor, to recover the amount so paid, in which the declaration averred that the plaintiff had become guarantor at the special instance and request of the principal debtor, it is stated that if the plaintiff, of her own accord, without a request, either express or implied, from the principal debtor, guaranteed the note, she would not be able to recover "under the averments of her declaration." The conclusion of the

lower court that there was an implied request on the part of the principal debtor was sustained, and accordingly a recovery allowed.

It has been held that the makers of a note who are in fact sureties for their co-obligor, the principal maker, cannot be made principals as to one who subsequently signs the note as surety, without their knowledge or assent. *Whitehouse v. Hanson* (1860) 42 N. H. 9. It was accordingly held in this case that the party who subsequently signed as surety, and who had been compelled to pay a part of the note, could not recover of the makers who were in fact sureties, as though they were principal makers.

It has been held that one who becomes surety without the knowledge or request of an existing surety is not entitled to contribution from such surety. Thus it has been held that one who became the stayor of a judgment on a note, against the principal maker and sureties thereon, the judgment not showing who was the principal or who were the sureties, and who had been compelled to pay the note, has no right of contribution against the original sureties for the debt, where such sureties had no knowledge of his becoming stayor. *Chaffin v. Campbell* (1856) 4 Sneed (Tenn.) 184. In *Carter v. Black* (1839) 20 N. C. 561 (4 Dev. & B. L. 425), one who became the guarantor of a negotiable bond, and who was compelled to pay the same under an execution, was held to have no right to recover in an action of assumpsit against a surety who had no knowledge of his becoming guarantor. The theory of this decision is not altogether clear. The bond had been lost, and the court states that the defendant derived no benefit from the act of the plaintiff; that the bond was not extinguished, and although said to be lost, that a court of law could not take an indemnity from the plaintiff. The court, in further discussing the question, says that assumpsit for money paid will not lie where one person pays the debt of another without his request, express or implied; that there was no express request in this case, and that the law would not imply a request from the fact and circumstances. The court states that the guarantor here was not an indorser of the instrument, but was a mere volunteer, and placed his name on the bond only at the instance of the then holder, and that the compulsion of law in paying the debt was a compulsion of the plaintiff's own seeking, which arose out of his own voluntary act. But a recovery by the plaintiff was allowed in a



subsequent action in equity. *Carter v. Jones* (1848) 40 N. C. (5 Ired. Eq.) 196, 49 Am. Dec. 425. See quotation from the *Jones* case in the opinion in *LESLIE v. COMPTON*, ante, 706.

But the contrary has been held as to this and recovery allowed from the surety. In *Chaffee v. Jones* (1837) 19 Pick. (Mass.) 260, one who had signed a note on the back thereof before final negotiation—a form of signing which was held to make him a joint promisor or surety—was held to have the right to recover contribution from a cosurety. The court states that “if the plaintiff signed the note before it was negotiated; he was an original promisor and surety; and signing the note in that character, he has his remedy against the other sureties, whether they knew of his becoming surety or not.”

See *Darrah v. Osborne* (1822) 7 N. J. L. 71, supra.

Where a person signs the instrument without the knowledge or request of the prior parties, it has been held that this amounts to a material alteration which discharges nonconsenting parties. Thus, a surety has been held discharged by the addition of another surety without his knowledge, subsequent to the final delivery of the instrument, and not liable for contribution to such added party who had paid the debt. *Windle v. Williams* (1897) 18 Ind. App. 158, 47 N. E. 680. See note to *Bank of Commerce v. Webster*, ante, as to adding of another party to negotiable instrument subsequent to its execution as an alteration.

W. A. E.

#### ARIZONA SUPREME COURT.

MRS. M. BRUTINEL, Appt.,

v.

J. E. NYGREN.

(17 Ariz. 491, 154 Pac. 1042.)

**Principal and agent — employing sub-agent — liability of principal.**

1. A general agent to manage a drug business who has special authority to find a purchaser for it, has no implied authority to employ a subagent to find the purchaser, so as to bind his principal for services rendered by the subagent without the knowledge of the principal.

For other cases, see *Brokers*, II. a, in *Dig.* 1-52 N. S.

**Same — ratification — liability for services.**

2. Closing a sale with a customer produced by one specially authorized to procure a purchaser satisfactory to the owner does not render the owner liable for the services of a subagent who in fact found the customer, but of whose connection with the transaction the principal was ignorant.

For other cases, see *Brokers*, II. a, in *Dig.* 1-52 N. S.

**Estoppel — establishment of agency.**

3. A subagent cannot hold the principal liable to him for services on the ground of estoppel if he did not change his position to his detriment, in reliance upon the principal's conduct.

For other cases, see *Estoppel*, III. a, in *Dig.* 1-52 N. S.

(February 10, 1916.)

**Note.**—As to liability of a principal in respect of the remuneration due for the services of a subagent, see annotation following this case, post, 720.

L.R.A.1918F.

**A**PPEAL by defendant from a judgment of the Superior Court for Greenlee County in plaintiff's favor, and from an order denying a motion for new trial, in an action brought to recover certain commissions on an alleged negotiation of sale of defendant's drug store and fixtures. Reversed.

The facts are stated in the opinion.

Mr. L. Kearney, for appellant:

The authority of an agent cannot be established by showing that he acted as agent, or that he claimed to have the power which he assumed to exercise.

*Institution for Savings v. Brookline*, 220 Mass. 300, 107 N. E. 939; *McGregor v. Hudson*, — Tex. Civ. App. —, 30 S. W. 489; *Matlack v. Paregoy*, 155 Mo. App. 95, 173 S. W. 10; *Mills v. Berla*, — Tex. Civ. App. —, 23 S. W. 910; *Bowles Co. v. Olark*, 59 Wash. 336, 31 L.R.A. (N.S.) 613, 109 Pac. 812.

If the plaintiff has a cause of action against anyone, it is against O. P. Dunn, and not against the defendant.

*Williams v. Moore*, 24 Tex. Civ. App. 402, 58 S. W. 953; *Hanback v. Corrigan*, 7 Kan. App. 479, 54 Pac. 129; *Jenkins v. Funk*, 33 Fed. 915; *National Cash Register Co. v. Hagan*, 37 Tex. Civ. App. 281, 88 S. W. 727; *Jones v. Brand*, 106 Ky. 410, 50 S. W. 679; *Mechem, Agency*, 2d ed. § 1701, note 40, § 1702; *Houston Cotton Oil Mill & Mfg. Co. v. Bibby*, 43 Tex. Civ. App. 100, 95 S. W. 562.

An agent does not have the power to appoint a subagent, or otherwise delegate his authority, unless he is expressly authorized to do so; and where it is claimed that the agent has such power, that fact

must be proved on the trial by the party claiming such power to exist.

*Deffenbaugh v. Jackson Paper Mfg. Co.* 120 Mich. 242, 79 N. W. 197; *Matlack v. Paregoy*, 188 Mo. App. 95, 173 S. W. 8; *Meux v. Haller*, 179 Mo. App. 466, 162 S. W. 688; *Ney v. Eastern Iowa Teleph. Co.* 162 Iowa, 525, 144 N. W. 383; 19 Cyc. pp. 119, 120, 192; 1 Am. & Eng. Enc. Law, 2d ed. 972; 1 Am. & Eng. Enc. Law, 2d ed. Supp. Agency, p. 182, § 984, note; *Williams v. Moore*, 24 Tex. Civ. App. 402, 58 S. W. 957; *Hanback v. Corrigan*, 7 Kan. App. 479, 54 Pac. 129; 2 C. J. p. 686, notes 45, 47; *Jenkins v. Funk*, 33 Fed. 915.

A sale of real estate by the owner to a purchaser with whom a broker had unauthorizedly negotiated was not a ratification of the agency of such broker.

*Williams v. Moore*, 24 Tex. Civ. App. 402, 58 S. W. 953; *Copeland v. Stoneham Tannery Co.* 142 Pa. 446, 21 Atl. 825; *Hardinger v. Columbia*, 50 Wash. 405, 97 Pac. 445.

Before a principal can be bound upon the ground of ratification, it must appear that he had full knowledge of all the material facts affecting his interest in the transaction, and that it is not a part of the duties of an agent to delegate his authority.

*Fargo v. Cravens*, 9 S. D. 646, 70 N. W. 1053; *Davidson v. Dallas*, 8 Cal. 244; *Maze v. Gordon*, 96 Cal. 61, 30 Pac. 962; *Kerr v. Sharp*, 83 Ill. 199; *Merrill v. Lathan*, 8 Colo. App. 263, 45 Pac. 524; *Rowan v. Hyatt*, 45 N. Y. 138; *Ferguson v. Gooch*, 94 Va. 1, 40 L. R. A. 234, 26 S. E. 397; *Williams v. Moore*, 24 Tex. Civ. App. 402, 58 S. W. 953.

The principal is not liable to compensate a subagent employed by an agent to sell the property, although the agent was authorized to take any steps necessary.

*Jenkins v. Funk*, 33 Fed. 915; *Carroll v. Tucker*, 2 Misc. 397, 21 N. Y. Supp. 953; *Mason v. Clifton*, 3 Fost. & F. 899; *Williams v. Moore*, 24 Tex. Civ. App. 402, 58 S. W. 953; *Hanback v. Corrigan*, 7 Kan. App. 479, 54 Pac. 129; 2 C. J. p. 686, notes 45, 47; *Clark v. Clark*, 59 Mo. App. 532; *Groscup v. Downey*, 105 Md. 273, 65 Atl. 930.

To sustain an action for commission, a broker must show a direct employment by the principal, or direct authority for him to treat with the agent of the principal.

*Matlack v. Paregoy*, 188 Mo. App. 95, 173 S. W. 8; *Harper v. Goodall*, 62 How. Pr. 288, 10 Abb. N. C. 161; *Harrell v. Veith*, 13 N. Y. S. R. 738; *Hurd v. Lee*, 132 App. Div. 110, 116 N. Y. Supp. 445; *Edwards v. Tyler*, 141 Ill. 454, 31 N. E. 312; *Zeimer v. Antisell*, 75 Cal. 509, 17

Pac. 642; *Jones v. Moncrief-Cook Co.* 25 Okla. 856, 106 Pac. 466; *American Jobbing Assn. v. James*, 24 Okla. 460, 193 Pac. 672.

It is incumbent upon plaintiff to show that defendant had authorized C. P. Dunn to employ plaintiff and pay him a commission, or show a complete ratification of the acts of Dunn in employing plaintiff as such subagent.

*Williams v. Moore*, 24 Tex. Civ. App. 402, 58 S. W. 953; *Hanback v. Corrigan*, 7 Kan. App. 479, 54 Pac. 129; *Deffenbaugh v. Jackson Paper Co.* 120 Mich. 242, 79 N. W. 197; *Matlack v. Paregoy*, 188 Mo. App. 95, 173 S. W. 8; *Meux v. Haller*, 179 Mo. App. 466, 162 S. W. 688; 2 C. J. p. 686, notes 45, 47; 19 Cyc. 119, 120, 192.

Before the doctrine of ratification has any place, it must be shown by the testimony that the defendant had full knowledge of all the material facts affecting her interest in the transaction.

*Davidson v. Dallas*, 8 Cal. 244; *Fargo v. Cravens*, 9 S. D. 646, 70 N. W. 1053; *Maze v. Gordon*, 96 Cal. 61, 30 Pac. 962; *Kerr v. Sharp*, 83 Ill. 199; *Merrill v. Lathan*, 8 Colo. App. 263, 45 Pac. 524.

Mr. E. V. Horton for appellee.

*Franklin, J.*, delivered the opinion of the court:

Two important doctrines familiar to the law of agency come forward for consideration in this case: The one has to do with the appointment of an agent and the nature and extent of his authority; the other relates to the doctrine of ratification and agency by estoppel. In order to make this judgment intelligible in principle and in results, we shall first try to ascertain and summarize the ultimate or cardinal facts to be gleaned from the record, without an attempt to give even a moderate proportion of the details. Then we shall discuss and apply the law as we understand it. The court in this case, and properly so, allowed great latitude in the admission of testimony from which the existence of an agency and the authority of such agent to do the particular act in controversy may be inferred. It is our duty to give this evidence its full scope, with every fair and reasonable inference that may be derived from it, and then say whether the judgment is supported by the law and the facts.

The appellant, Mrs. M. Brutinel, is a French woman, with but little knowledge of the English language. She was the owner of a drug store on Chase creek, in the town of Clifton. Mr. C. P. Dunn, a druggist by profession, is her son-in-law. Mr. Dunn induced Mrs. Brutinel to purchase the drug

store, and on the faith of his promise to manage the business, she invested her money in it. Some time after the purchase of the drug store Mr. Dunn decided to leave Clifton to engage in other business. Because he had been instrumental in getting Mrs. Brutinel to go into the drug business on his promise to manage it for her, and having decided to leave Clifton, Mr. Dunn wished to obtain for Mrs. Brutinel the return of her investment. To this end he induced Mrs. Brutinel to allow him to find a purchaser for the business, which she did, with the understanding that any purchaser he might procure would buy it upon terms and conditions satisfactory to her. In the latter part of May, 1913, Mrs. Brutinel sold the drug store to Mr. David Robbins and Mr. W. A. Riker for \$4,000, executing to them her bill of sale conveying the property; the purchase money in part being evidenced by promissory notes secured by a chattel mortgage. The appellee, Mr. J. E. Nygren, who is also engaged in the drug business, claiming that Mrs. Brutinel is indebted to him on account of the transaction, brought this action to recover \$1,460 for his services. The employment of Mr. Nygren had its origin in the following letter written to him by Mr. Dunn:

Clifton Drug Company, Mrs. M. Brutinel,  
Prop.

Clifton, Arizona, February 13-12.

Mr. Nygren:

Received your letter to-night. Also the other reached me some time ago, which I immediately answered by wire, care Owl Drug Store. I figured that anyway Wayland would know just where to reach you. Not receiving answer to the wire, I concluded you had decided to call it off. In the wire I quoted you a price of \$850 on the fixtures exclusive of jewelry fixtures. These together with space I have rented to Mr. Miller, and he is open and doing business. Of course, since quoting you the above price, I have continued making preparations to open up, and now expect to open about next Tuesday or Wednesday. The outlook is certainly very favorable here. Everyone seems to be kicking at the new manager down below. I have gone to considerable expense in making the store presentable, repainted and papered throughout, put in new linoleum and new set wiring and new electric fixtures. The store will be as good as new and will look better than it ever did when we reopen. I feel now it would not justify me to take less than \$1,000 for fixtures, and stock to be invoiced at wholesale cost. If you cared to make this deal on this basis, would allow you 5 per cent, or if you can get over \$1,000 for fixtures, which you should be able to do,

you could have all above this amount. The fixtures and fountain together cost originally at least \$2,500. The stock I have bought since is only staple goods and in moderate quantities. Probably stock will run \$1,000 in all, making the whole a \$2,000 proposition. I do not think the outfit, everything considered, could be beat at this price anywhere, and I feel confident I could do some better in short time if I hold it. If you decide to do anything let me know at once, as I am carrying ads in several big daily papers and will sell first favorable opportunity. Will make terms on half, if desired, and if party is reliable. With best wishes, I am,

Yours truly.

C. P. Dunn.

Miller pays \$25 mo. rent. This would make drug dept. rent \$60 month.

Mrs. Brutinel was never informed of the contents of this letter. She had no knowledge whatever that it had been written. She never knew anything at all at any time about any contract or promise or transaction which Mr. Dunn had or was having with Mr. Nygren. Indeed, she never knew of Mr. Nygren, or that he was claiming any remuneration from her, until the summons and complaint were served upon her in this action. She never employed the plaintiff, but he was employed by Mr. Dunn. True it is that Dunn was her agent, authorized to manage her drug business; and true it is that he was her agent specially authorized to find a purchaser for the business, the sale to be made upon terms and conditions satisfactory to appellant. Dunn had no special authority and no power to conclude a contract for the sale and purchase of the drug business. His authority was expressly limited to finding a purchaser satisfactory to the principal. The distinction is here to be noted between the authority given to an agent to sell, and the authority given to an agent merely to offer for sale. There is not a scintilla of evidence that the authority of Dunn included the authority to employ the appellee at the expense of the appellant, unless such a power may be implied from his agency to manage the drug business and his subsequent special authority to find a satisfactory purchaser for it. Mr. Dunn testified that when he wrote the letter to Mr. Nygren, which is copied herein, he was not acting for Mrs. Brutinel, but solely on his own initiative, for himself alone; that he never told her anything about it, and if there was any obligation incurred, it was his own, and not Mrs. Brutinel's. Among other instructions, the court gave the following:

"You are instructed that if you believe

from the evidence that the plaintiff was employed to find a purchaser for the property of defendant, and pursuant thereto did find a purchaser, who, through the efforts of the plaintiff, purchased defendant's property in question upon the terms specified, or upon terms agreed to between the defendant and such purchaser, and that the plaintiff was the procuring cause of the sale, then your verdict will be for the plaintiff.

"As the case is presented to you, the sole question is whether or not the plaintiff has earned a commission according to the terms of the contract; and in case you decide he has, it is your duty to determine the amount of that."

The case was tried to a jury, which gave the appellee a verdict for \$1,250. Judgment followed the verdict. The appeal is from the judgment and order denying the motion for a new trial.

At the close of the plaintiff's evidence, and again at the close of all the evidence in the case, the defendant requested an instruction in the nature of a demurrer to the evidence. The court refused to grant either of these requests, and the ruling is assigned as error—the ground being in substance that there is no evidence tending to show that Mr. Dunn was authorized to act for the defendant, or that he ever did act for the defendant in employing the plaintiff; that if he did so act, his action was unauthorized and unratified by defendant. Error is also predicated upon the instructions given.

A careful review of the record discloses that the facts are not disputed. It is only the inferences which can reasonably be drawn from them that give rise to the contentions here, and we are of opinion that the inferences to be drawn from the facts in this case are such that men may not reasonably differ concerning them. The question is therefore one of law for the court. However, if there be any evidence reasonably tending to support the judgment, it ought to be sustained.

The primary object of an agency is to bring the principal into contractual relations with third parties—into privity with them; and it is elementary, therefore, to say that a principal is not responsible for contracts which he has neither directly nor indirectly authorized. "It is axiomatic in the law of agency that no one can become the agent of another except by the will of the principal, either expressed or implied from particular circumstances; that an agent cannot create in himself an authority to do a particular act by its performance; and that the authority of an agent cannot be proved by his own statement that he is

such." *Graves v. Horton*, 38 Minn. 66, 35 N. W. 568.

Of course, the mere order of proof is not vital. This is within the legal discretion of the trial judge, and if he allows evidence of the agent's acts before proof of the agency to do the particular act in question, it will not be reversible error, provided proof of such agency is established at some stage of the trial. But where the nature and extent of an agent's authority is directly involved, it must never be lost sight of; and this cannot be too strongly emphasized, that it ultimately may be established only by tracing it to its source in some word or act of the alleged principal. The agent certainly cannot confer authority upon himself, or make himself agent, merely by acting as such, or saying that he is one. Mr. Mechem says: "The agent's authority, moreover, may not be shown merely by proving that he acted as agent. A person can no more make himself an agent by his own acts only than he can by his own declarations or statements. If his acts can be connected with the principal in some way, as by showing that the principal knew of them and assented to them, a different result ensues; and, where the acts are of such a public or intimate nature, so notorious, or so long continued as reasonably to justify the inference that the principal must have known of them, and would not have permitted them to continue if they were unauthorized, evidence of them is admissible as against the alleged principal." *Mechem, Agency*, § 289.

The fundamental idea, therefore, or seed grain, so to speak, of agency, has its conception in something lawful that a person may do, and a delegation by such person to another of the power lawfully to do that thing. So this agency has been catalogued according to its kind, as either general or special. The basic error of appellee's case is in giving a broader application to the term "general agency" than its significance warrants. "If by express appointment, or by long acquiescence, recognition, or course of dealing, one man has conferred upon another the character of one possessing the requisite authority to represent him in a general way during some more or less continuous period in the transaction of all of his business of a certain kind, or at a particular place, or to perform all acts of a certain kind or class, he must be held to have conferred upon him the attributes and powers inherent in the character so bestowed. Such an agent the law denominates, for convenience sake, a general agent. But if, on the other hand, in a single instance, either by express terms or by his conduct, he confers upon the other

the character of one having authority to do a single thing, perhaps in a specific way, he must be held to have conferred upon him those attributes and powers, and those only, which are inherent in that character. This agent, for the same convenience, is termed a special agent." *Mechem, Agency*, § 737.

The distinction ordinarily drawn between a general and special agency is often artificial and unsatisfactory. The scope of the authority of a special agent is ordinarily much more restricted than that of a general agent; but when it is said that "if the special agent exceeds his instructions the principal is not bound," while "if the general agent exceeds his instructions, the principal will be bound," the statement is entirely misleading. So far as the authority of an agent involves the rights of innocent third persons, who have relied upon the character bestowed upon the agent, the principal is bound equally by the authority which he actually gives and by that which by his own act he appears to give; and this is true, whether we call the agency a special or general one. The general agent's authority is not universal; it is not an unlimited one. He is not alter ego, but the exercise of his authority is limited to that which is expressly conferred, broadened by the apparent authority, upon which third persons exercising due care may rely, to do all acts within the ordinary and usual scope of the business he was empowered to transact. In other words, every agency is so far general that it must cover not only the precise thing to be done, but whatever usually and rationally belongs to the doing of it. To be a general agent one does not have to be one of unlimited powers. As said by Mr. Mechem: "It is none the less true, however, as has been seen, that the scope of the general agent's authority must not be exceeded. Each, acting within the scope of the authority conferred, binds his principal; each, acting beyond that scope, binds himself only or no one. But while these rules applying to the two classes are alike in kind, they differ, as has been shown, in degree. It is believed, however, that the difference is one of degree only, and not of principle." *Mechem, Agency*, § 742.

In a New York case Mr. Justice Comstock says: "There are in the books many loose expressions concerning the distinction between a general and special agency. The distinction itself is highly unsatisfactory, and will be found quite insufficient to solve a great variety of cases. It is not profitable to dwell upon that distinction. Underlying the whole subject there is this fundamental proposition: that a principal is bound only by the authorized acts of his agent. This authority may be proved by

the instrument which creates it; and beyond the terms of the instrument, or of the verbal commission, it may be shown that the principal has held the agent out to the world in other instances as having an authority which will embrace the particular act in question. . . . But, in whichever way this is done, it cannot be limited by secret instructions of the principal on the one hand, nor can it be enlarged by the unauthorized representation of the agent on the other. These principles, I think are elementary." *Mechanics' Bank v. New York & N. H. R. Co.* 13 N. Y. 599.

An excellent statement of the matter is to be had in a quotation from 1 Minor's Institutes, 206, found in the case of *Cross v. Atchison, T. & S. F. R. Co.* 141 Mo. at page 147; 42 S. W. 679, as follows: "Whether the authority be general or limited, the servant [agent] cannot charge the master [principal] if he exceeds it. He is, of course more likely to transcend the bounds of a narrow than of an extended power; but the principle in either case is the same. Within his commission, he binds his master [principal]; beyond it, he does not. Whilst, then, we must distinguish clearly between a general agent and a special agent, it is not because there is a diversity in the leading principle which determines the master's [principal's] liability, but merely in order to adjust the actual measure of it."

See also *Gore v. Canada Life Assur. Co.* 119 Mich. 136, 77 N. W. 650.

The mere fact that one is dealing with an agent, whether the agency be general or special, should be a danger signal, and like a railroad crossing suggests the duty to "stop, look, and listen;" and if he would bind the principal is bound to ascertain, not only the fact of agency, but the nature and extent of the authority; and in case either is controverted, the burden of proof is upon him to establish it. In fine, he must exercise due care and caution in the premises. "Unusual and unnatural acts are not to be tolerated; strained constructions are to be avoided; inferences of facts are to be limited to those which are reasonable, natural, and ordinary; and, as has been so often pointed out, inferences are to be drawn only from facts for which the principal is responsible, and not from mere considerations of convenience or policy. The mere fact that one is found to be a general agent justifies neither the court nor the jury in guessing that given acts are within the scope of his authority." *Mechem, Agency*, § 740.

Conceding, for the purposes of this case only, that when Mr. Dunn employed the plaintiff to find a purchaser for the drug

business, he was acting as the agent of Mrs. Brutinel, and not on his own account,—a concession which is by no means justified as an inference from the disclosed facts,—is the act in controversy fairly included within the limits, or, as it is ordinarily stated, within the scope, of Dunn's authority, either express or implied? If it is, the principal is bound; if it is not, the act of the agent binds himself alone or no one. In other words, do the facts and circumstances of this case justify this inference that Mr. Nygren was employed as the principal's agent under such circumstances as to reasonably warrant the conclusion that Mrs. Brutinel has taken the subagent as her agent and becomes liable for his compensation?

This inference is sought to be justified from the fact, and the only facts traceable in the record to any word or conduct of hers, that Mrs. Brutinel employed Mr. Dunn as her agent to manage the drug business, and during the course of such employment specially authorized him to offer the same for sale. Thus an express authority is given by the principal to Mr. Dunn to manage the drug store, and this express authority carries with it every power necessary and proper to be done in the case in hand to effectuate the purpose for which the authority in question was created. Where nothing is indicated to the contrary, there are so many things connected with such duties involving the discretion, judgment, and choice of methods that it would not be unreasonable for third persons dealing with such an agent to rely upon the presumption that he possessed those powers commensurate with his undertaking, and which are usually and properly exercised by other similar agents under like circumstances. In other words, it carries with it the implied power to do all those acts naturally and ordinarily done in such cases. But such an implied agency is not to be extended by construction beyond the obvious purposes for which it is apparently created. Clearly such an agency cannot imply the authority in Mr. Dunn to employ a subagent to sell the drug store, good will, and fixtures at the expense of Mrs. Brutinel, because such acts are not naturally and ordinarily done in such cases, and there is nothing in the record to show any uses and customs prevailing in similar cases or any course of dealing between the parties, that would justify the extension of the agency to include any such power. So with the special authority given to Mr. Dunn to find a purchaser for the business. Here his authority was expressly limited to the power to find a purchaser satisfactory to the principal. From such authority it can-

not be implied as a matter of law that Mr. Dunn had the power to bind his principal by an agreement to pay another commission for making a sale, because the agent must have special authority to bind his principal by the promise to pay commissions and the evidence fails to disclose any fact, either by word or conduct, or any usage and custom prevailing in similar cases, or any course of dealing between the parties, that would justify any presumption that Mrs. Brutinel authorized Mr. Dunn to perform the act in question, or that she has by any conduct logically and rationally tending to that end lead Mr. Nygren who must himself exercise due care and caution in the premises, reasonably to believe that such authority had been conferred, and accordingly to act upon such belief. In fine, the fact that Dunn was her general agent in managing the drug store and her special agent to offer it for sale would not justify Mr. Nygren in guessing that the act of Mr. Dunn in employing him as subagent at the expense of Mrs. Brutinel was within the scope of Mr. Dunn's authority.

There is an utter failure to trace the sources of his reliance, if he did so rely, to any word or act of the principal that would justify him in concluding that Mrs. Brutinel is liable by reason of her consent to, or concurrence in, the employment. Notwithstanding the difficulty in some cases of ascertaining the extent of an agent's power, the general rule is that a person dealing with an agent takes the risk. To the objection that no one would be willing to deal with an agent upon this basis Chief Justice Shaw said: "This objection, we think, is answered by the consideration, that no one is bound to deal with the agent. Whoever does so is admonished of the extent and limitation of the agent's authority, and must, at his own peril, ascertain the fact upon which alone the authority to bind the constituent depends. Under an authority so peculiar and limited, it is not to be presumed that one would deal with the agent, who had not full confidence in his honesty and veracity, and in the accuracy of his books and accounts. To this extent, the seller of goods trusts the agent, and if he is deceived by him he has no right to complain of the principal. It is he himself, and not the principal, who trusts the agent beyond the expressed limits of the power; and therefore the maxim, that where one of two innocent persons must suffer, he who reposed confidence in the wrongdoer must bear the loss, operates in favor of the constituent, and not in favor of the seller of the goods." *Mussey v. Beecher*, 3 Cush. 511.

Concerning this "maxim" Mr. Mechem

says: "There are, as has elsewhere been pointed out, many loose statements to be found in the books to the effect that there is a general principle of the law that, where one of two innocent persons must suffer by the act of a third, that one should bear the loss by whose act the loss was made possible, or who enabled the wrongful act to be committed, or who first reposed trust and confidence in the wrongdoer, and the like. As a matter of fact, notwithstanding these general statements, there is no such general principle as that which is thus declared. Like many other alleged maxims, this one contains only a half truth at most, and its use seems to be resorted to only to cover loose reasoning or to span a gap without noticing it." *Mechem, Agency*, § 1986.

But it is urged that Mrs. Brutinel is bound upon the doctrine of ratification. Ratification must necessarily rest upon knowledge of the facts or thing to be ratified. Knowledge of the facts and voluntary action, however, are as essential here as elsewhere, and the principal, by accepting what he was entitled to from the agent, in ignorance that a subagent had been employed, does not ratify his appointment. But, conceding that Dunn attempted to act for Mrs. Brutinel in employing Nygren, she was in entire ignorance of that fact when she consummated the sale with Riker and Robbins. See *Servant v. McCampbell*, 46 Colo. 292, 104 Pac. 394; *Rice v. Post*, 78 Hun, 547, 29 N. Y. Supp. 553; *Craver v. House*, 138 Mo. App. 251, 120 S. W. 686; *Ballentine v. Mercer*, 130 Mo. App. 605, 109 S. W. 1037; *Benham v. Ferris*, 159 Mich. 632, 124 N. W. 538; *Hanback v. Corrigan*, 7 Kan. App. 479, 54 Pac. 129; *Sims v. St. John*, 105 Ark. 680, 43 L.R.A. (N.S.) 796, 152 S. W. 284; *Carroll v. Tucker*, 2 Misc. 397, 21 N. Y. Supp. 952.

In one jurisdiction it is said: "The right of sale is one of the most valuable rights incident to the ownership of property, and it ought not to be restricted for other than cogent reasons. Unless some public interest or paramount private right renders a curtailment necessary, the owner of any character of property should have the unhampered right to sell it, with the entire world as a market. If another person, unauthorized by the owner, assists an agent in making a sale, is it right and just to hold that, if apprised of what has been done by such assistant or subagent, and the fact that the agent has promised compensation by the owner, the latter cannot accept the terms offered by the purchaser without becoming liable to such subagent? Under such circumstances it cannot be claimed

that the owner has misled the subagent; nor will consummation of the sale without compensating him place him in any worse position than he would be in if the sale should be abandoned. It is true that one cannot adopt part of an authorized contract without adopting the whole; but the contract submitted to Mrs. Williams, and the one she adopted, was the contract for the sale of the land, and not the contract between Miller and Straub. It was not stipulated in the contract of sale that she should pay Straub for services rendered. It is true, when she adopted that contract, she had knowledge of the other contract and of the services rendered by Straub; but as the latter contract was unauthorized by her, as she had done nothing to induce Straub to render the services, as her consummating the sale without remunerating him would place him in no worse position than he was already in, and as she had the power and right, independent of that contract, to sell her land to the proposed purchaser, she had the right, in the forum of conscience as well as at the bar of the law, to accept the terms of the contract of sale without ratifying the contract between Miller and Straub, either upon the ground of adoption or estoppel." *Williams v. Moore*, 24 Tex. Civ. App. 402, 58 S. W. 953.

But this authority goes somewhat farther than the holding in most jurisdictions as to what amounts to the ratification of an unauthorized contract, but under the facts of that case it may correctly be placed upon the failure to establish an agency by estoppel. "The general rule of law is that if an agent, in the conduct of his agency, employs a subagent, without authority to bind his principal, expressly given or fairly presumptive from the particular circumstances or the usage of business, the subagent must look to his immediate employer for his pay, and has no claim for compensation against the agent's principal, between whom and the subagent no privity exists." *Jenkins v. Funk* (C. C.) 33 Fed. 915; *Jones v. Brand*, 106 Ky. 410, 50 S. W. 679; *Bonwell v. Howes*, 15 Daly, 43, 2 N. Y. Supp. 717; *Rice v. Post*, 78 Hun, 547, 29 N. Y. Supp. 553; *Atlee v. Fink*, 75 Mo. 100, 42 Am. Rep. 385; 2 C. J. p. 778, § 445; *Mechem, Agency*, § 1761.

Nor has the plaintiff established an estoppel, for he has not changed his situation to his detriment, in reliance upon the principal's conduct. "The estoppel works in favor of the third party who has dealt in good faith with the agent upon the strength of the representations made by the princi-

pal." 4 Mod. Am. Law, "Agency," p. 20, § 24.

The learned judge of the trial court misapprehended the law in his charge to the jury. In submitting the first instruction quoted, the right of the plaintiff to recover was not made to depend upon whether Mrs. Brutinel had agreed, directly or indirectly, to pay him a commission or not. The issue whether or not Mrs. Brutinel authorized Dunn, either directly or indirectly, to employ Nygren at her expense, was so important that the jury should have been instructed to find a verdict for the defendant if such employment was not so authorized, unless the employment, if unauthorized, was in some way ratified by Mrs. Brutinel. The agreement of Dunn with the plaintiff would not bind the defendant, unless she authorized him to contract for her, or ratified the contract when made, or by reason of her representations to the plaintiff, who relied thereupon to his detriment, she is estopped to deny the employment.

The last instruction quoted is particularly prejudicial, for it excluded from the jury a consideration of the most important issue in the case, and in effect authorized the jury to determine whether, in their judgment, they thought it just or desirable that the defendant should be held liable in this case. No other parts of the charge did or could cure these errors. "The court, however, in cases of this sort, should carefully instruct the jury as to their function in the matter, and as to the rules of law by which they are to be guided. That function is not to determine whether the jury think it might be just or desirable or appropriate or convenient that the alleged principal should be held in the given case, but to decide whether, according to the rules of law, the alleged principal has in

fact, by word or conduct, authorized the assumed agent to perform the act in question, or has, by conduct rationally and logically tending to that end, led the other party, who has himself exercised due care and caution, reasonably to believe that such authority has been conferred, and to act upon such belief. What the legal rules are which govern such situations should be explained by the court; and it is the duty of the jury to apply to the facts in the case the rules of law given them by the court. It is not for juries to make the law of agency." Mechem, Agency, § 297.

Upon the uncontroverted evidence in the record the plaintiff's employment was by Dunn, and between the plaintiff and defendant no privity, express or implied, exists, and neither by ratification nor estoppel is she under any obligation to compensate him. To sustain the judgment in this case it would be necessary to hold that the jury, in arriving at their verdict, have a legal right, in the absence of any evidence in regard thereto, to conjecture and assume necessary and controlling facts, which, under the law, is beyond the province of a jury. The plaintiff may have a valid claim for remuneration. If he has, the wrong defendant has been selected to pay it. It follows, from the views we have expressed, that the request for an instructed verdict should have been given. On the facts contained in the record, no judgment should have been rendered against the defendant.

For the reasons given, the judgment is reversed, and the cause remanded for proceedings consistent herewith.

Ross, Ch. J., and Cunningham, J., concur.

### **Annotation—Liability of a principal in respect of the remuneration due for the services of a subagent.**

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- § 1. *Right of recovery considered with reference to the scope of the agent's authority, 722.*
- § 2. *General statement, 722.*
- § 3. *Privity of contract as between the principal and a subagent whose employment was authorized, 722.*
- § 4. *Power of agent in respect of imposing liability upon the principal for the subagent's compensation, 723.*

#### **I.—continued.**

- § 5. *Employment of subagent by agent acting in pursuance of authority expressly conferred, 724.*
- § 6. *Employment of subagent by general agent:*
  - a. *Employment by general agent appointed to control real property, 725.*
  - b. *Employment by general agent appointed to manage a business, 726.*



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*c. Employment by general agent representing an insurance company within a specified territory, 726.*

*d. Employment by general agent representing other descriptions of companies within a specified territory, 729.*

**§ 7. Employment of subagent by special agent, 731.**

**§ 8. Particular circumstances from which an enlargement of the agent's ordinary authority may be implied, 732.**

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**§ 9. Dependency of subagent's remedial rights upon those of the agent, 740.**

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**II. Right of recovery considered with reference to the question whether the contract of employment was adopted by the principal:**

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**§ 13. Same subject further discussed, 746.**

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**§ 15. Subagent employed by agent professedly acting as agent, and within the scope of his authority, 748.**

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**§ 18. Supersession of lien by contract, 752.**

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**IV. Right of recovery considered with reference to the question of liability as between the principal and the employing agent:**

**§ 20. Subagent employed by agent professedly acting as agent, and within the scope of his authority, 753.**

**§ 21. Same situation further discussed, 756.**

**§ 22. Subagent employed by professed agent acting in excess of his authority, 762.**

**§ 23. Subagent employed by agent who did not disclose his agency, 764.**

**I. Introductory.**

For the purposes of the following discussion the expression "subagent" will be assumed to connote a person employed by an agent to assist him in regard to business transactions by the performance of services of the same character as those which appertain to the functions which have been delegated to the agent himself. Subagents employed on a footing which renders them in a technical sense "servants" in respect of the performance of their duties are regarded as being outside the scope of the monograph. The liability of a principal for

the remuneration of persons employed by his agent who are neither subagents nor servants is discussed in the monograph appended to *Chesson v. Richmond Cedar Works*, ante, 6.

The footing upon which the amount of compensation is ascertained in cases in which a subagent is held entitled to recover against the principal is, of course, the same as that which is applicable to actions brought by agents of all descriptions. It would be out of place, therefore, to deal with this phase of the subject in a note of the specialized scope which is indicated by its title.

**§ 1. Right of recovery considered with reference to the scope of the agent's authority.**

**§ 2. General statement.**

No clearer or more exhaustive exposition of the general considerations which determine the extent of an agent's authority to employ a subagent is to be found in the reports than that which is contained in the following passage in the judgment delivered by Thesiger, L. J., for the English court of appeal: "As a general rule, no doubt, the maxim '*delegatus non potest delegare*' applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim, when analyzed, merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken to personally fulfil; and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract. But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed so as, on the one hand, to enable the agent to appoint what has been termed '*a subagent*' or '*substitute*' (the latter of which designations, although it does not exactly denote the legal relationship of the parties, we adopt for want of a better, and for the sake of brevity), and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute; and that when such authority exists, and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to

the former for the due discharge of the duties which his employment casts upon him as if he had been appointed agent by the principal himself."<sup>1</sup>

As applied to cases involving the right of a subagent to recover from the agent's principal compensation for services rendered, the doctrines laid down in this passage lead to the particular conclusions which have been thus stated by Judge Story: "In regard to the superior or real principle, the general rule of law is, that if an agent employs a subagent, to do the whole or any part of the business of his agency, without the knowledge or consent of the principal, express or implied, there, inasmuch as no privity exists in such a case between the principal and the subagent, the latter will not be entitled to claim from the principal any compensation for commissions or advances or disbursements in the course of his subagency. But his sole remedy therefor is against his immediate employer, and his sole responsibility is also to him. But where, by the usage of trade, or the express or implied agreement of the parties, a subagent is to be employed, there a privity is deemed to exist between the principal and the subagent, and the latter may, under such circumstances, well maintain his claim for such compensation, both against the principal and the immediate employer, unless exclusive credit is given to one of them; and, if it is, then his remedy is limited to that party."<sup>2</sup>

**§ 3. Privity of contract as between the principal and a subagent whose employment was authorized.**

The doctrine ordinarily taken for granted in cases of the type discussed in the present monograph is that the right of a subagent to maintain an action against the principal for his remuneration, in so far as it depends merely upon the existence of a privity between these parties, becomes a necessary inference whenever it appears that the appointment of the subagent was within the scope of the agent's authority. But in a case involving the right of a subagent employed by the general agent of an insurance company, to hold the company

<sup>1</sup> *DeBussche v. Alt* (1877 C. A.) L. R. 8 Ch. Div. 286, 2 Eng. Rul. Cas. 289, where the actual question involved was the right of the principal to hold the subagent liable for certain profits accruing in respect of the sale of a ship.

<sup>2</sup> Agency, 9th ed. § 387, quoted in *McKenzie v. Nevius* (1842) 22 Me. 157, 38 Am. Dec. 291.

responsible as for a breach of the contract of employment, one of the Federal courts of appeals proceeded upon the theory that the contract, although made in the exercise of a power specifically conferred upon the agent, did not, in the absence of an express stipulation to that effect, create between the company and the subagent a relationship of such a nature as would enable the latter to maintain an action on the contract against the former.<sup>3</sup> A perusal of the opinion discloses some inconsistency in respect of the doctrinal position of the court. In one passage the existence of a privity of contract was denied in toto; in another it was asserted that such privity was predicable in a qualified sense, and for some purposes.<sup>4</sup> The palpable discrepancy between these statements is possibly an indication that the court was somewhat embarrassed by the difficulty of procuring a satisfactory basis for the doctrine which, in the final analysis, the decision may be said to require for its support; viz., that there may be a privity of a restricted nature, which is not accompanied by so essential and characteristic an incident of a contract of employment as the presumptive right of the person employed to claim damages for a wrongful dismissal. There is apparently no other specific authority for such a doctrine, and its soundness is, to say the least, not beyond question. The present writer ventures to suggest that the decision might with greater propriety have been referred simply to the consideration that the explicit provisions of the two

written contracts under discussion rendered this company exempt from all liability for the payment of the subagent's compensation, and that its immunity in this respect entailed as a necessary consequence the incapacity of the subagent to maintain against it an action in which the measure of damages would be the amount of the prospective earnings which he had been prevented from earning.<sup>5</sup>

**§ 4: Power of agent in respect of imposing liability upon the principal for the subagent's compensation.**

By a court of inferior jurisdiction the doctrine has been propounded that the fact of an agent's having been impliedly invested with the power of employing the subagent does not necessarily justify the inference that he was also authorized to bind the principal to remunerate the subagent for service rendered in pursuance of the contract of employment.<sup>1</sup> This statement, if it simply means that, in the view of the court, the authority of the agent to charge the principal with liability for the subagent's compensation is merely presumptive in its nature, is not open to any objection, except that of a somewhat unfortunate ambiguity. If it means more than this, it would embody a theory essentially inconsistent with the cases in which it has been taken for granted that the right of the subagent to recover compensation from the principal is conditioned simply upon his ability to prove that the intermediate agent was empowered to employ him.<sup>2</sup>

<sup>3</sup> *Union Casualty & Surety Co. v. Gray* (1902) 52 C. C. A. 224, 114 Fed. 422. There the contract between the defendant company and its general agent, Black, by whom the plaintiff was employed, provided that "such agent is authorized as such to appoint and employ, within and for the territory aforesaid, but subject always to such rules and regulations as may be prescribed in respect thereof by said company, any and all subagents, subordinates, and employees reasonably necessary for the proper transaction of the business contemplated by this contract, and for the fulfillment of his agreements hereunder." It was also stipulated that "said agent . . . shall be directly accountable . . . to and with said company for all moneys, etc., belonging to said company, . . . and shall be directly liable to this company for and in respect of all acts, doings, and agreements of any and all solicitors, agents, special agents, canvassers, clerks, and other employees appointed or employed by said agent, . . . there might be a question as to the company's being liable upon the

contracts made for Black by such subagents. This authority to appoint them for the purposes mentioned removed all questions as to the company's liability for contracts so made. So far, and in this qualified sense as to third parties holding policies of the company, it may be said to have been privy to the contract between Black and Gray. That is, the company was bound thereby to recognize policies duly issued within the scope of his authority, by Black or his subagents, as liabilities of the company."

<sup>4</sup> See pp. 230 and 231 of the report in 52 C. C. A.

<sup>5</sup> See *Lester v. New York L. Ins. Co.* (1892) 84 Tex. 87, 19 S. W. 356, the effect of which is stated in § 21, note 7, *infra*.

<sup>1</sup> *Williams v. Moore* (1900) 24 Tex. Civ. App. 402, 58 S. W. 953.

<sup>2</sup> See the following subtitles. The case of *Lindquist v. Northwestern Port Huron Co.* (1908) 22 S. D. 298, 117 N. W. 365, in which the liability of a manufacturing company for the commission of a subagent hired by an agent who was conceded to

But, apart from its inconsistency with those cases, its incorrectness will be at once apparent if we advert to the consideration that, according to the ordinary view (see preceding section), the employment of a subagent by an agent empowered to employ him must, in the absence of evidence to the contrary, be deemed to create a privity between the principal and the subagent; or, in other words, to render the subagent an agent of the principal. Under such circumstances, an obligation on the principal's part to remunerate the subagent manifestly supervenes; and, as the existence of that obligation is, in this point of view, a direct result of the agent's exercise of his power in respect of the employment of the subagent, the authority to impose the obligation may warrantably be regarded as an incident of the power to employ. This is in effect the position taken by another court of inferior jurisdiction, by which it has been laid down that "the power to appoint, in the absence of a limitation on its terms, would include the power to fix the com-

pensation."<sup>3</sup> But the language thus used seems to be too broad. The court presumably meant that the agent was empowered to fix a *reasonable* compensation. It is sufficiently obvious that the implication concerning the extent of his power cannot be supposed to go further than this.

**§ 5. Employment of subagent by agent acting in pursuance of authority expressly conferred.**

The applicability of the general rule, "*Delegatus non potest delegare*," is, of course, negatived wherever it is shown that the agent was expressly authorized to employ a subagent on such a footing as to create a privity of contract between him and the principal. Under such circumstances the principal clearly becomes responsible for the subagent's remuneration, unless it is also proved by affirmative evidence that the subagent agreed to look solely to his immediate employer for such remuneration. See §§ 20 and 21, *infra*.<sup>1</sup>

have power to employ him was affirmed, may be specially referred to in this connection.

<sup>3</sup> *Employers' Liability Assur. Co. v. Morris* (1900) 14 Colo. App. 354, 60 Pac. 21 (stating this to be the purport). The decision relied upon was *Mutual L. Ins. Co. v. Lewis* (1899) 13 Colo. App. 528, 58 Pac. 787. See § 6, note 9, *infra*.

**a. Employment by agent appointed to sell real property.**

<sup>1</sup> In *Kurtz v. Payne Invest. Co.* (1912) 156 Iowa, 376, 135 N. W. 1075, where the defendant company was engaged in the sale of the subdivisions of a certain tract of land, the testimony of Stewart, the person who employed the plaintiff, that his duties were "generally to appoint agents, and work together with them in interesting buyers," was thus commented upon by the court: "The defendant confirmed what he did in the way of fixing prices, and from this and the circumstance that he had authority to appoint agents and work with them it might have been inferred that he also was authorized to arrange with the agent the terms on which services should be rendered. In other words, from the authority to appoint agents, there may be implied the authority to define the terms of such appointment, including the matter of compensation. As there was evidence that Stewart was without such authority, the issue was appropriate for the determination of a jury."

In *Sterling v. DeLaune* (1907) 47 Tex. Civ. App. 470, 105 S. W. 1169 (writ of error denied by the Supreme Court). It was held that a subagent employed by an agent in pursuance of an express authorization was

not entitled to claim a larger commission than that which the agent himself was to receive under the terms of his appointment.

In *Craver v. House* (1909) 138 Mo. App. 251, 120 S. W. 686, one Hollister, a man in the employ of the plaintiff, a real estate broker having learned that defendant's property was for sale, but that he was out of the city, applied to the defendant's son, F. E. House, a lawyer, and offered to furnish a purchaser for the property, if it could be purchased for \$3,500. The son telegraphed to his father for instructions, which in a short time resulted in defendant directing him "to go ahead and sell at that price." Neither plaintiff nor Hollister ever saw these telegrams. After receiving instructions to sell, the son informed Hollister that "the sale could be made" at the price named. Hollister showed the property to a Mr. Beeson and induced him to sign a contract for the purchase. The son then gave Hollister directions about getting the abstract of the property, and, in due time, defendant executed a deed, conveying the property to the purchaser. The opinion was expressed that the rule of law as to an agent authorized to sell real estate, who is clothed with the discretionary power as to price and terms, had no application to the facts of the case, for the reason that the price and terms were fixed by the defendant, and that F. E. House was only clothed with the ministerial power to sell at the price and upon the terms so fixed. The evidence disclosed that it was not the defendant who was looking for a purchaser, but that a purchaser was seeking defendant to purchase. "The natural conclusion from the facts," said the

**§ 6. Employment of subagent by general agent.**

In the present monograph it would be out of place to do more than make a passing allusion to a subject which is, to some extent, considered in *BRUTINEL v. NYGREN*, ante, 713, the nature, theoretical soundness, and practical value of the distinction which has been taken between the powers of general and special agents. All that need be here said is that, as such a distinction supplies a convenient basis of classification, the cases which turn upon the scope of the powers of intermediate agents in respect of the employment of subagents may appropriately be arranged with reference to it.

**a. Employment by general agent appointed to control real property.**

In one case it was laid down that, if the employer of the subagent was the general agent of the defendant, "having the same powers that she possessed in reference to the sale of her land, then, of course, he had the power to find her for compensation to a subagent."<sup>1</sup> This observation doubtless embodies a perfectly unexceptionable doctrine; but, as it furnishes no indication of the views of the court concerning the circumstances under which a general agent becomes virtually the alter ego of the principal in

the sense predicated, it is not very instructive for practical purposes.

There would seem to be adequate reason for taking the position that, where a general agent, whose ordinary functions have reference merely to the control of his principal's property, is directed to sell it, the direction should be regarded simply as having the effect of adding to his functions as general agent those of a special agent in respect of the sale. In this point of view the question whether he has the power of employing a subagent to assist him in making the sale would ordinarily be determined on the same footing, and with reference to the same considerations, as if his relationship to the principal were that of a special agent only. If this is the correct theory, it would follow that a subagent so employed cannot recover against the principal, unless he produces some affirmative evidence to supplement the fact of his employer's general agency in respect of the control of the property. The view thus suggested is in harmony with some portions of the argument of the court in *BRUTINEL v. NYGREN*, and seems to be also supported by the case cited in the footnote, in so far as it is possible to extract any broad rule from the reasoning of the court.<sup>2</sup>

court, "is that the defendant did not authorize anyone to procure a purchaser, but that he was willing to accept one at his price and upon his terms."

**b. Employment by agents appointed to sell personal property.**

In *Neff v. Harwood Barley Mfg. Co.* (1914) 193 Ill. App. 439 (no opinion reported), the points which, according to the abstract, were decided, are as follows: (1) Where a prospective purchaser writes a manufacturing concern that he is desirous of purchasing a motor truck, and is informed that their agent is desirous of seeing the purchaser about the agency of the truck in purchaser's vicinity, such agent acts with in the apparent scope of his authority in appointing the purchaser as agent, and it is immaterial that the appointing agent may have acted contrary to private instructions; (2) where a manufacturing concern, selling through agents on commission, has received the benefit of work done under an agency created under authority which it notified a prospective purchaser and agent it had reposed in one of its general appointing agents, the right of such appointed agent to a commission cannot be defeated by the mere fact that the seller subsequently makes agents of the customers introduced by such appointed agent.

One of the excepted cases in which, under

the Codes of three of the American States, the delegation of an agent's powers is permitted, is "when such delegation is specially authorized by the principal." Cal. Civ. Code 1916, § 2349 (4); N. D. Civ. Code 1905, § 5794 (4); S. D. Civ. Code 1908, § 1699 (4).

<sup>1</sup> *Williams v. Moore* (1900) 24 Tex. Civ. App. 402, 58 S. W. 953. Such general agency was held to be negated by the language of the only finding of fact which bore upon the point, as it simply stated that she instructed Miller to find a purchaser for said land at a price of \$25 or more per acre.

<sup>2</sup> In *Gold v. Serrell* (1893; Com. Pl.) 6 Misc. 124, 26 N. Y. Supp. 5, the evidence which was held to establish the plaintiff's right of recovery was as follows: That defendant admitted that the plaintiff's employer, Syms, was her general agent, and as such had charge and control of her property; that the contract for the purchase and sale of property which was entered into between the defendant and the vendees was executed by Syms, acting for defendant; that Syms continued to represent the defendant in respect of the delivery of the deed and the payment of the purchase money; and that, after the contract was made, defendant admitted to each of the vendees that she owed plaintiff for his commissions. It was held that plaintiff's

*b. Employment by general agent appointed to manage a business.*

That the appointment of an agent to manage a business does not invest him by implication with authority to employ a subagent for the purpose of selling the business is obviously a necessary deduction from the consideration that there is no ground whatever upon which managerial functions which, ex hypothesi, extend merely to keeping up a business as a going concern, can be deemed to carry with them the power to transfer the business itself. This doctrine, although not formally enunciated in *BRUTINEL v. NY-*

right to the commissions promised by the agent was "in no sense impaired by defendant's instructions to the latter that she would not consent to the allowance of broker's commissions out of the proceeds of sale which she expected to realize."

<sup>2a</sup> In *Benjamin v. Benjamin* (1843) 15 Conn. 347, 39 Am. Dec. 384, the court remarked, arguendo, that "the very case of intrusting another with the superintendence of a farm is put in the books on the civil law, under which it was held that an agency of that description does not authorize the agent to sell the property of the principal for any purpose, unless it be of a perishable nature."

<sup>3</sup> In *Furnas v. Frankman* (1877) 6 Neb. 429, the plaintiff, Frankman, applied to Robert W. Furnas, one of the members of the firm of Furnas, Irish, & Company, to be employed in canvassing for orders for nursery stock. Furnas referred him to one Martin, who was then the agent of the firm, "with very general authority to superintend, manage, and carry on said business," which he did "in their firm name." Furnas, at the same time, told him that "Martin was doing all their business in the nursery line." Frankman thereupon applied to Martin, who employed him in the name of the firm. The defendant relied mainly upon the fact that by the terms of Martin's engagement with Furnas, Irish, & Company, he was not authorized to employ other agents for and on behalf of the firm, so as to make it liable for their services, and that all subagents were to be Martin's agents, and they were to look solely to him for compensation for their services. But the court said: "Undoubtedly, if Frankman had been aware of this restriction upon Martin's authority, it would have proven an insuperable objection to his recovery, and he would have been compelled to look to Martin alone for compensation. And doubtless it would have been the same had he not been led to believe by the firm itself that Martin was possessed of all the authority in and about the business that he assumed to exercise. . . . But here, in addition to the declaration of Furnas that 'Martin was doing all their business in the nursery line,' the referee found that

GREEN, ante, 713 was clearly taken for granted by the court.<sup>2a</sup>

On the other hand, a general agent of this description will, it seems, ordinarily be deemed to have the authority to employ such subagents as may be required for the purpose of enabling him to carry on the business to the best advantage.<sup>3</sup>

*c. Employment by general agent representing an insurance company within a specified territory.*

The theory indicated by some cases seems to be that, unless a different inference is required by the contract under which a general agent of this de-

Frankman 'had no knowledge that Martin was not authorized to enter into the contract' in the name of the firm, 'but, on the contrary, he was informed by Martin, and believed, that he had such authority.'

. . . It is clear that the facts found by the referee constituted Martin the general agent of Furnas, Irish, & Company, in the sale of nursery stock, with full authority to employ subordinates to solicit orders in the name of the firm. And this authority included also the power to bind his principals for the payment of compensation as to all persons not advised of the private understanding by which Martin himself was to pay those whom he should thus employ."

In *De Baril v. Campoy* (1885; C. P.) 17 Phila. (Pa.) 383, the ground upon which an action was held not to be maintainable for a commission claimed in respect of the sale of personality was that the letters authorizing the defendant's son to make the sale did not prove him to have been his father's general agent, and so authorized to appoint other agents.

In *Blowers v. Southern R. Co.* (1906) 74 S. C. 221, 54 S. E. 368, the right of a third person to recover compensation for services rendered in carrying mails at the request of a station agent was affirmed on the ground that the station agent was a subagent as regards the defendant's superintendence of transportation.

Compare also *Trueman v. Loder* (1840) 11 Ad. & El. 589, 113 Eng. Reprint, 539, where, in the course of a judgment declaring the defendant to be liable for not performing a written contract for the sale of a quantity of tallow, entered into by and in the name of one Higginbotham, who carried on business for the defendant in his own name, Lord Denman observed: "If, then, the defendant chose to appoint an agent to carry on trade for him in the name of Higginbotham, he clearly authorized that person to do all that could be necessary for him so to carry it on; among other things, to employ a broker to sell for him; and it does not lie in his mouth to deny that the name of Higginbotham, so inserted by the broker in the sold note, is the defendant's own name of business."

scription is appointed, he should be taken to have been invested with the power, not merely of employing subagents, but of employing them upon such a footing as to bring them into privity with his principal, and so render that principal liable for their remuneration.<sup>4</sup> In this point of view the responsibility of the company may be regarded as being predicated both upon the theory of an authority conferred, and upon an application of the rule "that the acts of a general agent with reference to the subject of the agency will bind his principal, although he may have received private instructions narrowing his authority, unless such instructions are known to the party dealing with him."<sup>5</sup>

On the other hand, in a case where the right of recovery was denied, for the reason that the plaintiff had not succeeded in proving his allegation that his employer was a general agent, the court added: "We do not intend that it shall be understood that we are of the opinion that a general agency, so called, necessarily carries with it the authority to appoint special agents for the company. Manifestly, any agency, general or special, is no more than the principal chooses to make it, unless he undertakes to limit the effect of the power which

others have a right to suppose he has conferred, when he will be estopped to deny such power."<sup>6</sup> This remark, although technically it was a mere obiter dictum, may reasonably be regarded as showing that the point adverted to would have been decided adversely to the claimant, if it had been actually involved in the case. It will be observed that the court made no allusion to the ulterior question which has been considered in one case (see § 4, *supra*), viz., whether the exercise of a power of appointment which a general agent is proved or conceded to possess necessarily creates such a privity between the principal and the subagent as will render the former liable for the remuneration of the latter.

In practice, however, the presumptive extent of the power of general agents of this description is seldom an element of controlling importance. The incidents of the relationship existing between the agents and subagents, and between each of them and the principal, have ordinarily been discussed with reference to some kind of affirmative proof, the introduction of which rendered it superfluous to consider what initial presumption should be entertained,—either the provisions of formal written contracts;<sup>7</sup> of the contents of let-

\* In *Benesch v. John Hancock Mut. L. Ins. Co.* (1890; Com. Pl.) 16 Daly, 394, 11 N. Y. Supp. 714, the plaintiff, who was seeking employment, called at the office of defendant, a foreign corporation, and was received by the manager, Hill, who, upon learning his business, referred him to one Miller, as the "superintendent for Staten Island." Miller entertained the application of plaintiff for employment, drew up a written paper for him to sign, to be sent to the home office for approval, engaged him in the meantime at a salary of \$10 per week to solicit insurance for the company, and demanded from him \$100 as security for the faithful discharge of his duty, which sum plaintiff paid into the said office. The grounds upon which it was held that the plaintiff was entitled to maintain an action for the recovery of his salary and deposit were thus stated: "The transaction through which the plaintiff was induced to part with his money and give his services to the company, under, as he believed, due employment by them, took place at the office of the company in New York, and, in effect, with the manager himself; for although all that Mr. Hill, the manager, did was to refer the plaintiff to Mr. Miller, yet, as this was done with full knowledge of the plaintiff's application for employment, and that he came to that office pursuant to an advertisement and a letter apparently issuing from it, whatever Miller did in respect of the plaintiff's application

was as much an act of Hill as if the latter personally transacted the whole business. The plaintiff having first applied to Hill, and being referred by the latter to Miller, without any notice that Miller was acting on his own behalf, had a right to assume that Miller was acting for Hill. Miller was an agent of the company, with limited powers, which did not include the hiring of others; but the plaintiff dealt with him because referred to him by Hill, and the plaintiff's right of recovery does not depend upon Miller's authority, but upon Hill's. Hill's power to employ agents was, it seems, restricted by the company to receiving and forwarding written applications for employment, and the hiring of such applicants as were thereafter approved by the company. The plaintiff, however, did not know of this limitation upon Hill's authority. . . . The case resembles in its principal features *Cox v. Albany Brewing Co.* 56 Hun, 489, 10 N. Y. Supp. 213."

<sup>4</sup> *Equitable Life Assur. Co. v. Brobst* (1886) 18 Neb. 526, 20 N. W. 204.

<sup>5</sup> *Gore v. Canada Life Assur. Co.* (1898) 119 Mich. 136, 77 N. W. 650.

<sup>7</sup> In *Cotton States L. Ins. Co. v. Mallard* (1876) 57 Ga. 64, the first paragraph of the syllabus prepared by the court is as follows: "A contract made by the general agent of a life insurance company, charged with the duty of appointing subagents, whereby he obliged the company to pay the subagent a fixed sum per month, and

ters;<sup>8</sup> or extraneous testimony bearing upon the nature of the rights and liabili-

ties created by the employment of the subagents.<sup>9</sup>

signed the contract as general agent for the company, is the contract of the company, and the company, and not the general agent, is responsible to the subagent for such salary." The following paragraph of the syllabus thus states the conclusion arrived at with regard to another point raised in the case: "When the charter gives the general agent 'the management of his department and the state agencies,' [and] 'the appointment of agents and direction of their work under his control, subject to the approval of the officers of the company,' the latter words do not mean that the approval of the officers of the company is a condition precedent, necessary to the appointment of all subagents and every direction of their work, but they mean simply to reserve to such officers a supervisory control over the subagents and their work, including their appointment, and until the officers do, by some act, intervene and nullify the contracts appointing the subagents and the orders directing their work, the appointments, contracts, and orders of the general agent are valid and binding upon the company." It was also laid down that "the subagents are not bound by a private contract made between the company and their general agent limiting the powers of the general agent to guarantee salaries; they are bound with notice and knowledge of the provisions of the charter, which is a public law, but not of a private contract unless actual knowledge be brought home to them."

See also *Union Casualty & Surety Co. v. Gray* (1902) 52 C. C. A. 224, 114 Fed. 422 (§ 3, note 1, supra), and *Moore v. New York L. Ins. Co.* (1898) — Tenn. —, \*51 S. W. 1021 (§ 21, note 7, infra).

<sup>8</sup> In *Vail v. Northwestern Mut. L. Ins. Co.* (1901) 192 Ill. 567, 61 N. E. 651, affirming (1901) 92 Ill. App. 655, where the action was brought for the recovery of commissions on renewals of insurance, the trial judge excluded testimony consisting of a written instrument, conversations of the plaintiff with the officers and agents of the defendant, and letters written by him and them, previous to, as well as after, the execution of the written instrument. The instrument was in the form of a letter addressed to the appellant, and signed "Dean & Payne, General Agents for Illinois." It contained a proposition from Dean & Payne to accept all desirable life insurance which the plaintiff might wish to offer the defendant company during the ensuing five years; which insurance was to be placed through Dean & Payne with the company for which they were agents, and to be approved and accepted by that company. It was also proposed that under certain special conditions there should be paid to appellant, in addition to his cash commissions, a renewal commission of 5 per cent on ten renewals as same are paid to the company, "providing Dean & Payne,

or either of them, receive said commission from said company." The instrument also contained a number of other provisions and conditions. The court was of opinion that, when read as a whole, it clearly appeared to be a contract between the plaintiff and Dean & Payne, and not between the plaintiff and the defendant, and that the relation which appellant bore to appellee was only that of a subagent under Dean & Payne. It was held that, as the terms of the agreement were plain and unambiguous as to who was intended to be bound by it, it could not be varied, contradicted, or enlarged by intrinsic evidence. The trial judge, therefore, had not erred in excluding the testimony offered.

<sup>9</sup> In *Mutual L. Ins. Co. v. Lewis* (1899) 13 Colo. App. 528, 58 Pac. 787, the written contract under which it was alleged that the claimant's services were rendered was as follows: "Denver, Colo., February 17, 1893. It is mutually agreed between John L. Stearns, general agent of the Mutual Life Insurance Company of New York, and Mr. J. H. Lewis, that the latter shall act as special agent for this company under the schedule of commission attached, and that he shall receive a guaranty of \$200 per month for one year from date, said guaranty to be deducted from commission earnings. It is further agreed that all traveling expenses for business done outside of Denver by said J. H. Lewis shall be borne by said J. L. Stearns. . . . [Signed] John L. Stearns, General Agent. John H. Lewis." A demurrer to the complaint having been sustained, and an appeal taken by the plaintiff, the judgment was reversed in (1896) 8 Colo. App. 368, 46 Pac. 621, on the ground that the contract was so framed that evidence aliunde was admissible to show that Stearns had authority from the defendant to execute the writing in its behalf; and that in making the contract he did in fact act as its agent. Upon a retrial of the cause in the lower court, judgment was rendered in favor of the plaintiff for the amount of his claim. This judgment was affirmed by the court of appeals. The defendant relied upon testimony given by its auditor and second vice president to the effect that subagents employed by a general agent did not represent the company, but were the mere personal appointees of the general agent, and that if Stearns employed special agents, he employed them on his own account, and had no authority to bind the defendant for their compensation. But the court said: "The testimony of those witnesses would seem to be contradictory of the certificate which the defendant furnished the superintendent of insurance, and which was signed by its second vice president, one of the witnesses. By the terms of that writing, Stearns, as the general agent of the defendant, possessed full power and authority to appoint special agents, not



*d. Employment by general agent representing other descriptions of companies within a specified territory.*

In an early California case an instruction in favor of a local agent of a steam-

ship company, having its domicile in New York, was held to be erroneous for the reason that he had not produced any affirmative evidence from which it could be inferred that the company's agent in San

for himself, but for the company, his appointments to be as valid and binding upon the company as if made directly by its officers. Therefore when Stearns employed the plaintiff to act as special agent for the defendant, he only exercised an authority which was distinctly and explicitly conferred; and that the purpose of the contract between Stearns and the plaintiff was to create between the defendant and the plaintiff the relationship of principal and agent abundantly appears from the certificate which Stearns himself filed with the superintendent of insurance. Although from the contract alone we would not regard ourselves as warranted in saying that, in executing it, Stearns was acting for the company, yet his own certificate, and that of the defendant, show very clearly that he was so acting, and that he had the requisite authority to so act." It was argued by counsel that a distinction should be taken between the effect of the certificates upon the obligations of the company to third persons, on account of the acts of its special agent, and its objections to the special agent himself, the result being that while, by virtue of the plaintiff's appointment, in effecting contracts of insurance he would be the company's agent, with full authority to bind it, the company was, notwithstanding, at liberty to say, in a controversy between him and it, that, by virtue of some private regulations of his own, he was not its agent at all. But the court said: "No such distinction is deducible from the language of either of the certificates, or of the contract between Stearns and the plaintiff; no knowledge of it was traced to the plaintiff, and, upon the evidence, the court was amply justified in saying that it was unwarranted. . . . When we consider the purpose for which the certificates were filed,—the object which was sought, and which was attained, by their filing—we do not think it competent to the defendant to prove facts inconsistent with their terms. They were official statements, solemnly made for the purpose of compliance with the law, in order to secure an advantage to the defendant; and, when filed, they became public records. It is a conclusive presumption that they meant exactly what they said. Public policy requires that the defendant shall abide by the record it has made. Stearns had the power from the company to appoint agents to represent it. In making appointments, he acted for the company, and bound the company. His appointees were the servants of the company, and the company, acting through him, was their employer. The power to appoint, in the absence of limitations upon its terms, includes the power to fix compensation. The contract with the plaintiff was in con-

formity with the authority with which Stearns was clothed."

In *Employers' Liability Assur. Co. v. Morris* (1900) 14 Colo. App. 354, 60 Pac. 21, the power of a state agent to appoint sub-agents was treated as having been established by the insurance company's failure to deny certain allegations of the complaint by the admissions of its answer, and by the testimony of its own witnesses.

In *Homan v. Brooklyn L. Ins. Co.* (1879) 7 Mo. App. 22, the plaintiff had been employed, as a solicitor of insurance, by one Wilson, the defendant's agent at St. Louis. Wilson's written contract showed that he had been appointed for the purpose of receiving applications for insurance, and of collecting and paying over premiums; that he had authority to appoint subordinate agents to aid him in the business of his agency, for whom he was to be responsible; and that the company was not to be liable for the remuneration of the subordinates. Wilson testified that he did not hire the plaintiff on his own account; but it appeared that both the plaintiff and Wilson understood that the defendant's obligation to pay the plaintiff for services depended on whether an agreement as to such payment would be entered into by certain officers of the company, who, at the time when the plaintiff was employed, were expected to arrive at St. Louis. On the ground that there was some evidence in support of the plaintiff's theory, the question whether he was entitled to recover was held to be for the jury. In answer to the further objection of the defendant that no authority on the part of Cole (the secretary of the company) to employ the plaintiff for the company had been proved, it was declared that the fact of the company's having sent him to St. Louis on business connected with the agency, and his subsequent letters when at home, written as secretary, in connection with what he did when at St. Louis, apparently with the sanction of his company, constituted sufficient evidence of authority to go to the jury.

In *United States L. Ins. Co. v. Hessberg* (1875) 27 Ohio St. 393, where the plaintiff, Hessberg, who had been employed by Ricke, the defendant company's general agent for the territory in question, was held not to be entitled to commissions in respect of business transacted prior to the absconding of Ricke, the court did not analyze the evidence in detail, but referred particularly to elements, as tending to show that he was not the agent of the company in such a sense as to render it liable for his services; viz., Hessberg's own testimony, a certain letter of his to the president of the company, and his account book with Ricke of

Francisco was authorized to appoint him.<sup>10</sup> But the soundness of this ruling seems to be at least open to question. It is submitted that the instruction so disapproved might be justified, either on the ground that the San Francisco agent was the company's general agent in California, and so presumptively authorized to employ subagents in that state, or on the ground that, having regard to the remoteness of that state from New York, and the defective condition of the existing communication between the Atlantic and Pacific coasts, it might reasonably be assumed that the company intended to leave the appointment of its local agents in the hands of its chief representative in California.

In a case where the plaintiff unsuccessfully sought to hold a steel company liable for remuneration in the nature of a commission on a sale effected in pursu-

ance of an agreement made with an employee who was the defendant's supervising engineer, having his headquarters at its factory in another state, and who apparently acted also as its salesman and solicitor, the decision was based upon the ground that "no authority to employ subagents is ordinarily incident to either of these two branches of service, and, in the absence of special terms of employment, none should be inferred."<sup>11</sup>

In a Missouri case, where the plaintiff had been hired as a sales agent by a person who conducted the business of a New York manufacturing company within a certain territory, the question whether that person had authority, real or ostensible, to make the contract of employment, was determined in favor of the plaintiff from the particular facts in evidence.<sup>12</sup>

the commissions charged to him, in which Ricke was credited with compensation received. The plaintiff also sought to recover on another ground; viz., that, as Ricke's defalcation to the company, some \$3,000, had been paid by his sureties, the company had no claim on the commissions on premiums and renewals thereafter to be collected; that the person who succeeded Ricke as general agent had collected for the company, on the Hessberg business, \$2,455 premiums and \$13,659.13 on renewals; that Ricke's commissions on these aggregated \$1,515; that this sum was in law the property of Hessberg. The argument relied upon was that, admitting that Hessberg was only the local subagent of Ricke, by whom he was to be paid, yet, as general agent, Ricke had power to employ such local agent, and pledge his own commissions which the company were to pay him, to such local agent; that he virtually did so pledge them, and that the pledge operated as a lien on the premiums and renewals to the extent of such commissions, and substituted Hessberg as the real owner of said \$1,500 collected by Ricke's successors to all the rights of Ricke. But the court was of the opinion that the contract of Ricke with the company could not be construed as conferring the power claimed.

<sup>10</sup> *Johnson v. Pacific Mail S. S. Co.* (1855) 5 Cal. 408.

<sup>11</sup> *Carroll v. Manganese Steel Safe Co.* (1809) 111 Md. 252, 73 Atl. 665.

<sup>12</sup> *Raike v. Manhattan Rubber Mfg. Co.* (1907) 127 Mo. App. 480, 105 S. W. 1100. There the contract of employment relied on was in writing signed by the plaintiff for himself and by the defendant company by "E. P. Watrous, Manager." It provided, in substance, that the defendant company employed Raike, in the "capacity of a special agent," for one year, to introduce and sell a line of goods manufactured by defendant. The territory within which

plaintiff was to operate was stated as comprising the principal part of Texas and part of the Indian Territory, the company having the privilege, if it should be considered expedient, of sending him into other territory on trips; "for instance, through the Republic of Mexico, and other territory of the Southwest." Plaintiff was accorded the privilege of carrying any "side lines" of goods not in competition with defendant's, with the understanding that the profits from the sale of such side lines should be exclusively his own. The court said: "In the absence of an express statement in the contract between Watrous and the company, fixing the scope of the former's agency, the actual authority which he enjoyed must be found in subsequent arrangements expressly conferring authority on him, and in the course of business which the company allowed him to pursue. We can see no possible reason to doubt that the employment of plaintiff was within his actual authority. The letter written by the vice president of the company on November 5, 1902, though it related to a dispute between Watrous and another employee of the company by the name of Miller, shows the company intrusted the ways and means of conducting its business within the St. Louis territory so as to achieve success, to the choice of Watrous, reserving the right to criticize his actions. The letter said the company looked to him for results, and that the officers felt safe in leaving ways and means in his hands. The letter further said its sum total amounted to this: That Watrous was the manager in charge of the St. Louis store, and the company proposed to leave matters in his territory entirely to him, making suggestions from time to time as they deemed proper. The evidence shows without dispute that other salesmen were employed by Watrous to operate in his territory, and that the hiring of employees

### § 7. *Employment of subagent by special agent.*

As a general rule, an agent who is appointed to deal with a particular transaction or class of transactions is entitled to recover compensation, although he may have availed himself of the services of a subagent.<sup>1</sup>

On the other hand, it is a well-established doctrine that, *prima facie*, an agent of this description is not invested with the power of employing a subagent

on such a footing as will entitle the person employed to look to the principal for the payment of his remuneration. All the decisions reviewed in the footnote proceed upon the theory that, in order to recover against the principal for services rendered in pursuance of the contract of employment, the subagent must produce some affirmative evidence which tends to show that the agent was authorized to create a privity of contract between the principal and the subagents.<sup>2</sup>

was so far in his hands that, when an applicant for employment in the St. Louis territory, would address the New York officials on the subject, in person or by letter, they would refer him to Watrous. The letter and this testimony show positively a direct authority in Watrous to hire plaintiff, or, at the very least, are evidence from which the court was justified in finding as a fact that he had authority to do so."

<sup>1</sup> *Corning v. Calvert* (1858; Com. Pl.) 2 Hilt. (N. Y.) 56 (loan transaction); *Henninger v. Burch* (1903) 90 Minn. 43, 95 N. W. 578 (sale).

In *Bray v. Riggs* (1905) 110 Mo. App. 630, 95 S. W. 116, an objection raised by the defendant was that plaintiff, by an agreement with one Dice, assigned a part of his account or contract between himself and the defendant without the latter's consent. But the court held that the agreement in question, which was to the effect that, if Dice would find a proper purchaser, he, plaintiff, would divide with him the commission defendant had promised to pay, was not an assignment of a part of a cause of action. Consequently it did not in any wise affect plaintiff's claim to the whole commission.

#### **a. Employment by agent appointed to sell real property.**

<sup>2</sup> See *BRUTINEL v. NYGREN*, ante, 713, where the plaintiff's employer, although a general agent of the defendant, so far as the management of her business was concerned, was treated as being, in respect of the sale of that property, merely her special agent.

In *Merrill v. Lathan* (1896) 8 Colo. App. 263, 45 Pac. 524, Mr. Burdette, a real estate agent, who had the disposal of certain real estate belonging to a Mr. Robertson, with authority to sell it for cash, or exchange it for other property, told the plaintiff that he had the property for sale or trade, and the latter replied that he would see what he could do in the matter. A short time afterwards the plaintiff met Tucker, an employee of the defendant, and ascertained from him that the defendant had a number of horses and mules which he desired to trade for something else. The plaintiff asked Tucker for a list of the animals, and the latter went to his employer and procured it, and gave it to the plaintiff. When the plaintiff asked for the list, he gave Tucker a description of Robertson's real estate, indorsed on his business card, which Tucker

took to the defendant. The plaintiff introduced Burdette to Tucker, and Tucker introduced Burdette to the defendant. Burdette brought the defendant and Mr. Robertson together, and the two latter then made their own contract and exchanged their properties. The plaintiff did not see the defendant, and the latter was unacquainted with the plaintiff, and knew nothing of his connection with the transaction until after it was concluded. The grounds upon which the court reversed a judgment for the plaintiff in an action brought for the recovery of a commission were thus stated:

"The theory advanced is that Mr. Tucker, as the agent of the defendant, employed the plaintiff to negotiate the exchange, and that the latter, in virtue of the employment, became the defendant's agent, and is therefore entitled to the commission which he claims. The argument in support of the theory is a very good specimen of legal ingenuity, but it has failed to convince us. The plaintiff had no personal dealings with the defendant; and Mr. Tucker, the defendant's hired man, from whom the plaintiff obtained his information concerning the horses and mules, had not, and did not assume or purport to have, any authority, either to dispose of the property himself, or to engage the services of another for that purpose; and nothing that he did could be construed into an employment of the plaintiff. What he did might well have been done by any employee taking an interest in his employer's success, or by any kindly disposed neighbor, without exciting a suspicion that he was acting by authority."

In *Doggett v. Greene* (1912) 254 Ill. 134, 98 N. E. 219, Ann. Cas. 1913B, 1166, reversing (1911) 163 Ill. App. 369, the jury were instructed that if they believed, from the evidence, that the defendant gave his son, Dr. Greene, authority to sell the property, and that such authority gave Dr. Greene implied authority to employ a broker to assist him to find a purchaser, then the act of Dr. Greene, within the scope of his authority, would be binding upon the defendant; and also that if they believed, from the evidence, that the defendant authorized his son, Dr. Greene, to sell the property and use his own discretion as to price, and that the authority was not limited as to the mode or means by which the sale should be accomplished, then the plaintiffs were not required to prove that the defendant gave

**§ 8. Particular circumstances from which an enlargement of the agent's ordinary authority may be implied.**

An examination of the statements

his son express authority to employ a broker, if the jury believed, from the evidence, that the employment of a broker was one of the necessary, proper, and usual things to be done in order to the proper exercise of the authority of Dr. Greene. This instruction was criticized as follows: "The court erred in submitting a question of law to the jury whether authority to sell the property gave implied authority to employ a broker, and as a question of law the instruction was a non sequitur, since authority to sell property does not, alone, imply authority to employ a broker. It was not a case where an agent is authorized to do some act which he cannot do himself. There was no evidence from which the jury could find that the employment of a broker was one of the necessary, proper, and usual things to be done for the proper exercise of the authority to sell and use discretion as to the price. An agent must generally perform his services personally, and he cannot delegate his authority without express permission." It is held that the trial judge should have given the instruction asked for by the defendant, viz., that if the defendant wrote to his son, Dr. Greene, to sell the property, and use his discretion as to price, and no further authority was given in reference to the sale or employment of brokers, then Dr. Greene had no authority to employ the plaintiffs and bind the defendant to pay their commissions.

In *Groscup v. Downey* (1907) 105 Md. 273, 65 Atl. 930, a judgment for the plaintiff, Downey, was reversed on the ground that the court had granted the plaintiff's prayer for an instruction of the following tenor: If the jury find from the evidence that the defendant was the owner of the leasehold property in question, that the defendant's husband was her agent in charge of the said property and for the sale of the same, that he employed the plaintiff to procure a purchaser for the said property in fee, and that the said property was sold by the defendant or her said agent to said purchaser procured by the said plaintiff for \$8,700 in fee, then the plaintiff is entitled to recover such compensation as the jury may find usual and customary. The court said: "This prayer in effect instructs the jury as matter of law that William Groscup, if found by them to have been the defendant's agent in charge of said property and for the sale of the same, had the authority as such agent to employ another person to procure a purchaser for it, and thus make the defendant liable to such person for compensation if the property was sold to the purchaser procured by him. That instruction involved a twofold error. In the first place, an agent of the character described in the prayer has not, as matter of law, power to delegate his authority to another

quoted in § 2, supra, which define the scope of the general rule, shows that it is subject to various qualifications in respect of certain elements which may op-

person or employ a subagent. In the second place, a sale by the defendant to a purchaser procured by the subagent would not ratify his employment or make her liable to him for compensation unless she knew when she made the sale that the purchaser had been procured by him."

In *Bonwell v. Howes* (1888) 15 Daly, 43, 2 N. Y. Supp. 717, reversing (1888) 1 N. Y. Supp. 435, the assignee of one Rogers, who had effected an exchange of property belonging to the defendant, sought to recover the commission claimed by Rogers in respect of his services. It was shown that R. W. Howes, by whom Rogers was employed, was, to his knowledge, acting as the agent for J. T. Howes, the defendant, and that, until after the transaction was consummated, Rogers had had no communication, directly or indirectly, with the defendant. There was no testimony tending to show that the defendant was previously aware of Rogers's employment. Held, that the complaint should have been dismissed.

In *Carroll v. Tucker* (1893; Com. Pl.) 2 Misc. 397, 21 N. Y. Supp. 952, the plaintiff relied upon testimony to the effect that, shortly before the action was instituted, plaintiff's attorney called on one of the defendants for the purpose of ascertaining "whether the agent had authority to bind the defendant, or to sell, and employ a broker," and that he was told that the agent "was authorized to take any steps necessary to sell." But the court held that this statement did not amount to an admission that the agent had been invested with authority to employ another broker.

In *Hand v. Conger* (1888) 71 Wis. 292, 37 N. W. 236, the defendant Conger, who resided at Elkhorn, in Walworth county, Wisconsin, employed by parole one Haight, a resident of Oshkosh, to sell or aid in the sale of certain land which he owned in Price county, of which the plaintiff's real estate brokers were residents. Haight was not authorized to settle and fix the terms of sale, although Conger expressed his willingness to approve of what he might do in the matter. Subsequently Haight employed one McDonald to find a purchaser for the land, and told him he might have all he got for it over \$12,000 as his compensation therefor. It did not appear that any terms of sale other than the price were stated by Haight to McDonald. The latter thereupon agreed with the plaintiffs that if they would find a purchaser of the land for \$13,000, they should have a commission of \$500 out of the purchase money. The plaintiffs soon found a person, one Davis, who would purchase the land and pay the price therefor on certain terms and conditions. Davis paid McDonald \$500 toward the purchase, and McDonald, in his own name, gave him a receipt, in which the agreed terms of sale were

erate so as to produce an enlargement of the agents' implied authority with re-

inserted. McDonald paid the \$500 to Haight, who gave a receipt therefor to McDonald for Davis, stating therein the terms of sale as reported by McDonald to Haight. Thereafter McDonald, Davis and one of the plaintiffs, met at Oshkosh to close the sale. Haight and Davis differed as to the terms. Haight refused to take the responsibility of accepting the terms insisted upon by Davis, and Davis refused to accept the terms insisted upon by Haight. The four then went to Elkhorn and met Conger, who expressed his willingness to execute the contract proposed by Haight; but Davis would not accept it. Conger refused to sign the contract proposed by Davis, and so the sale failed and Conger repaid Davis the \$500. Held, that the plaintiffs were not entitled to receive this \$500 from Conger.

For other cases illustrating the doctrine stated in the text, see also *Jenkins v. Funk* (1888) 33 Fed. 915; *Sims v. St. John* (1912) 105 Ark. 680, 43 L.R.A.(N.S.) 796, 152 S. W. 284; *Willoughby v. Brown* (1914) 190 Ill. App. 51; *Hanback v. Corrigan* (1898) 7 Kan. App. 479, 54 Pac. 129; *Quale v. Hazel* (1905) 19 S. D. 484, 104 N. W. 215; *Westaway v. Close* (1912) — Sask. —, 7 D. L. R. 849 (ruling of single judge).

"The employment of a real estate broker to rent the premises in which the family lives is not within the scope of the ordinary agency of the wife, and special authority or ratification must be shown." *Harper v. Goodall* (1881; Com. Pl.) 62 How. Pr. (N. Y.) 288, 10 Abb. N. C. 161 (complaint in action to recover commissions held to have been properly dismissed). Followed in *Harrell v. Veith* (1888) 13 N. Y. S. R. 738.

Having regard to the above decisions it is clearly an a fortiori conclusion that the appointment of a subagent to assist in making a sale of real property is not within the implied scope of the powers of an agent whose designated functions, so far as the disposition of the property is concerned, extend merely to informing his principal of any offers which may be made by possible purchasers. *Jones v. Brand* (1899) 106 Ky. 410, 50 S. W. 679. There the normal functions of Pope, the employer of the claimant, were the collection of rents and the payment of taxes. As a circumstance supporting its conclusion, the court also pointed out that the testimony of two of the witnesses conclusively proved that Brand, when he suggested to them that they might thwart the designs of Pope to sell the property to another party, could not have been acting under the authority of Pope, as he was endeavoring to thwart the very purpose which Pope had in view. Reference was made to the fact that, in the course of litigation in the Federal court, which grew out of the attempted sale by Pope to third parties, it had been held that Pope himself had no authority from Jones to conclude a sale of the property, and that there was an entire lack of testimony going to show that

Jones ever authorized the appointment of any agent by Pope.

In a case where the action was brought to enforce a contract for the sale of land it was laid down that agents acting under verbal instructions to sell land are not empowered to "appoint a subagent without the knowledge or consent of the principal, who could bind the principal in regard to the sale of his lands." *Tynan v. Dulling* (1894) — Tex. Civ. App., 25 S. W. 465.

On the other hand, in a case where the action was brought for the specific performance of a verbal contract for the purchase of land, it was declared that a person authorized by the owner of land to sell it, using his best judgment as to value and terms of payment, has power to employ any person whom he may think proper to aid him in finding a purchaser. *Renwick v. Bancroft* (1881) 56 Iowa, 527, 9 N. W. 367.

#### **b. Employment by agent appointed to lease real property.**

In *Fairchild v. King* (1894) 102 Cal. 320, 36 Pac. 649, the evidence upon which the plaintiffs relied was to the following effect: The defendant King authorized his codefendant Jackson to secure a tenant for his ranch. Jackson communicated with and authorized the plaintiff Fairchild to secure such a tenant for the ranch, and told him of King's willingness to pay a liberal commission. Fairchild employed the plaintiffs Lawton and Mathison to assist in obtaining a lessee, and Lawton, Mathison, and Fairchild negotiated with one A. L. Reed, who was introduced to King by Lawton, and afterwards was accepted by King as lessee. Held, that a judgment of nonsuit was properly granted in favor of defendant King. The court said: "The plaintiffs were strangers to him. He never directly or indirectly contracted in any manner for their services. And it is not claimed that Jackson was specially authorized to appoint subagents for the purpose of securing a tenant, as may be done in certain cases under § 2340 of the Civil Code. This case does not furnish one of the exceptions laid down in that section to the general principle that delegated power cannot be delegated." The court quoted the statement in Wharton on Agency, § 709, that "a broker, like an attorney, is selected as a specialist on account of his presumed skill and discretion and of the confidence bestowed on him by his principal. He therefore cannot depute his duties, so far as they are discretionary, to another."

In *Burger v. Allen* (1903) 24 Ky. L. Rep. 1418, 71 S. W. 641, an instruction directing the jury to find for the plaintiff, if they believed from the evidence that the defendant or his agent employed the plaintiff to procure a certain company to take a lease upon the property of defendant, and agreed to pay him a commission for so doing, was held to be erroneous, for the reason that the defendant "could only be held responsible under the contract of his agent provided the,

gard to the employment of subagents. In cases where such an enlargement is

agent was duly authorized to make the contract in question;" whereas this instruction authorized the jury to hold plaintiff liable under the contract in question if made by an agent or appellant, whether the agency was for the purpose of making this lease, or for any other purpose.

In *Colne v. Atlantic Ave. R. Co.* (1901) 60 App. Div. 615, 69 N. Y. Supp. 696, where the plaintiff sued to recover commissions which he claimed to have earned for services rendered in procuring a lease to be made by the defendant corporation of its franchise and property to the Nassau Railroad Company, it appeared that the only person with whom the plaintiff had any relations in connection with the lessors was one Seligman, a banker, in whose employ the plaintiff had been at different times for some years, and who was an important personage in connection with the defendant corporation and its business, having been largely instrumental in dictating its policy and in conducting its affairs. The contention of the plaintiff was that, having regard to Seligman's preponderating influence in the corporation, he should be taken to have had authority to contract with the plaintiff to employ him on behalf of the Atlantic Avenue Railroad Company, to render service, and consequently that an implied promise on the part of the defendant to pay for the value of such service arose. But the court was of opinion that, upon the plaintiff's own showing, there was nothing that connected Mr. Seligman with the Atlantic Avenue Railroad Company in such a way as to justify the conclusion that he had employed the plaintiff on behalf of the defendant corporation. On the contrary, the evidence of the plaintiff's declarations tended to prove that the plaintiff was employed by Seligman for himself or on his own behalf; for the testimony of one of his own witnesses was to the effect that, when the subject of the sale or lease of the defendant's road was first mentioned, Colne stated that he represented the owners of the property, the Seligmans, and wanted the witness to bring about an arrangement.

See also *Willoughby v. Brown* (1914) 190 Ill. App. 51 ("authority to sell or lease does not imply authority in the agent to employ a broker"); *McConnell v. Holderman* (1909) 24 Okla. 129, 103 Pac. 593.

#### c. Employment by agent appointed to sell personal property.

An agent appointed for the purpose of soliciting and taking orders within a specified district for an article manufactured by a foreign corporation has no implied authority to hire subagents on such footing as will bring them into privity with his principals. *National Cash Register Co. v. Hagan* (1904) 37 Tex. Civ. App. 281, 83 S. W. 727. There it was held that the defendants, who had been hired by the El Paso agent of an Ohio corporation, could not recover anything on a counterclaim for repairs made

upon the articles sold, and for commissions in respect of sales.

In *Schmalling v. Thomlinson* (1815) 6 Taunt. 147, 128 Eng. Reprint, 989, where an action for commission, work and labor, and money paid, was brought by one who had shipped and forwarded a quantity of cocoa for the defendants from London to Amsterdam, the following circumstances were proved upon the trial: In consequence of Hulletts, the defendants' brokers in London, having recommended Aldibert, Becker, & Company to the defendants as perfectly safe persons, the defendants wrote to Hulletts that although Aldibert, Becker, & Company were unknown to them, if they, Hulletts, thought them respectable men, the defendants would employ them to transport the cocoa to Amsterdam. Aldibert undertook to conduct the whole by the circuitous route which the existing war rendered necessary. The defendants knew no one but Aldibert, Becker, & Company in the business. Aldibert, Becker, & Co. employed the plaintiff, who was indebted to them, to perform the whole business. This the plaintiff did, but without any communication had with the defendants, and he now looked to the defendants for payment. Their contention that they were liable to Aldibert, Becker, & Company, whom alone they had intrusted, and to no one else, was upheld. The court said: "There is no privity between the plaintiff and the defendants. . . . An argument was raised by the Solicitor General on this ground, that the defendants must know that someone would be employed by Aldibert, Becker, & Company; but he forgets the fact that another person introduced Aldibert, Becker, & Company, to the defendants as the persons who were to conduct the whole, and there is no pretense that the defendants ever authorized them to employ any other to do the whole under them: the defendants looked to Aldibert, Becker, & Company only, for the performance of the work, and Aldibert, Becker, & Company had a right to look to the defendants for payment, and no one else had that right."

In *National Cash Register Co. v. Ison* (1894) 94 Ga. 463, 21 S. E. 228, the syllabus written by the court is as follows: "An agent employed to sell a commodity in a given state, or in several given states, at a fixed percentage on the amount of sales, with a stipulation in the contract that he is to pay all his own expenses, has no authority, merely by virtue of his power as agent, to employ others at the expense of the company either to act as subagents or to advertise and command the commodity in a particular locality or to a particular community. Persons employed by him for such service must look to him for compensation, and cannot charge the company with the same without its consent."

In *Fudge v. Seckner Contracting Co.* (1898) 80 Ill. App. 35, the contention that the trial judge had erred in directing a ver-

predicable on this ground its effect, so far as the remedial rights of the sub-

dict for the defendant was urged on two grounds: (1) That the evidence would warrant a conclusion by the jury that Hatch was the agent of defendant, authorized to procure a broker, and that, acting under such authority, he did employ appellant; and, (2) that if this were not so, yet the appointment of Hatch as defendant's agent to sell the bonds in question invested him with implied authority to engage plaintiff as a subagent. The court, after observing that there was no evidence tending to support the first of these contentions, proceeded thus: "The other proposition is, that the nature of the employment of Hatch by appellee, i. e., to sell the bonds, was such an employment as would, as a matter of law, authorize Hatch to procure a broker as a subagent for appellee, and by such employment obligate appellee to pay the broker's commissions. To sustain this proposition we find no authority in the cases cited elsewhere. Against it is the authority of many decisions: *Corbett v. Schumacker* (1876) 83 Ill. 403; *Solly v. Rathborne* (1814) 2 Maule & S. 298, 105 Eng. Reprint, 393; *Cockran v. Islam* (1814) 2 Maule & S. 301, 105 Eng. Reprint, 393; *Paddock v. Colby* (1846) 18 Vt. 485."

In *Atlee v. Fink* (1881) 75 Mo. 100, 43 Am. Rep. 385, it was held that an agent placed in charge of a branch of its business in another state by a firm engaged in manufacturing and selling lumber, and intrusted merely with the function of making sales, was "not authorized to promise a compensation for sales made for the firm by others, which would bind the firm."

"It seems too plain to require any citation of authority to show that an agent authorized to sell on a commission is not a general agent, and that he has no power to employ other agents under him at the expense of his principal." *De Baril v. Campoy* (1885; Com. Pl.) 17 Phila. (Pa.) 383.

In *Hibbard v. Rock* (1890) 75 Wis. 619, 44 N. W. 641, where the defendant in an action for goods sold and delivered filed a counterclaim in respect of commissions on sales, which he alleged to have been promised to him by Bennett, a traveling salesman of the plaintiff company, the secretary of the company testified positively that Bennett had no authority to promise the defendant a commission on goods sold by him to the third person, one Nelson, or to anyone else, and that such promise, if ever made, was never ratified or confirmed so as to make it binding on the principal. It was also shown conclusively that the plaintiff never gave its traveling salesmen any authority whatever to grant commissions, or even credits on goods sold by them. In this state of the evidence it was held to be clear that Bennett had no express authority to bind his principal to pay the defendant commissions on goods sold Nelson, even if such a contract was made.

For other cases in which the general doctrine stated in the text was affirmed with

reference to subagents of this description, see *Meux v. Haller* (1913) 179 Mo. App. 466, 162 S. W. 688; *Jones v. Keeler* (1903; Sup. App. T.) 40 Misc. 221, 81 N. Y. Supp. 648; *Clark v. Lillie* (1867) 39 Vt. 405; *Sherwood Bros. v. Seattle Fruit & Produce Auction Co.* (1916) 93 Wash. 544, 161 Pac. 371 (holding that an agent employed to market fruit could not recover from his principal the commission charged by his subagent).

Reference may also be made to another decision which, although it does not, properly speaking, fall within the scope of the present note, was decided on grounds which render it instructive with regard to the right of a subagent to recover compensation from the principal. *Cockran v. Islam* (1814) 2 Maule & S. 301, 105 Eng. Reprint, 393. There the assignees in bankruptcy of Campbell were held to be entitled to recover from the assignees in bankruptcy of Hutchinson, the proceeds derived from the sale of certain goods which Campbell had consigned to a broker on a *del credere* commission, and which that broker had afterwards, without the knowledge of Campbell, placed with Hutchinson, upon a *del credere* commission, and upon an agreement to divide the commission with him. Lord Ellenborough, Ch. J., observed: A principal employs a broker from the opinion he entertains of his personal skill and integrity; and a broker has no right, without notice, to turn his principal over to another of whom he knows nothing. It appears to me, therefore, that there is no privity, either express or implied, between Campbell and Orr, and Hutchinson. There certainly was not any express privity; neither can any be implied, unless the case had found that the usage of trade was such as to authorize one broker to put the goods of his employer into the hands of a subbroker to sell, and to divide the commission with him.

Compare also *Barret v. Rhem* (1869) 6 Bush. (Ky.) 466; *DeBussche v. Alt* (1878) L. R. 2 Ch. Div. 286, 47 L. J. Ch. N. S. 381, 38 L. T. N. S. 370, 2 Eng. Rul. Cas. 289, neither of which involved an action for compensation.

#### d. Employment by agent appointed to purchase personal property.

In *Rudd v. Nashville & St. L. R. Co.* (1886; Ct. App.) 7 Ky. L. Rep. 823, it was laid down that a person empowered to negotiate as to the purchase of a controlling interest in the stock of a corporation cannot be regarded as a general agent, with implied power to employ others for the principal, the nature of the business intrusted to the agent not being of such a character as to require others besides himself to perform it.

In *Commer Mfg. Co. v. First Nat. Bank* (1915) — Tex. Civ. App. —, 173 S. W. 536, a draft drawn by one Sanders on the defendant company for the amount due for services rendered in respect of the purchase of certain lumber was discounted by the

agent are concerned, will obviously be the same as in cases where his employ-

ment was in pursuance of an authority expressly conferred.

plaintiff bank. Held, that an action on the draft could not be maintained, as the testimony introduced merely showed that one Brommar was an inspector and buyer for appellant, and that he, acting for appellant, and in its name, contracted with Sanders in writing that the company would pay him a certain commission on such lumber as it might purchase from the party to whom he proposed to refer them. By testimony which went no further than this, the bank did not discharge the burden of proving that Brommar had the authority to bind the defendant by the contract.

**e. Employment by agent appointed to procure a loan.**

In *Mason v. Clifton* (1863) 3 Fost. & F. (Eng.) 899, where the plaintiff was employed by the attorney who had been requested by the defendant to procure a loan for him, Cockburn Ch. J., thus directed the jury: "In this case, it appears that the defendant employed Kingdon to raise money upon the usual terms, and that the plaintiff obtained it upon other and different terms, to which the defendant would not accede. Even, therefore, assuming that the defendant could be rendered liable, without any recognition of employment, to a third party whom he never employed, he would not be liable if the loans were not procured on the terms he authorized, but on other terms, unless afterwards ratified and accepted. If the defendant gave a general authority to Kingdon to obtain the money on any terms, and to employ anyone to obtain it, he would be liable. But otherwise, not so."

The theory entertained in one case seems to have been that a person who employs an agent to procure a loan, knowing that such agent is not himself engaged in money-lending as a business, should be deemed to have impliedly authorized him to engage a sub-agent for the purpose of consummating the transaction. *Kinhead v. Hartley* (1913) 161 Iowa, 613, 143 N. W. 591, Ann. Cas. 1915D, 1. But the precise position of the court in this point of view is left somewhat obscure by its opinion, and the conclusion arrived at—that a verdict had properly been directed for the defendant—was deduced from the evidence as a whole, which showed that the original negotiations had been broken off, and that the transaction had finally been consummated on a basis different from that which had been proposed.

**f. Employment by agent appointed to solicit insurance contracts.**

In *Gore v. Canada Life Assur. Co.* (1898) 119 Mich. 136, 77 N. E. 650, the question whether the plaintiff sustained contract relations with the defendant was thus discussed: "His claim is that he was employed on behalf of the defendant by one Glass, with the subsequent approval of Bucknell, who was called the 'manager of the Michigan branch.' The defendant asserts that it

made a contract with some men named Cox, living in Toronto, Ontario, by which they had control of its business in Michigan and some other states, upon a commission of 50 per cent upon new business, they to employ and pay their own subordinates; and that they established a branch office for Michigan, which they maintained under the charge of Bucknell, who was called 'manager of the Michigan branch of the Canadian Life Assurance Company,' who was paid by a share of the commission on Michigan business and an allowance made by the Coxes. It is claimed that Glass was engaged by them upon similar terms; that he was designated 'inspector of agencies;' that he was not authorized to employ any agents for the company, but was at liberty to divide his own commissions as he pleased, with any whom he should see fit to engage to help him. . . . From the foregoing we think it evident that the arrangement made with the Coxes, and through them with others, did not contemplate authority to pledge the credit of the company in the employment of agents, and that neither Cox nor Bucknell understood that he had such authority. Glass, who was employed as superintendent or inspector of agencies, or, as he says, given exclusive right to work the south half of Michigan, had no greater authority. We think, therefore, that the plaintiff's claim must fall, unless it can be said that he had a legal right to understand that he was to look to the defendant for his pay by reason of its holding out Bucknell and Glass as its agents, with authority to bind it in such matters. . . . There was nothing in Glass's relation to the company which gave the plaintiff to understand that he had such authority. Glass says that he was an inspector of agencies. Plaintiff's counsel say that he was superintendent of agencies. There is nothing in the testimony to show that an inspector or superintendent of agencies was given such authority, and there is no such legal presumption. If, as the word imports, his business was to superintend or inspect the work of agents, it does not imply the right to appoint agents, and make contracts with them upon behalf of the company. So that, at the time Gore made the contract with Glass, he had no right to assume that Glass had such authority from anything except the statement and acts of Glass."

In *Stinson v. Sachs* (1894) 8 Wash. 391, 36 Pac. 287, the defendant in an action on a note counterclaimed for services alleged to have been rendered by him, at the request of one Marston, a soliciting agent of the plaintiff company, but failed to produce any affirmative evidence that Marston was authorized to bind respondent to a contract covering such services, and plaintiff's testimony was that Marston had no such authority. Held, that, it was incumbent upon defendant to show the existence of such authority when it was challenged, since the



### a. Custom or usage.

One of the elements of this description is the prevalence of a custom or usage,

services were not such as come within any implied authority of a mere soliciting sub-agent, and consequently that the trial judge had properly withdrawn the counterclaim from the consideration of the jury.

### g. Employment by agent appointed to collect a debt.

In *Strong v. West* (1900) 110 Ga. 382, 35 S. E. 693, where the defendant, the purchaser of a note, sent it to a Missouri company for collection, and the Tennessee bank to which the company forwarded the instrument sent it on to an attorney resident in the city in Georgia where the land conveyed as security for the note was situated, the ground upon which it was held that the attorney was, as matter of law, the agent of the holder for the purpose of collecting the note by means of a sale of the land, and therefore entitled to remuneration for his services in respect of the collection, was, that the holder, when he chose the company as his immediate representative, was affected with notice that in a certain event the company would have to employ an attorney in Georgia, and "the power on the part of that agent to make the necessary employment went to her agent with the transmission of the papers." The rights and liabilities of the parties were held to be governed by the common-law principle embodied in § 3023 of the Georgia Civ. Code, viz., that the agent's authority will be construed to include all necessary and usual means for effectually executing it. The court cited *Story on Agency*, § 85; *Mosheim on Agency*, § 194, and *Barclay v. Hopkins* (1877) 59 Ga. 565, in which it was held that if the agent was only expressly empowered to place a paper belonging to his principal in the hands of an attorney for collection, he was nevertheless also empowered to make a contract in regard to the manner and terms of the collection; that the one power necessarily carried with it the other.

In *Swayne v. Union Mut. L. Ins. Co.* (1899) — *Tex. Civ. App.* —, 49 S. W. 518, the doctrine as to the power of a collecting agent to employ counsel for his principal was recognized, but held not to be applicable, because the subagent by whom the plaintiff attorney was employed agreed that the employment was to be at his own expense.

### h. Employment by the agent of a political party.

In *Owen v. Hadley* (1914) 186 Mo. App. 1, 171 S. W. 973, the evidence showed that one Morris, the chairman of a state Republican committee, acting upon his own initiative, employed one Spencer and another as counsel, and provided certain funds to defray the necessary expenses incident to the contests, thereby relieving the contestees of the burden of employing counsel and

under which subagents are normally employed by agents deputed to deal with the transaction or class of transactions to which the employment has reference.<sup>1</sup>

defending the title to their respective offices in proceedings previously instituted; that Spencer employed plaintiff to render the services in question; that the agreement did not purport to bind Morris personally; that Spencer had no authority so to do; that it did not purport to bind the defendant Hadley or any of the contestees; and that Spencer limited his own responsibility to \$50 per week, which was paid. Held, that no liability attached, under the agreement made by Spencer, to Hadley, Morris, or any of the other members of the committee. For the other point decided in this case, see § 22, note 2, *infra*.

### a. Employment by agent appointed to sell real property.

<sup>1</sup> In *Lamson v. Sims* (1882) 16 Jones & S. (N. Y.) 281, the plaintiff, who was a broker in real estate, testified that real property in New York was almost invariably sold through a broker. The agent, as witness for the defendant, gave detailed testimony as to his relations to the defendant and to the plaintiff, and in such a form that the jury were at liberty to take his testimony as affording circumstantial evidence as to his authority to employ a broker for the defendant. Held, that, on the whole case, it was for the jury to determine whether the defendant had given to his agent authority to employ, for him and for that purpose, a broker.

For another case in which the differentiating significance of usage was recognized, see *Eastland v. Maney* (1904) 36 *Tex. Civ. App.* 147, 81 S. W. 674.

For cases in which the controlling significance of this element was affirmed, but in which it was held that the alleged usage had not been established by the evidence, see *Doggett v. Greene* (1912) 254 Ill. 134 (140), 98 N. E. 219, Ann. Cas. 1913B, 1166; *Williams v. Moore* (1900) 24 *Tex. Civ. App.* 402, 58 S. W. 953.

In *Edgar v. Caskey* (1912) — *Alberta*, —, 7 D. L. R. 45, where the actual point involved was the duty of an agent to disclose his agency, the court observed: "The business of selling real estate is one in which the right of an agent to employ another to dispose of the same might reasonably be presumed. It is common knowledge that this is a very usual method employed by real estate agents in this country." The doctrine thus laid down obviously reflects a point of view different from that indicated by the American decisions cited in § 7, *supra*.

In *Bonwell v. Howes* (1888; Com. Pl.) 15 Daly, 43, 2 N. Y. Supp. 717, a remark made by one of the justices of the city court, that the testimony established the fact that it was customary in New York to employ brokers to sell property, was thus criticized: "That is true, but irrelevant;

**b. Necessity.**

Another qualifying element is the existence of a necessity, either absolute, or, in view of the circumstances, reasonably predicable, that a subagent should be employed by the agent.

One situation in which this element might well be regarded as creating an exception to the general rule mentioned at the beginning of this section is suggested by the decision cited in the foot-

note, which shows how the sickness and anticipated death of the agent himself might, under some circumstances, be reasonably regarded as investing him with an implied power to appoint a substitute. But the facts of the case are not such as to bring it within the scope of the present monograph.<sup>2</sup>

Another such situation is indicated by the exceptive provision in the Codes of three American states, which permits the

was made, part of his work was to write contracts with agents. Held, that this evidence tended to show that Hestwood had authority to make contracts, and that the contracts so made by him should fix the compensation to be paid to agents, and include all other terms that were necessary to express the agreement between the defendant and its agents. In this point of view the defendant's position, that he had no authority to bind it to pay a specified commission in case less than a certain number of silos were sold by the agent, was pronounced untenable.

One of the excepted cases in which, under the Codes of three of the American states, the delegation of an agent's powers is permitted, is "when it is the usage of the place to delegate such powers." Cal. Civ. Code 1915, § 2349 (3); N. D. Civ. Code 1905, § 5794 (3); S. D. Civ. Code 1908, § 1699 (3).

**d. Employment by agent appointed to purchase personal property.**

In *Commer Mfg. Co. v. First Nat. Bank* (1915) — Tex. Civ. App. —, 173 S. W. 536, the ratio decidendi was that "it did not appear that it was either usual or necessary for a person employed . . . to inspect and buy lumber, to employ at his principal's expense another or other persons to assist him in the discharge of his duties."

**e. Employment by agent appointed to procure a charter party.**

"Where, by the custom of trade, a ship broker, or other agent, is usually employed to procure a freight or charter party for ships seeking a freight, the master of such a ship, who is authorized to let the ship on freight, will incidentally have the authority to employ a broker or agent for the owner, for this purpose. And the same principle will apply to a factor, where he is, by the usage of trade, authorized to delegate to another the authority to substitute another person to dispose of the property." *Story, Agency*, 9th ed. § 14.

<sup>2</sup>Gray v. Murray (1817) 3 Johns. Ch. (N. Y.) 167, where the legal representatives of a supercargo who had died on the homeward voyage of his ship, after having appointed substitutes, were held to be entitled to compensation in respect of the services performed by those substitutes. It would seem that they also would have been in a position to claim compensation directly from the defendant. But the point was not adverted to.

because the question here is, has one agent any authority to employ another? No proof on that subject was offered." This criticism possibly needs some qualification. Would not evidence of such a custom be pertinent in a case where the employing agent was not himself engaged in the business of selling property?

**b. Employment by agent appointed to lease real property.**

In *Western Carolina Realty Co. v. Rum-bough* (1916) 172 N. C. 741, 90 S. E. 931, where the plaintiffs sued for commissions alleged to be due in respect of services rendered by them in procuring a tenant for the property of the defendant, a married woman, and collecting the rents, the evidence (which is only partially stated in the report) was held to be sufficient to require the submission to the jury of the questions whether the defendant's husband, by whom the plaintiffs were employed, had been appointed as her agent to lease the property, and, if so, whether he was impliedly authorized to engage the plaintiffs to assist him.

**c. Employment by agent appointed to sell personal property.**

In *Hibbard v. Peek* (1890) 75 Wis. 619, 44 N. W. 641, the authority of a traveling salesman in the hardware trade to render his principal liable for the commissions of his subagents was denied for reasons thus stated: "We do not think there was any proof given of a custom or usage in the hardware trade of traveling salesmen paying such commissions, or agreeing to pay them, which was sufficiently long-continued and uniform so that the court would be justified in assuming that the parties contracted with reference to it, or that the salesman had authority to bind his principal to pay such commissions by reason of its existence. The practice of a considerable number of houses in the hardware trade of giving their traveling salesmen authority to pay such commissions would not warrant a court in presuming that agents generally had such authority who were sent out by hardware houses to sell their goods."

In *Royer v. Western Silo Co.* (1916) 99 Kan. 309, 161 Pac. 654, where the action was brought to recover commissions on sales of silos, effected under a contract made with one Hestwood, the evidence tended to show that Hestwood was a salesman for the defendant; that he signed the written contract in question; and that at the time it

delegation of an agent's powers when the act in question "is such that the agent cannot himself, and the subagent can, lawfully perform." Cal. Civ. Code 1915, § 2349 (2); N. D. Civ. Code 1906, § 5794 (2); S. D. Civ. Code 1908, § 1699 (2). "Thus, if a person should order his goods to be sold by an agent at public auction, and the sale could only be made by a licensed auctioneer, the authority to substitute him in the agency, so far as the sale is concerned, would be implied."<sup>3</sup>

It is clear, moreover, that cases might possibly occur in which statutory qualifications would operate so as to require the employment of a subagent to attend to the sale of property situated in a foreign country, or in a state or province other than that in which the agent resides.

Abstracting the factor of statutory qualifications, the remedial rights of a subagent employed by an agent appointed to sell property, in so far as they depend upon the circumstance that the agent's residence and the property are in different localities, are determined with reference to the criterion of reasonable necessity.

On general principles it would seem that an application of this criterion will justify, if not demand, the adoption of the doctrine that an agent intrusted with the sale of real property should be presumed to have been impliedly authorized to employ a subagent whenever the property is in a foreign country. The cases in which this presumption is most readily susceptible of a rebuttal are obviously those in which the agent resides in a country coterminous with that in which

the property is situated, and there is only a short distance between his residence and the property.

The authority of the agent to delegate his functions where his residence and the property are situated in different subdivisions of a country, such as the American states or the Canadian provinces, has also been treated as being the subject of a *prima facie* presumption.<sup>4</sup> But in this instance the presumption is doubtless more easily rebutted than it is where the property is situated in a foreign country. Little, if any, probative force should apparently be ascribed to it, where the property is near the agent's residence. For example, if an agent residing in New York city is instructed to sell a lot in Jersey City, it can scarcely be supposed that the fact of the agent's nonresidence would be treated as being of itself sufficient to show that the principal contemplated the employment of a subagent in the latter of those cities.

Where the agent's residence and the property are both situated in a territorial subdivision of the kind specified above, the implied authority of the agent to delegate his functions must be determined as an open question of fact, depending upon various elements, of which the most material seem to be the distance by which the agent's residence is separated from the property, the degree of convenience with which he can travel from one place to the other, and the character of his own occupation, as one which will or will not permit him to visit the neighborhood where the property lies with sufficient frequency to attend satisfactorily to the business of effecting the sale.<sup>5</sup>

<sup>3</sup> Story, Agency, 9th ed. § 14.

<sup>4</sup> In *Eastland v. Maney*, (1904) 36 Tex. Civ. App. 147, 81 S. W. 574, where the plaintiffs, who were residents of California, were employed to sell land in Texas, the court remarked: "It is a fair presumption growing out of the exigencies of the transaction that it was contemplated that a purchaser should be obtained through a subagent. . . . It follows as a corollary to the above proposition that if the circumstances of the case justified the appointment of a subagent, the principal would be liable for his compensation."

In *SeEVERS v. Cleveland Coal Co.* (1916) 179 Iowa, 235, 159 N. W. 194, one of the grounds upon which an agent employed by the general manager of a company having its principal office in Chicago, to sell its land in Iowa, was held entitled to recover his commissions from the corporation, was that the manager had been specially authorized by the person who owned practically all the company's stock to effect a sale, and

that in executing his agency he would of necessity be compelled to employ someone in Iowa to find purchasers for the property.

<sup>5</sup> In *Sims v. St. John* (1912) 105 Ark. 680, 43 L.R.A.(N.S.) 796, 152 S. W. 284, the owner of the land in question lived in Indiana, and employed one Black, who lived in an adjoining county to where the lands were situated, as his agent. The plaintiff lived in another county, and was further away from the land than Black. Held, that there were "no exigencies in the case, showing that the parties to the contract contemplated that it would be necessary for Black to employ the appellant or anyone else as subagent;" certainly there was "nothing to indicate that, if Black did employ subordinates to assist him in procuring a purchaser, they should look to the appellee for their compensation."

In *Williams v. Moore* (1900) 24 Tex. Civ. App. 402, 58 S. W. 953, one of the trial judge's findings of fact was that Miller, the defendant's agent, who was not a real es-

Whether the exigencies of business were in a given instance such as to invest an agent with implied authority to hire subagents to assist him in the sale of personal property has apparently not been considered with reference to an action of which the object was the recovery of remuneration. But the reasoning upon which the English court of appeal based a decision with regard to another kind of claim is apposite and instructive.<sup>6</sup>

*c. Ministerial or mechanical character of functions delegated.*

An execeptive provision in the Codes of three American states declares that an agent, unless specially forbidden by his principal to do so, can delegate his powers to another person "when an act to be done is purely mechanical." Cal. Civ. Code 1915, § 2349 (1); N. D. Civ. Code 1905, § 5794 (1); S. D. Civ. Code 1908, § 1699 (1). This statutory qualification

tate agent or engaged in selling lands, and who resided in Washington county, Texas, employed the defendant C. A. Straub, plaintiff's assignor, who was a real estate agent in Williamson county, to sell said 777 acres of land. The first assignment of error challenged the trial court's conclusion of law that Mrs. Williams, by authorizing Miller to find a purchaser for the land at not less than \$25 per acre, authorized him to employ a subagent to sell the land. Two points were raised: (1) that Miller had no authority to employ a subagent to sell the land at any price; and (2) that if he had authority to employ a subagent, he could not employ one to sell the land for less than \$25 per acre. The court observed that, if the attainment of the object contemplated by Miller's appointment required services which Mrs. Williams knew that he could not personally render, he would be invested with implied authority to employ someone else to render them. But the right of Moore to recover against Mrs. Williams was denied on grounds thus stated: "Any man of ordinary intelligence can negotiate a sale of real estate. It is doubtless true that, in the agricultural portions of this state, a large per cent of the sales of real estate is accomplished without the assistance of a broker. In this case, it is true that the land is located in Williamson county, and Miller resided in Washington county, and was not a real estate broker, but he was Mrs. Williams's general agent in leasing and managing all her lands in both counties, for which he was paid an annual salary. Whether this occupied all or only part of his time is not disclosed by the record; but it is reasonable to suppose that, in the performance of these services, he made frequent trips to Williamson county, and spent considerable time upon or in the vicinity of the land in question, and that he was ac-

of the general rule *delegatus non potest delegare*, embodies a common-law doctrine which has been recognized in some of the cases which have been reviewed in other sections.<sup>7</sup>

But, as subagents who perform functions of the kind thus characterized are normally employed on such a footing as to render them servants, their remedial rights do not come within the scope of the present monograph.

*§ 9. Dependency of subagent's remedial rights upon those of the agent.*

In one case the facts involved and the conclusions arrived at are thus stated in the syllabus prepared by the court: The party appearing in a charter party as owner of the vessel chartered was in reality only an agent of the owners, acting, as between himself and the owners, under limited powers, and under a special agreement as to compensation. This agent employed subagents, with whom

acquainted with the people in the neighborhood thereof, and that by informing them that he was agent for the sale of the land, and by seeking a purchaser in Washington county, where he resided, he might have accomplished a sale without the assistance of a real estate broker. So it is not made to appear that Miller could not in person render the services that Mrs. Williams instructed him to render; and therefore, the facts of his not being a real estate broker, and not residing in the county where the land is situated, do not justify the conclusion that he had implied authority to bind Mrs. Williams for compensation to a subagent."

<sup>6</sup> *In De Bussche v. Atl* (1878; C. A.) L. R. 8 Ch. Div. 286, 2 Eng. Rul. Cas. 289, the liability of the defendant to account for the profit made by him by the re-sale of a ship which he had been employed to sell and had himself bought was affirmed on the ground that, "where a shipowner employs an agent for the purpose of effectuating a sale of a ship at any port where the ship may, from time to time, in the course of its employment under charter, happen to be, is pre-eminently one in which the appointment of substitutes at ports other than those where the agent himself carries on business is a necessity, and must reasonably be presumed to be in the contemplation of the parties."

<sup>7</sup> *Groscup v. Downey* (1907) 105 Md. 273, 65 Atl. 930; *Bonwell v. Howes* (1888) 15 Daly, 43, 2 N. Y. Supp. 717, reversing (1888) 1 N. Y. Supp. 435; *Lewis v. Ingersoll* (1864) 3 Abb. App. Dec. (N. Y.) 60; *Williams v. Moore* (1900) 24 Tex. Civ. App. 402, 58 S. W. 953 (where the opinion was expressed that an agent appointed to sell real property would be impliedly authorized to employ a person to show it to possible purchasers.

the owners had no dealings. The rights of the latter as to commissions are controlled by the terms of the actual contract which their principal had made with the owners.<sup>1</sup>

**§ 10. Revocation of agent's authority, effect of.**

The question whether the revocation of the employing agent's authority operates so as to preclude the subagent from recovering compensation from the principal is determinable with reference to the general doctrine which is thus stated in a standard textbook: "As to third persons [the revocation takes effect] when it is made known to them, and not before. Until, therefore, the revocation is so made known, it is inoperative. If known to the agent, as against his principal, his rights are gone, but as to third persons who are ignorant of the revoca-

tion, his act binds both himself and his principal."<sup>1</sup>

The effect of a revocation in another point of view is considered in a case reviewed in § 3, *supra*.

**II. Right of recovery considered with reference to the question whether the contract of employment was adopted by the principal.**

**§ 11. Principal's explicit recognition of the employer as his own agent.**

One of the conclusions to the establishment of which evidence offered for the purpose of showing that the subagent is entitled to recover on the ground of an adoption of the contract of employment by the principal may be directed is, that he explicitly recognized him as an agent, either before or after the services in respect of which compensation is claimed were rendered.<sup>1</sup>

<sup>1</sup> Brown, C. & Co. v. Haigh (1904) 113 La. 563, 37 So. 478. Adverting to one of the clauses in the charter party which recited that a certain commission was due to Brown, Chipley, & Company, the court said: "That clause was inserted for the convenience and benefit of Pinckney & Company [intermediate agents] in collecting the money which would be due to them under the charter. It was a mere delegation of agency to them for certain purposes, and the insertion of their name in the charter party did not throw them into privity with the owners of the ship, or alter the latter's legal obligations of the owners to the plaintiff, resulting from the charter party."

<sup>1</sup> Story, Agency, § 470. This passage was quoted in Lamson v. Sims (1882) 16 Jones & S. (N. Y.) 281, where it was held that the alleged revocation did not affect the subagent's right to compensation, because the evidence was such as to warrant the inference that it was not made known to the plaintiff until after he had secured a purchaser with whom a contract of sale might have been made.

<sup>1</sup> In Carroll v. Manganese Steel Safe Co. (1909) 111 Md. 252, 73 Atl. 655, the court, adverting to a letter from the defendant, upon which the claimant relied, observed that, even if it betokened an acceptance of his services in carrying on certain earlier negotiations with a bank in regard to the purchase of the defendant's property, if he had actually secured the contract, "it, standing by itself, could hardly be construed as having a similar operation upon any services that might have been rendered by him a year thereafter, in relation to another and different transaction."

In Warren Commission & Invest. Co. v. Hull Real Estate Co. (1906) 120 Mo. App. 432, 96 S. W. 1038, the state of facts with reference to which it was held that an instruction in the nature of a demurrer to the evidence had been properly refused by the

trial judge was thus specified by the court: "The evidence is all one way, and in fact it appears by defendant's evidence, that the Hull Company was the authorized agent of the defendant to sell the property, and that the Hull Company, through its chief officer, agreed with the plaintiff that it might sell the property and receive, as compensation for its services, one half the usual commission of 2½ per cent of the selling price and that the defendant was not only apprised of this arrangement, but ratified it by recognizing the plaintiff as its authorized agent to sell the property. A sale was negotiated by plaintiff on the terms and for the price agreed upon, and while the Hull Company's letter of September twenty-seventh stated the terms of the sale were subject to change, no change was made or suggested until after the sale was negotiated, too late to defeat plaintiff's claim for the agreed commission."

In Nelson v. National Drill Mfg. Co. (1905) 20 S. D. 299, 105 N. W. 630 (sale of personalty), certain evidence, not reported, was held to be sufficient to entitle the plaintiff to recover.

In Lindquist v. Northwestern Port Huron Co. (1908) 22 S. D. 298, 117 N. W. 365, the adoption of a contract made by the general agent of a manufacturing company with a salesman was shown by the language of a letter.

In Dockery v. Maple (1910) — Tex. Civ. App. —, 125 S. W. 631, the right of the subagent to recover for services in obtaining a purchaser for defendant's land was predicated on a ratification, inferred from evidence tending to prove that defendant knew that he was trying to obtain a purchaser, and that, when he had obtained one, defendant agreed to compensate him.

In Clark v. Lillie (1867) 39 Vt. 405 (sale of personalty), the facts involved and the comments of the court thereon are stated in the following extract from the clearly rea-

**§ 12. Acceptance of the benefits of the transaction by the principal.**

An examination of the cases under this head shows that they may be divided into the following classes:

(1) Cases which simply affirm in general terms the elementary rule of the law of agency, that a ratification of the unauthorized contract of an agent cannot be predicated on the ground of an acceptance of its benefits, unless the evidence also shows that, at the time of the acceptance, the principal had knowl-

soned and instructive opinion: "But the plaintiff communicated to the defendant truthfully and fully the details of the bargain the traveling agent had made with him, to allow him 10 per cent commission on all sales in Brattleboro, and indicated to the defendant that he had some doubt of this agent's authority to make such contracts. The defendant had no reason to suppose that the plaintiff questioned Sadler's authority to bind himself, or desired information on that point from the defendant. That authority Sadler would probably have without permission from the defendant. The defendant ought to have understood from the very fact that the plaintiff was writing him, that the plaintiff's doubt was whether Sadler had authority to bind him. The defendant, in reply to this communication, wrote the plaintiff that Sadler was authorized to make 'about such a trade' as he had, and that he would abide by it. The plaintiff could hardly be expected to understand that the defendant merely meant to say he would abide by a trade in which Sadler undertook to bind himself, nor could he reasonably expect the plaintiff to understand that the defendant was agreeing to abide by only a part of the trade when he made no such qualification to his promise. It may be said that he did qualify Sadler's bargain as to the time to be given purchasers, but this was only calculated to assure the plaintiff that in other respects he was satisfied with the arrangement, and this assurance was confirmed by the defendant's providing in the same letter for the payment to the plaintiff of the commissions due him for sales already made. In providing for this payment he gives the defendant no intimation that he is acting at the request of Sadler, but pays the debt precisely as if he owed it himself. This letter was a complete ratification of the contract Sadler had made, and a promise upon valid consideration to the plaintiff by the defendant that he would pay the plaintiff the 10 per cent commission on the sales in Brattleboro. . . . The question really reduces itself to this: whether the defendant's liability to the plaintiff is to be governed by what was said between them, or by an arrangement between Sadler and the defendant of which they both neglected to inform the plaintiff, and for which neglect the plaintiff was not respon-

edge of all the material circumstances incidental to the formation of the contract, and the subsequent conduct of the parties with reference to it.<sup>1</sup>

(2) Cases in which that rule has been affirmed in the particular form that the claimant cannot hold the principal liable for his compensation if the fact of his having been employed by the agent was unknown to the principal at the time when he availed himself of the benefits of the contract.<sup>2</sup>

(3) Cases in which language has been

sible. The defendant may have supposed that Sadler informed the plaintiff of this arrangement, but the plaintiff was not at fault for his so thinking. On the contrary, the plaintiff informed the defendant of the contract with Sadler, and no such qualification being mentioned in the plaintiff's letter, the defendant had reason to understand that it had not been made a part of the contract. The law will presume that the defendant meant what his language, by its terms and under the circumstances in which it was used, would fairly be understood to mean, and this presumption is a matter of law, and not to be rebutted by proof that he intended something more or different, which he made no attempt to express, and which the plaintiff neither understood nor had reason to understand."

In *Williams v. Moore* (1900) 24 Tex. Civ. App. 402, 58 S. W. 953 (sale of land), a finding to the effect that the defendant never at any time acknowledged her liability for commissions nor promised to pay the same was held to import that when the subagent's claim was brought to her attention she denied liability therefor, and to show that she did not by adoption ratify the agent's conduct in promising compensation, if any such promise was made.

On conflicting evidence, the question whether a principal ratified the contract of his agent is, of course, one for the jury. *Quale v. Hazel* (1905) 19 S. D. 483, 104 N. W. 215 (sale of land).

<sup>1</sup> "There was no ratification, for defendant is not shown to have accepted the fruits of plaintiff's efforts with full knowledge of the facts." *Harper v. Goodall* (1881; Com. Pl.) 62 How. Pr. (N. Y.) 288, 10 Abb. N. C. 161, where the claimant was employed by the defendant's wife to procure a tenant for his property.

<sup>2</sup> This is one of the points decided in *BRUTINEL v. NYGREN*, ante, 713.

In *Servant v. McCampbell* (1909) 46 Colo. 292, 104 Pac. 394, one *Servant*, who had been appointed by several shareholders in a corporation as their attorney in fact to dispose of their shares, employed plaintiff to find a purchaser, and promised him a certain commission. The only evidence adduced on the part of plaintiff that notice was brought home to the defendants was the testimony of *Servant* that he would usually, after meeting *McCampbell*, get as

used which seems to import the adoption of an unqualified theory, under which the liability of the principal becomes, in the absence of countervailing evidence, a necessary conclusion whenever the single fact is established that the principal availed himself of the con-

tract procured by the services of the claimant.<sup>3</sup> The unsoundness of a theory of this broad and unqualified scope is clearly indicated by the consideration that it takes no account of the indispensable element of the principal's knowledge. See par. (1), *supra*. The

many of the stockholders together as he could, and in a general way tell them what he was doing. The court said that such evidence was wholly insufficient to establish a ratification of the acts of Servant in agreeing, if he did, that the defendants should jointly pay the commissions claimed.

In *Merrill v. Lathan* (1896) 8 Colo. App. 263, 45 Pac. 524, for facts, see § 7, note 2, *a, supra*, one of the grounds upon which the court denied that there had been any ratification was thus stated: "The defendant concluded the transaction without a suspicion that the plaintiff had even the remotest connection with it. He therefore lacked the knowledge necessary to a ratification, and without which there could be no ratification. The fact that he received a description of Mr. Robertson's property indorsed on the plaintiff's business card has no significance; and his offer to pay \$25 rather than have trouble was not a recognition of the plaintiff's claim."

In *Groscup v. Downey* (1907) 105 Md. 273, 65 Atl. 930, one of the grounds upon which an instruction in favor of the plaintiff was held erroneous was that it was inconsistent with the doctrine that "a sale by the defendant to a purchaser procured by the subagent would not ratify his employment, or make her liable to him for compensation, unless she knew when she made the sale that the purchaser had been procured by him."

In *Benham v. Ferris* (1910) 150 Mich. 632, 124 N. W. 538, there was testimony tending to prove that the defendant agreed with one Mingus that if Mingus would sell defendant's farm, he might have all he could get more than \$1,800; that Mingus availed himself of the services of plaintiff upon an arrangement made between them; that plaintiff brought about a sale of the land in two parcels for more than \$1,800; and that defendant accepted from Mingus the sum of \$1,800, and conveyed the land. On the other hand, there was no testimony tending to prove that Mingus was authorized to employ plaintiff on defendant's account, or that defendant ever supposed that plaintiff was claiming to act as his agent, or was assuming so to do. Held, that a verdict should have been directed for the defendant.

In *Craver v. House* (1900) 138 Mo. App. 251, 120 S. W. 686, the contention of the plaintiff, that the judgment in his favor could be upheld on the ground that the defendant ratified the act of his agent in carrying out the contract, was thus discussed: "The defendant, it is true, ratified the contract of sale made by his agent and conveyed the property to the purchaser;

but in so doing we are not to consider that he ratified his act in employing plaintiff to find a purchaser for it. He was bound to comply with the contract in that respect, because he had authorized it to be made. But there is no direct evidence to the effect that he then knew of plaintiff's employment. If he had read the contract he would have been informed that plaintiff had been so employed. But we do not think that, had he done so, that it goes to prove ratification. The rule in such cases is stated thus: 'A principal does not ratify the unauthorized act of his agent by accepting the proceeds or fruit thereof, if knowledge of it did not come to him in time to enable him to repudiate the entire transaction without essential injury' (*Clark v. Clark* (1894) 59 Mo. App. 532). The proof that defendant offered to pay \$75, in our opinion does not tend to show ratification. He did not thereby recognize the contract as binding. It was only an offer to pay a disputed claim."

In *Brown v. Scott* (1895) 91 Wis. 674, 65 N. W. 499, where the plaintiffs were employed by one of several tenants in common to find a purchaser for their land, and brought about a sale, the grounds upon which an action for commission was held not to be maintainable were thus stated: "The defendant, prior to the consummation of the sale, neither knew that the plaintiffs were rendering or had rendered him any service in the matter, nor did he have knowledge of the facts which should have put him upon inquiry or would lead him to suppose that such was the case. When he first obtained knowledge of the facts the contract had been fully completed, and he could not reject the service or return the benefits received if he had wished to do so. He had no opportunity, after knowledge of the facts, to choose whether he would reject or accept."

See also *Sims v. St. John* (1912) 105 Ark. 680, 43 L.R.A.(N.S.) 796, 152 S. W. 284; and *Rice v. Post* (1894) 78 Hun, 547, 20 N. Y. Supp. 553, the effect of which is stated in § 21, note 8, *infra*.

<sup>3</sup> In *Strong v. West* (1900) 110 Ga. 382, 35 S. E. 693, it was laid down broadly that the principal, "in accepting the benefit of the services rendered by the claimant, ratified his employment, even if it had not been originally authorized."

In *Budd v. Howard Thomas Co.* (1903: Sup. Spec. T.) 40 Misc. 52, 81 N. Y. Supp. 152, where it was held that a good cause of action was shown by a complaint which claimed compensation for services rendered in respect of the purchase and shipment of certain carloads of fruit, the ruling was

argument might possibly be advanced that it is to some extent supported by the analogy of that which declares that money in the hands of a subagent, upon which he is entitled to a lien as against the principal, cannot be recovered by the principal until he discharges the amount due to the subagent for services performed with respect to the transaction in the course of which the money came into his possession. See § 17, *infra*. But the existence of the lien plainly introduces a differentiating fac-

tor of controlling significance, which renders the cases that turn upon the latter doctrine inapt precedents in cases which involve simply the right to recover compensation.

(4) Cases which embody the theory that evidence which merely shows that the principal availed himself of the benefits of the transaction in question is not sufficient of itself to warrant the inference of an intention on his part to become responsible for the remuneration of the subagent.<sup>4</sup>

founded on the "principle of law that where one party deals with the agent of another party, and the principal adopts and accepts the fruits of the contract so made, he is bound by all of the instrumentalities by and through which the benefit is obtained."

In *Kurtz v. Payne Invest. Co.* (1912) 156 Iowa, 376, 135 N. W. 1075, it was laid down broadly that, if the employment of the plaintiff as a subagent to sell the defendant's land was unauthorized, and there was no agreement that his commission should be at a certain specified rate, he was entitled to recover on a quantum meruit.

In *Dewing v. Hutton* (1900) 48 W. Va. 576, 37 S. E. 670, the syllabus of the court is as follows: "A person who employs an agent to buy up timber lands, and such agent engages the services of another for certain compensation agreed between them, cannot escape the payment of such compensation if he accepts the purchases secured thereby. If he would enjoy the benefits, he must assume the burdens in whole, and not in part."

This statement of the law was approved in *Fisher v. Berwind* (1908) 64 W. Va. 304, 131 Am. St. Rep. 898, 61 S. E. 910, where the defendant's liability was affirmed in respect of services performed in pursuance of a written agreement between defendant's agent and the plaintiff, by which the latter undertook to acquire such coal lands and coal-mining rights in certain counties as the agent or his legal representatives should, from time to time, indicate. In this case, however, it should be observed that the court based its decision not only upon the fact that Berwind became the owner of the 860 acres of coal through the subagency of Fisher, but also upon evidence that Berwind's manager in Philadelphia was in touch with the work carried on by Fisher, and was in consultation with him personally, as well as through Reese. That the conclusion arrived at, viz., that Fisher's employment was thus impliedly authorized and ratified by Berwind, and that the latter was therefore liable for his compensation, would apparently have been adopted even if the evidence going to show the principal's recognition of the agency before the transaction was consummated had not been an element in the case. So much seems to be inferable from the approval of the broad doctrine laid down in *Dewing v. Hutton*

(W. Va.) *supra*. But obviously the court's reliance upon two distinct considerations renders the decision a precedent of somewhat less certain import with regard to the effect of a simple acceptance of the benefit of the subagent's services.

The report of both the above West Virginia cases, however, shows that the principals were actually acquainted with the facts, and the formal statement of doctrine may possibly be regarded as being simply an instance of a lack of judicial precision.

Compare also *Grace v. American Cent. Ins. Co.* (1879) 16 Blatchf. 433, Fed. Cas. No. 5,648, where, in a *action brought on a policy of insurance*, it was held that the plaintiff, by accepting a policy procured through a broker employed by the broker to whom the plaintiff had applied, ratified the employment of that broker.

<sup>4</sup> In *Sims v. St. John* (1912) 105 Ark. 680, 43 L.R.A.(N.S.) 796, 152 S. W. 284, the court observed that the defendant did not, by making the sale of his property, "recognize any relation of agency existing between himself and the appellant [plaintiff]. At most, his conduct could only be taken as a recognition of the relation of the agency between Black [agent] and appellant."

In *Hanback v. Corrigan* (1898) 7 Kan. App. 479, 54 Pac. 129, the contention rejected was that, by selling the property to the purchasers, the principal ratified the contract of the agent to pay a commission to the subagent by whom the purchaser had been secured.

The effect of *Rudd v. Nashville, C. & St. L. R. Co.* (1886; Ct. App.) 7 Ky. L. Rep. 823, as stated in the reporter's abstract, is as follows: Although an agent employs another for the principal without authority, express or implied, yet if the principal ratifies the act of the subagent, he is equally liable as if he had originally employed him, or given the agent the power to do so; and while this ratification will often be implied by the acceptance of the benefit arising from the services of the subagent, yet the acceptance must be under such circumstances as imply an obligation to pay for them.

In *Williams v. Moore* (1900) 24 Tex. Civ. App. 402, 58 S. W. 953, the court made the following remarks: "If it be conceded that Miller [agent] attempted to act for Mrs. Williams in employing Straub [subagent],



(5) Cases in which the ratio decidendi is, that the principal may warrantably be held liable whenever it appears from the testimony that he had notice of the claimant's employment by

his agent to perform services in respect of the transaction in question, and that the services as performed enabled him to consummate that transaction in the manner shown.<sup>5</sup>

and that she knew that fact before she consummated the sale, we are still of the opinion that by so doing she did not ratify Miller's acts in that particular. The right of sale is one of the most valuable rights incident to the ownership of property, and it ought not to be restricted for other then cogent reasons. Unless some public interest or paramount private right renders a curtailment necessary, the owner of any character of property should have the unhampered right to sell it, with the entire world as a market. If another person, unauthorized by the owner, assists an agent in making a sale, is it right and just to hold that, if apprised of what has been done by such assistant or subagent, and the fact that the agent has promised compensation by the owner, the latter cannot accept the terms offered by the purchaser without becoming liable to such subagent? Under such circumstances, it cannot be claimed that the owner has misled the subagent; nor will consummation of the sale without compensating him place him in any worse position than he would be in if the sale should be abandoned. It is true that one cannot adopt part of an unauthorized contract without adopting the whole; but the contract submitted to Mrs. Williams, and the one she adopted, was the contract for the sale of the land, and not the contract between Miller and Straub. It was not stipulated in the contract of sale that she should pay Straub for services rendered. It is true, when she adopted that contract she had knowledge of the other contract and of the services rendered by Straub, but as the latter contract was unauthorized by her, as she had done nothing to induce Straub to render the services, as her consummating the sale without remunerating him would place him in no worse position than he was already in, and as she had the power and right, independent of that contract, to sell her land to the proposed purchaser, she had the right, in the forum of conscience as well as at the bar of the law, to accept the terms of the contract of sale without ratifying the contract between Miller and Straub, either upon the ground of adoption or estoppel."

All the cases in which recovery has been denied simply on the ground of the plaintiff's having failed to show that the agent had power to employ him are in a sense implied authorities for this theory. See subtitle I., *passim*. But it would, of course, be unwarrantable to lay any considerable stress upon them in the present connection.

The following remarks of Lindley, L. J., although they have no reference to a subagent's right of recovery, may also be quoted: "It is said that Mr. Peace had an equity against the company because the

company has had the benefit of his labour. What does that mean? If I order a coat and receive it, I get the benefit for the labour of the cloth manufacturer; but does anyone dream that I am under any liability to him? It is a mere fallacy to say that because a person gets the benefit of work done for somebody else, he is liable to pay the person who did the work."

<sup>5</sup> In *Randolph Lumber Co. v. Western Silo Co.* (1914) 92 Kan. 368, 140 Pac. 867, Ann. Cas. 1915D, 30, it was held that a demurrer had been improperly sustained to evidence showing that a salesman of a manufacturing company employed a local agent to make sales on stated terms, and that sales made by the person so employed were reported and filled. The court said: "The question involved is whether there was any evidence of authority on the part of the salesman to make the contract relied on by the plaintiff, or of facts that would preclude the defendant from denying such authority. We think the case falls within the rule that the principal cannot accept the fruits of a contract made in his behalf and at the same time reject any of its burdens on the ground that it was unauthorized (*Evans v. Central L. Ins. Co.* (1912) 87 Kan. 641, 41 L.R.A.(N.S.) 1130, 125 Pac. 86; *Owensboro Wagon Co v. Wilson* (1909) 79 Kan. 633, 101 Pac. 4; *Bank of Lakin v. National Bank* (1896) 57 Kan. 183, 45 Pac. 587). The company could not ratify a sale made at less than the authorized price and charge the agent with the difference (*Halloway v. Arkansas City Mill. Co.* 77 Kan. 76, 93 Pac. 577). It is true there was no direct evidence that the defendant, at the time of filling the orders, knew the price at which the sales were made or the commission its salesman had agreed to pay to the local agent. These matters, at least as to the selling price, might perhaps be inferred, but, in any event, the jury would have been justified in finding that the salesman was acting within the apparent scope of his employment, and that the plaintiff was protected in dealing with him on the assumption that his acts were authorized (*Townsend v. Missouri P. R. Co.* (1912) 88 Kan. 260, 128 Pac. 389)."

In *Hornbeck v. Gilmer* (1903) 110 La. 500, 34 So. 651, plaintiff sought to sell his land through the agency of a broker, through whom another agent was called in to assist in effecting the sale. Plaintiff had been informed of this, and did not disapprove of the action of his broker in employing someone to assist in effecting the sale. On the contrary, he accepted the services of both. The buyer was sent to the seller by these agents. Three of the rulings with regard to this state of facts are thus set out in the syllabus written by the court:

(6) Cases in which the position is taken that the principal's liability cannot be predicated from evidence which establishes the fact that he had knowledge of the claimant's employment, as well as the fact that he ultimately accepted the benefits of his services.<sup>6</sup> The considerations which are deemed by the present writer to point to the conclusion that this is the correct theory are stated in the following section.

*§ 13. Same subject further discussed.*

From the authorities discussed in the preceding section it is apparent that there is a conflict of doctrine not only with regard to the question whether the principal's liability may be predicated from the single fact of his having accepted the benefit of the contract procured by the services of the claimant, but also with regard to the question whether such liability may warrantably be inferred from that fact in conjunction with the fact of knowledge on the principal's part that the claimant had been employed by the agent to assist

him. The present writer ventures to express the opinion that both these questions should receive a negative answer.

It is sufficiently obvious that, in the final analysis, an adoption of the doctrine under which a principal's acceptance of the benefits of a contract procured through the services of a person known to have been employed by his agent is treated as imposing upon him a liability for that person's remuneration logically involves an adoption of the theory that the inference to be drawn from the fact of acceptance should always be the same as that which is universally conceded to be proper in cases in which the factor of an intermediate employer is not present. That this theory has actually been taken for granted by many judges is shown by the circumstance that cases relating to the remedial rights of agents have been frequently cited as apposite precedents in cases where the claimants were agents. But there would seem to be adequate reasons for disputing the soundness of such a view, so far as regards cases of

(3) A special agent who employs another to assist in effecting a sale, to the knowledge of his principal, binds the principal to pay the fee (of which the seller had knowledge) promised to the one thus employed for the principal. (4) The owner had been informed of the amount to which the special employee or agent would be entitled. He is bound therefor by accepting the result of the services of the special employee. (5) Under the circumstances of this case, payment of the first special agent for his services was not payment to the second agent for his services in the matter.

In *Hurt v. Jones* (1903) 105 Mo. App. 106, 79 S. W. 486, where the evidence showed that the plaintiff had been employed with the knowledge of the defendant, by the person appointed by her to sell certain land, and had rendered material services in procuring a purchaser, the court thus stated its conclusions: "The act of approval by defendant of the contract was an approval of plaintiff's agency. At law, defendant had the right to claim the benefit of the contract made by her agent in his own name. But in doing so, she assumed the obligation to pay the plaintiff for his services whether her agent had the authority or not to employ him (*Holmes v. Board of Trade* (1888) 81 Mo. 137). With full knowledge of all the facts she adopts the sale so made and conveys the land to the purchaser named in the contract. She ought to be estopped from denying plaintiff's right to compensation for his services."

<sup>6</sup> In *Homan v. Brooklyn L. Ins. Co.* (1879) 7 Mo. App. 22, it was laid down: "Where a person is employed by an agent, the mere fact that the principal of the agent knows

that the person so employed is acting in the business committed by the principal to his agent, and accepts such employment as beneficial, does not prove an agreement on the principal's part to pay for the services of the person so employed. To hold the principal to payment, the element of privity of contract between the principal and subagent should appear." The reference in this statement to the element of a knowledge of the claimant's employment must be regarded as qualifying the remarks which follow it: "Acts of recognition and the acceptance of services on the part of the principal do not necessarily tend to prove ratification in the sense here claimed: for the question arises, ratification of what? If, for example, *Cole and Taylor* [officials of defendant], relying on what *Wilson* [local agent] seems to have done (that is, hired the plaintiff under the obligation to pay him), accepted the plaintiff's services as the employee of and to be paid by *Wilson*, the acts of *Cole and Taylor* in this behalf in no way prove, or tend to prove, their acceptance or ratification of any employment of the plaintiff." The doctrinal standpoint indicated by this language is manifestly different from that which is disclosed by the later opinion delivered by the same court in *Hurt v. Jones*, note 5, *supra*.

See also *Sims v. St. John* (1912) 105 Ark. 680, 43 L.R.A.(N.S.) 796, 152 S. W. 284, in which the court reasoned upon the assumption that the right to maintain an action for services performed in procuring a purchaser for land could not be predicated merely upon the ground that the defendant knew that the agent appointed by him had employed the plaintiff to assist him.

the type with which we are concerned in the present monograph, viz., those involving claims in respect of services of the same description as those which the employing agent himself agreed to perform. See § 1, *supra*.

Where a recognized agent is seeking to recover from a recognized principal remuneration for services rendered in the course of his agency and accepted by the principal, the question whether a privity of contract existed between the plaintiff and the defendant obviously does not arise. The sole point to be determined is whether a certain significance shall be ascribed to an act done by the principal with reference to a contract which, *ex hypothesi*, had been previously made by him.

A situation which, for the purpose of this discussion, is essentially similar to that specified in the preceding paragraph, is presented in cases where the plaintiff is a person who, by means of services performed without reference to any pre-existing arrangement with the defendant, has enabled him to consummate the transaction in respect of which the compensation is claimed. In this instance also only a single conclusion can be drawn from the evidence, viz., that the defendant, by electing to avail himself of the benefits of the services so performed, intended to recognize the plaintiff as his agent, and that a privity was constituted between these two parties with all its ordinary consequences.

But the conditions affecting the right of recovery are materially different where the plaintiff is a person employed by an agent of the defendant for purposes which render him a subagent in the sense in which that expression is used in the present monograph. Under such circumstances we have to take into account the additional elements which are indicated by the considerations that the primary effect of the plaintiff's employment was to create merely a contractual relationship between him and

a person who had himself undertaken to perform for the defendant services of the same nature as those which constitute the cause of action, and that the services performed by the plaintiff must be regarded as being *prima facie* referable to the obligations incident to that relationship. In this point of view it would seem to be reasonably clear that the fact of the defendant's having accepted the benefit of the services as performed, even when it is conjoined with the further fact of his knowledge of the plaintiff's employment, cannot warrantably be deemed to possess the same probative significance as in a case in which his liability to a person with whom he dealt directly is the point in controversy. These two facts do not necessarily show that a privity of contract was created between the defendant and the plaintiff. On the contrary, it is manifest that, in the absence of extraneous testimony tending to impart a different complexion to the defendant's conduct, he is entitled to take the position that, in adopting and executing the contract procured by the plaintiff, he was merely availing himself of the services which the intermediate employee had agreed to render, and that the plaintiff was simply one of the instrumentalities by means of which those services were rendered.<sup>1</sup> It is submitted that, under the circumstances supposed, there is no more reason for holding that a principal's acceptance of the benefits of a subagent's services imports the assumption of an obligation to remunerate him than there is for holding that the employer of an independent contractor renders himself liable for the remuneration of a subcontractor by accepting the material results of his work. It is well settled that, apart from statute or a special agreement, a subcontractor does not, by virtue of such acceptance, acquire any remedial rights against the contractor's employer, even though that employer was fully cognizant of the fact that he was engaged upon the work in question

<sup>1</sup> In support of this statement it will be advisable to refer to the language used in *Barnard v. Coffin* (1886) 141 Mass. 37, 55 Am. Rep. 443, 6 N. E. 364, where the actual question involved was whether the agent was liable to the principal for a loss sustained on the sale of the principal's property by reason of the fraud of a subagent employed without the principal's consent. The argument that the principal had ratified the employment of the subagent by confirming the sale and signing the deed was thus answered by the court: "If the plain-

tiff understood that Ochs was employed by the defendant as his agent, then these acts of the plaintiff might be held to be a ratification of his employment. . . . But if the plaintiff understood that the defendants employed Ochs as their agent to assist them in transacting the business which they had undertaken, then these acts might only show that the plaintiff was willing that the defendants should transact the business by means of their servants or agents, for whom they should be responsible."

(see § 50 of the note to *Martindale v. Lobdell-Emery Mfg. Co.* ante, 8); and for the purposes of the analogy to which attention is drawn, the distinction, such as it is, between an agent and a contractor, may well be treated as a negligible factor.

As is shown in the note just mentioned, a different conclusion is indicated as being appropriate with regard to cases in which the subemployee is hired to perform services which are not of the same description as those incidental to the agency of the hiring employee.

**§ 14. Estoppel as a ground for allowing recovery.**

The probative significance of the fact that the principal accepted the benefits of the contract procured by the subagent's services has sometimes been discussed with reference to the question whether it estopped him from denying the authority of the agent to employ the subagent. Two of the decisions are adverse to the imputation of liability to the principal upon this ground.<sup>1</sup> But it should be observed that the right of recovery in this point of view has not received much attention from the courts by which the fact of acceptance—either dissociated from or combined with the element of knowledge—is regarded as constituting evidence from which a ratification by the principal may be inferred.<sup>2</sup> Such courts might be disposed

to treat the argument from analogy as being strongly persuasive in favor of predicating an estoppel. The analogy, however, is not complete, for one of the essential ingredients of an estoppel is that the party in whose favor it is claimed should have been excusably misled by the other party, and it is not easy to suggest any consideration to which the element of deception can satisfactorily be referred in the type of cases now under discussion.<sup>3</sup> Even in cases where the principal was aware of the hiring of the subagent, the conclusion that he misled the subagent by allowing him to go on performing services could not warrantably be drawn, for, under such circumstances, the principal would, in the absence of notice to the contrary, be entitled to presume that subagent was merely an employee of the agent.

**III. Lien of subagent for his compensation.**

**§ 15. Subagent employed by agent professedly acting as agent, and within the scope of his authority.**

The doctrine laid down by Judge Story is that, wherever a privity exists between the principal and the subagent, "the subagent will incur a direct and immediate responsibility to the principal, and not merely to the agent who employs him. He will also have a reciprocal personal claim against the prin-

<sup>1</sup> In *Carroll v. Tucker* (1893; Com. Pl.) 2 Misc. 397, 21 N. Y. Supp. 952, leave to appeal denied in (1893) 3 Misc. 633, 22 N. Y. Supp. 1129. (sale of land), the court made the following remarks: "The respondent argues, however, that, by consummating the sale which he negotiated, the appellants are estopped to question his authority, upon the ground that the enjoyment of the fruits of an agent's act charges the principal with responsibility. The principle upon which the respondent relies is of recognized and salutary operation, but he misapprehends its import and application. . . . Here the act of Thompson in substituting plaintiff as broker, if there were such substitution, was beyond the scope of Thompson's authority; and the transaction, the enjoyment of the fruits of which is supposed to estop the appellants, was not the transaction of their agent, but of a stranger. The rule was never applied, and in reason can never be applied, so as to validate a delegation of his agency by a broker, else the principal would be at the mercy of his broker, and might be burdened with liability to as many deputies as the broker should choose to appoint. The law is settled otherwise. Where the subagent has been appointed

without authority, and his acts are afterwards ratified, he can recover no compensation from the principal, but must look to the agent." 1 Am. & Eng. Enc. Law, 395." This decision was approved in *Rice v. Post* (1894) 78 Hun, 547, 29 N. Y. Supp. 553 (sale of land), where the court said: "It is true that the defendant has had the benefit of the plaintiff's services, but all that benefit he was entitled to from the services of the agent whom he had employed. If the latter has employed another to render the services which were due from him, he only obligates himself to compensate the person so employed."

See also *BRUTINEL v. NYGREN*, ante, 713

<sup>2</sup> In *Hurt v. Jones* (1903) 105 Mo. App. 106, 79 S. W. 486, the enforceability of the claim was predicated on the ground both of an "approval of plaintiff's agency," and of the defendant's estoppel. See § 12, note 5, supra.

<sup>3</sup> In a case reviewed in § 7, supra, the contention that the principal might be held liable on the ground of estoppel was rejected for the reason that he had "neither intentionally nor negligently misled the plaintiff." *Merrill v. Lathan* (1896) 8 Colo. App. 263, 45 Pac. 524.

principal, and will be clothed with a lien against him to the extent of the services performed and the advances and disbursements properly made by him, on account of the subagency."<sup>1</sup> This passage is in accord with the following extract from a standard textbook: "The agent who effects a policy for his principal, and advances the premium, or becomes responsible for it [which is this case], and retains the policy in his hands, has a lien upon it for his commission and the premium until the same are paid to him, or he is supplied with

funds for the payment, whether his immediate employer is the assured himself or an intermediate agent, and in the latter case, whether the intermediate agency was known or not known to the subagent claiming the lien."<sup>2</sup>

The latter of these statements of the law has been approved by the House of Lords in a case in which a subagent was declared to be entitled to a lien on a policy of insurance effected by him.<sup>3</sup>

The right to such a lien has also been affirmed in two American cases.<sup>4</sup>

<sup>1</sup> Agency, § 388. For other relevant passages in the same treatise, see note 4, *infra*.

<sup>2</sup> Phillips, *Ins.* § 1909. It is worth noting that no cases were cited by the learned author, who was evidently not acquainted with the American decisions cited *infra*.

<sup>3</sup> *Fisher v. Smith* (1878) L. R. 4 App. Cas. (Eng.) 1. There the plaintiff, Fisher, who lived at Barrow-in-Furness, which is some sixty or seventy miles from Liverpool, employed a local agent, Skinner, to effect a policy upon some goods. Skinner employed the defendant Smith, a resident of Liverpool, and instructed him to effect the policy. The defendant, having effected the policy, kept it in his hands, as was the universal practice of brokers effecting insurances. Lord Penzance said: "The result of that transaction, as it seems to me, would be to make Mr. Smith, the defendant, the subagent of Mr. Fisher. Mr. Fisher knew that he had been employed for the purpose of effecting the policy, and Mr. Smith knew that he was effecting the policy, not for Skinner, but for Fisher. It was, therefore, a perfectly well understood transaction; the principal at Barrow-in-Furness had employed the local agent; the local agent had employed the agent at Liverpool; that agent thoroughly understanding for whom he was acting, and the principal thoroughly understanding that the local agent was acting for him. Under these circumstances it appears to me that the ordinary rule of law, that a lien would arise in favor of the broker who held in his hands the policy, could not but be applicable to this case. It is precisely the same as if there had been no intermediate agent at all, and as if Mr. Fisher had written direct to Mr. Smith to ask him to open a policy for him. Having opened that policy, and having got possession of it, he was not liable to give it up to his principal until he had received the premium, which he had either paid or become liable to pay, in respect of it."

<sup>4</sup> In *Sharp v. Whipple* (1857) 1 Bosw. (N. Y.) 557, it was laid down, in an action for the conversion of an insurance policy by the defendant, that "an insurance broker has a lien for the premium paid by him and his commissions upon the policies which he effects, even when it is known to him that the person who employs him is

merely an agent for the party assured." For the other point ruled in this case, see § 17, note 4, *infra*.

In *McKenzie v. Nevius* (1842) 22 Mo. 138, 38 Am. Dec. 291, where the subject was very elaborately discussed in various points of view, a lien was declared in favor of a subagent who had been employed by the agent of a foreign principal to effect an insurance on a vessel. The action was brought by an inhabitant of New Brunswick for the proceeds of a policy which the defendants, New York brokers, had procured upon the plaintiff's ship at the request of a Maine firm, Buck & Tinkham, who had been employed by the plaintiff as his agents for that purpose. One of the points upon which the measure of recovery depended was whether the defendants had for their indemnity, a lien on the policy, by virtue of which they received the money in question. The court referred to the doctrine laid down in *Story on Agency* (§§ 373, 376, 379): "Insurance brokers have now by general usage a lien upon policies of insurance in their hands, procured by them for their principals, and also upon the moneys received by them upon such policies. In cases of agency there generally exists a particular right of lien in the agent for all his commissions, expenditures, advances, and services, in and about the property or thing intrusted to his agency, whenever they were proper or necessary or incident thereto." The general rule formulated in § 386 of the same treatise was also quoted.

The following remarks were then made: "When these principles are applied to the facts in this case, there can be no doubt that the defendants held a lien upon the policy. If it had been obtained by the plaintiff's immediate agent, from his means and running to him, it would have created a lien in his favor. We have seen that the contract was between their agent and the defendants, who were to look exclusively to their direct employers, and were not obliged or allowed, in the absence of a special agreement, to seek for remuneration beyond him. All the security which the law gives to the immediate agent must extend to the subagents in this case, so far as the latter have a right for their indemnity to look to the former as their principal." In answer to the contention that there was

**§ 16. Subagent employed by agent professedly acting as agent, but exceeding his authority.**

Where nothing more is shown than that the employment of a subagent by an agent professedly acting as agent was unauthorized, the case is governed by the rule that, "if no privity exists between the principal and the subagent, no lien can be acquired by the latter against the former, unless so far as he may claim, by way of substitution, the lien of his immediate employer."<sup>1</sup>

On the other hand, "a subagent who is employed by an agent to perform a particular act of agency, without the privity or consent of the principal, may also acquire a lien upon the property thus coming into his possession, against the principal, for his commissions, ad-

vances, disbursements, and liabilities thereon, if the principal adopts his acts, or seeks to avail himself of the property or proceeds acquired in the usual course of such subagency. For the principal will not be allowed to avail himself of the benefits of the transaction without at the same time subjecting himself to its burdens."<sup>2</sup>

**§ 17. Extent to which the lien is available.**

**a. Subagent employed by person whose agency was disclosed.**

The general rule applicable to cases in which the subagent had notice that the person by whom he was employed was acting as agent is, that he can assert his lien only with regard to claims

no privity between the plaintiff and the defendants, the court quoted the general rule laid down in *Story on Agency*, § 387, with regard to the effect of authorized employment of a subagent by an agent in creating a privity between the subagent and the principal (see § 2, supra, of this monograph). The further point raised, as the money claimed was in the defendants' hands by virtue of a contract between Buck alone and them, it could not be recovered except through that contract, was thus dealt with: "The defendants' claim for effecting the insurance was against the plaintiff's agents, for the reasons which are obvious, and which have been before examined. But where the reason ceases, the law no longer applies. Where, from its own notion of justice, the law so far favors the subagent of a foreign merchant that he is at liberty to look to his immediate employer, who is a fellow citizen, it does not allow him to retain moneys which he well knew belonged to a foreigner, and which never was the property of his employer. We cannot doubt that when the policy on which the money was received was executed, the plaintiff understood that Buck would employ a subagent. It had been uniformly so before, and on the 4th of December, 1887, the agent informed the defendants that the owner had ordered him to have the policy renewed; and we think there was an expectation on the part of the plaintiff, and when Buck undertook to execute the order, an implied agreement between him and them, that it would be effected as it had been before.

The first contract between the plaintiff's agents and the defendants was that insurance should be effected by the latter, and that having been done, the former should compensate them therefor; and the owner of the property insured, being a foreigner, they could regard his agents as their principal, to the extent of the contract. After the loss they were again employed by the plaintiff's agent to take measures to obtain the damages, and for this, too, they

were entitled to recompense, and had a lien in the first contract upon the policy, and in the last on the money received for the same. These contracts were between the plaintiff's agent and the defendants. After the latter undertook the performance of these services any want of fidelity in them would have been cause of complaint or for damages with the other contracting party, and this same party alone would have been answerable to the defendants for a breach on their part; these were the particular duties which it was expected they would do, for these were all they were requested to undertake by Buck; these, too, they did perform, to the satisfaction of all interested, and were permitted to retain therefor their full compensation. But the fruits of these contracts, these expenditures, these services, belonged to the plaintiff; they were never intended to be relinquished or diminished in the smallest degree. He paid the defendants indirectly the consideration which brought them into being, and to make them available to him the several agencies were employed. The product of these measures which he took, and for which he had paid, are now moneys, a part of which are in the defendants' hands. Every contract which was entered into, to effect this result, has been faithfully executed; and so far as the plaintiff gave authority to bring it about, the obligations on one side and the other are discharged. The avails of all this are now in the defendants' hands, excepting what they have paid. This is charged with no lien, and we know of no reason why it should not be recovered by the plaintiff for the benefit of the bank to which he assigned it."

<sup>1</sup> *Story Agency*, § 388.

<sup>2</sup> *Story on Agency*, § 389. This statement of the law was approved in *McKenzie v. Nevius* (1842) 22 Me. 138, 38 Am. Dec. 291 (see preceding section); *Fisher v. Berwind* (1908) 64 W. Va. 304, 131 Am. St. Rep. 898, 61 S. E. 910.

which he is entitled to enforce against the principal; the lien is not available in respect of debts due to him from the employing agent. This rule is illustrated by several English decisions relating to insurance contracts.<sup>1</sup> Hav-

ing regard to the facts involved in most of these, it is clear that the courts must have proceeded upon the assumption that the rule was the same, whether a foreign or a domestic principal was concerned. The doctrine embodied in

<sup>1</sup> In *Maanass v. Henderson* (1801) 1 East, 335, 102 Eng. Reprint, 130, Jennings, an English subject, who had received orders in time of war to effect an insurance for a neutral foreigner, opened the policy with his usual broker in his own name, informing him at the same time that the property was neutral. It was held that this statement affected the defendants with notice that Jennings acted as agent, and not on his own account, and that the case was governed by the general rule that, "if the agent disclose his principal at the time, it is clear he cannot pledge the property of such principal to another with whom he is dealing, for his own private debt." Consequently all that the defendants could retain was the amount of the premium due on this policy on the part of the plaintiff.

The effect of *Man v. Shiffner* (1802) 2 East, 523, 102 Eng. Reprint, 469, is thus stated in the marginal note: The assignee of a policy of insurance on goods, who became such by the indorsement to him of the bill of lading of the goods by the consignor after he had directed his correspondent to make the insurance, takes it subject to the lien of the correspondent of the consignor for his general balance; and can only claim, subject to that lien, the money received on such policy by the broker in whose hands it was deposited for that purpose by the correspondent. But the broker has no sublien on the policy for the general balance of his own account with such correspondent if he knew at the time that the policy was effected for another person.

In *Snook v. Davidson* (1809) 2 Campb. (Eng.) 218, 11 Revised Rep. 696, A, a merchant, at different times employed C, an insurance broker, to effect policies of insurance for him. C, without A's concurrence, employed B, another insurance broker, to effect these policies, informing him that they were for a correspondent in the country. B effected the policies in A's name, and delivered them all, except one, to C. C became bankrupt, without having paid B any part of the premiums. A was then indebted to his estate beyond the amount. Lord Ellenborough laid it down that B had not a lien on the policy he detained for the general balance due to him from C, and that A could maintain trover for this policy against B, after tendering him the premiums and commissions due in respect of it alone. This ruling was based upon the ground that there was no privity between the plaintiff and the defendant, and consequently that the subagent "could not acquire the broker's general lien."

In *Lanyon v. Blanchard* (1810) 2 Campb. (Eng.) 597, 11 Revised Rep. 808, the plaintiff, a resident of Montevideo, wrote to one

Crowgy at Falmouth, inclosing an undorsed bill of lading of certain tallow, deliverable to the shipper's order, and directing him to effect an insurance on the tallow, and to employ a good house at Liverpool to sell it, for the plaintiff's benefit. Crowgy came to London, employed the defendant to effect the insurance, represented that he had authority to indorse the bill of lading, and actually did indorse it accordingly, to a person at Liverpool, named by the defendant. The defendant effected the policy, and after the ship was lost, received the sum from the underwriters. Lord Ellenborough was of opinion that, in transactions of this sort, if an agent represents himself to have a power which is not intrusted to him, his principal is not bound by his acts; that the person who gives faith to the representations of the agent must run the risk of their being true or false; and that, as Crowgy had no authority to indorse the bill of lading, or to act as proprietor of the tallow, the defendant was only a subagent, and could not retain the sum he had received upon the policy from the person for whose ultimate benefit it was effected. Obviously the term "subagent" is here used in the special sense of "a subagent who was not in privity with the principal."

In *Solly v. Rathbone* (1814) 2 Maule & S. 298, 105 Eng. Reprint, 392 (action of trover), where the subagent employed by a factor to sell the plaintiff's goods unsuccessfully claimed a lien upon the proceeds for a balance due to him from the factor in respect of previous transactions, the conclusions of the court were thus stated by Lord Ellenborough: "This is a case in which the actual factors, being insolvent and unable themselves to make the necessary advances upon the consignment sent to them, agreed with the defendants, the associated consignees, without the authority or knowledge of the consignors, to divide the commission between them; all which was in breach of their duty to the consignors, and in fraud of them. Supposing, therefore, the defendants are entitled under the circumstances to some relief, and that an action for money had and received would lie,—and I do not pronounce whether it would or would not,—there is certainly not any privity between these parties. What have the consignors of these goods to do with that which passes between Clegg and Company and the defendants in contravention of the trust reposed in them? It seems to me that there is nothing to impeach the verdict."

Reference may also be made to *Cahill v. Dawson* (1857) 2 C. B. N. S. 106, 140 Eng. Reprint, 684, 26 L. J. C. P. N. S.

that assumption has been explicitly affirmed by the supreme court of Maine.<sup>3</sup>

*b. Subagent employed by person whose agency was not disclosed.*

The doctrine laid down in two English *nisi prius* cases is that a broker who effects a policy of insurance without notice that it is on account of a person other than his immediate employer has a lien upon it for the amount of the general balance due to him from

that person in respect of services rendered or otherwise.<sup>3</sup>

That doctrine has also been recognized by one of the inferior courts of New York.<sup>4</sup>

*§ 18. Supersession of lien by contract.*

Whether the lien claimed was superseded by any contract or course of business inconsistent with it is a question to be determined from particular facts in evidence.<sup>1</sup>

253, 3 Jur. N. S. 1128. There N., the subagent who effected a policy of insurance on the goods of a decedent, of whom the plaintiffs were the executors, was employed by L., who was himself a subagent of D., the person instructed by the decedent to take out the policy. One of the points laid down in an action brought against the head agent for negligence in effecting the policy was that, if the letter of instructions sent by D. to L. had been shown to N., he would have known that L. was acting merely as the agent of D., and would consequently have acquired no right to retain the proceeds of the policy for a claim against L.

<sup>2</sup> In *McKenzie v. Nevius* (1842) 22 Me. 138, 38 Am. Dec. 291 (for facts, see § 15, note 4, *supra*), it was contended that the subagents were entitled to apply the money received by them from the underwriters to their account against Buck, the intermediate agent, for distinct matters other than the disbursements and services in causing the insurance. This right they claimed on the grounds (1) that they held directly a general lien upon the policy in their own right, sufficiently broad to include this balance; and (2) that they represented Buck, who, it was asserted, had such a lien, if they had not. But it was held that the case was controlled by the doctrine that, "where it is known to the broker that the party acts for another, then his lien is strictly confined to his commissions and premiums and charges on that very policy." *Story Agency*, § 379. The court said: "The law, we have seen, does not require those who have expended money and incurred liability for the benefit of a foreigner, through a domestic agent, to look beyond the latter. But where they are thus secured, they must be satisfied. They cannot hold the funds of the foreigner to indemnify them for credits which they have given to the agents on other accounts. To give them the rights contended for would confer privileges which they could not enjoy in transactions purely domestic in their character. By such a construction, they would have the power to appropriate the property of the foreigner to debts having no connection with his affairs, without being subject to the risk of losing, by the inability of the agent, the outlays intended for the owner's benefit. While they are secured by a claim against a fellow citizen, to whom they voluntarily gave the credit, for the expenses of the in-

surance, and by a lien upon the policy, the one who is the sole owner of the property insured, who caused the transaction entirely for his own better security, would be exposed to have wealth to an unlimited extent pass from his own possession, into the hands of strangers, without consent or knowledge, and he left to the feeble consolation of looking to the personal credit of his agent."

<sup>3</sup> *Mann v. Forrester* (1814) 4 Campb. (Eng.) 60, 15 Revised Rep. 724; *Westwood v. Bell* (1815) 4 Campb. 349. In the latter case Gibbs, Ch. J., said: "The only question is whether he knew or had reason to believe that the person by whom he was employed was only an agent; and the party who seeks to deprive him of his lien must make out the affirmative. The employer is to be taken to be the principal until the contrary is proved. If the plaintiff's assent to the employment of Clarkson is denied, then he can have no right to the policy, and there is no privity between the parties. The argument about pledging the policy is fallacious. This never was a policy of the plaintiff's which he held unencumbered and handed over to his agent. In its very origin and creation it was burdened with the lien. It never has been the plaintiff's for an instant, but subject to the lien which is not claimed."

<sup>4</sup> *Sharp v. Whipple* (1867) 1 Boaw. (N. Y.) 557, where, in an action against the subagent for the conversion of a policy of insurance, the court remarked: "It is entirely clear, as matter of law, that if the defendant paid the premiums on effecting these two insurances now in question, he had a lien upon the policies as security for his reimbursement and his commissions. And it is probably not less clear that he had also a lien for the general balance of his insurance account against Spurr, who, at that time, was the only principal known to him in the transaction."

<sup>1</sup> In *Fisher v. Smith* (1878) L. R. 4 App. Cas. (Eng.) 1 (for facts, see § 15, note 3, *supra*), the contention that there was an antagonism between the contract made by the parties and the existence of the lien as alleged was thus disposed of by Lord Cairns: "Not only is there no statement that it was the habit for the policies to be delivered up at the end of the month, and not only is the case one in which you are dealing with a kind of article, namely, policies of



**§ 19. Extinguishment and discharge of lien.**

The lien of a subagent employed as an insurance broker is extinguished when he parts with the possession of the policy by delivering it to the assured person or his agent.<sup>1</sup>

In a case already reviewed in part it was urged that a discharge of the subagent's lien on a policy of insurance was predicable from the fact that the amount for which the plaintiff was liable in respect of the transaction had been paid by him to the intermediate agent.<sup>2</sup>

insurance, as to which there is no immediate necessity for delivering them up as soon as they are effected, but, in addition to that, you have a precise statement, inserted apparently for this very purpose, that it was not the usual practice for the defendant or his partner to part with the original stamped policies to Skinner & Company until the premiums were received from them. What does that mean but this, that the habit of business between the parties was that the respondent insisted upon and held firm by his lien?"

In *McKenzie v. Navius* (1842) 22 Me. 138, 38 Am. Dec. 291 (for facts, see § 15, note 4, supra), the contention that a waiver of the lien was inferable from the fact that the premiums were charged in the general account of the principal with Buck & Tinkham and Jonathan Buck was thus dealt with: "If the plaintiff's agents had been in truth the owners (of the policy in question), would the lien, which otherwise would have continued in full force, be waived because the premium should be charged to them in a general merchandise account? Would there be any relinquishment of the lien by a charge to the owner instead of the brig? Or would it have been less affected by keeping a distinct and separate account? When one individual or one firm is the sole owner of the property, is it material in what manner the account intended to exhibit the debts and the credits for settlement is made? There are rules by which it can be determined whether general credits are to be applied to the discharge of a lien or not, as well where the claim secured thereby is part of an account embracing other matters, as where the charges are entirely separate. If the lien would not be waived in the case supposed by the mode adopted in this instance, it is not perceived how the same course could change the security, or take from either party the rights which would otherwise attach, because the ownership is qualified, limited, or constructive. We are not aware of any reason or authority sufficient to in-

**IV. Right of recovery considered with reference to the question of liability as between the principal and the employing agent.**

**§ 20. Subagent employed by agent professedly acting as agent, and within the scope of his authority.**

A necessary deduction from one of the elementary doctrines of the law of agency is, that *prima facie* an action for the remuneration accruing to a subagent employed by a person who, in making the contract, professed to act as agent only, and who, as a matter of fact, had authority to enter into the contract on behalf of his principal, can be maintained only against that principal.<sup>1</sup> The effect of a decision founded

duce us to come to the conclusion that the lien was waived."

<sup>1</sup> *Sharp v. Whipple* (N. Y.) supra.

<sup>2</sup> *Fisher v. Smith* (1878) L. R. 4 App. Cas. (Eng.) 1 (for facts, see § 15, note 3, supra). The remarks of Lord O'Hagan with regard to this branch of the case were as follows: "It is said that, according to the course of business, he recognized a payment to Skinner as a payment to himself. He recognized nothing of the kind in the course of business. The course of business found to have existed on the face of this case was a course of business which led to the payment to Skinner by a monthly bill, and then a payment by Skinner to his under-agent, this Mr. Smith; and why Mr. Smith should be bound to stop in the middle of that course of business, so far as it helped him, I cannot at all understand. I put the question more than once myself to the learned counsel, whether or no there was anything in the case that would entitle him to contend that the intermediary had been constituted an agent to receive payment for the subagent, and the answer was that there was nothing of the kind. There is not a particle of evidence in the case, or any finding upon the case, that any such acceptance was ever authorized by Smith to the intermediary; and if not, I cannot at all comprehend how the payment to the intermediary can be held to have been a payment to the subagent. If that was not payment to him, and if he had a lien, the lien is there, still undischarged in justice and in law."

<sup>1</sup> In a note to *Schmaling v. Thomlinson* (1875) 6 Taunt. 149, 128 Eng. Reprint, 990, the reporter thus states the effect of *Cull v. Backhouse* (1793; Eng.) a *nis prius* case: That was an action for work and labor, and money paid, brought to recover a compensation for conveying corn from the interior parts of North America down to the coast, and the duties paid on shipping it. A person who was commissioned by the defendants to purchase and ship wheat for them, employed the plaintiff to bring it down to

on certain affirmative evidence which pointed to the same conclusion as that

the coast, and to pay shipping charges, etc., but failed to pay him, whereupon he claimed the amount from the defendants, who had not at that time paid to their immediate agent any part of the sum due for this service. Lord Kenyon, Ch. J., held that the plaintiff must sue the person who actually employed him, and not the defendant.

"It is well settled that when the agency is disclosed, and the contract relates to the matter of the agency, and is within the authority conferred, the agent will not be personally bound, unless upon clear and explicit evidence of an intention to substitute or to superadd his personal liability for or to that of the principal." *Whiting v. Saunders* (1898) 23 Misc. 332, 51 N. Y. Supp. 211.

"If the defendant acted and contracted avowedly as the agent of his co-owners of the property to be sold, who were known as principals, his acts and contracts within the scope of his authority would be considered the acts and contracts of the principals, and would involve no liability on the part of the defendant . . . as their agent; for the presumption is that an agent always intends to bind his principal, and not himself." *Oliver v. Mowawetz* (1897) 97 Wis. 332, 72 N. W. 877.

In *Pardridge v. LaPries* (1876) 84 Ill. 51, an employee of a mercantile house, who occupied a responsible position, and who sometimes took charge of the delivery of goods sold, employed an expressman to make deliveries. This he did with the knowledge if the firm, or one of its members, and they failed to notify the expressman that he must look to the clerk for his pay. Held, that the firm was liable to the expressman for his services, and that the right of recovery was not defeated by the fact that the clerk made a payment to the expressman, and that he did not call on the firm for his pay on pay days, there being no proof that he knew on what dates they were, nor by the fact that the clerk, after the suit was brought, offered to pay him, in order to escape dismissal. The court said: "It does not appear that it is customary for employees in such establishments to employ under-agents to perform their duties, and if not customary, appellee would not be chargeable with implied notice that, although professing to have authority, and actually employing him as the agent of appellants, it might be they had not given authority to DeMerz. Had such a custom been shown, it may be he should have made inquiry; but being employed for appellants, and not DeMerz, to perform this particular duty, and they having permitted him to enter upon and continue in its performance without any notice or explanation to undeceive him, he had the right to suppose that he was in fact employed by appellants, and had the right to look to them for payment."

In *Clay v. Hopkins* (1821) 3 A. K. Marsh. (Ky.) 485, where Hopkins, an agent employed for the sale of an estate by one Clay,

who was managing it as attorney in fact for the owner, brought suit to restrain the sale of the land, an injunction was denied on the ground that the plaintiff's claim for compensation was enforceable only against Clay, and that he had no lien on the property.

In *Hoyt v. Hoyt* (1906) 73 N. H. 549, 64 Atl. 18, the evidence with reference to which a nonsuit in an action for commissions was held to have been properly directed is thus stated in the opinion: That the plaintiff applied to the Motor Company for an agency for the sale of automobiles in some territory in New Hampshire that included Franklin county; that the company referred him to the defendant, who was then its agent for five counties in the state, including the county of Merrimack; that he was informed by the defendant that, according to the rules of the company, he would have to purchase or sell a machine in order to be appointed an agent, and that a discount or commission of 20 per cent would be allowed him on the list price, according as he purchased or sold a machine; that the plaintiff was unable to purchase a machine; that it was then agreed he should have two weeks in which to attempt to make a sale; that if any other person should, during that time, want the agency, and the plaintiff had a trade in prospect, he might, upon notifying the defendant, have an additional two weeks in which to complete the trade, and if no one applied for the agency, that he should have more than two weeks without notice in which to make a sale. It also appeared that when the plaintiff made the contract he knew the defendant was acting as agent for the Motor Company. The court was of opinion that the only reasonable conclusion to be drawn from the evidence was that the defendant was authorized to appoint the plaintiff an agent of the Motor Company for the sale of automobiles at Franklin, upon his purchasing or making a sale of a machine; that both parties understood the contract was being made by the defendant as agent of the Motor Company; and that, in making the contract, the defendant was acting within the scope of his authority.

In *Gerloff v. Carleton* (1910; Sup. App. T.) 121 N. Y. Supp. 338, the plaintiff, a broker, testified that there was some conversation between himself and the defendants on the subject of commissions, but he was not exact or definite as to when such conversation took place, or as to what statements were made at the time. The defendants denied that they at any time undertook to guarantee to the plaintiff the payment of his commissions, and the whole course of dealing, as shown by the letters and bills put in evidence, disclosed that the defendants were acting as agents for a disclosed principal in each transaction, to the knowledge of the plaintiff. There were in evidence bills rendered by the plaintiff to defendants, which designated the defendants

required by this presumption is stated in the footnote.<sup>2</sup>

The general doctrine as to the presumptive nonliability of the agent was

formerly deemed to be subject to an exception as regards agents who represented foreign principals. A case in which the right of a subagent to recover

as agents for the disclosed principals. There was also testimony of the general custom of the business, supporting defendants' contention. Held, that a verdict in favor of the plaintiff was clearly against the weight of evidence, and should have been set aside.

See also *Colloty v. Schuman* (1905) 73 N. J. L. 92, 62 Atl. 186 (trial judge erred in refusing to charge the jury that the subagent's knowledge of the fact that his employer, the defendant, was acting as agent in employing him to find a tenant for certain real property would defeat his claim for commissions); *T. E. Hayman Co. v. Knepper* (1904; Sup. App. T.) 88 N. Y. Supp. 930 (claim against agent for commissions was disallowed); *Kyle v. Horbert* (1910; Sup. App. T.) 122 N. Y. Supp. 204; *Title Guarantee & T. Co. v. Sage* (1911) 146 App. Div. 578, 131 N. Y. Supp. 278; *Scottish-American Mortg. Co. v. Davis* (1902) — Tex. Civ. App. —, 72 S. W. 217 (judgment partially reversed in (1903) 96 Tex. 504, 97 Am. St. Rep. 932, 74 S. W. 17, but not on a point affecting its authority in relation to the rule stated in the text.

The Codes of three of the American states contain the following provision: A subagent, lawfully appointed, represents the principal in like manner with the original agent; and the original agent is not responsible to third persons for the acts of the subagent. Cal. Civ. Code 1916, § 2351; N. D. Civ. Code 1905, § 5796; S. D. Civ. Code 1908, § 1701.

By Louisiana Rev. Code 1889, § 3012 (2981), it is declared: "The mandatory who has communicated his authority to a person with whom he contracts in that capacity is not answerable to the latter for anything done beyond it, unless he has entered into a personal guaranty." This provision was applied in *Gilman v. Bonner* (1852) 7 La. Ann. 674. There the plaintiff alleged, that he was employed by Bonner and Smith to solicit and make contracts on behalf of Stillman, Allen, & Company for the supply of engines and machinery for sugar mills, sawmills, and other purposes; that Stillman, Allen, & Company executed some contracts, made by him on their behalf, and corresponded directly with him in reference to those contracts; and that he was recognized as agent, for those purposes, by them, and by Bonner and Smith. Held, that under a petition of this tenor, the plaintiff could not recover against the defendants, for it showed that Bonner and Smith were agents of Stillman, Allen, & Company; that the names of these principals were disclosed to the plaintiff in employing him; and that he rendered his services to the principals, and not to the agents. With regard to an allegation that the defendants were to pay 2½ per cent commis-

sion on the value of the machinery for which he made contracts, the court said that "this evidently means the defendants to whom he rendered the services, and 2½ per cent on the value of their machinery, not the defendants, Bonner and Smith, to whom he rendered no services, and who had nothing to do with the machinery, except as agents."

A similar rule, of course, prevails, where the employee is hired on a footing which renders him a servant. See *Labatt Mast. & S.* § 679; *McCartee v. Chambers* (1831) 6 Wend. (N. Y.) 649, 22 Am. Dec. 556; *Nabonie v. Scott* (1815) *Hume's Dec.* (Scot.) 353, cited in *Fraser, Mast. & S.* 134.

Except in cases where the principal defendant could hold him personally liable for the wages due under the contract of hiring, an agent of the employer is not chargeable as trustee in foreign attachment. *Casey v. Davis* (1868) 100 Mass. 124.

As to the rule regarding the nonliability of an agent upon contracts made by him in his capacity as agent, see, generally, *Evans, Principal & Agent*, \*362; *Mechem, Agency*, 555.

Having regard to the authorities above cited, it is clear that such unqualified statements as the following are inaccurate, in respect of their not showing explicitly that the principal's immunity is merely presumptive:

"If the agent does employ another, he is responsible for the acts of his substitute or assistant (*Bradstreet v. Everson* (1872) 72 Pa. 124, 13 Am. Rep. 665; *Morgan v. Tener* (1877) 83 Pa. 305); and consequently for his compensation." *DeBaril v. Campoy* (1885) 17 Phila. (Pa.) 383 (sale of personality by person appointed by defendant's son).

"The subagent can look for his compensation only to his immediate employer." 1 Am. & Eng. Enc. Law, 395, quoted, arguendo, in *Hanback v. Corrigan* (1898) 7 Kan. App. 479, 54 Pac. 129.

See also the conclusion of the passage quoted in § 21, note 8, *infra*, from the opinion in *Hill v. Morris* (1884) 15 Mo. App. 322.

<sup>2</sup> In *Clark v. Lillie* (1867) 39 Vt. 405, the facts which were held to show liability on the principal's part were thus stated: "The defendant has already paid one Sadler for these services, and by the arrangement between the defendant and Sadler, Sadler was to pay all commissions to local agents, like the plaintiff, appointed by him. The plaintiff was not made aware, when he was employed, of this arrangement, and though he was employed by the traveling agent, Sadler, he in fact understood he was made the local agent of the defendant, and was to look to him for pay, because nothing was said to him 'designed or calculated to give him to suppose' he might look to anyone

for his services was decided with reference to that exception is cited below.<sup>3</sup> But both in England and the United States, the question whether the agent who made the contract or his principal is liable to the person with whom it was made is now treated as one dependent on the intention of the parties, as gathered from the contract itself and the attendant circumstances.<sup>4</sup>

It has been laid down that an agent, whether he is acting in a public or private capacity, does not necessarily incur a personal liability by reason of the fact of his not having made the contract of employment in such a manner as to give the employee a remedy over against his principal;<sup>5</sup> but this doctrine is not accepted in every jurisdiction.<sup>6</sup>

**§ 21. Same situation further discussed.**

The presumption which, as stated in the preceding section, is ordinarily entertained with regard to the sole lia-

bility of a disclosed principal, may be rebutted by any description of evidence from which the agent's intention, actual or imputed, to undertake a personal responsibility for the subagent's remuneration, may be warrantably inferred. "A person contracting as agent will be personally liable, whether he is known to be an agent or not, in all cases where he makes the contract in his own name, or voluntarily incurs a personal responsibility, either express or implied."<sup>1</sup> In this point of view the subagent is entitled to recover against the agent if any of the following situations is established.

**a. That the agent promised to remunerate the subagent for his services.**

Where the effect of a written instrument is not involved, the question whether such an agreement was made is essentially one of fact, to be determined from the whole evidence.<sup>2</sup> But

else. It was the defendant's goods, and not Sadler's, he was employed to sell, and he naturally supposed it was the defendant, and not Sadler, who was to pay him for selling them. Sadler had, however, no actual authority to bind the defendant by a promise to pay local agents a commission."

<sup>3</sup> In *McKenzie v. Nevius* (1842) 22 Me. 138, 38 Am. Dec. 201, where it was held that the agents in Maine of a person residing in New Brunswick were liable for the expenses incurred and services rendered by the defendants in effecting, at the request of the agents, an insurance on the principal's ship (see § 15, note 4, supra), the court said: "By the usage of trade, a rule may be considered as established that agents or factors acting for merchants resident in a foreign country are held personally liable for contracts made by them for their employers, notwithstanding they fully disclose at the time the character in which they act. This arises from the consideration that the merchant abroad and his ability to discharge his obligations may be unknown to those who assume pecuniary responsibility, or make advances or perform services on his account; the presumption is that the credit is given exclusively to the foreigner's agent, unless rebutted by an agreement, express or implied; and that the party dealing with the agent intends to trust one who is known to him and resides in the same country and subject to the same laws as himself, rather than to trust to one who, if known, cannot, from his residence in a foreign country, be amenable to those laws, and whose ability may be affected by local institutions and local exemptions, which may put at hazard both his rights and his remedies. Story, Agency, §§ 268, 290, 400. The facts in the case at bar show that all parties conformed to this

principle, that the defendants made their charges exclusively to the plaintiff's agents, and did not seek to hold him responsible."

<sup>4</sup> Evans, Principal & Agent, \*\*525, 526; Mechem, Agency, § 556.

<sup>5</sup> Ogden v. Raymond (1853) 22 Conn. 379, 58 Am. Dec. 429 (plaintiff here was a servant).

<sup>6</sup> For a general review of the decisions bearing on the subject, see Mechem, Agency, § 550.

<sup>1</sup> Story, Agency, 9th ed. § 269. The subject of an election by the subagent to hold the agent responsible is discussed generally in Mechem, Agency, 2d ed. § 1424; Clark & S. Agency, §§ 461 et seq.; Evans, Agency, § 1424.

For a case in which it was held that the fact of the claimant's obtaining judgment against the agent amounts to an election not to sue the principal, see *Fureuli v. Bittner* (1910; City Ct.) 69 Misc. 112, 125 N. Y. Supp. 36, where the services were rendered in pursuance of a sealed contract which did not show that the promisor was the defendant's agent.

<sup>2</sup> *Willoughby v. Brown* (1914) 190 Ill. App. 51; *Mahoney v. Kent* (1894) 7 Misc. 726, 28 N. Y. Supp. 19 (verdict sustained, the evidence being conflicting as to existence of an agreement); *Westaway v. Close* (1912) — Sask. —, 7 D. L. R. 849.

In *Barthell v. Peter* (1894) 88 Wis. 316, 43 Am. St. Rep. 906, 60 N. W. 429, the defendant, who was an agent to sell certain lands for a principal, agreed to pay the plaintiff a commission of \$500 if he would find a purchaser ready, able, and willing to purchase a certain parcel. After the plaintiff found and produced such purchaser, defendant discovered that this parcel of land was not the property of his principal. His contention was that a mutual mistake

probably no court would now uphold a verdict which contravened the doctrine embodied in several decisions, that, "where a sale of real estate is made by an agent with the assistance of a subagent, under an agreement to divide his commissions with him, such subagent is not entitled to recover the commission for the sale from the owner of the land."<sup>3</sup>

Where the contract between the agent and the subagent is embodied in a written instrument, the question whether recovery can be had is one of law for the court.<sup>4</sup> The extent to which parol evidence is admissible for the purpose of modifying a subagent's remedial rights under such a contract is indicated by the following statement in a leading case: "There is no doubt

of fact, which avoided the contract to pay commissions on the sale, was thus disclosed. But the court said: "The plaintiff was in no way responsible for the defendant's mistake. On these facts judgment was rendered for the plaintiff. This judgment was plainly right. The defendant's mistake was not, within the meaning of the law, a mutual mistake. The fact concerning which the mistake was made was not an inducement to the contract, or material thereto, so far as plaintiff was concerned. The plaintiff performed the labor which he agreed to perform, and cannot be defeated by the fact that defendant was negligently mistaken as to a fact which was entirely immaterial to the plaintiff, and which should have been within the defendant's own knowledge."

In *Siler v. Perkins* (1912) 126 Tenn. 380, 47 L.R.A.(N.S.) 232, 149 S. W. 1060, where the defendants were sued not only as individuals, but also as agents and trustees of all of the shareholders of the corporation, a portion of the fruits of the sale of corporate stock which had been brought about by complainant had been impounded by injunction and attachment writs, and to discharge these writs the defendants executed an individual bond to pay any recovery which complainant might obtain in the pending cause. Held, that the defendants would not be heard to say that they were not personally liable for the decree rendered in the case.

<sup>3</sup> *McCombe v. Moss* (1915) 121 Ark. 533, 181 S. W. 907.

In *Carroll v. Tucker* (1893; Com. Pl.) 2 Misc. 397, 21 N. Y. Supp. 952, the court, after laying it down if Thompson, the broker whom the defendants employed, had, in order to promote the sale in question, engaged the plaintiff as his auxiliary, on an agreement to divide commissions, then, as subagent, plaintiff must look only to Thompson for compensation, thus proceeded to review the evidence bearing upon this point: "Thompson testifies: 'We were both brokers in the matter. There was a sort of implied understanding between brokers that I would divide commissions with him.' Plaintiff says Thompson 'told me he would pay me a commission,'—a commission, not the commission; and he, not the defendants, would pay it. Obviously the plaintiff's own version of the transaction is in harmony with Thompson's statement that he was to divide his commission with the plaintiff. But, that the plaintiff understood he was only to share Thompson's compensation is

cleared of all doubt by the fact that he presented a bill, and threatened suit, for only half the commission."

In *J. B. Watkins Land Mortg. Co. v. Thetford* (1906) 43 Tex. Civ. App. 536, 96 S. W. 72, it was held that, having regard to the evidence introduced, it was error to refuse an instruction to the effect that, if the sale in question had been made by defendant's agents with the plaintiff's assistance, under an agreement with them to divide the commissions with him, he would not be entitled to recover anything from the defendant for his services.

In *McCormick v. Obanion* (1912) 168 Mo. App. 606, 153 S. W. 257, where the action was brought by the employing agent, the court thus discussed an objection raised on the ground of a defect of parties plaintiff: "It appears that one Allen Davis materially aided the plaintiff in finding the purchaser, and that plaintiff promised him half the commission. He was a witness and testified that he had no contract with defendant and did not look to him for any pay; that the arrangement to divide the commission was altogether between him and plaintiff. This is sufficient to relieve defendant of any liability to him."

In *Wefel v. Stillman* (1907) 151 Ala. 249, 44 So. 203, where the party seeking to recover half the commission was the agent, who had brought suit against the subagent, after the latter had recovered judgment against the principal for the whole of the amount which was to be paid if a sale should be brought about, a portion of the argument of the court proceeded upon the ground that the agreement between the plaintiff and defendant would not put the defendant in any relation with the owner of the land, so as to give him any right to earn or claim and recover commissions from the owner.

See also *Dockarty v. Tillotson* (1902) 64 Neb. 432, 89 N. W. 1050, where the claimant was a servant.

<sup>4</sup> In *Etna Ins. Co. v. Church* (1871) 21 Ohio St. 402, Church brought an action to recover a share of one twentieth, or 5 per cent, of the profits payable to J. B. Bennett, general agent of the company, accruing or made during the period of Church's service. This claim was founded upon the following letter, written by Bennett to Church: "Dear Sir:—The proposition now made you, for re-engagement of your services, is upon about the same line of duty as formerly performed, at a salary of \$3,500 for the first year and traveling ex-

that where such an agreement is made, it is competent to shew that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, . . . and charge with liability on the other, . . . the unnamed principals: and this, whether the agreement be or be not required to be in writing by the Statute of Frauds: and this evidence in no way contradicts the written agreement. It does not

deny that it is binding on those whom, on the face of it, it purports to bind; but shews that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal. But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party is not such would be to allow parol evidence to contradict the written agreement; which cannot be done."<sup>5</sup>

penses (say commencing duty first of June next), and annually thereafter so long as the connection continues; in addition to that salary and expenses, an interest of one twentieth (5 p. ct.) of the general agent's yearly profits' account." Held, that the trial judge had properly ruled "that the contract for a share of the general agent's yearly profits' account was the contract of the company, and not the personal contract of the agent. . . . There were but two parties to the contract, Church on the one part and the company on the other. The contract was made on behalf of the company, by its agent, who was thereby estopped from claiming of the company the share of his profits thus contracted by the company to be paid to another."

In *Mosby v. Hunter* (1848) 31 N. C. (9 Ired. L.) 119, A declared against B for the breach of an agreement in writing, signed by B, in the following words: "R. H. Mosby has promised to procure for my mother a pension from the government of the United States, supposed to be due to her as the widow of Lieutenant Charles Gerard, and in the event of his doing so, I promise and oblige myself to give the said R. H. Mosby one half of the money due her on account of the said pension. Given under my hand the 3d day of December, 1838. Charles G. Hunter." The court was of opinion, "from the terms and scope of the contract, that it referred exclusively to a right to a pension then subsisting or supposed to subsist; and that, as there was no right at the time, the bargain and the subject of it failed together. The defendant had no notion of employing the plaintiff, nor had the plaintiff any intention of engaging, to solicit from Congress the grant of a pension to this lady. . . . Indeed, it is not pretended that the plaintiff performed any such service as that. The claim is that, under evidence prepared to establish, as was supposed, an existing right to a pension, the lady was decided to be entitled to a pension granted four years afterwards. Such a case was not at all in the view of the parties. They were not treating for the division of the bounty of the country, which might never be granted and was altogether uncertain in amount. . . . Both the words of the agreement and the circumstances repel the plaintiff's claim. As the plaintiff's

services did not inure to the benefit of the defendant, he is liable only as far as he expressly agreed. In such a case the law cannot imply a promise. There was, therefore, no error in directing the jury to find for the defendant on the second count."

The following general statement may usefully be referred to in this connection: "Even when [the agent] discloses the name of his principal, if he signs a written contract in his own name merely, which does not show upon its face that he was acting as the agent of another, or in an official capacity in behalf of the government, he will be personally bound thereby." *Mills v. Hunt* (1838; Ct. of Err.) 20 Wend. (N. Y.) 431, quoted with approval in *Wheeler v. Reed* (1864) 36 Ill. 82.

<sup>5</sup> Parke, B., in *Higgins v. Senior* (1841) 8 Mees. & W. 834, 151 Eng. Reprint, 1278 (judgment delivered for the whole court). The question to which a negative answer was returned in this case was whether, in an action on an agreement in writing, purporting on the face of it to be made by the defendant, and subscribed by him, for the sale and delivery by him of goods above the value of £10, it is competent for the defendant to discharge himself, on an issue of the plea of nonassumpsit, by proving that the agreement was really made by him by the authority of and as agent for a third person, and that the plaintiff knew those facts at the time when the agreement was made and signed.

For another useful exposition of the law, see *Meyer v. Redmond* (1912) 205 N. Y. 478, 41 L.R.A. (N.S.) 675, 98 N. E. 906, approved in *Thomas Gordon Malting Co. v. Bartels Brewing Co.* (1912) 206 N. Y. 537, 100 N. E. 461.

These authorities seem to be inconsistent with the unqualified statement in the syllabus written by the court for a Georgia case, that parol evidence was not admissible to vary the terms of a plain and unambiguous written contract between these general agents and the plaintiff, under the terms of which he was their employee, and not that of the company. *Boren v. Manhattan L. Ins. Co.* (1896) 90 Ga. 238, 25 S. E. 314. Only the syllabus is reported, so that it is impossible to ascertain what precedents were relied upon.

**b. That the subagent performed the services in question on the understanding that he was to look to the agent alone for his remuneration.**

This situation exists, whenever an agent, having undertaken the performance of some duty to his principal, em-

ploy on his own account a person to assist him.<sup>6</sup> Whether the contract of employment is one of the character thus indicated is a question which may depend either upon the language of a written contract,<sup>7</sup> or which may be determinable with reference to other

<sup>6</sup> *Boren v. Manhattan L. Ins. Co.* (1896) 99 Ga. 238, 25 S. E. 314 (insurance company not bound for compensation of a person who was employed by its general agents, in their individual capacity, to work for it); *National Cash Register Co. v. Hagan* (1904) 37 Tex. Civ. App. 281, 83 S. W. 727 (relying upon the general rule stated in *Mechem, Agency*, §§ 197, 690); and the cases cited in the following notes.

<sup>7</sup> In *Moore v. New York L. Ins. Co.* (1898) — Tenn. —, 51 S. W. 1021, the complainant, Moore, made with Plant, the defendant's general agent in Georgia, a contract which contained the following provisions, among others: That the complainant should act exclusively as agent for the party of the first part, and that, in thus acting, he should submit to, and abide by, all rules and regulations provided by the party of the first part from time to time, and by the defendant company in its instructions to agents; that all moneys or securities received or collected by the complainant, for or on behalf of the party of the first part, should be held by him as a fiduciary trust, and should be paid over by him to the party of the first part, or to the defendant company, if it should notify him to do so before he should have paid them over to the party of the first part; that if the complainant should withhold any funds after they had been demanded from him in writing by the party of the first part, such action should work a forfeiture to the party of the first part, unconditionally, of all claims whatsoever, accrued or to accrue, under the contract to complainant; that complainant should receive a specified compensation for policies taken during his continuance as agent of the party of the first part; that the "party of the second part shall have under this agreement no claims whatever for commissions or other services against the New York Life Insurance Company, and that said party of the first part might offset against any claims under this agreement any debt or debts due by said party of the second part to said party of first part;" that no charge should be made by the complainant for any extra services, unless such services should have been ordered in writing by the party of the first part and such compensation agreed upon. There were other provisions looking to, and providing for, paramount rights of the New York Life Insurance Company to any funds in the hands of the complainant. The court was of opinion that, under the contract thus entered into by complainant, he must look to Plant, his employer, for whatever compensation he might earn, and consequently that he had no claim against the

insurance company. A demurrer to the complainant's bill was, therefore, held to have been properly sustained.

In *Lester v. New York L. Ins. Co.* (1892) 84 Tex. 87, 19 S. W. 356, where the appointee of a general agent, representing in another state the same company as the one sued in the above case, brought against it an action to recover damages for a breach of contract, one of the grounds upon which it was held that a demurrer to the complaint had been properly sustained was thus stated: "The contract itself, being made a part of the petition as an exhibit, controlled the averments; it shows affirmatively that the company was not to be bound by the contract. It stipulates that plaintiff shall have no claims whatever for commissions or services against the company."

In *Matthews v. Jenkins* (1885) 80 Va. 463, the agreement in question was one "entered into between T. W. Matthews, secretary of the Mutual Endowment Association of Baltimore, Maryland, and S. T. Jenkins, of Atlanta Georgia." By two clauses, the said Matthews agreed to pay the said Jenkins a specified sum per month for one year, as a guaranteed salary, and also in a certain contingency all the commissions of the membership fee over and above 20 per cent. The instrument was signed by T. W. Matthews, without the addition of any words giving notice that it was executed by him as agent. It was argued that the agreement created in legal effect a contract between the association and the plaintiff, but none between the defendant and the plaintiff; and that the suit should therefore have been brought against the association. The court rejected this contention, saying: "The only question to be determined is the purpose and intent with which the plaintiff executed this agreement. Did he intend to bind himself or the association? And this question, we think, may be easily answered upon a simple examination of the terms which the plaintiff has seen fit to employ. Here all the words of promise are the words of the defendant. . . . In this case we have no parol evidence to aid us in the construction of the contract. It is, however, on its face the personal contract of the defendant Matthews, and unless we are prepared to reverse the rule that a party is to be held to intend what is the plain and manifest import of the language he has used, it must be so held. Nor can the circumstance that he, in one place in the body of the instrument, speaks of himself as the secretary of the Mutual Endowment Association, overcome or even weaken the

descriptions of testimony bearing upon the intention of the parties.<sup>8</sup>

effect of these evidences that the contract was personal as to Matthews, and not intended to bind the association. At most, this statement that he was secretary of the association simply indicates, to use the language of Chief Justice Shaw, in *Bradlee v. Boston Glass Manufactory* (1835) 16 Pick. (Mass.) 347, quoted by Moncure, J., in *Early v. Wilkinson* (1852) 9 Gratt. (Va.) at p. 71, 'the person for whose account his (the defendant's) statement was made,' but does not indicate an intention on the defendant's part to do a mere ministerial act in giving effect and authenticity to the promise of another."

See also *Union Casualty & Surety Co. v. Gray* (1902) 52 C. C. A. 224, 114 Fed. 422, reviewed in § 3, *supra*.

<sup>8</sup>In *Sims v. St. John* (1912) 105 Ark. 680, 43 L.R.A.(N.S.) 796, 152 S. W. 284, the facts which were held to show that appellant (plaintiff) could not hold the appellee liable for his compensation were thus stated: "He looked to Black for directions. He had no correspondence with St. John, and never saw him before the transaction was consummated. He reported all his actions to Black, and Black reported them to appellee. In none of the transactions of the appellant with reference to procuring a purchaser do we find him professing or assuming to have been employed by the appellee. It nowhere appears that appellee recognized the appellant as his agent, nor that appellee knew that appellant claimed to be his agent. Under the facts stated, it may be said that appellee knew that his agent Black had the appellant employed, and that appellant performed services in procuring a purchaser for the land. But it nowhere appears that appellee knew that the appellant expected the appellee to pay for those services. The interurban company, whom the appellant interested, and who, according to his statement, procured the purchaser, reported its acts to the appellant, and the appellant in turn reported to Black, and Black in turn reported to the appellee."

In *McCombs v. Moss* (1916) 121 Ark. 533, 181 S. W. 907, it was held to be error to refuse an instruction which embodied the idea that, although the claimant procured the purchaser of the defendant's property, yet if he did this as a subagent for his immediate employer, one Leslie, and not on his own account as agent for appellant, he must look to Leslie for his commissions.

In *Miles v. Mays* (1890) 15 Colo. 133, 25 Pac. 312, the defendant, Miles, was the brother of Mrs. Whitsitt, the owner of the property sold, and appeared to have entire control of that property. Mays was employed by Miles exclusively, having no negotiations whatever with Mrs. Whitsitt touching the transaction. It did not appear that she was at any time consulted, or that her advice or wishes were made known to Mays or otherwise considered. According to the testimony, Miles proceeded in

all respects precisely as he would have if the property had belonged to him. There was nothing to show that Mrs. Whitsitt refused or objected to the sale as negotiated by Mays. The sole responsibility for such rejection rested with Miles. The court, advertent to the objection that Miles did not in words assume individual responsibility for the payment of Mays's commission, said: "But, under all the circumstances, there was sufficient in the record to warrant a submission to the jury of the question as to whether or not Mays's employment was in the nature of a subagency, where reliance is placed upon the intermediate agent, the credit being given in whole or in large part to him, and not exclusively to his principal. In such cases the rule is that suit may be brought against the immediate employer, even though his principal may sometimes also be liable. Story, *Agency*, 386, 387."

In *Rice v. Post* (1894) 78 Hun, 547, 20 N. Y. Supp. 553, one Bruff had been for many years the agent for the defendant to manage and care for the property in question, and to collect the rents. He was also, at the time to which the evidence related, authorized to sell the property. The plaintiff, who had been for some time one of the tenants, always dealt with Bruff, and supposed that he was the owner of the property. He owed about \$260 for rent, when Bruff engaged him to find a purchaser for the property, and agreed to pay him double commissions if he succeeded in finding a purchaser at the price of \$14,000. He did find a purchaser whom he brought into communication with Bruff, and a sale or exchange of the property was effected, at the nominal price of \$14,000. Bruff allowed the plaintiff credit for the rent due from him, asserting that this full amount which he owed him for commissions. The plaintiff claimed a balance of \$260, as being still due. The reasons for denying his right to recover were thus stated: "There is no evidence that Bruff was in any manner authorized by the defendant to employ a subagent or broker to make a sale of the property, and of course none that he was authorized to contract for the defendant to pay double commissions for such service. There is no evidence that the defendant knew that the plaintiff was employed to or did render any service in connection with the sale; and the only evidence that he knew that the plaintiff was credited with the rent due from him, on his claim for commissions, was the admission, by the defendant's answer, that he had paid the plaintiff the sum of \$264.50. This admission affords no evidence of a ratification by the defendant of the contract made by Bruff, because there is no evidence that he ever knew before this action was commenced that any such contract had been made. The contract made did not purport to be the defendant's contract, nor to be made for him; but was made by Bruff, and was un-



derstood by the plaintiff to be Bruff's contract in his own behalf, and to bind no one but himself. The fault of the plaintiff's action is that it makes choice of the wrong man for defendant."

In *Dale v. Hepburn* (1895; Com. Pl.) 11 Misc. 286, 32 N. Y. Supp. 269, affirmed in (1897) 154 N. Y. 763, 49 N. E. 1095, Hubbell & Company, a collection agency in New York, retained plaintiff as their attorney to take proceedings in Chicago to collect for them a draft placed in their hands by the defendant, Mrs. Hepburn, and remit proceeds to them after deducting his fees, the amount of which was specified in a circular accompanying the retainer. The evidence showed that plaintiff was acquainted with one of the Hubbells, and had had previous business transactions with the concern; that he had no understanding with Mrs. Hepburn in regard to compensation; that all of his correspondence was with the Hubbells; that the first notice defendant had of any claim was when she was served with the summons and complaint in the action, and that the only bill for his services which plaintiff ever sent to anyone was sent to Hubbell and Company. It also appeared that defendant's son acted as her agent in all of these transactions; that whatever he did was done with Hubbell & Company; and that in the course of these dealings he knew that the plaintiff was the attorney of record in the action commenced in the state of Illinois. The court said: "Under such a state of facts, it is clear that the plaintiff was acting on a retainer from Hubbell & Company, and not from the defendant, and the question of her liability depends upon whether or not Hubbell & Company were merely her agents in the transaction, or were themselves principals; and we think there can be no doubt but that they were principals. Under the name of an agency, they were conducting a collecting business on their own account. They would be responsible to the defendant for the collection of the money, not as agent, but as principal. So they are responsible to the plaintiff for any services rendered by him to them. They undertook to collect the note, and not merely to employ agents for the defendant to do so." The authorities relied upon were *Hoover v. Greenbaum* (1874) 61 N. Y. 305, affirmed in (1876) 91 U. S. 308, and *Bank of Clarke County v. Gilman* (1894) 81 Hun, 487, 30 N. Y. Supp. 1111, in both of which, however, the point involved was the liability of the collecting agent for the acts of the subagent.

In *McConnell v. Holderman* (1909) 24 Okla. 129, 103 Pac. 593, where the right of Holderman to recover for services rendered in procuring oil leases was affirmed, the defendant insisted that he was an agent of certain oil companies, and that, acting as the agent of these companies, he employed plaintiff to represent these companies in procuring the leases. The plaintiff testified in substance that a short time

before the leases were taken, the defendant called him up on a long distance telephone, and requested him to put out his men in a certain district and pick up leases, for which he would be paid a specified commission. The defendant's evidence regarding this conversation was to the same effect. He also testified that a few days afterwards he had gone to the plaintiff's office, and confirmed what he had said over the telephone; that he told the plaintiff to take the leases in the name of Planters' Oil & Gas Company, and a few days later, to change the name to Polo Oil Company; that the plaintiff took several leases for the Planters' Company, and the balance for the Polo Oil & Gas Company; that he told the plaintiff to forward the leases to him at B, along with the draft and voucher accompanying same, so that payment might be made; that the drafts for the Planters' Oil & Gas Company were paid by him as treasurer of that company; for P. D. McConnell were paid with a P. D. McConnell check; and that those for the Polo Oil & Gas Company were paid by means of a draft drawn on it through a bank. The business was conducted in accordance with the arrangement thus made between the parties above set out, and the charges for all service rendered by Holderman were made on his books against McConnell, and not against any of the companies. The court was of opinion that the contract shown by this testimony was an agreement on the part of the defendant to employ the plaintiff personally, and not as an agent; and that the inference to be drawn from the testimony was not rebutted by proof that, after all of the work was done, the plaintiff had sent to the defendant bills for the leases to the oil companies, charged in the names of the companies to which they were made; and that he thereafter wrote a letter to the defendant in which he urged him to have the parties to whom the leases were made pay for the same. The further contention that the fact that the leases were not taken in the name of defendant, but in the names of the different oil companies, was evidence that the plaintiff understood and knew that he was not working for the defendant, but was hired by and was working for these oil companies, was rejected.

In *Hill v. Morris* (1884) 15 Mo. App. 322, where an action brought to recover the amount of the losses, including commissions and telegrams, incurred as a result of a transaction under which certain barrels of pork were sold for the account of the defendant's on the Chicago board of trade, was held not to be maintainable, the reasons of the court were thus stated: "Our view, then, upon the question now raised is that Morris and Hill were principal contractors; that, by the contract between them, Hill made himself the agent of Morris to sell the five hundred barrels of pork for future delivery on the Chicago market, using his own instrumentalities to effect the sale; that he was not constituted an

c. That there is no other responsible principal to whom resort can be had except the intermediate agent by whom the subagent was employed.<sup>9</sup>

This situation is illustrated by various cases in which promoters of companies have been held liable for services rendered under contracts made by them.<sup>10</sup>

**§ 22. Subagent employed by professed agent acting in excess of his authority.**

One of the accepted doctrines of the

agent to appoint another agent for this purpose, but that he was an independent contractor; that Nichols was merely his agent, and not the agent of Morris; that that there was no privity of contract between Nichols and Morris; that Nichols could not maintain upon the contract an action against Morris and the partners of Morris, because he had no contract with Morris; but that whatever cause of action he may have had was against Hill only, with whom the contract which he made was made. In other words, we think it is clear that the position of Nichols was that which is sometimes termed in law that of a sub-agent; and the general rule unquestionably is that the principal, on the one hand, has no right of action against the subagent (*Trafton v. United States* (1845) 3 Story, 656, Fed. Cas. No. 14,135; *Hoover v. Wise* (1875) 91 U. S. 308, 311, 23 L. ed. 392, 394; *Homan v. Brooklyn L. Ins. Co.* (1879) 7 Mo. App. 22); nor, on the other hand, has the subagent a right of action against the principal (*Corbett v. Schumacker* (1876) 83 Ill. 403), where the position of the intermediate agent was that of an independent contractor or undertaker." The theory indicated by the language of the latter part of this passage seems to be, that the expression "subagent" does not apply to a person hired by an agent on such a footing as to bring him into privity of contract with the principal. This view, if it was actually entertained, was plainly erroneous. Obviously the decision, if it is to stand at all, must be supported either on the ground that the agent was not invested with the implied power of delegating his functions on terms which would render the delegate an agent of the principal, or on the ground that the plaintiff understood that he was to look to the agent for his remuneration. The failure of the court to realize clearly the necessity of basing its judgment specifically on one or other of these grounds renders the case a somewhat unsatisfactory precedent. It may be observed, moreover, that the expression "independent contractor" is employed in a sense which is, to say the least, unusual in cases of the type now under consideration.

For cases which involved merely the re-

law of agency is the following: "Whenever any party undertakes to do any act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally liable to the person with whom he is dealing for and on account of his principal."<sup>1</sup> This doctrine has been discussed under its general aspects in the monograph appended to *Haupt v. Vint*, 34 L.R.A. (N.S.) pp. 518 et seq. The cases in which it has been recognized with respect to contracts of the type now under discussion are cited in

medial rights of the subagent as against the agent, the question of the principal's liability not being raised or adverted to. see *Wyman v. Snyder* (1884) 112 Ill. 99, 1 N. E. 469; *Provident Trust Co. v. Darrough* (1906) 168 Ind. 29, 78 N. E. 1030; *Murphy v. Hiltibridge* (1906) 132 Iowa, 114, 109 N. W. 471; *Parker v. Merrill* (1899) 173 Mass. 391, 53 N. E. 913; *Olsen v. Jordan* (1888) 38 Minn. 466, 38 N. W. 485; *Blake v. Austin* (1903) 33 Tex. Civ. App. 112, 75 S. W. 571; *Barthell v. Peter* (1894) 88 Wis. 316, 43 Am. St. Rep. 906, 60 N. W. 429.

It has been held that the Washington enactment (*Laws* 1905, p. 110; *Rem. & Bal. Code*, § 5289), which provides that an agreement authorizing the employing of an agent or broker to sell or purchase real estate for compensation or commission shall be void unless in writing, covers only contracts between the owner of land and the agent who sells or agrees to sell the same, and consequently it does not apply to transactions between two brokers or real estate men. *Jones v. Kehoe* (1911) 61 Wash. 423, 112 Pac. 497; *Armstrong v. Webber & Co.* (1916) 92 Wash. 295, 158 Pac. 957. One of the cases in which, under the Codes of three states, a person who assumes to act as an agent is responsible to a third person as a principal for his acts in the course of his agency, is "when, with his consent, credit is given to him personally in a transaction." *Cal. Civ. Code* 1915, § 2343 (1); *N. D. Civ. Code* 1905, § 5791 (1); *S. D. Civ. Code* 1908, § 1696 (1).

<sup>9</sup> For the general rule as to the personal responsibility of the intermediate agent under such circumstances, see *Story, Agency*, § 280.

<sup>10</sup> *Kelmer v. Baxter* (1866) L. R. 2 C. P. (Eng.) 174, 36 L. J. C. P. N. S. 94, 12 Jur. N. S. 1016, 15 L. T. N. S. 213, 15 Week. Rep. 278; *Scott v. Ebury* (1867) L. R. 2 C. P. (Eng.) 255, 36 L. J. C. P. N. S. 161, 15 L. T. N. S. 506, 15 Week. Rep. 517; *Hub Pub. Co. v. Richardson* (1891) 59 Hun, 626, 37 N. Y. S. R. 541, 13 N. Y. Supp. 665.

<sup>1</sup> *Story, Agency*, § 264, quoted in *Oliver v. Morawetz* (1897) 97 Wis. 332, 72 N. W. 877.

the footnote.\* As explained in the monograph appended to *Haupt v. Vint*, 34 L.R.A.(N.S.) pp. 535 et seq., its rationale, according to the theory now generally adopted, is an implied warranty on the part of the agent that he was empowered to contract on behalf of the principal. In this point of view he

is deemed, so far as the cases which fall within the scope of the present monograph are concerned, to insure the subagent against consequences arising from the defect of authority; viz., the loss of the compensation earned by the performance of the service in question.<sup>3</sup>

\* In *Oliver v. Morawetz* (1897) 97 Wis. 332, 72 N. W. 877, it was found, in answer to the first question submitted to the jury, that the defendant represented to Oliver, the plaintiff, that he (Morawetz) was authorized by his co-owners to sell the real estate in question upon the terms stated in the receipt which was given in evidence. After the plaintiff had performed his undertaking and procured a purchaser, the defendant, as well as his co-owners, refused to sign the paper or carry out and conclude the sale. The defendant testified explicitly that he was not authorized to sell the property. Held, that as he had induced the plaintiff to act in the premises, and procure a purchaser upon the specified terms, he was bound to make the agreement good, or be responsible for the consequences.

In *Houston Cotton Oil Mill & Mfg. Co. v. Bibby* (1906) 43 Tex. Civ. App. 100, 95 S. W. 562, a judgment for the plaintiff was reversed on grounds thus stated: "The evidence shows conclusively that Grigg, while appellant's agent to purchase cotton seed, had no authority whatever to employ anyone else in behalf of the company to make such purchases, and that it was clearly beyond the scope of his apparent authority to make such contract of employment. It also shows beyond controversy that appellant never acquiesced in or ratified Grigg's employment of the appellee. The contract sued upon shows upon its face that it was entered into between Grigg and Bibby in their own names and in their own behalf, the appellant's name not being mentioned or in any way connected with it."

For other cases in which the rule was applied or recognized, see *National Cash Register Co. v. Ison* (1894) 94 Ga. 463, 21 S. E. 228; *Roach v. Rutter* (1909) 40 Mont. 167, 105 Pac. 555; *Taylor v. Nostrand* (1892) 134 N. Y. 108, 31 N. E. 246; *Brown v. Barse* (1896) 3 App. Div. 287, 38 N. Y. Supp. 400; *Williams v. Moore* (1900) 24 Tex. Civ. App. 402, 58 S. W. 953; *Westaway v. Close* (1912) — Sask. —, 7 D. L. R. 849.

For a case in which the agent was held personally liable for the compensation of a servant, see *Hewitt v. Roudebush* (1872) 24 La. Ann. 254.

In *Owen v. Hadley* (1914) 186 Mo. App. 1, 171 S. W. 973, the facts of which are stated in § 7, note 2, subd. h, ante, it was contended that Hadley and Morris were liable, upon the theory that, without being authorized to do so, they procured the services in question to be rendered for the benefit of others. But the facts were con-

sidered to be such as to leave no room for the application of this theory. The court said: "All that is shown as to Governor Hadley's connection with the ultimate employment of plaintiff for this work is that he told plaintiff, as the latter says, to report to Judge Spencer, with whom plaintiff made his agreement. And Mr. Morris appears to have left the matter of employing plaintiff entirely in Judge Spencer's hands, and to have done nothing whereby to bind himself personally in the premises. And the evidence is that while the services were being rendered, Mr. Morris took charge of making the weekly payments to plaintiff, and learned that plaintiff was claiming \$100 per week, whereupon he told plaintiff that he would pay but \$50 per week. We see nothing in the evidence to fasten personal liability upon either of these two defendants."

It has been laid down broadly that "where the subagent has been appointed without authority, and his acts are afterward ratified, he can recover no compensation from the principal, but must look to the agent." *Hanback v. Corrigan* (1898) 7 Kan. App. 479, 54 Pac. 129, quoting 1 Am. & Eng. Enc. Law, 395, note. But obviously this statement needs some qualification, for the "ratification" may be effected under circumstances which show an intention on the part of the principal to assume responsibility for the payment of the compensation.

The following provision is found in the Codes of three states: If an agent employs a subagent without authority, the former is a principal and the latter his agent, and the principal of the former has no connection with the latter. Cal. Civ. Code, § 2350; N. D. Civ. Code 1905, § 5795; S. D. Civ. Code 1908, § 1700.

One of the cases in which, under the same Codes, a person who assumes to act as an agent is responsible to third persons for his acts in the course of his agency, is: "When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so." Cal. Civ. Code 1915, § 2343 (2); N. D. Civ. Code 1905, § 5791 (2); S. D. Civ. Code 1908, § 1696 (2).

Under Louisiana Civ. Code, art. 3013 (2082), the mandatary is responsible to those with whom he contracts only when he has bound himself personally, Code, arts. 3013 (2082), or when he has exceeded his powers without having exhibited his authority. See *Gilman v. Bonner* (1852) 7 La. Ann. 674.

<sup>3</sup> *Oliver v. Morawetz* (1897) 97 Wis. 332, 72 N. W. 877.

**§ 23. Subagent employed by agent who did not disclose his agency.**

The general rule applicable to this situation has been thus formulated by the New York court of appeals: "A person, even though making an agreement for another, makes himself personally liable thereon if he contracts in his own name without disclosing his principal, although the other party to the contract may suppose that he is acting as an agent.<sup>1</sup> Under such circumstances the credit is presumed to have been given to the agent himself.<sup>2</sup>

<sup>1</sup> *De Remer v. Brown* (1901) 165 N. Y. 419, 59 N. E. 129.

For cases in which the fact of nondisclosure was held to involve the inference of liability on the part of the agent, see *Loehde v. Halsey* (1899) 88 Ill. App. 452; *Bacon v. Rupert* (1880) 39 Minn. 512, 40 N. W. 832; *Mahoney v. Kent* (1894; Com. Pl.) 7 Misc. 726, 28 N. Y. Supp. 19.

In *Dameron v. Quick* (1914) 116 Va. 614, 82 S. E. 709, the ratio decidendi was that the claimant, who sought to recover for services rendered with respect to certain patents, was not shown to have elected to sue an undisclosed principal.

See also the cases cited in § 54, note 1, of the monograph appended to *Martindale v. Lobdell-Emery Mfg. Co. ante*, 1.

For cases in which the liability of the agent to servants employed by him was affirmed, see *Wood v. Brewer* (1882) 73 Ala. 259; *Keen v. Sprague* (1824) 3 Me. 77; *Purcell v. Aronson* (1896; Sup. App. T.) 40 N. Y. Supp. 1147 (plea of having acted as agent not established unless the defendant proves not only that he did so act, but also that the capacity in which he acted was disclosed to the employee).

The consequences of a failure to disclose the principal are discussed generally in *Mechem on Agency*, 2d ed. § 1410.

In *Porter v. Day* (1892) 44 Ill. App. 256 (action to recover commissions in respect of sale of land), an instruction was held to be erroneous for the reason that it did not embrace the principle thus formulated in *Wheeler v. Reed* (1864) 36 Ill. 81 (action on warranty): "It is a settled rule in verbal contracts if the agent does not disclose his agency and name his principal, he binds himself and becomes subject to all liabilities, express and implied, created by the contract and transaction, in the same manner as if he were the principal in interest."

<sup>2</sup> *Story, Agency*, § 266.

<sup>3</sup> In *Siler v. Perkins* (1912) 126 Tenn. 380, 47 L.R.A.(N.S.) 232, 149 S. W. 1060, where it was held that one who negotiates with a broker to sell the stock of a corporation of which he is a part owner, without disclosing the names of the co-owners whom he stated to exist, cannot, while sharing in the benefit of the broker's services, avoid liability for the commission, on the theory

As is indicated by the phraseology of the statement above quoted, the agent is not relieved of liability unless he discloses not merely the fact of his being an agent, but also the name of his principal.<sup>3</sup>

In order to exclude the operation of this rule, it must be shown that the claimant had actual knowledge of the agency. It is not enough that the existence of the principal might have been discovered by him.<sup>4</sup> "There is no hardship in the rule of liability against agents. They always have it in their

that he was merely agent for a disclosed principal. The argument that the defendants *Perkins* and *Gatliff* were acting as agents for a disclosed principal was based upon one of complainant's answers to this effect: "I have always understood that Dr. *Gatliff* and Mr. *Perkins* and a man in Ohio were the principal and largest owners of the stock." But the court said: "We think it clear that when these defendants, without disclosing to complainant the names of the holders of the stock, assumed to represent the holders of all the stock, only giving to complainant the knowledge that one man in Ohio and themselves were the principal owners of the stock, it cannot be said that these defendants disclosed the names of their principals to complainant; and when, under these facts, they, for themselves and their associate stockholders, accepted the benefits of the services of complainant in finding for them a purchaser for the entire capital stock under a contract express, or one arising by implication of law out of the dealings between them and complainant, they cannot defeat his recovery of just compensation for making the sale or finding the purchaser who took all the stock at a price agreeable to all the stockholders, by invoking the defense that complainant's contract for compensation was not with them, but with their principals."

See also § 54, note 3, of the monograph appended to *Martindale v. Lobdell-Emery Mfg. Co. ante*, 1.

In view of this recognized condition precedent to the agent's immunity, such a statement as the following is somewhat lacking in precision: "A person, contracting as agent, will be personally responsible, where, at the time of making the contract, he does not disclose the fact of his agency, but treats with the other party as being himself the principal; for in such case it follows, irresistibly, that credit is given to him on account of the contract. He must disclose the fact that he is acting only as agent, in order that the other party may determine whether he will accept the responsibility of the principal in the transaction." *Whiting v. Saunders* (1898) 23 Misc. 332, 51 N. Y. Supp. 211 (action for recovery of commission on sale held to be maintainable against agent).

<sup>4</sup> *Mahoney v. Kent* (1894) 7 Misc. 726,

own power to relieve themselves, and when they do not, it must be presumed that they intend to be liable."<sup>5</sup>

A disclosure of the principal by the agent after the transaction in respect of which the services were rendered has reached such a stage that the subagent has acquired a perfected right to his

compensation is not sufficient to relieve the agent of liability.<sup>6</sup> "Nor is the commencement of an action against the principal conclusive evidence of an intention to hold him alone. Nothing short of satisfaction from the principal would in such a case be conclusive evidence of a discharge of the agent."<sup>7</sup>

28 N. Y. Supp. 19; *McConnell v. Holderman* (1909) 24 Okla. 129, 103 Pac. 593; *Story, Agency*, § 554.

<sup>5</sup> *Cobb v. Knapp* (1877) 71 N. Y. 348, 27 Am. Rep. 51.

<sup>6</sup> In *Whiting v. Saunders* (N. Y.) *supra*, it was shown that plaintiffs were aware of defendant's agency before the contract of sale between Mrs. Saunders, the principal, and her vendee, was executed or even drawn up. But there was some evidence tending to show that plaintiffs did not know

of defendant's agency until after they had undertaken the employment of finding a purchaser, and had brought the transaction, practically, to a close. Under these circumstances, the court refused to disturb a verdict against the agent.

See also the case cited in the following note.

<sup>7</sup> *McConnell v. Holderman* (1909) 24 Okla. 129, 103 Pac. 593, quoting *Mechem, Agency*, § 554. C. B. L.

## KENTUCKY COURT OF APPEALS.

SUSAN F. DICKSON, Appt.,

v.

S. J. DICKSON, Exr., etc., of S. L. Dickson, Deceased.

(180 Ky. 423, 202 S. W. 891.)

**Will — devisee's attack on deed to testator.**

1. A widow claiming under a will which, inter alia, devises to her a life estate in real estate obtained by her husband from her, cannot maintain an action to set aside for fraud the deed by which it was conveyed.

*For other cases, see Wills, III. i, in Dig. 1-52 N. S.*

**Same — satisfaction of debt.**

2. The acceptance of a devise to testator's widow of a life estate in all his property does not satisfy her claim against the estate for the purchase price of land sold by her to him.

*For other cases, see Executors and Administrators, IV. a, 3, in Dig. 1-52 N. S.*

**Evidence — consideration for deed — sufficiency.**

3. Nonpayment of the purchase price of real estate is not shown by testimony of the officer who took the acknowledgment of the deed that he saw no payment made at that time.

*For other cases, see Evidence, XII. k, in Dig. 1-52 N. S.*

**Will — bequest of effects.**

4. A bequest for life of all of testator's household furnishings and effects, and also his real estate, carries all his personal property and not simply that connected with the household; especially if all the estate is

**Note.** — As to meaning of word "effects" in a will, see annotation following this case, post, 769.

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bequeathed in remainder after the death of the life tenant, with no provision as to any portion of it during the lifetime of the life tenant except that given him.

*For other cases, see Wills, III. c, in Dig. 1-52 N. S.*

(May 7, 1918.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Kenton County dismissing a petition filed for the construction of the will of S. L. Dickson, deceased, and for the cancelation of two certain deeds. Reversed.

The facts are stated in the opinion.

Messrs. B. F. Menefee and J. M. Lansing for appellant.

Mr. S. D. Rouse, for appellees:

The plaintiff's suit was one for the recovery of the purchase price of the land. This being so, there would be no controversy as to the burden of proof, no matter what the relations of the parties were.

*Shacklette v. Goodall*, 151 Ky. 20, 151 S. W. 23; *Miller v. Taylor*, 165 Ky. 463, 177 S. W. 247.

The word "effects" cannot properly be construed to mean anything other than household goods.

Page, *Wills*, § 478; *Northey v. Paxton*, 60 L. T. N. S. 30.

Thomas, J., delivered the opinion of the court:

The principal question involved in this appeal is the proper construction of the will of S. L. Dickson, deceased. It arises in this way: The deceased and the appellant, who was plaintiff below, each being more than sixty years of age, were married in 1905. It was not the first venture for either of them. Plaintiff bore no chil-

dren as the fruits of her first marriage, but the deceased was the father of five children by his first marriage, one of whom is the appellee S. J. Dickson, who is the executor of his father's will.

At the time of the marriage the deceased was the owner of about 16 acres of land, and immediately adjoining it was a tract of 15 acres owned by the plaintiff, who is the appellant. In 1908 appellant and her husband conveyed her 15 acres to S. J. Dickson, a son of the deceased, and the latter and his wife the next day conveyed it to the deceased, who with his wife continued to reside upon the two tracts as one body until April 6, 1194, when the husband died.

The consideration recited in each of the deeds conveying the 15 acres of land owned by plaintiff was "one hundred (\$100) dollars and other considerations, . . . the receipt whereof is hereby acknowledged." Before his death the deceased duly executed his will, the material part of which is in these words:

"I, Simeon L. Dickson, being of sound and disposing mind and memory, do hereby make and publish this my last will and testament.

"Item First. I direct that all my just debts be paid as soon after my death as possible.

"Item Second. I give, bequeath and devise to my beloved wife Susan F. Dickson, all my household furnishings and effects, and also my farm at Fiskburg, Kenton county, Kentucky, for and during the term of her natural life.

"Item Third. After the death of my wife, I give, bequeath and devise to my children S. J. Dickson, Mary B. Pelly, and E. N. Dickson and the children of my deceased daughter, Millie F. Byrd, all of my estate in remainder of whatever kind or description and wheresoever situated, absolutely and in fee simple, it being my intention to leave to each of my children above named and the children of my deceased daughter an equal share in my estate in remainder."

This will was probated by the Kenton county court on April 20, 1914, and the named executor, S. J. Dickson, qualified, and is now acting in that capacity, while the widow immediately took possession of the farm, the house thereon, and its furnishings, and has continued to hold them. More than a year thereafter, and without any statutory renunciation of the will, she filed this suit against the executor, devisees, and heirs of her deceased husband, claiming that the will, properly construed so as to effectuate the intention of the testator, gave to her for life not only the farm and household furnishings, but also the income from the net balance of other personal property

owned by her husband, consisting principally of cash, notes and corporate stock in different corporations, amounting in the aggregate to \$6,375.

She also sought to cancel the two deeds referred to on the ground that she was unduly influenced and overreached by her husband to execute the one to S. J. Dickson, and that it was done because of a fraudulent scheme entered into between the deceased and his son to enable the former to obtain title to that property; but, if this could not be done, that she be allowed to recover from the estate of her husband the sum of \$1,200, which she alleged was the agreed price that she was to receive for her land, none of which had ever been paid her, and that the recited consideration was false and untrue. She further insisted upon the recovery, as against her husband's estate, of other items which she claimed her husband owed her for certain property belonging to her, and which her husband had converted and appropriated to his own use.

The answer denied the averments of the petition, and in another paragraph pleaded that plaintiff had elected to take under the will of her husband, which she had not renounced, and that she was thereby estopped to insist upon a cancellation of the deeds to the 15 acres of land, and also to insist upon a recovery of the \$1,200, since it was claimed that an acceptance of the provisions of the will operated as a satisfaction of that debt, if it ever existed.

Appropriate pleadings made up the issues, and upon submission the court dismissed the petition. Complaining of that judgment, the widow prosecutes this appeal.

It might be well enough, at the beginning, to dispose of the two contentions with reference to the cancellation of the deeds and the widow's right to recover the \$1,200, since we have concluded that neither of them can be upheld. It is a principle of law, so well settled that it needs no fortification of adjudged cases, that a devisee or legatee cannot take, under a will, property devised by it, and at the same time assert in himself independent title to such property. The law imposes upon him the duty to elect in the manner provided by law whether he will accept the terms of the will or insist upon his adverse title to the devised property. This principle of law effectually disposes of plaintiff's contention growing out of the alleged fraudulent procurement of the deeds referred to. But we are unable to agree with defendant's claim that the devise to the widow operated as a satisfaction of her claim for \$1,200 as alleged consideration for her land. The doctrine that a legacy satisfies a debt

owing to the devisee grows out of a presumption that it was the intention of the testator to satisfy the debt with the legacy. It is, at best, not a favorite doctrine of the law, and slight circumstances showing a contrary intention on the part of the testator will be sufficient to overcome the presumption. The governing rule upon the subject is thus stated in 40 Cyc. 1885:

"The rule that a legacy given by a debtor to his creditor, equal to or exceeding the debt in amount, is to be deemed a satisfaction of the debt, although well established, is regarded with great disfavor, and the courts almost universally manifest a strong disinclination to enforce it. Consequently, very slight circumstances are considered sufficient to take a case out of its operation. Its operation, it has been said, will not be enlarged, and will only be applied to cases that fall strictly within it, and then only when a contrary presumption cannot be drawn from the will.

"The rule is not to be applied in cases where the language of the will excludes the inference that the testator intended that the testamentary gift should go in satisfaction of the debt, as where the will expresses a particular purpose or motive for making the gift. No presumption arises that a legacy is given in satisfaction of a debt where the will contains a provision for the payment of debts," etc.

There are also other grounds for discarding the rule, among which is that a devise of property of a different nature from the debt will not be presumed as a satisfaction of it. This court, in the two cases of *Cloud v. Clinkinbeard*, 8 B. Mon. 397, 48 Am. Dec. 397, and *Smith v. Park*, 27 Ky. L. Rep. 12, 84 S. W. 304, had under consideration this rule as to the presumed satisfaction of debts with legacies, as well as the exceptions to its application, and in the first case said: "There is also another reason why the presumption of satisfaction does not arise in this case. The testator in his will directs all his just debts to be paid; if, then, he owed to the plaintiff Mrs. Cloud a just debt, he virtually directed its payment, as well as the payment of the legacies to her."

In the *Smith* case it was said: "The will, in addition, contains an express devise for the payment of her [the testatrix's] debts, and this fact negatives the idea that the specific devise of \$500 was intended as a payment; the rule being that, where a testator in his will directs all his just debts to be paid, if, then, he owed to his devisee a just debt, he virtually directs its payment, as well as the payment of the legacy."

See also *Liste v. Tribble*, 92 Ky. 368, 17 S. W. 742.

However, the proof in this case is wholly insufficient to show either a promise to pay \$1,200, or any other sum, nor is it sufficient to show that the consideration for the deed executed by the wife, for whatever sum it may have been, has not been paid. The only evidence upon either of these issues is the testimony of the officer who took the acknowledgment of the grantors in the deed, and he says that he saw no payments made to anyone at that time, which, of course, proves no material fact, even if the officer had seen the deed delivered, which he did not. We therefore conclude that the court was not in error in rejecting both of the claims growing out of the conveyance by plaintiff of her land.

This leaves for consideration only the construction of the will. Many rules prevail in the law as aids to assist courts in construing and interpreting such documents. Chief among them, and indeed the one which surrenders to no other, is that the intention of the testator, as gathered from the four corners of his will, shall prevail. *Cecil v. Cecil*, 161 Ky. 419, 170 S. W. 973; *Whitaker v. Whitaker*, 166 Ky. 632, 179 S. W. 684; *Compton v. Moore*, 167 Ky. 657, 181 S. W. 360; and *O'Rear v. Bogie*, 157 Ky. 666, 163 S. W. 1107. Other rules, although subordinate to the one mentioned, frequently applied by the courts so as to arrive at the intention of the testator, are that he is presumed not to intend to die intestate as to any of his property, and that words are to be construed in their ordinary and usual acceptance, unless from their context and circumstances and surroundings of the testator he employed them to convey a different meaning. These latter rules are of such universal application as that they will be accepted without being fortified by authorities.

With these rules in mind, let us briefly consider the will to see what property was intended by the testator to be devised to his widow the appellant. It is her contention that she takes a life estate in all of his property, while appellees insist that she takes such estate in only the farm, in the "household furnishings" and household goods, giving to the word "effects" a meaning synonymous with goods, and qualifying it by the adjective "household," as if the testator had said "all my household furnishings and [household] effects." The definition of the word "effects," as given by Mr. Webster in the 1916 edition of his new *International Dictionary*, is: "Goods; movables; personal estate; as, 'The people escaped from the town with their effects;'"

sometimes used to embrace real as well as personal property."

Practically this same definition is given in 40 Cyc. 1527, where it is said: "The word 'effects' in its primary and ordinary meaning includes only personal estate, goods, movables, and chattel property. It denotes property in a more extensive sense than goods, and includes all kinds of personal property."

The text then proceeds to say that, in its broadest sense of property or worldly substance, it may include real estate. In Words and Phrases, 2d Series, vol. 2, there is this definition: "The word 'effects' is of very general significance, and is equivalent at least to personal property."

See *Gallagher v. McKeague*, 125 Wis. 116, 110 Am. St. Rep. 821, 103 N. W. 233, and Page, Wills, § 478.

In the case of *Humble v. Humble*, 3 A. K. Marsh. 123, this court had before it the construction of a will containing this clause: "I give and bequeath unto Hannah, my dearly beloved wife, and Uriah, my son, all my household goods, money and movable effects."

The testator owned some slaves which were not specifically devised by his will, nor was there any clause in it broad enough to include them, unless they were devised to the wife and son under the term "movable effects." In a contest between the heirs of the testator and his two devisees, his wife and his son, concerning the ownership of the slaves, this court held that they were included by the term "movable effects," and passed under the will to the devisees named, saying: Slaves, in their nature, are movable; and although they might have been described with more precision by other expressions than movable effects, yet, when it is recollected that by that part of the will first cited the testator has evinced a fixed design not to die intestate as to any part of his estate, and when it is also observed that the will contains no other bequest which can, upon the most and enlarged and liberal rules of interpretation, apply to the slaves, we can entertain no reasonable doubt but by the expression 'movable effects' the testator intended to dispose of his slaves. These expressions, it is true, may, in strict propriety, embrace other species of property; but as slaves are, in their nature, movable, in furtherance of the marked design of the testator not to die intestate, we apprehend that by those expressions the slaves must be construed to have passed to the wife of the testator and his son Uriah."

The testator in the instant case owned no real estate except that mentioned in his will; hence, we are not concerned as to whether the word "effects," as used in his will, includes real estate. From what has been said, however, it is patent that its ordinary and commonly understood definition in the law, as well as among the laity, is that it refers to and includes all kinds of personal property. So that, if the testator used it in this sense, it is sufficiently broad to include all of his other personal property besides his household furnishings.

In looking at the four corners of the will, we must not pass by its third item, by which the testator devised "after the death of my [his] wife" to his children "all of my [his] estate *"in remainder,"* etc. No present interest in any property was devised to such devisees, but the interest which they took in any of his property was postponed until "after the death of my wife," and, further, that they took none of his estate except one *"in remainder."* This, to our minds, evinces an intention on his part to give to his devisees other than his wife a *remainder interest* only in whatever property they took, which they were not to become possessed of until after the death of his wife. In other words, that the interest which his children took was to be preceded by the particular estate of his wife in that *same property*. Any other interpretation would have allowed the testator to die intestate as to his property other than his farm and household furnishings, or at least intestate as to such property during the life of his wife, and such a construction would also confine the meaning of the word "effects," as being synonymous with "furnishings" and of no additional inclusive force. This would make the use of the word entirely surplusage. We do not think the testator used it in that sense, but, on the contrary, when we look at the entire will and apply to it the rules of interpretation referred to, we are convinced that he intended to give to his wife a life estate in not only the farm and the household furnishings, but also in his other personal property of which he might die possessed.

The trial court having construed the will contrary to the views herein expressed, and denied to the widow the income from the fund of \$6,375, it results that his judgment is erroneous, and should be and it is reversed, with directions to enter a judgment in conformity with this opinion.

Petition for rehearing denied.



**Annotation—Meaning of word “effects” in a will.**

In determining the meaning of the word “effects” in a will, the courts apply the general rules of construction of wills; but beyond this the individual cases are of value only for the purpose of illustration, each case being, in effect, a law only to itself. This follows because the facts and circumstances vary, in at least some particulars, in nearly all cases, the impracticability of basing decisions on precedents being aptly illustrated by many of the cases hereinafter set out, wherein contrary conclusions are reached, and often in the same jurisdiction, upon facts which in the main are, to say the least, similar.

The most important rule to be followed is, of course, the one which requires that the general intent of the testator, if not inconsistent with some established rule of law or public policy, such, for instance, as that the testator has not used any words which can be so construed as to conform to his intent, must govern. Generally speaking, this intent is to be gathered from the language of the will as a whole, construed in the light of the circumstances surrounding its execution, the nature and amount of property devised, the relation of the parties, etc., together with various minor or subordinate and ancillary rules of construction, which have been established by the courts. Prominent among the latter are the rule which requires that, when possible, the will must be given effect as a whole; the rule that the will should be so construed as to dispose of the whole estate; and the rule or doctrine *ejusdem generis*, itself a rule of intent, by which the natural import of words of general description or broad meaning (such as “effects”) is confined or restricted to matters or things of the same class as is comprehended by accompanying words or clauses, of special or limited meaning. The latter rule is the one most often involved in the cases under consideration herein, this being due to the fact that the word “effects” is seldom used in a will, except in connection with other words having a more limited or restricted meaning. However, as before stated, and as pointed out in many cases, the construction to be put upon the word “effects” depends upon the facts of each particular case, so that the present treatment involves the statement of the law of cases rather than the deduction of working rules.

**Personal estate as “effects.”**

For cases determining what passes under a bequest of effects, etc., contained in a place or receptacle, see the following cases as set out in the annotation to *Creamer v. Harris*, L.R.A.1915C, 653, on the parenthetically noted pages: *Foxall v. McKenney* (1827) 3 Cranch, C. C. 206; *Fed. Cas. No. 5,016* (page 654); *Webster v. Wiers* (1884) 51 Conn. 569 (page 657); *Tempest v. Tempest* (1856) 2 Kay & J. 635, 69 Eng. Reprint, 937, varied on another point on appeal in (1857) 7 DeG. M. & G. 470, 44 Eng. Reprint, 184, 26 L. J. Ch. N. S. 501, 3 Jur. N. S. 251, 5 Week. Rep. 402 (page 661); *Gibbs v. Lawrence* (1860) 30 L. J. Ch. N. S. (Eng.) 170, 7 Jur. N. S. 137, 3 L. T. N. S. 367, 9 Week. Rep. 93 (page 655); *Northey v. Paxton* (1888) 60 L. T. N. S. (Eng.) 30 (page 656); *Re Miller* (1889) 61 L. T. N. S. (Eng.) 365 (page 656); *Re Seton-Smith* [1902] 1 Ch. (Eng.) 717, 71 L. J. Ch. N. S. 386, 86 L. T. N. S. 322, 50 Week. Rep. 456 (page 661); *Re Howe* [1908] W. N. (Eng.) 223 (page 660); *Re Lea* (1911) 104 L. T. N. S. (Eng.) 253 (page 658) *Campbell v. M'Grain* (1875) Ir. Rep. 9 Eq. 397 (page 656); *Watson v. Arundel* (1876) Ir. Rep. 10 Eq. 299 (pages 656, 660); *MacPhail v. Phillips* [1904] 1 Ir. R. 155.

**—in general.**

The word “effects,” when used in a general or unlimited sense and not restricted by the context, means everything embraced within the description, and is, at least, equivalent to “personal property.” *Gallagher v. McKeague* (1905) 125 Wis. 116, 110 Am. St. Rep. 821, 103 N. W. 233; *D'Almaine v. Moseley* (1853) 1 Drew. 629, 61 Eng. Reprint, 592, 1 Eq. Rep. 252, 22 L. J. Ch. N. S. 971, 17 Jur. 872, 1 Week. Rep. 475; *Fullerton v. Martin* (1853) 1 Drew. 238, 61 Eng. Reprint, 442, 22 L. J. Ch. 893, 17 Jur. N. S. 778, 1 Eq. Rep. 224, 1 Week. Rep. 379; *Michell v. Michell* (1820) 5 Madd. Ch. 69, 56 Eng. Reprint, 821, 21 Revised Rep. 280; *Parker v. Marchant* (1842) 1 Younge & C. Ch. Cas. 290, 62 Eng. Reprint, 893, 11 L. J. Ch. N. S. 236, 6 Jur. 292; *Wilson v. Major* (1805) 11 Ves. Jr. 205, 32 Eng. Reprint, 1066, *Kirby-Smith v. Parnell* [1903] 1 Ch. (Eng.) 483, 72 L. J. Ch. N. S. 468, 51 Week. Rep. 493; *Howse v. Seagoe* (1854) 2 Week. Rep. (Eng.) 597. And when not restricted by the context, the words “per-

sonal effects," in a will mean "personal property." *Reimer's Estate* (1893) 159 Pa. 212, 28 Atl. 186, reversing (1893) 23 Pittsb. L. J. N. S. 452.

—defeating gift.

But where the word "effects" is not used in a general or unlimited sense, but has its meaning colored or cut down by association with words of a narrower or limited meaning, the general rule is that "effects" must be limited to articles ejusdem generis with the associated articles mentioned with it. In other words, the rule ejusdem generis applies, which means that, ordinarily, the word "effects" must be limited by the context to things of the same class as those enumerated in the same or associated clauses.

Thus, in *Gallagher v. McKeague* (1905) 125 Wis. 116, 110 Am. St. Rep. 821, 103 N. W. 233, where a testator disposed of his realty, and, after making eight specific bequests of personalty, bequeathed "all the household furniture and effects," it was held that the word "effects" was limited by the context to "household effects," and did not pass other personal property not otherwise disposed of.

So, in *Hutchinson v. Rough* (1879) 40 L. T. N. S. (Eng.) 289, where a testator made a bequest of "my household furniture and effects of all kinds," followed by another gift of "all my other real and personal estate," it was held that the word "effects," since followed by a gift of all other real and personal estate, must be read ejusdem generis with the words immediately preceding it.

And in *Rawlings v. Jennings* (1806) 13 Ves. Jr. 39, 33 Eng. Reprint, 209, 9 Revised Rep. 137, a bequest of an annuity, together with all of testator's "household furniture and effects, of what nature or kind soever," was held to pass only articles ejusdem generis with those specified, and not to pass the residue of the personal estate, although such construction would result in partial intestacy.

And in *Borton v. Dunbar* (1860) 2 Giff. 221, 66 Eng. Reprint, 93, affirmed in (1860) 2 De G. F. & J. 338, 45 Eng. Reprint, 651, 30 L. J. Ch. N. S. 8, 6 Jur. N. S. 1128, 3 L. T. N. S. 519, 99 Week. Rep. 41, where testator, after giving small legacies and specific bequests of his carpet bag, portmanteau, and sea chest, directed that the remainder of "his money and effects may be expended in purchasing a suitable present for his godson," an infant, it was held that a remote and contingent reversionary in-

terest in certain stocks did not pass, the theory being that the context of the will contradicted the notion that the use of a remote interest in a sum of stock was contemplated in the carrying out of the purchase, which it obviously was intended should be made immediately.

And the words "other effects," as used in a bequest of "household effects, books, pictures, paintings, engravings, plate, linen, china, and other effects" was held, in *Re Hammersley* (1899) 81 L. T. N. S. (Eng.) 150, to be limited to things of the same kind, namely, such things as were about the house; and, therefore, that carriages, horses, and all the pictures, whether in the house or elsewhere, did, but that jewelry did not, pass under the bequest.

And the word "effects," as used in a bequest of a mortgage, certain stock, notes, and cash, "household furniture, plate, linen, wearing apparel, stock in trade, working tools, lease of premises occupied by him as a carpenter and builder, and effects," which was followed by a disposition of other real and personal property, was held in *Howse v. Seagoe* (1854) 2 Week. Rep. (Eng.) 597, not to be residuary, on the ground that the testator, by proceeding to dispose of other property in subsequent clauses, indicated that he had not disposed of all his property by the previous bequest.

And in *Welman v. Neufville* (1885) 75 Ga. 124, where testatrix bequeathed to a friend all "silver, jewelry, and other personal effects," it was held that the term "personal effects" must, in accordance with the evident intent of the testatrix, be confined to similar articles of slight value, except that derived from association and personal use, and that it would not pass a valuable personal estate not specifically disposed of.

And in *Barney v. May* (1917) 135 Minn. 299, 160 N. W. 790, where testatrix made several specific bequests of enumerated personal belongings, such as jewelry, plate, china, pictures, furniture, and books, followed by a bequest of the residue of "her personal estate" not enumerated in the will, it was held that, in keeping with the testatrix's evident intent, the rule ejusdem generis must be applied, so that the residuary clause did not pass a residue of money and securities not in existence or in mind at the time of the execution of the will.

So, in *Re Donohue* (1905) 109 App. Div. 158, 95 N. Y. Supp. 821, reversing (1905) 46 Misc. 370, 94 N. Y. Supp. 1087, where a testator, after making specific bequests of various articles of

personal property, bequeathed "all the personal effects belonging to me and on storage in the warehouse," followed by a devise and bequest of "all the rest, residue and remainder of my property of every kind and character," it was held that the words "personal effects" must be limited to the personal effects in the specified storehouse, and could not be construed as a residuary bequest of all personal property not specifically bequeathed, especially as the latter construction would do violence to the evident intent of the testator, as well as render a part of the will ineffective.

And again, in *Ennis v. Smith* (1852) 14 How. (U. S.) 400, 14 L. ed. 472, applying the rule that general words used in connection with something particular and certain are limited by their association to other things of a like kind, it was held that the word "effects" (French, "effets"), in the phrase "all my effects with my carriage and horse included," must be limited, and could not be regarded as residuary, so as to pass all personalty not otherwise disposed of and not even mentioned in the will, it being from the subject-matter of its use that intention of something else may be implied.

So, in *Lippincott's Estate* (1896) 173 Pa. 368, 34 Atl. 58, affirming (1894) 4 Pa. Dist. R. 251, 36 W. N. C. 333, the court applied the rule that where a word of general import, such as "effects," is preceded by and connected with words of narrower import, and the bequest is not residuary, it will be confined to the species of property ejusdem generis with those specifically mentioned, and held that a bequest of "my jewelry, wearing apparel, and personal effects, except such of the same as are not herein otherwise disposed of," did not pass, as personal effects, household furniture, especially as the excepted articles "otherwise disposed of" were all associated with the person of the testator.

In *Brandon v. Yeakle* (1899) 66 Ark. 377, 50 S. W. 1004, where a testator bequeathed his "stocks, notes, bonds, or other credits," followed by separate specific bequests of his books to a brother, a gold watch to another brother, and certain articles of jewelry and personal ornament to a sister, all of which and others were followed by a bequest of "any and all of the remainder of my personal effects of whatever nature," it was held that a half interest in a life insurance business passed under the term "credits," and not as "personal effects," the court saying that the latter

phrase, when used in a will, usually derived its meaning from descriptions of articles and classifications immediately preceding, and, in the instant case, seemed to have been used in an attempt to dispose of any personal effects he had inadvertently omitted from the preceding clauses.

And see *Gallagher v. McKeague* (1905) 125 Wis. 116, 110 Am. St. Rep. 821, 103 N. W. 233, and *O'Loughlin's Goods* (1870) L. R. 2 Prob. & Div. (Eng.) 102, 39 L. J. Prob. N. S. 53, 18 Week. Rep. 902, as set out at the end of the following subdivision of this annotation.

**—not defeating gift.**

The rule that the meaning of general and unlimited words may be cut down by the principle ejusdem generis, of course, does not apply where the intent of the testator is that such general words shall be given their larger meaning. In other words, while not technically accurate, it may be said that the rule ejusdem generis is subordinate to the intent of the testator as gathered from the whole will. And other rules which have been held applicable, and which often help toward defeating attempts to have the word "effects" given a limited meaning, are that such a limitation will be avoided, if possible, where to do otherwise would result in a partial intestacy; and that it will generally be given a broader meaning when used in residuary bequests.

Thus, in *Galloway v. Galloway* (1908) 32 App. D. C. 76, the court ruled that the rule of construction, that where certain things are enumerated, and a more general description is coupled with the enumeration, that description is commonly understood to cover only things ejusdem generis with the particular things mentioned, rests upon a mere presumption, and is subordinate to the rule of intent, and, applying such theory, held that a bequest of "all my household furniture, clothing, and personal effects whatever," to a daughter, followed by a devise of testatrix's home to her, which in turn was followed by a bequest of a small sum to each of two sons, the only other direct heirs, must be regarded as intended to embrace in the term "personal effects" all the personal property, except the two sums bequeathed to the sons, so as to bring the case within the exception to the rule ejusdem generis.

So, in *Gover v. Davis* (1860) 29 Beav. 222, 54 Eng. Reprint, 612, 30 L. J. Ch. N. S. 505, 7 Jur. N. S. 399, 9 Week. Rep.

87, a bequest of "the whole of my property and effects, that is to say, my books, clothes, bedding, etc., etc." was held to pass the whole estate, and not to be limited by the enumeration of specific articles, the Master of the Rolls being of opinion that such was the intention of the testator, and that the enumeration was made for the purpose of showing that the general statement extended to and included such things.

And the words, "all other effects," in a will bequeathing "all my furniture, jewelry, pictures, wearing apparel and other effects" to testator's wife, followed by a specific bequest to her of money, shares, securities, etc., with a direction to pay his debts, and a clause leaving it to her discretion to provide for certain heirs, and containing no other bequests, was held in *Jupp's Goods* L. R. [1891] P. (Eng.) 300, to pass the residuary estate, the court saying that the "clear words, 'all other effects,'" were "not cut down by any principle of ejusdem generis nor by any other specific bequest to other persons," and that, "in addition, you have a provision charging the debts which the husband left on the wife, and a provision leaving it to her generosity to provide for the persons who, if he had not disposed of the residue, would have been entitled to it. It is clear that the residue was intended to pass to the wife."

And in *Hotham v. Sutton* (1808) 15 Ves. Jr. 319, 33 Eng. Reprint, 774, 10 Revised Rep. 83, a bequest of "plate, linen, household goods, and other effects (money excepted)" was held to cover all personalty except money and bank notes, the court ruling that the exception prevented the application of the rule ejusdem generis, since, as money was not ejusdem generis with the things enumerated, it showed that other things were intended to pass under the words "other effects."

And in *Michell v. Michell* (1820) 5 Madd. Ch. 69, 56 Eng. Reprint, 821, 21 Revised Rep. 280, a bequest of "all and singular his plate, linen, china, household goods and furniture, and effects that he should die possessed of," followed by a devise of realty in trust, expressly subject to funeral expenses and all debts, was held to carry under the word "effects," as a specific bequest, all of testator's personal estate, free from debts, and not merely such property as was ejusdem generis with the property expressly mentioned, such being the testator's intent as determined from the context.

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And in *Harris v. James* (1864) 12 Week. Rep. (Eng.) 509, where a bequest gave "all and singular my household furniture, stock in trade, goods, chattels, and effects of every sort and kind, and also all moneys due me," it was held that the addition of the words, "of every sort and kind," made it impossible to construe the words, "goods, chattels, and effects," as meaning effects ejusdem generis, and that the bequest was at once specific as to furniture, stock in trade, and moneys, and residuary as to other personalty.

In *Dickson v. Dickson*, ante, 765, a bequest of testator's "household furnishings and effects, and also my farm," was held to carry all his personal estate, and not simply that related to household furnishings, the court adopting the rule that intent governs, and that, in determining such intent, it is presumed that the decedent did not intend to die intestate as to any of his property; in other words, that the rule ejusdem generis is subordinate to the testator's intention, which evidently was to use the term "effects" in its broad sense, the fact that any other conclusion would have created an intestacy for life, as to a part of the estate, aiding in the determination of such intent. And to the same effect, see *Humble v. Humble* (1820) 3 A. K. Marsh. (Ky.) 123, as set out in the *DICKSON CASE*.

And in *Parker v. Marchant* (1842) 1 Younge & C. Ch. Cas. 290, 62 Eng. Reprint, 893, 11 L. J. Ch. N. S. 236, 6 Jur. 292, a bequest of all of testator's "jewels, plate, linen, china, carriages, wines, and other goods, chattels, and effects whatever," was held to carry the residue of the personal estate, the court saying that such was the evident intent of the testator, as gathered from the context of the will, and that any other conclusion would result in a partial intestacy.

So, in *Lloyd's Estate* (1856) 2 Jur. N. S. (Eng.) 539, where testatrix, after making several specific bequests, directed her executor to sell her "household furniture and other effects" and, after paying debts, let the surplus sink into the residue, all of which was directed to be divided among named persons, it was held that the term "effects" included all the personal estate, and passed many things of considerable value, even though testatrix was ignorant of their existence, the court applying the rule that intent must govern, and that a testator is presumed not to die intestate.

And again, in *Reimer's Estate* (1893)

159 Pa. 212, 28 Atl. 186, reversing (1893) 23 Pittsb. L. J. N. S. 452, where testator, after making provision for payment of debts, directed "that the whole of my estate remaining shall be divided as follows: "To A any and all of my household goods, books, clothing, furniture, etc., that he may desire. The balance of the personal effects to be divided among," etc., it was held that the latter sentence of the quoted provision was residuary as to all the personal property not passing under the first-quoted sentence, and could not be limited to articles named, but not desired by A. In addition, the court said that such was the evident intent of the testator, and that to limit the second sentence as contended might render it entirely inoperative, as well as make the testator die intestate as to all personal property not specifically mentioned in the first sentence.

Where the term "effects" is used in the residuary clause of a will, and an intention to dispose of the whole estate is shown, and to restrict the term to things ejusdem generis with property more specifically described in the same clause would result in a partial intestacy, the rule ejusdem generis should not be applied. This was the rule laid down in *Re Way* (1903) 6 Ont. L. Rep. 614, in holding that a residuary bequest of "all my furniture, books, plate, and other personal effects," was sufficient to pass a beneficial interest in a real estate mortgage owned by the testator. And in *Fisher v. Hepburn* (1851) 14 Beav. 626, 51 Eng. Reprint, 425, a bequest by testator "of his estate and effects whatsoever and wheresoever, canal shares, plate, linen, china, and furniture," by a residuary clause, was held not within the rule ejusdem generis, and, since not limited to things like those specifically mentioned, sufficient to pass the residuary personal estate, the Master of the Rolls saying that to hold otherwise would require a strained construction, and be at variance with the testator's intention. So, in *Re Parrott* (1885) 53 L. T. N. S. (Eng.) 12, cash and book debts were held to pass, under a residuary clause bequeathing "all my household furniture, wines, carriages, horses, and other effects, except my jewelry," the court finding that the intent of the testator was to pass all of his estate, and not to die intestate as to any part of it. And all personal estate not specifically disposed of was held, in *Smyth v. Smyth* (1878) L. R. 8 Ch. Div. (Eng.) 561, 38 L. T. N. S. 633, 26 Week. Rep. 736, to pass under a bequest of "my sheep and

all the rest, residue, moneys, chattels and all other my effects," following a bequest of two specific sums of money. And in *Hearne v. Wigginton* (1821) 6 Madd. Ch. 119, 56 Eng. Reprint, 1037, where testator, after making specific bequests of money, household furniture, and wearing apparel, bequeathed "all my other effects . . . to be sold for his benefit," the residue of the personal estate, including money, was held to pass, the court refusing to confine the bequest of "effects" to things ejusdem generis with those specifically mentioned, or to confine it to things which could be sold, and placing its decision on the ground that such was the testator's intention. And in *Re Broadwell* (1912) 134 L. T. Jo. (Eng.) 107, a bequest of "all my household furniture and personal effects," following certain specific bequests in a will which contained no residuary clause, was held to be residuary, so that "personal effects" included all the residuary personal estate. So in *Scarborough's Goods* (1860) 30 L. J. Prob. N. S. (Eng.) 85, 6 Jur. N. S. 1166, 9 Week. Rep. 149, a bequest of "all my personal effects and everything of every kind," in testator's apartment or "elsewhere," was held to make the beneficiaries universal legatees. In *Graves v. Howard* (1857) 56 N. C. (3 Jones, Eq.) 302, it was held that the provision, "The residue of testator's estate and effects," following specific bequests and devises, meant what was left after all liabilities were discharged, and all the purposes of the testator were carried into effect.

In *Hodgson v. Jex* (1876) L. R. 2 Ch. Div. (Eng.) 122, 45 L. J. Ch. N. S. 388, 24 Week. Rep. 575, a bequest of "all my plate, linen, furniture and other effects, that may be in my possession at my death," was held to be residuary as to personal property, and not limited to "other effects" ejusdem generis, the court adopting the rule that the words must be given their natural meaning unless a contrary intention appears in the will. And again in *Shepherd's Goods* (1879) 41 L. T. N. S. (Eng.) 530, the words "other effects," as used in a bequest of "all my household goods and furniture, plate, linen, glass and all other effects wheresoever and whatsoever," followed by specific bequests and pecuniary legacies, was held to pass the residuary personal estate, under the rule that words must be given their ordinary meaning where no contrary intention appears. So, in *Lowry v. Patterson* (1874) Ir. Rep. 8 Eq. 372, it was held that the words, "effects whatsoever and wherso-

ever," in a bequest of "all my stock, crop, farming implements, household furniture and effects whatsoever and wheresoever," must be given their natural meaning, so that they would carry everything, including money in bank and debts. And upon the question whether money and securities for money pass under bequests of "farm stock and implements and other personal effects," or of "household effects," see *Re Hord*, 10 Ont. Week. N. 278, cited in *Can. Ann. Dig.* (1916) col. 614. And in *Campbell v. Prescott* (1808) 15 Ves. Jr. 500, 33 Eng. Reprint, 844, a bequest of all of testator's "sugar house, cupola and merchandise, stock, with jewels, plate, household goods, furniture and all effects whatsoever," was held not to be restricted to things of the kind mentioned, but to pass personalty not specifically bequeathed, the view being adopted that the phrase, "all effects whatsoever," was equivalent to "property" or "worldly substance."

But the presumption against intestacy, which sometimes is held to avoid application of the rule ejusdem generis to the word "effects" in a bequest, cannot prevail, where the language of the will, fairly construed, is insufficient to carry the whole estate; it being contrary to the true construction of wills to give property to a specific legatee upon a forced construction of words which do not indicate such a purpose in the mind of the testator. *Gallagher v. McKeague* (1905) 125 Wis. 116, 110 Am. St. Rep. 821, 103 N. W. 233, holding that a bequest of "household furniture and effects," when not in a residuary clause, could not be construed to include a large portion of testator's personal property, although the same was not specifically disposed of, and such a construction would leave an intestacy as to the same, there being nothing in the will expressing an intention to pass the whole estate. And the term "effects," as used in a will whereby testator bequeathed "whatever money remains at my agent's . . . also any money that may result from the sale of my effects . . . I also wish her to get my watch, etc.," was held in *O'Loughlin's Goods* (1870) L. R. 2 Prob. & Div. (Eng.) 102, 39 L. J. Prob. N. S. 53, 18 Week. Rep. 902, not to pass the residuary estate, but to be confined to things that might be sold, so that it did not pass a legacy; Lord Penzance, who delivered the opinion, arguing that the testator, by the word "effects," alluded to that portion of his estate which could be sold, and,

again, that it would not have been necessary for him to specifically refer to the watch if he had regarded the bequest as residuary, and this notwithstanding such construction resulted in a partial intestacy.

#### —general cases.

And, admitting that the rule ejusdem generis applies, a number of cases have passed upon the question as to what articles not specifically enumerated pass under the rule.

Thus, in *Field v. Peckett* (1861) 29 Beav. 573, 54 Eng. Reprint, 750, 30 L. J. Ch. N. S. 813, 7 Jur. N. S. 983, 4 L. T. N. S. 459, 9 Week. Rep. 526, a bequest of "household furniture, plate, books, prints, pictures, linen, china, brewing utensils, and other household effects" was held to pass, under the rule ejusdem generis, gold, silver and china snuff boxes used for purposes of ornament, as well as cabinets for china, which had been ordered and made, but not delivered, at the time of testator's death.

So in *Domville v. Taylor* (1863) 32 Beav. 604, 55 Eng. Reprint, 237, 8 L. T. N. S. 624, 11 Week. Rep. 796, a bequest of all "my household furniture, place," etc., "and other effects of the like nature," was held to pass plate at testator's bankers, plate to which he was entitled in remainder, subject to a life estate in his father, the produce of plate wrongfully sold by such life tenant, and furniture, linen, and books, which had been deposited in a warehouse for safe-keeping.

And in *Cole v. Fitzgerald* (1823) 1 Sim. & Stu. 189, 57 Eng. Reprint, 75, 3 Russ. Ch. 301, 38 Eng. Reprint, 588, 1 L. J. Ch. 91, 24 Revised Rep. 169, a bequest of "household furniture and other household effects," in testator's "dwelling house and premises," was held to comprise all property in the house and on the premises, intended for use or consumption therein, or for the ornament thereof, and that such property included pistols, lathes, and apparatus for turning, models, paintings, organ, parrot, books, and wine and liquors, but not a pony or cow or fowling pieces, unless kept for the defense of the house, or a haystack if held for sale.

In *Brinekerhoff v. Farias* (1900) 52 App. Div. 256, 65 N. Y. Supp. 358, affirmed in (1902) 170 N. Y. 427, 63 N. E. 437, a bequest of "all the rest of my plate and household effects," following specific bequests of various articles in testator's house, was held to pass wines in the house. And again, in *Re Bourne*

(1888) 58 L. T. N. S. (Eng.) 537, a bequest of "all my furniture, pictures, plate, jewelry, horses and carriages, and other household effects" was held to pass all wine in testator's house, under the words "other household effects," it being said that, by the inclusion of "horses" and "carriages," he evidenced an intent to enlarge the ordinary meaning of the phrase.

In *Pinder v. Pinder* (1870) 18 Week. Rep. (Eng.) 309, a bequest of stock in trade, money at the bank, good will, book debts, and effects belonging to testator's business of an earthenware manufacturer, was held to show an intent that the business should be carried on by the beneficiary, and therefore that trade fixtures passed as "effects belonging to his business."

In *Martin v. Osborne* (1887) 85 Tenn. 420, 3 S. W. 647, a devise of a house and lot of about 10 acres, together with "all the personal property and effects in the house and on the lot," was held to pass all the live stock usually housed or domiciled on such lot, although they may have been occasionally grazed on testator's adjoining land, when necessity demanded it.

But, as is held in *Re Haight*, 51 Sol. Jo. (Eng.) 343, as set out in 11-15 Mews, Eng. Case Law Dig. Supp. (1898-1910) title, Wills, col. 2054, a bequest of the "effects used in the business carried on by me," etc., does not include a balance on the business account at a bank.

In *Re Hall* [1912] W. N. (Eng.) 175, 107 L. T. N. S. 196, 28 Times L. R. 480, 56 Sol. Jo. 615, a motor car was held not to pass, under a bequest of "all my carriages, horses, harness, and stable furniture and effects," the court arguing that, having regard to the collocation of words, it appeared that the testator only intended to include horse-drawn vehicles as ejusdem generis with carriages. But in *Re Fortlage* [1916] W. N. (Eng.) 214, 60 Sol. Jo. 527, 141 L. T. Jo. 60, a motor car and a collection of postage stamps was held to pass under the words, "other household effects," in a bequest of "plate, linen, china, glass, books, pictures, prints, wines, liquors and all other consumable stores, horses, carriages, furniture and other household effects," the court saying that since the testator, by the use of the word "other," had classed horses and carriages and household effects together, a motor car must be so regarded; and that a collection of stamps could be regarded as in the same ornamental class as "pictures." However, in *Re*

*Masson* [1917] W. N. (Eng.) 252, 86 L. J. Ch. N. S. 753, 117 L. T. N. S. 548, 33 Times L. R. 527, 61 Sol. Jo. 676, which reversed (1917) 33 Times L. R. 380, which was based upon *Re Fortlage* (Eng.) supra, it was held that a valuable collection of stamps in albums and on cards did not pass under the words, "other household effects," as employed in a bequest of "books, pictures, prints . . . and other household effects," Lord Justice Swinfen Eady saying that he was by no means satisfied that the decision in the *Fortlage* Case ought to be upheld.

#### Real estate as "effects."

Supplementing note in 12 L.R.A. (N.S.) 661.

The great majority of the cases upon the question whether or not real estate will pass under the word, "effects," in a will, are treated in the note to *Andrews v. Applegate*, 12 L.R.A. (N.S.) 661, on the question, whether real estate will pass under the word "effects," in a written instrument.

And, in addition to the cases cited therein, see the following:

Thus, that the word "effects," used alone, may mean the whole of the testator's property, see *Borton v. Dunbar* (1860) 2 Giff. 221, 66 Eng. Reprint, 93, affirmed in (1860) 2 DeG. F. & J. 338, 45 Eng. Reprint, 651, 30 L. J. Ch. N. S. 8, 6 Jur. N. S. 1128, 3 L. T. N. S. 519, 9 Week. Rep. 41; *Campbell v. Prescott* (1808) 15 Ves. Jr. 500, 33 Eng. Reprint, 844; and *Howse v. Seagoe* (1854) 2 Week. Rep. (Eng.) 597.

And that "heritage" is carried by a bequest of the whole of testator's "means and effects," see *Forsyth v. Turnbull* (1887) 25 Scot. L. R. 168, 15 Sc. Sess. Cas. 4th series, 172, as set out in 2 Scots' Dig. (1873-1904) col. 2144.

And in *White v. Keller* (1895) 15 C. A. 683, 30 U. S. App. 275, 68 Fed. 796, the court applied the rule that the term "effects," when used in connection with words which describe real estate, may be construed to include real estate, and held that, since the word "property" included both real and personal estate, the term "property and effects," in a general residuary clause of a will, was sufficient to pass real estate not specifically devised.

But in *Wilson v. Major* (1805) 11 Ves. Jr. 205, 32 Eng. Reprint, 1066, where testator devised a copyhold estate to his wife to sell and to enjoy the income for life, and bequeathed to her "all his effects wheresoever or whatsoever for her

maintenance,” it was held that the widow was entitled to a life interest only in the copyhold estate, the court saying that the words, “all my effects,” could not so enlarge the devise as to give her an absolute interest; since to so hold would require a finding that the testator intended to give her an absolute interest in that in which by the preceding provision, he had given her a life interest.

So, in *Cave v. Cave* (1762) 2 Eden, 139, 28 Eng. Reprint, 849, a gift and bequest of all “goods, cattle, chattels and personal estate and effects whatsoever” was held not to pass real estate, the

Lord Chancellor being of opinion that the words, “effects whatsoever,” must be applied to matters ejusdem naturæ, and that they could not be applied as general words to things of a superior nature to those particularly specified, at least where a contrary intent was not manifested in the will.

And in *Bowlin v. Furman* (1863) 34 Mo. 39, a will nominating an adopted child as testator’s “sole and only heir of all the goods, chattels, rights and credits and effects,” etc., to inherit and enjoy, was held not to pass real estate.

G. J. C.

#### ARKANSAS SUPREME COURT.

IRENE BAKER et al., Appts.,

v.

MOSAIC TEMPLARS OF AMERICA.

(— Ark. —, 204 S. W. 612.)

#### Insurance — necessity of designating beneficiary.

1. A rule of a mutual benefit society that no benefit shall be paid unless a beneficiary is designated by the handwriting or mark of the member is not contrary to public policy.

For other cases, see *Insurance*, III. a, in 1-52 N. S.

#### Same — indefiniteness.

2. A rule of a mutual benefit society that no benefit shall be paid unless a beneficiary is designated by the member is not void for indefiniteness.

For other cases, see *Insurance*, III. a, in 1-52 N. S.

(June 24, 1918.)

**A**PPEAL by plaintiffs from a judgment of the Circuit Court for Pulaski County in favor of defendant in an action brought to recover an amount alleged to be due on a life insurance policy. Affirmed.

The facts are stated in the opinion.

Mr. Thomas J. Price, for appellants:

The mere designation of a beneficiary was not necessary when the deceased left living issue, who, under the laws of descent, would inherit the proceeds of the certificate anyway.

*Cullin v. Supreme Tent, K. M.* 77 Hun, 6, 28 N. Y. Supp. 276; *Arthur v. Odd Fellows' Beneficial Assn.* 20 Ohio St. 557;

**Note.** — As to validity and effect of rule of benefit society requiring designation of beneficiary by will or contract, see annotation following this case, post, 777, and references therein to annotations on related questions.

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*Halle v. Grand Lodge, I. O. B. B.* 24 Ohio C. C. 717; *Covenant Mut. Ben. Assn. v. Sears*, 114 Ill. 108, 29 N. E. 480; *Haynes v. Masonic Ben. Assn.* 98 Ark. 421, 136 S. W. 187, Ann. Cas. 1912D, 697.

Mr. Scipio A. Jones for appellee.

Humphreys, J., delivered the opinion of the court:

Appellants instituted suit in the third division of the Pulaski circuit court on the 30th day of March, 1918, against appellee, a fraternal benefit society organized under the laws of the state of Arkansas, to recover an amount alleged to be due them under the terms of an insurance policy issued by appellee on the life of their mother, who died on the 26th day of November, 1917. Appellee denied any liability on the policy. The cause was presented to the court, sitting as a jury, upon the pleadings, the policy, and an agreed statement of facts, from which the court found that no liability existed under the terms of the policy, as applied to the facts in the case, and rendered a judgment accordingly, from which an appeal has been properly prosecuted to this court.

Appellee is an organization commonly known as a fraternal benefit association, society, or order, and the policy issued is what is commonly denominated a beneficiary certificate. The policy contained a clause that the certificate, charter, articles of incorporation, constitution, and laws of the society, and the application for membership and medical examination, and all amendments thereof, should constitute the agreement between the society and the member. The agreed statement of facts, upon which the cause was submitted, is as follows:

“The plaintiffs, Irene Baker, Walter Baker, and Willie Baker, are the sole heirs at law of Emma Baker, deceased. Emma



Baker died a financial member of the Mosaic Templars of America, a fraternal benefit society organized under the laws of the state of Arkansas, on the 26th day of November, 1917, and, according to the terms of the certificate set out herein, the certificate has a face value of \$100.

"A paragraph on the policy or certificate, and this is law No. 7, from the constitution and by-laws of the Mosaic Templars of America, states: 'Members holding policies in this order and dying without making some disposition of the same by will or assignment will not, under any consideration, be paid, and said will or assignment must be made in their own writing, or mark thereof, attested by the scribe of their temple, chamber or palace, and must be sent to the national grand scribe on final proof of death,' Emma Baker's certificate or policy had no will (or) assignment thereon, when filed with the defendant with the proof of death."

It is insisted by appellant that the failure to designate a beneficiary by will or assignment in the manner provided in the policy cannot prevent a recovery. The policy specifically provides that the laws of the order shall become a part of the contract. The clause in question is law No. 7 of the organization. It was therefore necessary for the insured to comply with it before any liability would accrue on the contract. 1 Bacon, Ben. Soc. § 81; Woodmen of World v. Johnson, 80 Ark. 419, 97 S. W. 673; Supreme Lodge, K. L. H. v. Johnson, 81 Ark. 512, 90 S. W. 834.

It is said, however, that a clause of this character is contrary to public policy, and void. We know of no statutory provision in the state of Arkansas which is contravened by this clause in the contract. It does not conflict with § 6, Act 462, Acts 1917, as contended by appellant. That section of the statute provides who may become beneficiaries in fraternal benefit organizations, and permits the selection of anyone in the classes specified as beneficiaries, and limits the organization in the passage of its laws to classes of beneficiaries specified in the section. The section does not prevent the organization or society from passing a by-law to the effect that, unless a beneficiary is designated, no liability shall accrue under the policy. In other words, it leaves the organization and its members free to contract against lia-

bility unless a beneficiary is designated. We do not see how the suggestion that the rule may work an irreparable injury on members on their dying beds can avail appellants. It is true that the statutes of Arkansas permit another person to sign the testator's name to a will at the testator's request, but this is the very thing that the rule attempts to avoid. The rule recognizes only those designations of beneficiaries in wills and assignments made in the testator's own writing or mark, attested by the scribe of their temple, chamber, or palace. This rule seems to have been for the purpose of preventing any contest as to the genuineness of wills or assignments, designating the beneficiaries to whom the amounts due under the policy should be paid. It was a rule made for the protection of the society, and not for the purpose of changing or attempting to change, conflicting or attempting to conflict with, the laws of Arkansas with reference to the execution of wills.

It is said that the clause is indefinite, and that it is uncertain what shall become of the amount due on the policy in case no beneficiary was named, and, for that reason, it should be regarded as property, and descend to the heirs under the Statute of Descents and Distributions. We think the clause is very definite. It provides for no liability in case the beneficiary is not designated, as provided in the policy. In other words, it provides that no amount shall be paid to anyone unless the beneficiary has been designated. This policy contained no stipulation to pay the estate or personal representative of the insured any sum at his death. By virtue of his membership and certificate, he had the power to appoint a beneficiary in the manner prescribed. Having no property rights in the policy, the Statute of Descents and Distributions has no application. Having failed to designate the beneficiary under the terms of the policy, no liability against the association accrued to anyone. 1 Bacon, Ben. Soc. 4th ed. 310; Eastman v. Provident Mut. Relief Asso. 62 N. H. 555; Worley v. North Western Masonic Aid Asso. (C. C.) 10 Fed. 227; Maryland Mut. Benev. Soc. v. Clendinnen, 44 Md. 429, 22 Am. Rep. 52; 29 Cyc. 157-159; Cock v. Supreme Conclave, I. O. H. 202 Mass. 85, 88 N. E. 584.

No error appearing in the record, the judgment is affirmed.

**Annotation—Insurance: validity and effect of rule of benefit society requiring designation of beneficiary by will or contract.**

As to the right to designate by will the beneficiary of benefit insurance, see notes to Re Harton, 4 L.R.A.(N.S.) 939,

and Brinsmaid v. Iowa State Traveling Men's Asso. 42 L.R.A.(N.S.) 1161; and later cases of Ellis v. Fidelity & C. Co.

L.R.A.1915A, 109, and Koenigstein v. Grand Lodge, O. H. S. L.R.A.1917F, 398.

For disposition of fund in mutual benefit society upon failure of beneficiary, see notes to Modern Woodmen v. Puckett, 17 L.R.A.(N.S.) 1083, and Switchmen's Union v. Gillerman, L.R.A. 1918A, 1117.

It will be noted that in *BAKER v. MOSAIC TEMPLARS*, ante, 776, a provision of laws of the society that, in case members died without making some disposition of the benefit by will or assignment, in their handwriting, the benefit would not, under any consideration, be paid, was held not contrary to public policy; nor in conflict with a statute providing who might become beneficiaries in benefit associations, and permitting the selection of certain classes, and limiting the organization, in the passage of by-laws, to the classes of beneficiaries specified, the court stating that the statute left the organization and its members free to contract against liability unless a beneficiary was designated. And the provision requiring a beneficiary to be designated by will or assignment was held not invalid on the ground that it was indefinite and uncertain, as not specifying what should become of the fund in case no beneficiary was named, the court stating that the provision clearly provided that there should be no liability in case a

beneficiary was not designated according to the provision.

There is little authority bearing upon the question under consideration.

In the following cases, the validity of regulations of benefit societies, providing for the designation of beneficiaries by will, was apparently recognized, although not expressly discussed: *Nuehols v. Kentucky Mut. Ben. Soc.* (1894) 16 Ky. L. Rep. 270; *Maryland Mut. Ben. Soc. v. Clendinen* (1875) 44 Md. 429, 22 Am. Rep. 52; *Greeno v. Greeno* (1881) 23 Hun (N. Y.) 478.

In these cases, the power given the insured was held not to have been exercised, where his will contained merely a residuary clause, with no specific mention of the insurance benefit.

In *Supreme Council, C. M. B. A. v. Priest* (1881) 46 Mich. 429, 9 N. W. 481, where the insured reserved the right to change the beneficiary, it was held that neither a provision in the rules and regulations of a benefit association, that the fund, on the death of a member, should be paid to the person last named by him, and entered by his order on the will book of the company, nor a will, entered upon the will book, deprived the insured of the right to subsequently make a different disposition of the fund; and a later disposition, made in an ordinary will, revoking the former designation, was held valid. J. T. W.

#### SOUTH CAROLINA SUPREME COURT.

J. A. FOX, Appt.,  
v.

JUNIOR ORDER UNITED AMERICAN  
MECHANICS, Respt.

(— S. C. —, 96 S. E. 542.)

**Insurance — mutual benefit — suspension of local chapter — transfer of members.**

A member of a subordinate lodge of a mutual benefit society which has been suspended by the supreme council for nonpayment of dues, after he has reached the age which, under the constitution, rendered him

**Note.** — As to right of members of subordinate lodge of benefit society, which has been suspended or dissolved, to transfer to another lodge, see annotation following this case, post, 780; and references therein to annotations on related questions.

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ineligible to admission to beneficial membership, is not entitled to admission to another local lodge upon presentation of a proper card of dismissal from the suspended lodge, although the effect of refusal to admit him will be to deprive him of the benefits to which his original contract entitled him. *For other cases, see Benevolent Societies, IV. in Dig. 1-52 N. S.*

(July 24, 1918.)

**A**PPEAL by plaintiff from a nonsuit granted by the Common Pleas Circuit Court for York County in an action brought to recover damages for breach of a contract of insurance. Affirmed.

The facts are stated in the opinion.

Mr. J. Harry Foster for appellant.  
Messrs. Butler & Hall for respondent.

Hydrick, J., delivered the opinion of the court:

Plaintiff appeals from judgment of non-

suit in this action, which is for damages for breach of contract.

Defendant is a mutual benefit association, conducted on the lodge system, and governed by a constitution and by-laws. It has a national council and state and subordinate, or local, councils. The constitution provides that no applicant over the age of fifty years shall be admitted to beneficial membership in any council, but such applicants may be admitted to honorary membership only.

In 1907, plaintiff became a member of a subordinate council (Elgin No. 55), and defendant issued to him a certificate of membership, and thereby contracted to pay his legal dependent \$500 at his death, "upon the condition that the said J. A. Fox is now and shall be at the time of his death a beneficial member in good standing of a subordinate council of said order, and affiliating with the national council of said order, and also a member in good standing of the funeral benefit department of said national council, in Class B, in accordance with the laws of said national council, and his state and subordinate council now in force or hereafter adopted prior to said death." In 1911, plaintiff transferred his membership to Dry Creek council No. 88, and paid his dues in that council until the last of December, 1914, at which time that council was suspended for nonpayment of its dues to the state and national councils, and became defunct, and was not thereafter affiliated with the state and national councils. In 1915, plaintiff, being then over fifty years of age, obtained from the secretary of the state council a dismissal card, which, though not clearly explained by the testimony, we assume was a card certifying that, at the time of his dismissal, he was a member of the order in good standing. Upon this card, he applied to two other subordinate councils for membership, first to Lancaster council No. 38 and then to Rock Hill council No. 49. His application was rejected by both, on the ground that he was not eligible to membership, because he was then over fifty years of age. It appears that, under the laws of the order, before an applicant for membership can be received into a subordinate council, his application must be submitted to a secret ballot of the council, and that one black ball, or negative vote, is sufficient to require his rejection. The record does not clearly disclose whether plaintiff's application was rejected upon such a vote by either of the councils to which he applied for membership; but we shall assume that it was not, and that the sole ground upon

which admission to membership was denied him was that he was over fifty years of age, as that view of the testimony is most favorable to his contention.

The question, then, is whether there was any breach of its contract by defendant. It is too plain for argument that, if that question is to be answered from a consideration of the words of the contract, it must be answered in the negative. In plain and unambiguous language, the agreement to pay is subject to the condition that, at the time of his death, plaintiff should be a beneficial member, in good standing, of a subordinate council of the order, which must be affiliated with the national council, and it is admitted that he is not such a member. But appellant contends that, conceding that to be true, the provision of the constitution which prohibits his admission into Lancaster or Rock Hill council because of his age, after he had been admitted to membership in Elgin and Dry Creek councils before he attained the prohibitory age and had paid his dues in those councils until he had attained that age at which he could not obtain admission to any other council, is unreasonable and void, and ought therefore to be ignored by the court. We do not think so. That provision was accepted by appellant, as a part of his contract, when he joined the order. It is entirely reasonable for an insurance association or company to fix the age beyond which it will not accept a risk. Practically all insurers do so. Nor is there anything unreasonable in providing that, after an insured has passed a specified age, he may not be transferred from one class to another, or from one council to another, because the introduction of a considerable number of old men into a council in that way might, and, according to natural laws would, tend to weaken it, and it might also materially increase the burdens upon the other members of that council. It is purely a matter of contract, and the provision in question is not obnoxious to any law or to public policy.

It is true that appellant has been deprived of his insurance, apparently without any fault on his part, which is regrettable. But, on the other hand, the defendant is not at fault, has done him no wrong, and is not therefore responsible for his misfortune. By the terms of his contract, he made the council of which he became a member his agent for the purpose of keeping up its affiliation and, through it, his affiliation with the state and national council. Clearly, the parties had the right to make that sort of a contract. The fault,

therefore, lies with plaintiff's own agent, and not with defendant. The situation is practically the same as if he had appointed some person as his agent to pay his dues to the council, and that person had failed to do so, and the council had suspended

or expelled him for nonpayment of dues. He must look to his own agent for redress. Judgment affirmed.

Gary, Ch. J., and Watts, Fraser, and Gage, JJ., concur.

**Annotation—Right of members of subordinate lodge of benefit society, which has been suspended or dissolved, to transfer to another lodge.**

Generally, as to forfeiture of benefit certificate by default of subordinate lodge, see note to *Murphy v. Independent Order*, S. D. J. 50 L.R.A. 111.

It will be noticed that in *Fox v. Junior Order*, U. A. M. ante, 780, where the constitution of the society provided that no applicant over the age of fifty years should be admitted to beneficial membership in any council, and a subordinate council had been suspended for a failure of its officers to pay dues to the superior councils, it was held that a member of the subordinate council, who was over fifty years of age, was not entitled to be admitted as a member in other subordinate councils, the court holding that the provision was plain and unambiguous, and not unreasonable and void.

There is little direct authority on the question under consideration.

In *Lamb v. Knights of Birmingham* (1900) 10 Pa. Dist. 383, where the laws of the order expressly gave members a right to receive cards and pass from one lodge to another, and, upon the surrender of a charter of a lodge, it was agreed that members might receive cards and affiliate with other lodges, it was held that if a member of the disbanded lodge desired to continue his membership in the order he should have associated himself with another lodge; and that, not having done so, or paid any assessments after the disbanding

of the lodge, his rights in the order were terminated.

In *Starling v. Supreme Council*, R. T. T. (1896) 108 Mich. 440, 62 Am. St. Rep. 709, 66 N. W. 340, where the local council of which the plaintiff was a member broke up for want of members, and although he obtained a transfer to another council in the same city that council refused to receive him, it was held that he was under no obligation to unite with a council in another place, the purpose of the order being social as well as beneficial, and it was held that a recovery might be had, it appearing that the member had for more than two years paid all assessments of which he had notice to the head council, which received them, it being held that he had done all he was bound to do to retain his membership.

In *Kehrbaum v. Kegal* (1896) 17 Misc. 635, 40 N. Y. Supp. 589, where the Grand Rapids branch of an international association had disbanded, and a member of that branch applied for membership in the New York branch of the association, and paid to the international association the amount of his arrearages in the disbanded branch, and was then admitted as a member of the New York branch, it was held that he was reinstated to membership, and that recovery might be had for the death benefit provided for by the order.

J. T. W.

**WASHINGTON SUPREME COURT.**  
(Department No. 2.)

FRANK FLUCKIGER, by Guardian ad Litem, Appt.,  
v.

CITY OF SEATTLE, Resp't.

(— Wash. —, 174 Pac. 456.)

**Municipal corporations — coasting on streets — liability for injury.**

Failure of the police department to enforce an ordinance forbidding coasting in the city streets does not render the municipi-

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ality liable for injury to one injured while violating the ordinance.

For other cases, see *Municipal Corporations*, 11. 9, 2, in Dig. 1-52 N. 8.

(August 7, 1918.)

**A**PPEAL by plaintiff from a judgment of the Superior Court for King County in favor of defendant in an action brought

Note. — As to liability for injury to one while coasting in street, see annotation following this case, post, 782; and references therein to annotations on related questions.

to recover damages for injuries sustained in a coasting accident. Affirmed.

The facts are stated in the opinion.

Mr. Jay C. Allen, for appellant:

The ordinance in question is a traffic ordinance, passed for the benefit of pedestrians and other persons using the streets and highways thereof.

Rampon v. Washington Water Power Co. 94 Wash. 438, L.R.A.1917C, 998, 162 Pac. 514; Bogdan v. Pappas, 95 Wash. 579, 164 Pac. 208.

The city, by its conduct, should be estopped from using the ordinance as a shield against liability.

16 Cyc. 714; Athens v. Georgia R. Co. 72 Ga. 800; Otis Elevator Co. v. Chicago, 263 Ill. 419, 52 L.R.A.(N.S.) 192, 105 N. E. 338; Mattoon v. Elliott, 185 Ill. App. 78.

Messrs. Hugh M. Caldwell and Frank S. Griffith, for respondent:

Failure to enforce the ordinance does not render defendant liable for the injury sustained by plaintiff while coasting in violation of the ordinance.

4 Dill. Mun. Corp. 5th ed. § 1627; Wheeler v. Plymouth, 116 Ind. 158, 9 Am. St. Rep. 837, 18 N. E. 532; Hines v. Charlotte, 72 Mich. 278, 1 L.R.A. 844, 40 N. W. 333; Faulkner v. Aurora, 85 Ind. 130, 44 Am. Rep. 1; Schultz v. Milwaukee, 49 Wis. 254, 35 Am. Rep. 779, 5 N. W. 342; Norristown v. Fitzpatrick, 94 Pa. 121, 39 Am. Rep. 771; Kitsap County Transp. Co. v. Seattle, 75 Wash. 673, 135 Pac. 476, Ann. Cas. 1915C, 115; Buttrick v. Lowell, 1 Allen, 172, 79 Am. Dec. 721; Calwell v. Boone, 51 Iowa, 687, 33 Am. Rep. 154, 2 N. W. 614; Millett v. Princeton, 167 Ind. 582, 10 L.R.A.(N.S.) 785, 79 N. E. 909.

Chadwick, J., delivered the opinion of the court:

The appellant was injured in a coasting accident in the city of Seattle. Prior to the time of the accident the city council of the city of Seattle had passed an ordinance which prohibited coasting on any sidewalk or paved street. The ordinance had not been enforced by the police department. Coasting had been indulged in by those so inclined in several parts of the city, and in one or two instances the police department had detailed men to protect traffic while the sport was going on.

The controlling question is whether a city is liable to answer in damages to one who is injured while doing a thing which is prohibited by a city ordinance, although tolerated by the police officers of the city. It is the theory of appellant that the ordinance should not be raised as a bar to a recovery; that it has been abrogated by

long disuse and nonobservance, if not by the connivance of the officers whose duty it is to enforce it. He relies upon many cases, including Barnard v. Benson, 58 Wash. 191, 137 Am. St. Rep. 1051, 108 Pac. 439; Regan v. School Dist. 44 Wash. 523, 87 Pac. 828; State ex rel. Smith v. Ross, 42 Wash. 439, 85 Pac. 29; State ex rel. Cowles v. Schively, 63 Wash. 103, 114 Pac. 901; Spokane & E. Trust Co. v. Young, 19 Wash. 122, 52 Pac. 1010; Keane v. Brygger, 3 Wash. 338, 28 Pac. 653; McSorley v. Hill, 2 Wash. 638, 27 Pac. 552; Brown v. United States, 113 U. S. 568, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648; Chattanooga Plow Co. v. Hays, 125 Tenn. 148, 140 S. W. 1068. These cases hold that a practical construction of a statute by long-continued action or nonaction is equivalent to positive law, and that contemporaneous and continued practice of officers whose duty it is to execute or to take special cognizance of the statute is the highest evidence of its meaning, and should not be disregarded except for cogent reasons.

It was the opinion of the court below, and to that opinion we are inclined, that these cases are not controlling. They affirm a rule of construction resorted to by the courts when called upon to ascertain the meaning of doubtful or ambiguous statutes. The rule there announced has never been allowed to overcome a positive statute, fixing in plain and certain terms a right or liability when a subject of litigation, and this is so whether the cause of action sounds in contract or in tort. The mere nonenforcement of an ordinance by the administrative officers of a city will not overcome it, or estop the municipality from claiming its benefit when sued by one whose injury is traceable to its nonobservance. Judge Dillon in his work on Municipal Corporations, 5th ed. vol. 4, § 1627, lays down the rule as follows: "Unless there be a valid contract creating, or a statute declaring, the liability, a municipal corporation is not bound to secure a perfect execution of its by-laws, relating to its public powers, and it is not responsible civilly for neglect of duty on the part of its officers in respect to their enforcement, although such neglect results in injuries to private persons which would otherwise not have happened." Wheeler v. Plymouth, 116 Ind. 158, 9 Am. St. Rep. 837, 18 N. E. 532; Hines v. Charlotte, 72 Mich. 278, 1 L.R.A. 844, 40 N. W. 333; Faulkner v. Aurora, 85 Ind. 130, 44 Am. Rep. 1; Schultz v. Milwaukee, 49 Wis. 254, 35 Am. Rep. 779, 5 N. W. 342; Norristown v. Fitzpatrick, 94 Pa. 121, 39 Am. Rep. 771.

That the failure to execute an ordinance on the part of administrative officers will

not make the city liable or permit one who has violated the ordinance to take advantage of what may well be called his own wrong rests in even a deeper principle. The act of a city council in passing an ordinance is an expression of the corporate power of the city. That duty, so far as the concern of the public goes, is fully performed when the ordinance is passed, and to permit administrative officers, whose duty rests in the police power rather than in the legislative power of the city, to nullify an ordinance by ignoring it or failing wilfully to enforce it, would be to deny to the city council the power to legislate. Such a holding would put the power to veto an ordinance, which from the very nature of things must be accepted as the true expression of the will of the public, in the hands of an agency having no legislative power or responsibility. This court has heretofore had occasion to meet this question in a case, which, if not on all fours, is like in principle. In *Kitsap*

*County Transp. Co. v. Seattle*, 75 Wash. 673, 135 Pac. 476, Ann. Cas. 1915C, 115, the court said: "But the ordinance imposes a penalty on all who may thus transgress its provisions, and places the duty upon the port warden of enforcing it. If, then, the city is liable in damages, it must be by reason of the negligence of the port warden in failing to enforce the ordinance. The general rule is that a city is not civilly liable for neglect of duty on the part of its officers in respect to the enforcement of ordinances."

And then, after quoting the text of *Dillon*, the opinion continues: "In the present case, the negligence, if any, being that of the port warden in failing to exercise proper diligence in the enforcement of the ordinance, would not render the city liable to respond in damages."

Affirmed.

*Main*, Ch. J., and *Holcomb*, *Mount*, and *Mackintosh*, JJ., concur.

### Annotation—Injury to one while coasting in street.

This note supplements the note to *Lynch v. Public Service R. Co.* 42 L.R.A. (N.S.) 865, on the above question.

As to liability of municipal corporation for failure to prevent improper conduct in or use of streets, see notes to *Van Cleef v. Chicago*, 23 L.R.A. (N.S.) 636, and *Goodwin v. Reidsville*, 42 L.R.A. (N.S.) 862.

As to reciprocal duty of driver of automobile and children coasting in street, see note to *Albert v. Munch*, L.R.A. 1918A, 240.

Generally, as to contributory negligence of children, see note to *Jacobs v. H. J. Koehler Sporting Goods Co.* L.R.A. 1917F, 10, especially subdivision on "Coasting across track," p. 158.

It will be noticed that in *FLUCKIGER v. SEATTLE*, ante, 780, a recovery against the municipality for an injury received by the plaintiff, while coasting in violation of an ordinance prohibiting coasting, was denied, although the ordinance had not been enforced by the police.

As shown by the cases in the earlier note, the fact that a person who was injured while coasting was pursuing this sport on a public street will not necessarily preclude a recovery, if he was not guilty of contributory negligence, and negligence by another causing the injury is made to appear. Several later cases have passed upon the question.

In *Terrill v. Virginia Brewing Co.* (1915) 130 Minn. 46, L.R.A. 1915E, 1028, 153 N. W. 136, Ann. Cas. 1917C, 453, L.R.A. 1918F,

where plaintiff's child, while coasting down a city street, was killed while attempting to avoid the defendant's wagon, which was proceeding on the left side of the street, it was held that it could not be said as a matter of law that the boy was guilty of contributory negligence, but that the question was for the jury. In this case a statute requiring all vehicles to keep to the right was held applicable, but a statute regulating the speed of motor vehicles approaching a curve was held not to apply. [As to applicability of rule of road, where highway is being used for other than ordinary purposes of travel, see note to this case in L.R.A. 1915E, 1028.]

In *Stoll v. Laubengayer* (1913) 174 Mich. 701, 140 N. W. 532, the act of the deceased in starting her sled down an incline after the defendant had left his team standing over a path into which the sled turned, resulting in a collision with the team, was held the proximate cause of the accident, and a recovery was denied.

The evidence in *Rassman v. Shore Line Electric R. Co.* (1913) 87 Conn. 701, 87 Atl. 271, which is not set out, was held not to establish the neglect by the defendant of any duty owed to the plaintiff's intestate, but to show negligence by the latter, in attempting to coast across the defendant's track in front of a car, without observing its approach.

J. T. W.

## FLORIDA SUPREME COURT.

CHARLES BLUM COMPANY, Plff. in Err.,  
v.  
TOWN OF HASTINGS.

(— Fla. —, 79 So. 442.)

**Municipal corporations — refund — power.**

1. A general right exists in the common council or other proper boards of incorporated cities or towns to refund to individuals any sums paid by them as corporate taxes, which are found to have been wrongfully exacted, or for any reason inequitable.

*For other cases, see Municipal Corporations, II. h, 1; III. in Dig. 1-52 N. S.*

**License — unearned fee — recovery.**

2. Where a license to do business, granted by a municipality, becomes inoperative by operation of law, the licensee may recover the unused portion of his license tax from the municipality.

*For other cases, see Assumpsit, II. c, 2, in Dig. 1-52 N. S.*

**Municipal corporations — return of fees.**

3. Under the implied powers granted to municipalities, they have power and it is their duty to return money received for a privilege which the person who paid it is prevented from enjoying, through the operation of law, through no fault of his.

*For other cases, see Municipal Corporations, II. a. in Dig. 1-52 N. S.*

(West, J., dissents.)

(June 17, 1918.)

**E**RROR to the Circuit Court for St. Johns County to review a judgment in favor of defendant in an action brought to recover the unused portion of plaintiff's license tax to carry on the business of a retail liquor dealer. Reversed.

The facts are stated in the opinion.

Headnotes by BROWNE, Ch. J.

**Note.** — As to right to recover liquor license fee, or unearned portion thereof, upon adoption of legislation or regulation inimical to the sale of intoxicating liquor, see annotation in L.R.A.1918C, 241.

As to right to recover an unearned liquor license fee, where the business has not been entered upon, or has been abandoned voluntarily, or where the license turns out to have been improperly issued, see note in 16 L.R.A.(N.S.) 512, and a subsequent decision in 21 L.R.A.(N.S.) 112.

As to the right or duty of municipal corporations to refund liquor license fees on adoption of state prohibition, see note in 16 L.R.A.(N.S.) 519.

Messrs. Odom & Butler, for plaintiff in error:

Defendant has received money belonging to plaintiffs, which it is not in equity and good conscience entitled to retain, for which this action will lie, and the trial court erred in sustaining the demurrer thereto.

Allsman v. Oklahoma City, 21 Okla. 142, 16 L.R.A.(N.S.) 511, 95 Pac. 468, 17 Ann. Cas. 184; Roberts v. Boise City, 23 Idaho, 716, 45 L.R.A.(N.S.) 593, 132 Pac. 306; Pearson v. Seattle, 14 Wash. 438, 44 Pac. 884; Hirn v. State, 1 Ohio St. 15; Lydick v. Korner, 15 Neb. 500, 20 N. W. 26; Chamberlain v. Tecumseh, 43 Neb. 221, 61 N. W. 632; Auburn v. Mayer, 58 Neb. 161, 78 N. W. 462; Wood v. School Dist. 80 Neb. 722, 15 L.R.A.(N.S.) 478, 115 N. W. 308; Sharp v. Carthage, 48 Mo. App. 26; People v. Sackett, 15 App. Div. 290, 44 N. Y. Supp. 593; Nurnberger v. Barnwell, 42 S. C. 158, 20 S. E. 14; Zeglin v. Carver County, 72 Minn. 17, 74 N. W. 901; 15 R. C. L. p. 316, § 76; Scott v. New Castle, 132 Ky. 616, 21 L.R.A.(N.S.) 112, 116 S. W. 788; Bruner v. Clay City, 100 Ky. 567, 38 S. W. 1062; Hembrich Bros. Brewing Co. v. Kit-sap County, 45 Wash. 454, 88 Pac. 839; State ex rel. Grigsby v. Buehler, 10 S. D. 156, 72 N. W. 114; State v. Rouch, 47 Ohio St. 478, 25 N. E. 60.

Messrs. Frank E. Jennings and Cyrus H. Smithdeal, for defendant in error:

A municipal corporation has only such powers as are delegated to it by the legislature, and such other additional powers as are fairly implied.

State ex rel. Ellis v. Tampa Waterworks Co. 56 Fla. 858, 19 L.R.A.(N.S.) 183, 47 So. 358.

There is nothing in the charter of the town of Hastings, nor in the general statutes governing municipal corporations, directly authorizing the relief which plaintiff seeks.

Wood v. School Dist. 80 Neb. 722, 15 L.R.A.(N.S.) 478, 115 N. W. 308; Chamberlain v. Tecumseh, 43 Neb. 221, 61 N. W. 632; Shue v. Silver Creek, 98 Neb. 551, 153

As to the recovery of an unearned license fee upon revocation of the license for misconduct of the licensee, see note in 45 L.R.A.(N.S.) 593.

As to the right of the legal representative of a deceased licensee to recover a portion of the fee paid for a liquor license because of the licensee's death before the expiration of the term of the license, see note in 15 L.R.A.(N.S.) 478.

As to the liability for damages for wrongful revocation of liquor license, see Claussen v. Luverne, 15 L.R.A.(N.S.) 698, and note.

N. W. 562; *Roberts v. Boise City*, 23 Idaho, 716, 45 L.R.A.(N.S.) 593, 132 Pac. 306; *Anderson v. Galesburg*, 118 Ill. App. 530; *Melton v. Moultrie*, 114 Ga. 462, 40 S. E. 302; *Fitzgerald v. Witcherd*, 130 Ga. 552, 16 L.R.A.(N.S.) 519, 61 S. E. 227; *Phoebus v. Manhattan Social Club*, 105 Va. 144, 52 S. E. 839, 8 Ann. Cas. 667; *McGinnis v. Medway*, 176 Mass. 67, 57 N. E. 210; *Peyton v. Hot Springs Co.* 53 Ark. 236, 13 S. W. 764; *Alexander v. State*, 77 Ark. 294, 91 S. W. 181.

**Browne, Ch. J.**, delivered the opinion of the court:

The seventh count of the declaration in this case alleges, in substance, that the Charles Blum Company paid the city of Hastings the sum of \$2,000 for the privilege of selling wines, beers, and liquors for the term of one year from October 1, 1913; that on the 2d day of April, 1914, a local option election was held in St. Johns county, and the precinct in which the town of Hastings is situated voted against the sale of liquor. Plaintiff's license thereby became revoked, through no act or fault of his, and he was deprived of the use thereof from the 2d day of April to the 1st day of October, 1914. He sues for the return of the amount due for the unexpired and unused portion of his license.

A demurrer to this count was sustained, and the court, on plaintiff's motion, permitted him to dismiss without prejudice all the counts of the declaration except the seventh; and upon plaintiff refusing to amend or to plead further final judgment was rendered against him in favor of the defendant. The plaintiff took writ of error to this court.

The question presented is the right or duty of the town of Hastings to refund to the plaintiff the amount paid for the privilege of carrying on a business of retail liquor dealer therein from the 2d day of April to the 1st day of October, 1914.

The defendant in error invokes the doctrine that a municipal corporation has only such powers as are delegated to it by the legislature and such other additional powers as are fairly implied. There can be no dispute about this rule, and the difference arises as to what powers or duties may be fairly implied from the powers delegated. It can hardly be controverted that among the duties and powers of a city is that of paying its just obligations; in this instance, to return money received for granting permission for a person to do something, right at the time, that subsequently became beyond its power to grant or permit.

The rule is thus stated in 2 Cooley on Taxation, 3d ed. 1396, 1397: "A general

right exists in the state to refund any tax collected for its purposes, and a corresponding right probably exists in the common council, or other proper boards, of cities, villages, towns, etc., to refund to individuals any sums paid by them as corporate taxes, which are found to have been wrongfully exacted, or are believed to be, for any reason, inequitable."

What is said by Mr. Cooley with regard to a refund of taxes applies with greater force to an amount paid for a license, as is pointed out by the Kentucky court of appeals in *Scott v. New Castle*, 132 Ky. 616, 21 L.R.A.(N.S.) 112, 116 S. W. 788: "We do not agree with counsel for appellees that a license such as appellant paid is a mere tax, which, when voluntarily paid, cannot be recovered. It is true that a tax, when voluntarily paid, cannot be recovered, though illegally collected. *Louisville & N. R. Co. v. Com.* 89 Ky. 531, 12 S. W. 1064. But this rule is based upon considerations of public policy, and because the law provides ample means of correcting an illegal assessment before the process of collecting the tax begins; but a license such as appellant paid is on a different footing. As said in *Com. v. Central Hotel Co.* 121 Ky. 846, 90 S. W. 565, 12 Ann. Cas. 172: 'A license to sell liquor is for the purpose of regulating the traffic, and incidentally to raise revenue.' . . . Taxes are levied and collected regardless of the will or consent of the taxpayer, and for the purpose of raising a revenue. . . . The popular understanding of the word "license" undoubtedly is a permission to do something which, without the license, would not be allowed. The object of the license is to confer a right that does not exist without the license. . . . ' In obtaining the license of appellees, appellant expected, and appellees intended, it to confer the privilege to appellant to sell liquors in New Castle for the period of a year. In point of fact he exercised under it the privilege for 107 days, for which appellees received, and are entitled to retain, \$146.60."

Authorities are cited on both sides, some of which conflict, and others are not applicable to the conditions in the instant case. While it is necessary to discuss these cases extensively, a brief reference to some of them may be enlightening. In *Chamberlain v. Tecumseh*, 43 Neb. 221, 61 N. W. 632, the court laid down this rule: "It is the settled law of this state, where a liquor license has been issued by a city council, and on appeal such license is canceled, that the licensee is entitled to a repayment pro tanto, of the sum paid for the same, for the unexpired time." *Lydick v. Korner*, 15 Neb. 500, 20 N. W. 26, and



*State ex rel. Conway v. Weber*, 20 Neb. 473, 30 N. W. 531, followed."

An expression by the court in this case that, "while each member of the court as now constituted, entertains some doubt as to the soundness of the doctrine laid down in these cases, we do not now feel justified in disturbing a rule which has been so long recognized and followed by the courts," is much relied on by the defendant in error. At best, this is but the expression of a doubt that was not of sufficient strength to justify the court in disturbing the rule, and it cannot have any weight with us.

The case of *Scott v. New Castle*, supra, arose from a different state of facts, but the same question was involved as in the instant case; the duty of a city to refund to a person the unused portion of a license to sell liquor which he was prevented from using by reason of the result of a local option election. In that case the court said: "We are unable to see upon what principle of good morals or law appellees can justify their retention of the amount in controversy, or legally compel appellant to lose it. In the case of *Bruner v. Clay City*, 100 Ky. 567, 38 S. W. 1062, it was held that, where one was required to pay more for a liquor license than was authorized by the city charter, the payment was not a voluntary one, and he might recover from the city the amount paid in excess of the charter requirement. In principle the case supra does not differ from the case at bar. In each case the amount paid to the city for a license was more than it was entitled to receive. In the one case the amount [paid] was in excess of what the charter allowed; in the other the payment was not above the amount fixed by law, but it was in excess of what the city was entitled to retain, because the privilege of selling liquors which the license conferred failed by as much as the alleged excess to cover the period for which it was issued."

In the case of *Roberts v. Boise City*, 23 Idaho, 716, 45 L.R.A. (N.S.) 593, 132 Pac. 306, the court said: "The people in their collective capacity as a municipality ought to observe the same rules of honesty and fair dealing that they would demand of each other under like circumstances in their individual dealings."

In that case the license of the person who sought to recover for the unused portion had been revoked, because he was shown to be an unfit person to conduct a saloon. This the council had authority to do, and, as he lost his right to conduct a saloon through his own wrongdoing, the court held he was not entitled to recover. It, however, laid down this rule: "It is only where a license granted by the municipality

becomes inoperative by the act of the municipality itself, or by operation of law, that the licensee may recover the unearned portion of his license tax."

In the instant case the plaintiff in error was deprived of his right to carry on his business in Hastings, "by operation of law." While it is not governing, still the fact that the people of Hastings participated in the election at which the sale of liquors was prohibited is of much persuasive force.

In the case of *Bart v. Pierce County*, 60 Wash. 507, 31 L.R.A. (N.S.) 1151, 111 Pac. 582, the court said: "It is said that the rule thus announced is not supported by the weight of authority in other jurisdictions, but it at least finds support in the great principles of natural justice and common honesty, by which the conduct of the state and its instrumentalities, as well as the conduct of the individual, should be guided."

In *Sharp v. Carthage*, 48 Mo. App. 26, the court said: "The plaintiff did not pay \$800 for a piece of worthless paper, but for the privilege of carrying on a dramshop within the city for a period of one year, without interference by the city while he complied with other legal requirements. When the city immediately thereafter voted against the sale of intoxicating liquors within its boundaries, it thereby effectually prohibited the county court from granting a license to plaintiff, and rendered its own license worthless. The case is not distinguishable on principle from one where the city, having power to revoke a license, would on one day issue license for a year, pocket the proceeds, and then revoke it the next day without cause, because the case concedes that the only reason why the county court failed to issue a license to the plaintiff was that the city by its vote had prohibited it from so doing. The principle governing an action for money had and received is that the possession of money has been obtained which cannot be conscientiously withheld. Such an action is designed for the advancement of justice, and it is applicable where a person receives money which, in equity and good conscience, he ought to refund. *Stephenson County v. Manny*, 56 Ill. 160. This language is particularly applicable to the present proceeding."

For other cases in support of our holding that it is the duty of a city or county to refund for the unused portion of a liquor license, where the licensee has been prevented from using it through no fault of his own, but through operation of law, see *Allsman v. Oklahoma City*, 21 Okla. 142, 16 L.R.A. (N.S.) 511, 95 Pac. 468, 17 Ann. Cas. 184; *Nurnberger v. Barnwell*,

42 S. C. 158, 20 S. E. 14; *Zeglin v. Carver* County, 72 Minn. 17, 74 N. W. 901; *Bruner v. Clay City*, 100 Ky. 567, 38 S. W. 1062; *Stephenson County v. Manny*, 56 Ill. 160.

We concede that there is some conflict in the authorities, but in those cited by defendant in error the conflict, except in the Georgia cases, is more seeming than real. Thus Massachusetts has a statute providing for a refund of a license fee under certain circumstances, and in the case cited by defendant in error it was held that the license did not come within the provisions of the statute. Another reason why the Massachusetts case is not in point is that cities in that state have no authority to grant liquor licenses.

"Although the question whether licenses shall be granted in any city or town is determined by the vote of the inhabitants thereof, still the licensing board, whether a special commission, or the mayor and aldermen or the selectman, do not act as the agents of the city or town, but as public officers specially designated in that behalf, and, in the absence of any statute to the contrary, the city or town is not answerable for their acts as such officers. The license is not granted by the city or town, but by the state acting through its duly appointed officers." *McGinnis v. Medway*, 176 Mass. 67, 57 N. E. 210.

The case of *Phoebus v. Manhattan Social Club*, 105 Va. 144, 52 S. E. 839, 8 Ann. Cas. 667, was one to test the validity of a statute requiring social clubs to pay a license. At the time the license fee was paid, notation was made on the stub of the tax book that payment was made under protest. The court held that this did not show that the payment was not voluntarily made. The court, however, held, contrary to the contention of the defendant in error in the instant case, that it was a tax. The question before us, the refund of a license fee, when, through no fault of the holder, the city is unable to continue the privilege it gave him and which he paid for, was not involved in the Virginia case.

It is not necessary to continue this discussion to all the cases, as in most of them different statutes and different facts were under consideration. We will content ourselves with the summing up found in 15 R. C. L. p. 316, § 76: "A considerable number of the decisions favor recovery where, by the adoption of general prohibition or otherwise, the license is annulled or revoked without the licensee's fault; but the rule appears to be otherwise where the license turns out to have been improperly issued because the formalities and requirements prescribed by law were not observed."

It is not disputed that the defendant in

error received \$2,000 from the plaintiff in error, for which it agreed to permit him to carry on the business of liquor dealer for a year; that through no fault of his own he was able to engage in such business about six months only; that the plaintiff in error has paid about \$1,000 from which he received no benefit or return, and the city got hold of \$1,000 for which it gave nothing. If this money is not refunded, the plaintiff in error loses \$1,000; and if it be refunded the city loses nothing, for it only gives back to him to whom it belongs what he deposited with the city, for a privilege which the city is now unable to grant.

Specious reasoning which justifies an individual or a corporation, municipal or private, in keeping money received for a privilege that, through no fault of either party, the recipient is unable to grant, is of slight weight. It is no answer to this to say that the licensee knew that the people might at any time place it beyond the power of the city to give him the privilege that he had paid for. The city had the same knowledge, and it can be as well said that it took the money, knowing it might have to return for the unused portion of the license, if, through operation of law, it could not continue the privilege it had agreed to grant to the licensee.

The defendant in error concludes his brief with a statement of which this is a part, and this seems to be the theory upon which it predicates its defense: "It took that chance. Having taken the chance, it cannot, we submit, be heard to urge an implied obligation for relief against this defendant."

It is noticeable that the courts that sustain the contention of defendant in error adopt the same reasoning. We quote from some of the decisions: It is "one of the risks and chances which he assumes when he procures his license." *Roberts v. Boise City*, 23 Idaho, 716, 45 L.R.A. (N.S.) 593, 132 Pac. 306.

"He takes his chances about 'the revocation.'" *McGinnis v. Medway*, 176 Mass. 67, 57 N. E. 210.

This is the language of the race track and the card table, and is in marked contrast to that used by the courts that hold it to be the duty of the city to refund for the unused portion of a liquor license when, through no fault of either party, both are precluded from doing that for which one paid and the other received the money.

Says the New York court: "Under such circumstances, justice requires that restitution of the amount should be made." *People ex rel. Thomas v. Sackett*, 15 App. Div. 290, 44 N. Y. Supp. 593.

The Missouri court says: It is money

that "cannot be conscientiously withheld, . . . money which, in equity and good conscience, he ought to refund." *Sharp v. Carthage*, 48 Mo. App. 26.

Oklahoma says: It is "money . . . which it is not, in equity and good conscience, entitled to retain." *Allsman v. Oklahoma City*, 21 Okla. 142, 16 L.R.A. (N.S.) 511, 95 Pac. 468, 17 Ann. Cas. 184.

Kentucky puts it on the ground of "good morals" (*Scott v. New Castle*, 132 Ky. 616, 21 L.R.A. (N.S.) 112, 116 S. W. 788) and quotes approvingly from *Northrop v. Graves*, 19 Conn. 548, 50 Am. Dec. 264, where the right of recovery is predicated "upon the principle of Christian morals."

The supreme court of Washington justifies the refund on "the great principles of natural justice and common honesty."

We think those courts that decide that refund should be made on grounds of "equity and good conscience," "fair dealing," "natural justice and common honesty," stand on higher ground than those that adopt the theory that the transaction is a gamble, in which the city is the lucky participant.

We have examined a number of cases where various aspects of this question have been considered, and, in addition to any reasons that may have governed those courts that hold that refund should be made, there is one peculiar to Florida that is conclusive to us, and that is that the policy of this state is fixed by legislative enactment.

Chapter 5479, Act June 1, 1905 (Comp. Laws 1914, §§ 1215a, 1215b), provides for the refund by the state and counties to the holder of a liquor license "for and on account of the unexpired and unused portion" of his license, where the sale of liquor is discontinued as the result of a local option election. The state has thus adopted a public policy of fair dealing, and it is contrary to this policy for municipalities to retain the money paid for the unused portion of a liquor license, when the sale of liquor is discontinued as the result of a local option election in a precinct or county in which the city is situated.

It is argued that because the legislature provided for a refund by the state and counties that it is an expression of the legislative intention that such refund should not be made by cities. We see no force in that argument. Legislation was necessary for a recovery from the state, as it could not be sued. It is true a county may be sued, but, as legislation with regard to license taxes always embraces both the state and counties, it was natural that they should be linked together in providing for a refund.

It is pertinent to inquire into the reason for the enactment of this law. The only answer is that "the legislature was actuated by the desire to be just and fair." There is no other answer. And we ask: Why should not a municipality be as just and fair as the state?

It is contended that a city has no power to refund this money. A city has certain implied powers. Among them is the obligation of fair dealing, and to return money received for a privilege which the person who paid it is prevented from enjoying, through the operation of law, through no fault of his.

As it is the duty of the city to return the money to the holder of the license, the declaration states a cause of action, and it was error to sustain the demurrer.

The judgment is reversed.

Taylor, Whitfield, and Ellis, JJ., concur.

West, J., dissenting:

The license in this case was revoked through the fault of neither the municipality nor the licensee, and upon the happening of an event which both of them knew at the time the license tax was paid might occur at any time during the period covered by the license.

At the time when the license of plaintiff in error was issued, the right to engage in the sale of intoxicating liquors had, by a vote of the electors, been prohibited in most of the counties in the state, and, being fully informed with respect to the possibility of his privilege being revoked at any time, the plaintiff in error voluntarily paid the fees required for such privilege.

The license tax is for the privilege of dealing in spirituous, vinous, or malt liquors, and the statute which fixes the amount of such tax also expressly forbids the issuance of a fractional license for state, county, or municipal purposes to such dealers. Section 31, chapter 6421, Acts of 1913, Laws of Florida (Comp. Laws 1914, §§ 596kkkk, 3448b, 3448c, 3555, 3555a, 3564). So that any person who engages in this business in this state for any period of time must pay the whole amount of the license tax imposed.

It is true the state and counties refund what is termed "the unexpired and unused portion of said license," when any county becomes dry as a result of a local option election; but that is under the authority of a statute authorizing it, which is expressly limited in its terms to the state and counties of the state. Fla. Acts. 1905, chap. 5479. Fla. Comp. Laws, §§ 1215a and 1215b.

A permit and license to sell intoxicating liquors is not a property right, and confers no vested interest in the holder, and it seems to be well settled that the recovery back of a license tax which was voluntarily paid will not be allowed in the absence of statutory authority therefor. 25 Cyc. 631; 15 R. C. L. § 74; Johnson v. Atkins, 44 Fla. 185, 32 So. 879; Baker v. Fairbury, 33 Neb. 674, 50 N. W. 950; Camden v. Green, 54 N. J. L. 591, 33 Am. St. Rep. 686, 25 Atl. 357; Maysville v. Melton, 102 Ky. 72, 42 S. W. 754; Houston v. Feeser, 76 Tex. 365, 13 S. W. 266; Helena v. Dwyer, 65 Ark. 155, 45 S. W.

349; Cahaba v. Burnett, 34 Ala. 400; Mays v. Cincinnati, 1 Ohio St. 268; Phoebus v. Manhattan Social Club, 8 Ann. Cas. 667, and note. (105 Va. 144, 52 S. E. 839).

In view of this rule I think the sounder view is that held by the authorities referred to in the majority opinion, which hold the contrary view to that reached by the court, since there is no apparent reason why a liquor dealer should be put in a different class, with reference to the right to recover back license fees paid by him, from that of any other licensee who asks for a refund of license fees voluntarily paid by him.

#### KANSAS SUPREME COURT.

L. F. SCHUHMACHER, Appt.,  
v.  
J. C. LEBECK.

(103 Kan. 458, 173 Pac. 1072.)

#### Sale — naming price as offer.

1. A letter from the owner of land, in reply to an inquiry as to his price therefor, stating terms of sale, the person addressed to make his commission from the buyer, does not amount to an offer to sell the land to such person, but merely makes him the owner's agent to find a purchaser on the terms named. And such agent cannot, by reporting that he has sold the land on such terms, compel its conveyance to himself. For other cases, see *Contracts*, I. d. 4, in Dig. 1-52 N. S.

#### Broker — right to purchase.

2. An attempt by the agent in such a case to purchase the land for himself, without disclosing to his principal that he is the buyer, is within the rule which forbids a selling agent to buy for himself, notwithstanding he was to receive as a commission whatever price the land brought over a fixed sum.

For other cases, see *Brokers*, II. a, in Dig. 1-52 N. S.

(July 6, 1918.)

**A**PPEAL by plaintiff from a judgment of the District Court for Meade County sustaining a demurrer to a petition filed to compel specific performance of a contract for the sale of certain land. Affirmed.

The facts are stated in the opinion.

Mr. Frank S. Sullivan, for appellant:

Under the offer as made by the defendant,

Headnotes by MASON, J.

**Note.** — As to right of broker to purchase real estate listed with him for sale, see annotation following this case, post, 790, and references therein to annotations on related questions.

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plaintiff could not have defrauded him, even though he did purchase the property himself, and the defendant could not possibly be prejudiced or damaged, no matter to whom the land was sold, or who accepted the offer.

Johnson v. Furnish, 29 Kan. 523.

There was not a fiduciary relation between plaintiff and defendant.

Johnson v. Hayward, 74 Neb. 157, 5 L.R.A.(N.S.) 112, 103 N. W. 1058, 107 N. W. 384, 12 Ann. Cas. 800.

Plaintiff's acceptance of the offer constituted a binding contract.

Seymour v. Armstrong, 62 Kan. 720, 64 Pac. 612.

Mr. H. Llewelyn Jones, for appellee:

The alleged contract between the parties cannot be upheld, for the reason that the agent was himself an undisclosed purchaser.

Fry v. Platt, 32 Kan. 62, 3 Pac. 781; Evans v. Brown, 33 Okla. 323, 125 Pac. 469; Rodman v. Manning, 53 Or. 336, 20 L.R.A.(N.S.) 1158, 99 Pac. 657, 1135; Butler v. Agnew, 9 Cal. App. 327, 99 Pac. 395; De L'Archerie v. Rutherford, 54 Wash. 134, 102 Pac. 1033; Franck v. Blazier, 66 Or. 377, 133 Pac. 800.

The letter of October 16, 1916, disclosed that the plaintiff was the purchaser; this the defendant did not assent to, hence no contract was entered into.

Bridge v. Calhoun, Denny & Ewing, 57 Wash. 272, 106 Pac. 762; Bentz v. Eubanks, 41 Kan. 28, 20 Pac. 506; Seymour v. Armstrong, 62 Kan. 720, 64 Pac. 612; Osburn v. Addington, 91 Kan. 586, 138 Pac. 603; Hayes v. Possehl, 92 Kan. 609, 141 Pac. 559; Van Doren v. Altoona Portland Cement Co. 92 Kan. 473, 141 Pac. 560.

Specific performance is a matter of equity, not a matter of right.

Lingo v. Gentry, 101 Kan. 270, 166 Pac. 476.

Mason, J., delivered the opinion of the court:

L. F. Schuhmacher sued J. C. Lebeck, asking the specific performance of a contract which he alleged existed for the sale to him by the defendant of a quarter section of land. A demurrer to his petition was sustained, and he appeals.

The facts as set out in the pleading were: The plaintiff wrote to the defendant, inquiring the lowest cash price for which he would sell the land. An answer was received, saying: "You know all about my land locations and also \$2,500, \$1,000 down & the rest, \$1,500 at 6 per cent for five years if the party wants it that way you make your commission from the buyer. I have listed my place with other real estate men all with the same terms. Cash in hand for \$2,000."

A few weeks later the plaintiff sent the defendant a telegram reading: "Have sold your quarter for \$2,000 cash net to you. Letter will follow." Two days later he received a letter from the defendant, written five days before, directing him to take the land off his list, as it was priced too low. The plaintiff made a demand for the conveyance of the land, which was refused.

1. The first letter of the plaintiff was not an offer to sell the land to the defendant for \$2,000. It merely amounted to a "listing" of the land with the plaintiff as a real estate agent; that is, it made the plaintiff the agent of the defendant for the purpose of finding a purchaser ready, willing, and able to buy the land for the price and on the terms stated. This is manifest from the language used; and that the plaintiff so understood it is evident from the fact that his telegram did not purport to be an acceptance on his part of an offer made to him, but a report of the negotiation of a sale to someone else.

The plaintiff contends that the letter amounted to an offer to the public at large, which would result in a contract whenever anyone accepted it. We do not regard it as open to this interpretation. The plaintiff was given no authority to bind the defendant to sell the land to anyone. If he had produced a buyer, say at \$2,100 cash, the defendant could doubtless have been required to pay him a commission of \$100 (*Culbertson v. Sheridan*, 93 Kan. 268, 144 Pac. 268), but could not have been compelled to part with the property (*Brown v. Gilpin*, 75 Kan. 773, 90 Pac. 267, 17 L.R.A.(N.S.) 210). As the plaintiff could not, by any act of his, commit the defendant to a sale to someone else, he could not, by representing that he had attempted to do so, create a condition un-

der which he could compel a conveyance to himself.

2. The plaintiff concedes the general rule to be that an agent to sell cannot buy for himself. 20 L.R.A.(N.S.) 1158; 9 C. J. 538, 539. But he argues that the purpose of the rule is to protect the vendor from imposition, and, inasmuch as here the defendant was interested only in receiving the amount he had named, no such imposition was possible, and the rule does not apply. He cites *Johnson v. Furnish*, 20 Kan. 523, as sustaining this theory. That case merely holds, however, that it is no imposition upon a vendor, who has become obligated to sell land to one person, to be asked to execute the deed to a grantee designated by the buyer, instead of to the buyer himself.

It may be doubted whether, in the present case, the defendant's letter resulted in the employment of the plaintiff to find a purchaser of the property at any sum over \$2,000 in cash, he to have the excess as his commission. The proper interpretation may be that the selling price contemplated was \$2,000, and enough more to constitute a reasonable or customary commission. But assuming that his commission was measured by the excess, whatever it might be, we hold that he could base no claim upon a sale attempted to be made to himself, without advising the defendant that he was the purchaser. A sale made by an agent to himself is invalid, notwithstanding there may have been no actual fraud or unfairness on his part, and no injury to the purchaser. 2 Enc. L. & P. 1062, 1063; 9 C. J. 539; note in 80 Am. St. Rep. 560-562. Inasmuch as the defendant had a legal right to accept or reject any buyer produced by the plaintiff (being absolutely liable, however, for the commission), he was entitled to know all the facts concerning the transaction, including the price, before deciding upon his course in that regard, and a representation by the agent that the sale was to be made to a third person, when in fact he himself was the buyer, was capable of misleading the principal to his prejudice.

The following text may seem open to a construction militating against this view: "The mere fact that a broker is authorized to purchase or sell a particular piece of property at a specified price does not work an exception to the rule, for even under such circumstances a broker is expected to make an honest endeavor to obtain the most advantageous terms possible for his employer. A distinction is drawn, however, between such a case and an employment by which the broker is to receive as his compensation all that he can secure above a

fixed price net to the vendor, there being nothing in an agency of the latter character to cause the broker to refrain from himself purchasing at the price set by his employer and subsequently selling at an advance to a third person, for, by the terms of his employment, he would be entitled to such advance, even if the sale had been made direct." 4 R. C. L. 277, 278.

In the case upon which the second sentence of this quotation is based (*Merriam v. Johnson*, 86 Minn. 61, 90 N. W. 116), the owner of a tract of land sued his agent, to whom he had made a net price, for the profit he had obtained by buying it himself and at once reselling it. A verdict was directed for the plaintiff. The ruling was reversed on the ground that: the trial "court should have submitted the question of fact to the jury whether the contract was as appellant claimed, . . . namely, that he should have the privilege of selling the land at any price above \$10 per acre, in any way he chose, even to himself."

The supreme court added: "In view of a new trial, we have referred to the correspondence in detail, since it is upon that appellant relies, and we unhesitatingly hold that, if those letters constituted the only communication between the parties hereto, they conclusively prove that appellant em-

ployed respondent to sell the land for him at the best price obtainable by him, with his experience and ability as a real estate agent; that his compensation for such services was to be a reasonable commission to be paid by the purchaser; that appellant deeded his property to Cousins upon the supposition that he was the purchaser in fact, not knowing that respondent was buying the land himself, and even before so doing had sold it at an advance of \$6 an acre." 86 Minn. page 66.

The first headnote in the official report of the case reads: "A real estate agent, who induces the owner to fix a net price upon certain property, upon the supposition that a sale is to be made to a third party, cannot himself purchase the property and by such transaction, in any event, realize a greater profit than a reasonable commission in addition to the net price." 86 Minn. page 61.

The following cases, while not passing directly upon the exact question now under consideration, tend to support the decision we have announced: *O'Meara v. Lawrence*, 159 Iowa, 448, 141 N. W. 312; *Payne v. Beard*, — C. C. A. —, 247 Fed. 247; *Foss Invest. Co. v. Ater*, 49 Wash. 446, 95 Pac. 1017.

The judgment is affirmed.

### Annotation—Right of broker to purchase real estate listed with him for sale.

This note supplements a note on the same subject, appended to *Rodman v. Manning*, 20 L.R.A.(N.S.) 1158.

As to the right of a broker to commission where, with the principal's consent, he becomes the purchaser of land listed with him to sell, see note in 31 L.R.A.(N.S.) 536.

As pointed out in the note first referred to, which this note supplements, it is the general rule that a broker, with whom real estate has been listed for sale, cannot become the purchaser of it, or be interested in the purchase of it, unless his interest is disclosed to the principal. *Payne v. Beard* (1917) — C. C. A. —, 247 Fed. 247; *Braden v. Hollen* (1917) — Iowa, —, 163 N. W. 199; *Fred Brown & Co. v. Cash* (1914) 165 Iowa, 221, 145 N. W. 80; *O'Meara v. Lawrence* (1913) 159 Iowa, 448, 141 N. W. 312; *SCHUHMACHER v. LEBECK*, ante, 788; *Sutton v. Kiel Cheese & Butter Co.* (1913) 155 Ky. 465, 159 S. W. 950; *Sonnesyn v. Hawbaker* (1914) 127 Minn. 15, 148 N. W. 476; *Clubb v. Seullin* (1911) 235 Mo. 585, 139 S. W. 420; *Williams v. Johnston* (1916) 194

Mo. App. 242, 186 S. W. 1163; *McBride v. Campreden* (1918) — N. M. —, L.R.A.1918D, 407, 171 Pac. 140; *Re Dickinson* (1915) 171 App. Div. 486, 157 N. Y. Supp. 248; *Stiebel v. Lissberger* (1915) 166 App. Div. 164, 151 N. Y. Supp. 822, affirmed in (1918) 222 N. Y. 604, 118 N. E. 1078; *Baird v. Conover* (1917) — Okla. —, 168 Pac. 997; *Kuckenberg v. Durkee* (1914) 70 Or. 593, 140 Pac. 627; *Franck v. Blazier* (1913) 66 Or. 377, 133 Pac. 800; *Durand v. Preston* (1910) 26 S. D. 222, 128 N. W. 129; *Murphy v. Earl* (1912) — Tex. Civ. App. —, 150 S. W. 486; *Texas Brokerage Co. v. Barkley* (1910) 60 Tex. Civ. App. 466, 128 S. W. 431; *Sterling Engineering Constr. Co. v. Miller* (1916) 164 Wis. 192, 159 N. W. 732.

It has been held, however, that where the agency was to sell for a fixed price, and there is left with the broker no power of judgment or discretion, but he is merely to comply with particular and defined instructions, he is under no obligation to inform his principal that he is interested in the purchase of the property he is authorized to sell. *Clubb*

v. Scullin (1911) 235 Mo. 585, 139 S. W. 420.

Where the broker induces his principal to execute a deed or contract for the sale or conveyance of real estate listed with him to sell, and conceals from him his interest in the purchase, the principal, upon ascertaining the facts, at least as against the broker, or others with knowledge of the broker's fraud, is entitled to have the deed or contract canceled. *Payne v. Beard* (1917) — C. C. A. —, 247 Fed. 247; *O'Meara v. Lawrence* (1913) 159 Iowa, 448, 141 N. W. 312; *Kuckenberg v. Durkee* (1914) 70 Or. 593, 140 Pac. 627; *Texas Brokerage Co. v. Barkley* (1910) 60 Tex. Civ. App. 466, 128 S. W. 431. And where the contract is still executory, the broker is not entitled to its specific performance. *SCHUHMACHER v. LEBECK*, ante, 788; *Sutton v. Kiel Cheese & Butter Co.* (1913) 155 Ky. 465, 159 S. W. 950; *Curran v. Kent* (1915) 35 S. D. 523, 153 N. W. 142; *Murphy v. Earl* (1912) — Tex. Civ. App. —, 150 S. W. 486. For a contract of this character creates against the principal no legal liability. *Stiebel v. Lissberger* (1915) 166 App. Div. 164, 151 N. Y. Supp. 822. And where the principal conveys the premises without knowledge of the broker's interest in the purchase, and the latter subsequently sells the property at a profit, he may be required to account to the principal for the profits he made out of the transaction. *Fred Brown & Co. v. Cash* (1914) 165 Iowa, 221, 145 N. W. 80; *Clark v. Rogers Foundry & Mfg. Co.* (1917) — Mo. App. —, 199 S. W. 576; *Williams v. Johnston* (1916) 194 Mo. App. 242, 186 S. W. 1163; *McBride v. Campreden* (1918) — N. M.

—, L.R.A.1918D, 407, 171 Pac. 140; *Durand v. Preston* (1910) 26 S. D. 222, 128 N. W. 129. Or the principal may hold the broker for the damages suffered by him by reason of the fraud; *Re Dickinson* (1916) 171 App. Div. 486, 157 N. Y. Supp. 248.

And a broker who procures a sale or is instrumental in procuring the sale of the listed land, if interested in such purchase, cannot recover the commission he would have been entitled to had he acted in good faith towards his principal. *Braden v. Hollen* (1917) — Iowa, —, 163 N. W. 199. And this is true, although the attempt of the broker to purchase in his own interest falls through, but as a result thereof the principal makes the sale to another. *Alford v. Creagh* (1913) 7 Ala. App. 358, 62 So. 254; *Slagle v. Russell* (1911) 114 Md. 418, 80 Atl. 164. If the commission has actually been paid by the principal in ignorance of the broker's fraud, he is entitled to recover the same upon subsequently learning the facts. *Sterling Engineering & Constr. Co. v. Miller* (1916) 164 Wis. 192, 159 N. W. 732.

If the broker acts openly and fairly in the matter and with full knowledge of his principal, he may become the purchaser or become interested in the purchase of the property listed with him for sale. *Mitchell v. Gifford & Co.* (1910) 133 Ga. 823, 67 S. E. 197; *Sonnesyn v. Hawbaker* (1914) 127 Minn. 15, 148 N. W. 476; *Franck v. Blazier* (1913) 66 Or. 377, 133 Pac. 800; *Harris v. Wagner* (1917) — Tex. Civ. App. —, 195 S. W. 35; *Burt v. Stringfellow* (1916) 48 Utah, 330, 159 Pac. 527.

A. G. S.

#### TENNESSEE SUPREME COURT.

W. S. McCORMICK and Wife  
v.

J. A. PHILLIPS, Plff. in Certiorari.

(140 Tenn. 268, 204 S. W. 636.)

#### Contempt — violation of injunction — punishment after appeal.

An appeal from a final decree granting an injunction destroys the power of the chancellor to punish for contempt in violating the injunction, where the appeal vacates all orders contained in the final decree.

**Note.** — As to effect of appeal from injunction upon jurisdiction of trial court to punish for contempt for its violation, see annotation following this case, post, 794.

cree, and the appellate court has power to punish for contempt.

For other cases, see *Appeal and Error, III. b*, in *Dig. 1-52 N. S.*

(July 9, 1918.)

**C**ERTIORARI to the Court of Civil Appeals to review a judgment affirming a judgment of the chancellor adjudging defendant in contempt for violation of an injunction restraining him from building a levee beyond a certain point. Reversed.

The facts are stated in the opinion.

Messrs. G. T. Fitzhugh and Edgar Webster, for plaintiff in certiorari:

The court of civil appeals has the power to hear and determine contempt proceedings against one who violates a prohibi-

tory decree of a lower court, after an appeal has been perfected to the court of appeals.

*State ex rel. Conner v. Herbert*, 127 Tenn. 220, 154 S. W. 957; *State v. Anderson*, 6 Tenn. C. C. A. 1.

The appellate court has exclusive jurisdiction to hear and determine contempt proceedings for the violation of a prohibitory decree of the lower court pending an appeal therefrom, unless the lower court has specifically retained control over its decree, for the purpose of preserving the status quo and punishing for contempt one who violates that decree.

*Merrimac River Sav. Bank v. Clay Center*, 219 U. S. 527, 55 L. ed. 320, 31 Sup. Ct. Rep. 295, Ann. Cas. 1912A, 513; *San Antonio Street R. Co. v. State*, — Tex. Civ. App. —, 38 S. W. 54; *Ex parte Robertson*, 44 Tex. Crim. Rep. 566, 72 S. W. 859; *United States v. Shipp*, 203 U. S. 565, 51 L. ed. 319, 27 Sup. Ct. Rep. 165, 8 Ann. Cas. 265; *Anderson v. Comptois*, 48 C. C. A. 1, 109 Fed. 971; *Kentucky & I. Bridge Co. v. Kreiger*, 91 Ky. 625, 16 S. W. 824; *State ex rel. Carroll v. Campbell*, 25 Mo. App. 635; *National Dock & N. J. Junction Connecting R. Co. v. Pennsylvania R. Co.* 54 N. J. Eq. 167, 647, 33 Atl. 936, 35 Atl. 433; *Avent v. Markette*, 109 Miss. 835, 69 So. 705; 13 C. J. p. 54.

*Mr. R. Lee Bartels*, for defendant in certiorari:

The chancery court had complete jurisdiction to consider proceedings in contempt against Phillips for violating the injunction, even though the original record, in which the injunction was granted, was in this court.

*Merrimac River Sav. Bank v. Clay Center*, 219 U. S. 527, 55 L. ed. 320, 31 Sup. Ct. Rep. 295, Ann. Cas. 1912A, 513; *Burke v. Ellis*, 105 Tenn. 703, 58 S. W. 855; *Justice v. McBroom*, 1 Lea, 555; *Barnes v. Chicago Typographical Union*, 232 Ill. 402, 14 L.R.A.(N.S.) 1150, 122 Am. St. Rep. 129, 83 N. E. 932.

The burden rests upon one adjudged guilty of contempt to show that he has purged himself thereof, in order to be relieved of the punishment.

*Gibson*, Suits in Ch. §§ 922, 924.

*Neill, Ch. J.*, delivered the opinion of the court:

It appears that prior to the 26th of October, 1917, there was filed in the chancery court of Shelby county, a bill by complainants against defendant to enjoin him from erecting a certain private levee, on which he contemplated constructing a

road leading from his farm to a public road mentioned in the pleadings, on the ground that the erection of the levee would cause an overflow of the complainant's land. A fiat was granted by the chancellor, and an injunction issued of a temporary nature, restraining the defendant Phillips from proceeding with the building of the levee, and this injunction was afterwards, by the decree of the court in that case, in a modified form, made perpetual. This decree was entered on August 8, 1917. An appeal bond was filed on September 6, 1917, but there was no prayer for or grant of an appeal. On November 15, 1917, a nunc pro tunc order was entered as of date August 11, 1917, showing the granting of an appeal. The defendant was adjudged guilty of contempt on October 26, 1917, for violation of the injunction order contained in the final decree which, as stated, modified the preliminary injunction in certain particulars not necessary to be stated, but was allowed to purge himself by restoring the situation, as it stood before his violation of the injunction within twenty days after the 26th of October. After the expiration of the twenty days, and in the month of December, 1917, it was represented to the chancellor, by petition, that the defendant had not complied with the order granting him time to restore the situation, and such proceedings were had as that an order was finally entered, directing that he should be imprisoned until he should comply, or should give the bond therein described. From this judgment an appeal was prayed and granted to the court of civil appeals.

Pending the contempt proceedings in the chancery court, the defendant interposed a plea to the chancellor's jurisdiction, on the ground that, the decree in the original cause having been appealed from, the chancellor was denuded of further jurisdiction, and therefore there could be no contempt proceedings instituted against defendant.

The court of civil appeals held that the chancellor had jurisdiction to entertain contempt proceedings against the defendant for violation of the injunction contained in the decree in the principal case appealed from, notwithstanding the appeal, and so affirmed the chancellor's decree. The case was then brought to this court by the writ of certiorari, and it is now here for our decision.

We are of the opinion that the court of civil appeals was in error. The rule long established in this state is that a broad appeal in chancery vacates the decree of the



chancellor, and this necessarily involves all orders contained in such final decree, whether for injunction or otherwise. *Furber v. Carter*, 2 Sneed, 1; *Pond v. Trigg*, 5 Heisk. 532, 536; *Smith v. Holmes*, 12 Heisk. 466; *Turley v. Turley*, 85 Tenn. 251, 1 S. W. 891; *Vaccaro v. Cicalla*, 89 Tenn. 63, 14 S. W. 43; *Moses v. Grainger*, 106 Tenn. 7, 53 L.R.A. 857, 58 S. W. 1067; and see *Davis v. Jones*, 3 Head, 603; *Enochs v. Wilson*, 11 Lea, 228; *Loftis v. Loftis*, 94 Tenn. 231, 237, 28 S. W. 1091; *Fort v. Fort*, 118 Tenn. 103, 111, 112, 101 S. W. 433, 11 Ann. Cas. 964.

It appears that a different rule obtains in some other states. *Barnes v. Chicago Typographical Union*, 232 Ill. 402, 14 L.R.A.(N.S.) 1150, 122 Am. St. Rep. 129, 83 N. E. 932; *State ex rel. Bettman v. Harness*, 42 W. Va. 414, 26 S. E. 270; *Powhatan Coal & Coke Co. v. Ritz*, 60 W. Va. 395, 9 L.R.A.(N.S.) 1225, 50 S. E. 257; *Gates v. M'Daniel*, 4 Stew. & P. (Ala.) 60; *id.* 3 Port. (Ala.) 356. In other jurisdictions, it is held that the power of the lower court is lost by the appeal. *Kentucky & I. Bridge Co. v. Krieger*, 91 Ky. 625, 16 S. W. 824; *State ex rel. Carroll v. Campbell*, 25 Mo. App. 635; *Wilkinson v. Dunkley-Williams Co.* 141 Mich. 409, 104 N. W. 772, 7 Ann. Cas. 40; *Pennsylvania R. Co. v. National Docks & N. J. Junction Connecting R. Co.* 54 N. J. Eq. 647, 35 Atl. 433; *State ex rel. Mason v. Harper's Ferry Bridge Co.* 16 W. Va. 864; *Menuz v. Grimes Candy Co.* 77 Ohio St. 386, 83 N. E. 82, 11 Ann. Cas. 1037. In the Federal courts, the practice is to enter an order retaining control of the injunction in the lower court, but it seems the appellate court also has jurisdiction in such case. *Merrimack River Sav. Bank v. Clay Center*, 219 U. S. 527, 55 L. ed. 320, 31 Sup. Ct. Rep. 295, Ann. Cas. 1912A, 513. In Tennessee, an order retaining jurisdiction in the lower court cannot be made. It was attempted in *Humphreys County v. Houston County*, and held void, or rather vacated by the appeal. *Humphreys County v. Houston County*, 4 Baxt. 591.

The impossibility of sustaining the judgment of the court of civil appeals and the chancellor, in the present instance, will be readily seen from a brief consideration of the nature of contempt proceedings. It may be stated, in a general way, that these proceedings have two aspects. One is public for the vindication of law and order, and the orderly administration of proceedings in court, and is punished by fine and im-

prisonment; the other of a private nature, and is intended to give relief to the party injured. Our statute, upon the subject of contempts appears in Thompson's Shannon's Code, §§ 5918 to 5924, inclusive. Sections 5920 and 5921 are primarily remedial. It is provided in § 5920 that "if the contempt consists in an omission to perform an act which it is yet in the power of the person to perform, he may be imprisoned until he performs it."

Section 5921 provides: "If it consists in the performance of a forbidden act, the person may be imprisoned until the act is rectified by placing matters and person in statu quo, or by the payment of damages."

The judgment in the contempt proceeding in the present case was of a remedial nature, designed to restore the status as it existed when the decree in the main case was entered. Inasmuch as that decree was utterly vacated by the appeal, which was prayed and prosecuted before the final order of imprisonment in the present case was entered, it is perfectly clear that the chancellor's jurisdiction was gone. The jurisdiction was in the court of civil appeals, where the appeal rested. That court had power to punish for the contempt, because a change of the status, after the appeal was granted and bond given, was an effort on the part of the defendant to interfere with the jurisdiction of the court of civil appeals, by changing the condition of the property and the attitude of the parties, on which that court's decree on consideration of the merits had finally to rest.

Of course, the appeal did not vacate the original injunction, which was granted at the time the bill was filed. Whether the chancellor had power to punish for the contempt involved in the violation of the original injunction we need not consider, because no attempt of that kind was made. However, it may be doubted whether he would have such power to punish as for public contempt, as the original cause had left his court, since the contempt proceedings, whether of a public or private nature, are treated as being an incident of the cause, and after the cause has left his court, we are unable to see how the chancellor could further deal with it. This, however, would not prevent an indictment of a party for public contempt, and his punishment in the criminal court.

The result is that the judgment of the Court of Civil Appeals must be reversed, and the contempt proceedings dismissed, at the cost of the complainant.

**Annotation—Effect of appeal from injunction upon jurisdiction of trial court to punish for contempt for its violation.**

This note is supplementary to one in 14 L.R.A.(N.S.) 1150, on the same subject. Like the earlier note, it does not attempt to discuss the preliminary question whether the effect of an appeal is to suspend the operation of an injunction order (as to which, see note in 38 L.R.A.(N.S.) 436), in which case, of course, as there is no order to violate, there is no contempt which the court which granted such order can punish (see, *inter alia*, *Clute v. Superior Ct.* (1908) 155 Cal. 15, 132 Am. St. Rep. 54, 99 Pac. 362; *Ballagh v. Superior Ct.* (1914) 25 Cal. App. 149, 142 Pac. 1123; *Ziegfeld v. Norworth* (1911) 148 App. Div. 185, 133 N. Y. Supp. 208; *Haley v. Walker* (1911) — *Tex. Civ. App.* —, 141 S. W. 166); but, starting with the assumption that the order continues in force, deals with the further question whether the appeal renders the appellate court the proper tribunal to which to resort in case of its violation. Notwithstanding the discussion, in the case above reported, of the question whether the court below had jurisdiction to punish for contempt after the appeal had been perfected, the decision appears to have turned on the preliminary question of the effect of the appeal. The final decree having been suspended, there was no violation of it, and consequently no contempt for which the lower court could punish. On this theory, there is no conflict between this decision and those of other courts, which have held that the power of the court below to punish for contempt is not affected by the appeal. There was, however, as the court points out, a contempt of the appellate court, arising not from the violation of the injunction order but out of the alteration of the status of property during the pendency of the appeal.

In *Alfred v. Alfred* (1914) 87 Vt. 542, 90 Atl. 580, which was an original proceeding for contempt in the appellate court, it was held that, if the injunction remained in force pending the appeal, a violation of it was a contempt of the court that granted it, and not of the appellate court; and that, so far as that court was concerned, the case stood as if no injunction had been granted.

In *United R. Co. v. Superior Ct.* (1916) 172 Cal. 80, 155 Pac. 463, it was

held that a writ of mandate would issue to compel the superior court to cite and punish for contempt a violation of its temporary prohibitory injunction, from which the defendant had appealed.

And in *Wolf v. Gall* (1916) 174 Cal. 140, 162 Pac. 115, it is said to be settled, in California, that an appeal does not stay the force of a prohibitory injunction, and that the lower court has full power to punish a violation of such injunction pending the appeal.

In *Menuez v. Grimes Candy Co.* (1907) 77 Ohio St. 386, 83 N. E. 82, 11 Ann. Cas. 1037, it was held that the circuit court, only, had jurisdiction to punish for contempt for the violation of a decree of the court of common pleas, from which an appeal had been taken to the circuit court with a view to a trial *de novo*, the court saying: "When defendant perfected its appeal by giving the required notice and bond, the case, by operation of law, at once passed from the jurisdiction of the common pleas in to that of the circuit court. A part of the case which so passed was the perpetual injunction from which the appeal was taken. Thereafter, authority to suspend, modify, or enforce the injunction was exclusively in the circuit court." The court also said, in answer to the contention of counsel, that only the court which makes an order may punish the contempt which is implied in its violation, unless the act which is a contempt is also an offense against the state, and so punishable by a court having jurisdiction of crimes and misdemeanors; that such view might have been applicable if the jurisdiction of the circuit court had been invoked by a petition in error for a reversal of the judgment of the common pleas, for error appearing upon its records.

In *Sixth Avenue R. Co. v. Gilbert Elev. R. Co.* (1877) 71 N. Y. 430, the court said that where an appeal with a stay of proceedings had been taken to the general term of the supreme court, from an injunction decree rendered by the special term, which, under the New York statute, states "all proceedings on the part of the plaintiff in execution of the judgment," the court below should have and doubtless has the power, notwithstanding an appeal, to command re-

spect for its judgments and obedience to its mandates until they are reversed.

In *Merrimac River Sav. Bank v. Clay Center* (1910) 219 U. S. 527, 55 L. ed. 320, 51 Sup. Ct. Rep. 295, Ann. Cas. 1912A, 513, it was held that continuing a temporary injunction, pending an appeal to the Federal Supreme Court from a decree of a circuit court dismissing a bill asking injunctive relief, operates to continue in the circuit court such jurisdiction over the subject-matter of the litigation and the parties as to enable them to preserve the status quo pending the appeal, including the power to take cognizance of the violation of the injunction.

In *Graham v. Williamson* (1913) 128 Tenn. 720, 164 S. W. 781, it was held that, inasmuch as the power to punish for contempt is inherent in all courts, and each court can conduct such a matter arising in any case before it, the jurisdiction on appeal from a decision of the chancery court in the main controversy would control the jurisdiction on the merely incidental matter of a contempt arising in the case.

That the appellate court has jurisdiction of a proceeding to enforce by contempt process an injunction or order pending before the court on appeal was apparently regarded, in *Ft. Worth Driving Club v. Ft. Worth Fair Asso.* (1909) 56 Tex. Civ. App. 162, 121 S. W. 213, as not an open question; but the court had no occasion to decide whether such jurisdiction was exclusive of or concurrent with that of the court below.

In *State ex rel. Mason v. Harper's Ferry Bridge Co.* (1879) 16 W. Va. 864, it was held that where there is a dissolution of the injunction and an appeal with supersedeas, the contempt proceedings must be had in the appellate court; but in *State ex rel. Barthet v. Houston* (1885) 37 La. Ann. 852, the trial court was held, under similar circumstances, to possess jurisdiction to punish for contempt.

Reference may also be made to *Turner v. Scott*, 5 Rand. (Va.) 332, where the court was in doubt as to whether the proceeding ought to be in the lower or the appellate court. E. S. O.

#### MISSISSIPPI SUPREME COURT. (Division A.)

ARTHUR D. PARKER, Receiver of J. H. Menge & Sons, Limited, Appt.,  
v.

DANTZLER FOUNDRY & MACHINE  
WORKS.

(— Miss. —, 70 So. 82.)

**Set-off — goods furnished by receiver — implied contract.**

1. The mere fact that one ordering goods from a corporation, with intention of set-

**Note.** — The right to avoid a contract because of mistake as to identity of other party thereto is discussed in the note to *School Sisters v. Kusnitt*, L.R.A.1916D, 801.

Seller's mistake as to identity of vendee as affecting passing of title to the goods sold is discussed in the note to *Hickey v. McDonald*, 13 L.R.A.(N.S.) 413, and supplementary note to *Phelps v. McQuade*, L.R.A. 1918B, 975.

A question somewhat analogous to that presented in *PARKER v. DANTZLER FOUNDRY & MACHINE WORKS* is discussed in notes to *Eldridge v. Finniger*, 28 L.R.A.(N.S.) 227, and *Dixon Livery Co. v. Kane*, L.R.A.1916A, 1213, under the title, "Right of defendant in action by undisclosed principal on contract made by the agent, to avail himself of defenses that would have been available in an action by the agent in his own right on the contract."

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ting off the price against a debt owed by the corporation, consumed them after they were furnished by a receiver of the corporation, does not destroy the right of set-off if he had no notice of the receivership, since no contract with the receiver can be implied.

*For other cases, see Set-off and Counterclaim, I. a, in Dig. 1-52 N. S.*

**Payment — application — by court.**

2. The court will not apply payments, which have not been applied by the parties, so as to cause the debtor to pay money which he had not intended to pay except by way of set-off, upon a claim against the other parties to the transaction.

*For other cases, see Payment, IV. in Dig. 1-52 N. S.*

(April 22, 1918.)

**A**PPEAL by plaintiff from a judgment of the Circuit Court for Harrison County in favor of defendant in a suit to recover the balance alleged to be due on an account for goods sold and delivered by plaintiff to defendant. Affirmed.

The facts are stated in the agreed statement of facts, referred to in the opinion, which is as follows:

"It is hereby agreed by and between the parties hereto that the following constitute the facts in this cause, and that this case shall be tried by the court, without the intervention of a jury, upon the follow-

ing statement of facts: "(1) That J. H. Menge & Sons, Limited, was a corporation domiciled at New Orleans Louisiana, and doing business under said corporate title up to November 28, 1913, on which said date Arthur D. Parker was duly and legally appointed receiver of the said company by the civil district court of the parish of Orleans, state of Louisiana, a competent jurisdictional court, with full power to appoint receivers in such causes, and on which said date the said Arthur D. Parker duly qualified as receiver of the said company and still is the receiver of said company; that the said Dantzler Foundry & Machine Works is a corporation domiciled at Gulfport, Mississippi, and is still engaged in business at said place.

"(2) That on the date, and prior thereto, of the appointment of said receiver, J. H. Menge & Sons, Limited, was indebted to Dantzler Foundry & Machine Works in the sum of \$211.28, and that thereafter, to wit, on December 2, 1913, the said defendant ordered from J. H. Menge & Sons, Limited, without any knowledge whatever of the appointment of A. D. Parker or anybody else as receiver of said company, a bill of goods amounting to \$696.71, and that said order was filled by A. D. Parker, receiver, without any notice being given to said Dantzler Foundry & Machine Works that a receiver had been appointed for said company, and without any notice to said company that the order was being filled by A. D. Parker, receiver; that said goods were shipped by said Parker upon the order sent to J. H. Menge & Sons, Limited, and that there was no order given to said receiver for said shipment; that no notice was given the Dantzler Foundry & Machine Works that it would not be allowed credit upon settlement for the amount due it by J. H. Menge & Sons, Limited, but that the defendant accepted said shipment under the belief that it was being shipped by J. H. Menge, & Sons, Limited, and that it would be allowed credit for the amount owing to it by said company.

"(3) That the goods so ordered on December 2, 1913, were used by the defendant before invoice was received and before the defendant had any knowledge that A. D. Parker had been appointed receiver for said company or that the order had not been filled by said J. H. Menge & Sons Limited; that thereafter the defendant learned of the appointment of such receiver, and did, after learning of such fact, order other goods from said receiver up to and including May 19, 1914, aggregating the sum of \$1,213.95, including said invoice of \$696.71, ordered December 2, 1913, from J. H. Menge & Sons; that the Dantzler Foundry & Ma-

chine Works made a payment on said purchases in the sum of \$715.95 on the 27th day of April, 1914, and made another payment of \$286.72 on June 27, 1914, leaving a balance on goods sold by the said receiver, including the order of December 2, 1913, to J. H. Menge & Sons, filled by the receiver, to the said Dantzler Foundry & Machine Works in the sum of \$211.28, the amount due by J. H. Menge & Sons to defendant.

"(4) It is further agreed that on December 2, 1913, at the time of the purchase of said first bill, the defendant did not know that the said A. D. Parker, or anyone else, had been appointed receiver of said plaintiff, and that said receiver had the possession and control of all the assets of the said J. H. Menge & Sons, Limited. It is further agreed that on the 1st day of December, 1913, the defendant sent in an order to J. H. Menge & Sons for a portion of the items aggregating the purchases of \$1,213.95; the receiver of said company received said order and shipped the goods under the circumstances above outlined, that is to say, without any knowledge on the part of the defendant that a receiver had been appointed, and the defendant thought and expected the order to be filled by the person from whom it was ordered; that the goods were received and used prior to receipt of invoice or knowledge on the part of the defendant that a receiver had been appointed, but some time subsequent to the orders above mentioned the defendant did receive knowledge of the appointment of plaintiff as receiver of said company, and all subsequent purchases by defendant from the receiver were invoiced in the name of the receiver.

"(5) That the said receiver did not intend to deliver goods, wares, and merchandise in his possession as receiver to said defendant in settlement of or in part settlement of an old indebtedness of the said Menge & Sons to the defendant, which accrued prior to the appointment of the receiver, and that said receiver did not have any order of court or authority to pay said indebtedness in favor of the defendant in money or by the delivery of goods, wares, and merchandise, and that the Dantzler Foundry & Machine Works did not intend to and did not order the goods on December 1 and 2, 1913, from A. D. Parker, receiver, but ordered the goods shipped under said orders from J. H. Menge & Sons, Limited, under the belief that said orders would be filled by said J. H. Menge & Sons, Limited, and defendant allowed to set off its claim against said company.

"(6) That no dividends have been paid to the creditors of J. H. Menge & Sons,

Limited, by the receiver, but that the claim of \$273.60 of the said Dantzler Foundry & Machine Works against the said J. H. Menge & Sons, Limited, is recognized by the receiver and the civil district court as a just claim against said company, subject to a credit of \$62.32; that a dividend of — per cent has been declared."

**Messrs. H. Gardner and Charles S. Brown** for appellant.

**Messrs. White & Ford**, for appellee:

The Louisiana court's jurisdiction did not extend to the receiver in this state. Defendant had the right, if judgment was obtained against it, and it paid the money, to know that that would be the last time it would have to pay it.

*Pendleton v. Russell*, 144 U. S. 640, 36 L. ed. 574, 12 Sup. Ct. Rep. 743; *Booth v. Clark*, 17 How. 322, 15 L. ed. 164; *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773; *Hubert v. New Orleans*, 64 C. C. A. 389, 130 Fed. 21; *Great Western Min. & Mfg. Co. v. Harris*, 198 U. S. 561, 49 L. ed. 1163, 25 Sup. Ct. Rep. 770; *Fowler v. Osgood*, 4 L.R.A. (N.S.) 824, 72 C. C. A. 276, 141 Fed. 20; *High, Inj.* § 239, note p. 205; *Tully v. Herrin*, 44 Miss. 626; *Newell v. Fisher*, 24 Miss. 392; *Homer v. Barr Pumping Engine Co.* 180 Mass. 163, 91 Am. St. Rep. 269, 61 N. E. 883; *Murtey v. Allen*, 71 Vt. 377, 70 Am. St. Rep. 779, 45 Atl. 752; *Hunt v. Columbian Ins. Co.* 55 Me. 290, 92 Am. Dec. 596; *Wyman v. Eaton*, 107 Iowa, 214, 43 L.R.A. 695, 70 Am. St. Rep. 195, 77 N. W. 865; *American Trust & Sav. Bank v. McGettigan*, 152 Ind. 582, 71 Am. St. Rep. 353, 52 N. E. 793.

Defendant having ordered the goods from Menge & Sons under the belief that said order would be filled by them, and allowed to set off its claim against said company, it was not liable.

*Hendricks v. Robinson*, 56 Miss. 694, 31 Am. Rep. 382; *Bartlett v. Lowell*, 201 Mass. 151, 87 N. E. 195; 9 Cyc. 401, 403; *Arkansas Valley Smelting Co. v. Belden* Min. Co. 127 U. S. 387, 32 L. ed. 248, 8 Sup. Ct. Rep. 1308; *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 94.

**Smith, Ch. J.**, delivered the opinion of the court:

This is an appeal from a judgment against appellant in a suit instituted by him to recover of appellee a balance alleged to be due on an account for goods sold and delivered. The cause was submitted to the judge to be decided, without a jury, upon an agreed statement of facts which the reporter will set out in full, from which it will be observed that the amount

here in controversy is the exact amount admitted to be due appellee by Menge & Sons, and which it expected to be credited with when it ordered the goods here in controversy.

The contention of appellant is that appellee is attempting to use the debt due it by Menge & Sons as a set-off against a debt due him for goods sold and delivered after he took charge of the business of Menge & Sons as receiver. Appellee disclaims any such intention, and simply denies any liability whatever to appellant because of the shipment to it by appellant of the goods ordered by it from Menge & Sons.

Appellant can recover on the item of the account sued on, representing the price of the goods ordered by appellee from Menge & Sons and shipped by him, only upon a promise, either express or implied, by appellee to pay him therefor. He does and could not successfully claim that appellee made any such express promise, and no such promise can be here implied, for the reason that the goods were used by appellee before it learned that they were shipped by appellant, and not by Menge & Sons, it being "elementary law that a party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent." 2 Elliott, Contr. § 1408; 1 Elliott, Contr. § 102; 35 Cyc. 60; *Boulton v. Jones*, 2 Horn & H. 564, 27 L. J. Exch. N. S. 117, 3 Jur. N. S. 1156, 6 Week. Rep. 107; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *Randolph Iron Co. v. Elliott*, 34 N. J. L. 184, 3 Mor. Min. Rep. 63. The wisdom of this rule is manifest here, for appellee has a perfect defense by way of set-off against the party with whom it thought it was contracting, which defense appellant claims cannot be availed of against him.

That appellant must lose the balance unpaid on the price of the goods in so far as the recovery thereof from appellee is concerned is not here material, for he brought that trouble upon himself by shipping the goods without notifying appellee that its order therefor was being filled by him, and not by Menge & Sons, the party to whom the order was given, so that appellee could have exercised its right to accept or reject them.

But it is said by counsel for appellant that this principle cannot be availed of here, for the reason that under the rules governing the application of payments this item of the account sued on must be held to have been paid. The agreed statement of facts does not disclose that the payments

were applied by either appellee or appellant to any particular items of the account, and the court should not apply them so as to cause appellee to pay money which it does not owe and did not intend to pay, except in the manner disclosed by the agreed statement of facts, that is to say, by, in effect, setting off against it the debt due it by Menge & Sons.

The fact that appellee paid a part of the sum demanded of it by appellant for these goods does not constitute a ratification by it of appellant's substitution of himself for Menge & Sons in the sale thereof; such payment being wholly gratuitous and imposing no obligation whatever on appellee. Affirmed.

## IOWA SUPREME COURT.

J. E. WILLIAMS

v.

C. L. HERRING et al., Appts.

(— Iowa, —, 165 N. W. 342.)

### Partnership — share of profits.

1. One undertaking to manage a department of a business for a stated salary and a percentage of the profits does not become a partner in the business by reason of the agreement as to share of profits.

*For other cases, see Partnership, I. in Dig. 1-52 N. S.*

### Equity — business accounting.

2. An action by a department manager of a business for his share, under his contract, of the profits of that department, does not become one for accounting in equity, even though the transaction will be cumbersome and difficult to present to a jury if there is no question of mutual accounts.

*For other cases, see Accounting, in Dig. 1-52 N. S.*

(December 11, 1917.)

**A**PPEAL by defendants from a judgment of the District Court for Polk County overruling a motion for transfer to equity, for trial, of an action brought to recover damages for breach of a business contract. Affirmed.

Statement by Stevens, J.:

Action at law to recover compensation under a contract and damages for an alleged violation thereof. Defendant moved to transfer the trial to equity, and this appeal is from the judgment of the district court overruling said motion.

Messrs. Clark & Byers and Clifford V. Cox for appellants.

Messrs. George A. Wilson and Ayres, Strauss, & Shaw, for appellee:

The action was properly brought at law and is not cognizable in equity.

Note.—As to effect of sharing profits in addition to salary or other compensation, to create partnership relation, see annotation following this case, post, 801; and references therein to annotations on related questions.

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McMartin v. Bingham, 27 Iowa, 234, 1 Am. Rep. 265; Faville v. Lloyd, 140 Iowa, 507, 118 N. W. 871; Mayo v. Halley, 124 Iowa, 677, 100 N. W. 529; Galusha v. Wendt, 114 Iowa, 597, 87 N. W. 512; Grand v. Bulles, 69 Iowa, 525, 29 N. W. 439; Frick v. Kabaker, 116 Iowa, 503, 90 N. W. 498; Upton v. Paxton, 72 Iowa, 298, 33 N. W. 773; Marks Hat Co. v. Slatnik, — Iowa, —, 154 N. W. 758; Mitchell v. Beck, — Iowa, —, 156 N. W. 424; Freeman v. Miller, 157 App. Div. 715, 142 N. Y. Supp. 797; Bradford, E. & C. R. Co. v. New York, L. E. & W. R. Co. 123 N. Y. 316, 11 L.R.A. 116, 25 N. E. 499; Church v. Anti-Kalsomine Co. 118 Mich. 219, 76 N. W. 383; Clements v. W. S. Cooper Co. 136 N. Y. Supp. 93; Niehaus v. Niehaus, 141 App. Div. 251, 125 N. Y. Supp. 1071; Uhlman v. New York L. Ins. Co. 109 N. Y. 421, 4 Am. St. Rep. 482, 17 N. E. 363; Oppenheimer v. Van Raalte, 151 App. Div. 601, 136 N. Y. Supp. 197; Arkadelphia Mill Co. v. Barker, 109 Ark. 171, 159 S. W. 209; McCabe v. Colleton Mercantile & Mfg. Co. 106 S. C. 25, 90 S. E. 161; Bellingham v. Palmer, 54 N. J. Eq. 136, 33 Atl. 199.

The contract did not constitute a partnership agreement.

Porter v. Curtis, 96 Iowa, 539, 65 N. W. 824; Winter v. Pipher, 96 Iowa, 17, 61 N. W. 663; American Trust Co. v. Life Ins. Co. 173 N. C. 558, 92 S. E. 706; Freeman v. Miller, 157 App. Div. 715, 142 N. Y. Supp. 797; Oppenheimer v. Van Raalte, 151 App. Div. 601, 136 N. Y. Supp. 197.

The motion to transfer asks that the action be transferred from law to equity in entirety. Therefore if the action in either count of this petition is properly brought at law, the motion should have been overruled.

Mitchell v. Beck, — Iowa, —, 156 N. W. 428.

The cause of action set out in second count of plaintiff's petition is one for damages for breach of contract to convey personal property, which under no circumstances could be maintained in equity.

8 R. C. L. § 199.

Stevens, J., delivered the opinion of the court:

Plaintiff's petition, which is in two counts, is based upon the alleged violation by defendant of certain terms of a written contract, entered into on the 21st day of March, 1913, between the parties hereto, by the terms of which the defendant agreed to establish a wholesale and retail oil and gasoline business as a department of the business at that time conducted by him in the city of Des Moines, for the purpose of handling oils and gasoline of all kinds and description at wholesale and retail, same to be conducted as a branch to the principal business of defendant. All necessary capital up to \$50,000 was to be furnished by the defendant, the business to be located so far as possible in the buildings then occupied by defendant, the office facilities, credit rating, and other branches thereof to be employed and used in the conduct thereof without charge, except a pro rata charge for overhead expenses, based upon the actual cost to defendant of the items of rent, light, heat, office expenses, and materials furnished. Plaintiff agreed to devote his entire time and attention to the management of the department of the business referred to in said contract, for which it was agreed he should receive as full compensation \$125 per month payable monthly, and in addition thereto 30 per cent of the net profits of said business, to be determined annually as of the 31st day of December of each year, and to be divided and distributed as soon thereafter as convenient. It was further agreed that said contract should be in full force and effect for a term of five years, and plaintiff was therein given the option, personally, to, at any time during the life of said contract, purchase any part of the said business covered by said contract, up to 30 per cent of the actual amount invested therein, without any addition for good will, the purchase price thereof to be the cash value of the amount purchased, to be determined by the net charge upon the books of defendant to the department covered by said contract, showing the actual amount invested therein.

Plaintiff in count 1 of his petition alleges that he entered into said business and continued therein until on or about April 1, 1917; that he has received as compensation \$125 per month only, and that the net income of said business during the time he conducted same was \$40,000; and prays judgment against the defendant for 30 per cent thereof, or \$12,000. For a second cause of action he alleges that on or about the 15th of March, 1917, and during the life of said contract, and while he was yet in the employ of defendant, he sought to

exercise his option, under the terms thereof, to purchase 30 per cent of the value of the department of defendant's business covered thereby, but that defendant refused to convey same to him, or carry out the terms thereof in relation thereto; that the value of said business exceeded the actual amount invested therein in the sum of \$45,000; and prays judgment upon this count of his petition for \$13,500, and in the full sum of \$25,500.

The defendant for answer to plaintiff's petition admitted the execution of the contract, the payment of \$125 per month, and denied the remaining allegations thereof. Defendant for further answer alleges that defendant entered into contracts and leases for the right to use and occupy the real estate necessary for the conduct of said business; that same extends over a long period of years; that defendant contracted for and erected large buildings, oil tanks, and other equipment for the handling and conduct of business covered by said contract; that defendant purchased a large stock of oil and other products, which was continuously replenished from time to time in the conduct of said business; that defendant employed a large force of salesmen, stockmen, bookkeepers, and other employees, and expended large sums in advertising and placing the products of said business on the market; that the business was conducted by plaintiff as manager; that the books showing the transactions of said business were kept under the direction of plaintiff, and that same are in the possession of the department of defendant's business covered by said contract; that the same contains a vast number of items of debit and credit; that said business should be charged with the expense of buildings, leases, tanks, and equipment of every kind, together with the numerous items of expenses incident to the carrying on of said business; and that in determining whether said business yielded a net income it will be necessary to examine and go over all of the items upon said books and the transactions of said business, and also the question of depreciation of the value of buildings and equipment, and that same can only be properly and efficiently done by an accounting, and moved that this cause be transferred to equity for trial, which motion was by the court overruled.

The foregoing is a sufficient statement of the issues to indicate the grounds upon which appellant seeks to have the trial of this cause transferred to equity. The contention of appellant is that the relation between the parties is in the nature of a partnership, and that this action cannot be maintained until there has been a de-

termination by a court of equity whether the business conducted by the plaintiff, in fact, yielded a profit. There is no controversy between the parties, but that, if the contract created a partnership relation, this cause should be transferred to equity and the accounts there adjusted; but it is quite clear that no such relation was created by the contract, or is shown by the pleadings to exist between the parties. Plaintiff was, under no provision of the contract, to share in the losses of said business, and same was to be conducted as a department or branch of the business in which defendant was at that time engaged under the name of the Herring Motor Company.

It has been repeatedly held by this court that participation in the profits of a business alone does not constitute a partnership. There must be a sharing of losses. *Porter v. Curtis*, 96 Iowa, 539, 65 N. W. 824; *Winter v. Pipher*, 96 Iowa, 17, 64 N. W. 663; *Haswell v. Standing*, 152 Iowa, 291, 132 N. W. 417, Ann. Cas. 1913B, 1326. The contract considered in *Porter v. Curtis*, supra, was, in its provision for a share of the profits, quite like the contract involved in this controversy. In that case the court said: "It is very plain that the contract, as expressed in the writing, is not a contract of partnership. It is a hiring at a stated salary of \$1,200 a year, and a share of the profits. Porter undertook to devote his time to the business of the defendants as an engineer and draftsman, and attend the letting when it became necessary. It is well settled in this state that a mere participation in the profits of a business does not constitute a partnership as between the parties. There must be a sharing of the losses."

All of the capital of said business was to be furnished by appellant up to \$50,000, and appellee was to have no interest in the capital or equipment of said business, unless he purchased and paid therefor upon the basis set forth in said contract, but was to receive as additional compensation 30 per cent of the net income of said business, to be ascertained and paid as provided in said contract. The pleadings do not show that the relation of partners existed between the parties.

II. The principal contention of counsel for appellant, however, is that the ascertainment of the net income, if any, of said business, necessarily involves the examination and consideration of all of the items of income received and expense incurred in the conduct of said business, that numerous other questions, such as depreciation in the value of buildings and equipment, taxes, losses, etc., must be considered, and

that the number of items involved is so great that same can be properly tried and determined only by a court of chancery.

Plaintiff alleged in his reply that there is no dispute between the parties as to the "amount of commodities purchased and sold by the plaintiff and defendant under said contract; that there is a dispute as to certain charges for expense and depreciation, and of not exceeding twenty-five items; that the defendant has now and has had in his possession all the books and records in relation to said business." Of course, the allegations of plaintiff's reply are not controlling, but as plaintiff was in charge of and managed the business covered by the contract, the statements thereof afford some insight into the probable extent of the actual controversy between the parties. Attached to plaintiff's petition is a series of interrogatories, intended to elicit from defendant a full and complete statement of the items of debit and credit shown upon the books of said business. It does not appear from the pleadings that there are mutual accounts to be considered, but rather that all of the accounts are upon one side, and that the trial of the first count of plaintiff's petition involves only the determination of the question whether said business yielded a net income. Undoubtedly, the number of items upon the books and the transactions covered by the period of said business will be cumbersome and difficult to present to a jury, and yet, so far as the pleadings disclose, the accounts are not complicated or intricate, but vast in point of numbers. It is a matter of common experience that in the trial of cases of this character items of account not in dispute are practically eliminated by agreement of counsel, and that accounts involving great numbers of items and vast sums of money are presented in such a way as to reasonably be within the understanding and comprehension of a jury.

Plaintiff in the first count of his petition seeks to recover 30 per cent of the net income of the business in question. Appellant alleges that the books were kept under plaintiff's directions, and are in the office where same were kept. Apparently, the principal reason for seeking a transfer of this cause to equity is that same can there be much more conveniently and probably efficiently tried than at law. Conceding that this is true, yet the pleadings do not disclose a controversy arising out of a matter cognizable in a court of equity, and the relief sought upon the first count is for a sum alleged to be due as compensation, and upon the second count for damages based upon an alleged violation of one of the provisions of said contract. The



question of mutual accounts is not, under the pleadings, involved. The fact that the controversy involves a large number of items of debit and credit, arising out of many business transactions, and that same could be more conveniently tried to the court, is not a ground of equitable jurisdiction. The test is not whether the cause can be more conveniently or satisfactorily tried and determined by the court than a jury, but the accounts must be mutual, requiring an accounting, or there must be some other ground of equitable cognizance not shown to exist in this case. *McMartin v. Bingham*, 27 Iowa, 234, 1 Am. Rep. 265; *Faville v. Lloyd*, 140 Iowa, 501, 118 N. W.

871; *Galusha v. Wendt*, 114 Iowa, 597, 87 N. W. 512; *Marks Hat Co. v. Slatnik*, — Iowa, —, 154 N. W. 758; *Bradford v. New York, L. E. & W. R. Co.* 123 N. Y. 316, 11 L.R.A. 116, 25 N. E. 499.

In our opinion, plaintiff's cause of action upon both counts was properly brought at law, and he is entitled to a trial thereof by jury.

The ruling and judgment of the district court is affirmed.

Gaynor, Ch. J., and Weaver and Preston, JJ., concur.

Petition for rehearing denied.

### Annotation—Sharing profits in addition to salary or other compensation as creating partnership relation.

The general question of the effect of an agreement to share profits to create a partnership is treated in the note to *Miller v. Simpson*, 18 L.R.A.(N.S.) 963. That treatment, of course, includes the earlier cases upon the present question, and reference should be made thereto for same (see especially pp. 1019 et seq.), only the later cases being included herein. As is shown by the note referred to, the great weight of authority is to the effect that a mere participation in profits does not, in itself, create a relation of partnership, but that profit sharing is evidence of the partnership relation, although not conclusive, and, at most, prima facie or presumptive evidence of such relation; that this presumption of partnership may be overcome by countervailing proof; and that when the profit sharer is simply an agent or servant, who receives the profits as compensation for his services, without more, he is not liable as a partner, and the presumption is overthrown. In other words, in the case of a contract of employment between a master and his servant, or a principal and his agent, a provision for payment of a part of the profits to the agent or servant as compensation, or a part of the compensation, for his services, gives the employee none of the rights of a partner in the business, and imposes upon him none of a partner's liability, especially if the sharing in the profits is a mere means of ascertaining and determining the amount of the compensation for the services. And the fact that one receives a part of the profits and, in addition, a salary or other compensation, seems to point more strongly to the existence of the relation of master and servant,

or principal and agent, rather than that of copartners, than does the mere fact that the only remuneration is to be a share of the profits.

The later cases, in the main, support the foregoing rules.

Thus, some courts in recent cases have unqualifiedly held that a contract to receive a salary and a share of the profits of an enterprise, for services rendered, does not, in itself, constitute a partnership agreement. *WILLIAMS v. HERRING*, ante, 798 (holding that one undertaking to manage a department of a business for a stated salary and, in addition, a percentage of the profits, does not become a partner in the business by reason of the agreement as to sharing profits); *Rice v. Dougherty* (1911) 165 Ill. App. 125 (holding that an arrangement whereby one was employed at a stated monthly salary and, in addition, was to receive a specified portion of the net profits, did not, in itself, make the parties partners); *Miller v. Pepperling* (1914) 185 Mo. App. 222, 170 S. W. 328 (holding that a contract whereby one person furnished ground and money for the erection of houses, and the other was to superintend the erection and to be paid at a certain rate for doing the carpenter work, and that the profits, if any, realized upon the sale of the houses, was to be equally divided, does not create a partnership, since "essential elements of a partnership are lacking"); *Donahue v. Hanighen* (1914) 96 Neb. 180, 147 N. W. 464 (holding that a contract whereby a contractor agreed to pay an engineer a certain sum per month and, if the business proved profitable, a share of the profits, did not create a partnership, the en-

gineer having furnished nothing but his services); *Goodin v. Pitt* (1913) 36 Nev. 156, 134 Pac. 459 (holding that an undertaking to work in the defendant's business of manufacturing flour for a stated salary per month and, in addition, a specified percentage of the annual profits, over a certain amount, "in further consideration of services performed," creates a relation of employer and employee, and not a partnership relation, notwithstanding the compensation was measured in part by the profits, and the court saying that the fact that the compensation as an employee was, in part, to be determined by the profits of the business of his employer, did not create a partnership relation); *Gandía v. Pizá Hermanos* (1911) 17 P. R. R. 780; *Donkin v. Disher* (1913) 49 Can. S. C. 60, reversing on other grounds (1913) 18 B. C. 230. And this is especially true where there is no community of interest in the partnership property (*Lyden v. Spohn-Patrik Co.* (1909) 155 Cal. 177, 100 Pac. 236; *WILLIAMS v. HERRING*); and no liability for partnership debts is created (*Lyden v. Spohn-Patrik Co.* (Cal.) supra; *Goodin v. Pitt* (Nev.) supra) it being expressly held in many, although not all, jurisdictions that there must be a sharing of losses, in addition to participation in profits, in order to create a partnership (see *WILLIAMS v. HERRING*).

And that an agreement to share profits, in addition to a salary, is an indicia of a partnership contract, was the rule laid down in *Bankers' Surety Co. v. Maxwell* (1915) 138 C. C. A. 345, 222 Fed. 797, and *Stoller v. Franken* (1916) 171 App. Div. 327, 157 N. Y. Supp. 333. See also *Mayer v. Wilson* (1913) 242 Pa. 473, 89 Atl. 785, and *Orchard v. Dykeman* (1915) 43 N. B. 181, 21 D. L. R. 106. But such evidence is not conclusive (*Bankers' Surety Co. v. Maxwell* (Fed.) supra), and in fact is negated by proof that neither party had any intention of forming a partnership, that there was no

contribution to the capital, and that there was no provision for sharing losses (ibid). And in *Bankers' Surety Co. v. Maxwell* (Fed.) supra, where a building contractor agreed to pay his superintendent a salary and, in addition, as a bonus, a share of the profits, if any, it was said that, where there is an express contract to pay for services, it cannot be reasonably insisted that there is a contribution of services sufficient to work a partnership.

But it has been held that the fact that one receives a salary in addition to a share of the profits does not necessarily negative a partnership. Thus, in *Donleavey v. Johnston* (1914) 24 Cal. App. 319, 141 Pac. 229, where both parties were to draw a stated salary and, in addition, one was to receive one fourth of the profits, it was said that such facts were not unusual provisions in partnership agreements, for partners must live. And see, to the same effect, *Doss v. Ragan* (1911) 135 Ga. 850, 70 S. E. 662, and *Stoller v. Franken* (1916) 171 App. Div. 327, 157 N. Y. Supp. 333. And, upon this point, see also *Mayer v. Wilson* (1913) 242 Pa. 473, 89 Atl. 685, and *Orchard v. Dykeman* (1915) 43 N. B. 181, 21 D. L. R. 106.

In some jurisdictions, the question under consideration herein is governed by statute. For instance, in British Columbia, it is expressly provided by the "Master and Servant Act" (B. C. Rev. Stat. 1911, chap. 153, § 3) that no agreement respecting profit sharing by servants should create any relation in the nature of partnership, and by the "Partnership Act" (B. C. Rev. Stat. 1911, chap. 175, § 4) that the sharing of gross profits does not of itself create a partnership, but that the receipt of a share of the profits of a business is *prima facie* evidence of a partnership. See *Donkin v. Disher* (1913) 49 Can. S. C. 60, reversing (1913) 8 B. C. 230.

G. J. C.

#### LOUISIANA SUPREME COURT.

GEORGE H. ELMENDORF et al., Appts.,  
v.

O. O. CLARK.

(— La. —, 79 So. 557.)

Master and servant — chauffeur — minority — liability.

1. Where the owner of an automobile

Headnote No. 1 by MONROE, Ch. J.

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places in charge of it a chauffeur who does not possess the age qualifications required by a city ordinance, and the chauffeur fails to keep a proper lookout for the safety of children whom he sees playing upon a sidewalk bordering upon the street, and upon the side of the street upon which he is about

Note.—As to operating automobile on highway without license, see notes to *Dudley v. Northampton Street R. Co.* 23 L.R.A. (N.S.) 561; *Hemming v. New Haven*, 25 L.R.A. (N.S.) 734; *Lindsay v. Cecchi*, 35

to drive the machine, and negligently and in violation of the ordinance attempts to pass the children without sounding his horn, and at a prohibited rate of speed, with the result that one of the children, getting suddenly in the street in the course of their play, is knocked down by the machine and fatally injured, such owner will be held liable in damages to the parents, for the injury to and death of the child. There is, in such case, a direct relation of cause and effect between the violations of the prohibitory ordinance and the injury inflicted.

For other cases, see *Automobiles*, II. a; *Master and Servant*, III. a, in Dig. 1-52 N. S.

On rehearing.

**Same — contributory negligence — effect.**

2. The owner of an automobile who permits it to be operated by one not possessing the age qualifications required by municipal ordinance is not liable for injury inflicted by the car upon a boy who dashes in front of it from the sidewalk so suddenly that no one could have avoided striking him.

For other cases, see *Automobiles*, II b. in Dig. 1-52 N. S.

(Leche, J., dissents from proposition 1. Monroe, Ch. J., and O'Niell, J., dissent from proposition 2.)

(November 26, 1917.)

**A**PPEAL by plaintiffs from a judgment of the Judicial District Court for the Parish of Ouachita in favor of defendant in an action brought to recover damages for the death of plaintiffs' son, alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. R. F. Liebler and George Wear, Jr., for appellants:

There is no contributory negligence in the case; the child had the same legal right in the street as the automobile, and had a legal right to assume that an automobile would not run him down without warning or effort to stop or shunt the car.

L.R.A.(N.S.) 699; Atlantic Coast Line R. Co. v. Wier, 41 L.R.A.(N.S.) 307; Conroy v. Mather, 52 L.R.A.(N.S.) 801; Armstead v. Lounsberry, L.R.A.1915D, 628, and Southern R. Co. v. Vaughan, L.R.A.1916E, 1222.

For liability of owner upon the ground of dangerous agency, or of negligence in intrusting car to incompetent or negligent person, for injuries inflicted while the latter is operating the car for his own purpose, see notes to Neubrand v. Kraft, L.R.A. 1915D, 691; Walker v. Klopp, L.R.A.1916E, 1295, and Gardiner v. Solomon, L.R.A. 1917F, 380. And see the later case of Blair v. Broadwater, L.R.A.1918A, 1011.

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Burvant v. Wolfe, 128 La. 787, 29 L.R.A.(N.S.) 677, 52 So. 1025; Navailles v. Dielman, 124 La. 421, 134 Am. St. Rep. 508, 50 So. 449; O'Brien v. Hudner, 182 Mass. 381, 65 N. E. 788, 13 Am. Neg. Rep. 325; Albert v. Munch, 141 La. 686, L.R.A. 1918A, 240, 75 So. 513.

But if it was contributory negligence to be in the street, still the defendant would be responsible, under the last chance doctrine; for had the driver been looking, as he was legally bound to be doing, he would have seen the boy, and seen that he was unaware of the danger, and could have stopped or shunted the car, and avoided running over him.

Burvant v. Wolfe, supra; Thies v. Thames, 77 N. Y. Supp. 276.

Messrs. Stubbs, Theus, Grisham & Thompson, for appellee:

The violation of a city ordinance is not actionable negligence, and in order to recover damages it must be shown that the violation of the ordinance was the proximate cause of the accident, and that the injured party was free from negligence.

21 Am. & Eng. Enc. Law, 481, and notes to ¶ 6; Lopes v. Sahuque, 114 La. 1015, 38 So. 810; Hayes v. Michigan C. R. Co. 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; Grand Trunk R. Co. v. Ives, 144 U. S. 419, 36 L. ed. 489, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659.

The proximate cause of the accident was not the violation of the municipal ordinance with respect to age requirements or speed limit, but it was caused solely by the negligence of the Elmendorf boy in suddenly leaving the sidewalk in an angling direction, close to the approaching automobile.

Zoltovski v. Gzella, 159 Mich. 620, 26 L.R.A.(N.S.) 435, 134 Am. St. Rep. 752, 124 N. W. 527; Henderson v. Detroit Citizens' Street R. Co. 116 Mich. 368, 74 N. W. 525; Jordan v. American Sight Seeing Coach Co. 129 App. Div. 313, 113 N. Y. Supp. 786; Harder v. Matthews, 67 Wash. 487, 121 Pac. 983; Tiffany & Co. v. Drum-

As to liability where automobile is being used by a member of owners' family, see notes to McNeal v. McKain, 41 L.R.A.(N.S.) 775; Birch v. Abercrombie, 50 L.R.A.(N.S.) 59; Griffin v. Russell, L.R.A.1916F, 223, and Van Blaricom v. Dodgson, L.R.A. 1917F, 365. And see the later cases of Hutchins v. Haffner, L.R.A.1918A, 1008; Blair v. Broadwater, L.R.A.1918A, 1011; Halbertson v. Blosser, L.R.A.1918B, 498, and Hays v. Hogan, L.R.A.1918C, 715.

As to intoxication of person operating automobile (including the violation of statutes forbidding such operation), see note to Powell v. Berry, L.R.A.1917A, 306.

mond, 93 C. C. A. 469, 108 Fed. 47; 1 Thomp. Neg. § 237, p. 226.

Monroe, Ch. J., delivered the opinion of the court:

This is an action in damages by the parents of a boy, who lost his life by reason of his being struck by an automobile operated by the minor son of the defendant, and the matter comes to this court upon an appeal by plaintiffs from a judgment rejecting their demand.

The facts, as we find them disclosed by the evidence in the record, are as follows:

The accident occurred on De Siard street, the principal business thoroughfare of the city of Monroe, in the evening of Christmas Day, 1915, at about 5:30 or 6 o'clock, and it is admitted that the sun set at one minute past 5 on that day. The store windows were lighted at the time of the accident, and probably the street lamps, and it is contended on behalf of defendant that the lights upon his automobile (which was a Hudson 4, and, for convenience, will be called a car) had been turned on, but the evidence is radically conflicting on that point, and we shall pass it without decision. Defendant lived in West Monroe, which lies upon the west side of the Ouachita river, opposite the city, and is connected with Monroe by a bridge which spans the river at the end of De Siard street. He had been out for several hours with his car upon the east side of the city, and at the time of the accident was returning home, going westward, on the north side of De Siard street, which is separated by a street car track from the south side, and was the proper side for him to use, going in that direction. The acting chauffeur of the car was his son, who had attained the age of seventeen years some three or four months before, and was operating the car from the chauffeur's position, which, on that particular car, was upon the right end of the front seat, the left end having been occupied by defendant's brother-in-law Mr. Maroney, and the back seat by defendant and three of his friends, to wit, Mr. McLeod to the right, Mr. Whitfield in the middle, and defendant to the left, with Mr. Henry seated upon his knees. As the car approached the scene of the accident, the horn was sounded at a point about 150 feet distant, and was not sounded afterwards, and Whitfield and Henry testify that, from that distance, they saw a "bunch" of boys on the north sidewalk, Whitfield being unable to say whether they were playing, or merely standing, and Henry saying: "I was not looking right up the street. I was looking sort of up the sidewalk at those boys. I had my eyes on the boys. They

were playing—hunting each other. I was looking at the boys, thinking about how my boys used to be Christmas time—playing on the sidewalk."

McLeod saw them from a distance of twenty steps, and says that they were "tagging" at each other. Defendant, being on the left end of the back seat, with Henry on his knees, did not see the boys. "Jim-mie" Clark (the acting chauffeur) saw them from some distance, not stated, "walking down the street," and he says "they started playing," and that he "didn't see them, after that," until just a moment before the accident, when he saw the Elmendorf boy leave the sidewalk, but with his face turned in that direction, and come towards the car, by which he was knocked down and so injured that he died. Maroney "didn't see any children, or anyone on the sidewalk, until this little Elmendorf boy left the curb."

The car, we are satisfied, was moving at a rate exceeding 8 miles and probably as high as 10 miles an hour, and upon a line not less than 6 and probably 8 feet from the curb. The boy was struck by the metal piece which serves as a bumper, upon the thigh of the right leg, breaking the femur, knocking him down, and thereby fracturing his skull. The car, some 12 or 14 feet in length, passed over him, and when it was stopped he was found with his feet under the rear axletree and his body extending back, to the eastward. He was 10½ years of age, and had been sent by his mother to the baker's to get bread for supper, and, the baker not being ready with his bread, he met several other boys of about the same age, one or two of whom were on the same errand, and they seem to have engaged in what might be called skylarking with each other, playing "tag," as one of the incidents of which amusement little Elmendorf playfully kicked another of the boys, and, naturally expecting a return in kind, or of some kind, backed or sidled away, off the sidewalk and into the street; our conclusion, from the testimony and from the fact that the bumper, or guard, of the car struck him on the right leg, being, that his movement was rather a sidelong one, in a southeasterly direction, and that he kept his face turned towards the boys from whom he was retreating, but who was prevented from following by the desire to comply with a request from another member of the party to show him a pair of new boots that he had probably received as a Christmas gift, and which were somewhat obscured by an overcoat. It was perhaps on that account that the movement was not a very rapid one, and it is not surprising, under the circumstances, that there should

be some variance in the testimony as to whether it was backward, forward, or sideways. One or two of the boys say that the little chap backed slowly; another, that he ran. Young Clark, the acting chauffeur, says: "He was coming towards me with his head down, looking back, and he struck the street, about running. . . . He was going at a moderate gait."

It will be understood that the boy and the car were approaching the same point, the one moving in a southeasterly and the other in a westerly direction, and that, as we think, when the boy suddenly found that the car was bearing down on him, he made an attempt to escape it by a turn to his left, thus presenting his right side, upon which he received the impact of the car. After that he was taken to a sanitarium, where he lingered, with intervals of consciousness and suffering, until the following evening, when he died.

The city ordinance in force at that time prohibited the operation of motor cars in Monroe, without licenses, and prohibited the owners of such cars from permitting anyone under eighteen years of age, or not licensed as a driver or chauffeur, to use or operate them, and also made it unlawful for anyone to operate such a car in that part of the city at a higher rate of speed than 8 miles an hour. It is admitted that young Clark was under eighteen years of age, and that he had been operating the car in question, with defendant's consent, for some two and one-half years, and several witnesses testified that they considered him a careful operator.

It may be conceded that the mere violation of a city ordinance by one citizen does not afford another a ground of action in damages, unless some direct relation of cause and effect between the violation and the damages can be traced with reasonable certainty; and, if it were shown that the injury here complained of would have been sustained, even though defendant's car had been operated by a lawful chauffeur, at a lawful rate of speed, and that the chauffeur had been guilty of no negligence, defendant would be entitled to judgment in his favor, notwithstanding that, in fact, the car was operated by an unlawful chauffeur at an unlawful rate of speed. But no such showing has been made. To the contrary, we find warrant in this record, as well as in common reason, for the conclusion that if an older, more cautious and experienced chauffeur had been driving the car, and had seen approaching him, on a sidewalk raised but a few inches above the street, a "bunch" of boys, inspired with Christmas hilarity, he would not have taken his eyes off of them when they began to play "tag,"

but would have assumed that their activities might lead them suddenly into the street, and would have regulated the speed and direction of the car, and have sounded his horn, with reference to that probability. Moreover, it seems quite certain that, if the car had been traveling even a shade slower, it would not have reached the point of collision at the moment that the boy reached there, and that there would have been no accident.

Mr. I. E. Petit, a witness called by plaintiffs, and who may be said to have qualified as an expert in the driving of automobiles, testified as follows, on cross-examination:

Q. In your experience in driving cars on the streets of Monroe, is it not the most dangerous practice that you know of, of children jumping suddenly from the sidewalk?

A. Worse than it is in a city 400 times as big as this.

Q. Is that not the most dangerous feature in driving in Monroe—the most dangerous feature of traffic?

A. Yes sir.

His re-examination in chief reads in part:

Q. I understand that you say that Monroe is . . . severely afflicted with people who make a practice of darting off the sidewalks in front of automobiles. If that be true, would not that fact—with a bunch of children, from four to fourteen years of age, playing on the sidewalk—from your experience, would not that cause the ordinary driver to be unusually watchful?

A. The trouble with the drivers—If a man were always driving—ordinary drivers—I don't think it would make any difference. I do, because I am driving 200 times up and down the street, all the time. . . .

Q. Is it well known among automobile drivers that children are apt to turn out on the street?

A. I don't know about all persons. I know it is. It is well known to me, because I have been driving; not only children, but grown people.

He further testifies that a car driven along the street should carry a headlight and a horn, and that the horn should be sounded at reasonable intervals.

We have it, then, drawn out by defendant's learned counsel, that the most dangerous feature of automobile driving in Monroe is the practice of the children of jumping from the sidewalks, and, otherwise from the witness, that it is the duty of a prudent chauffeur to be on the lookout for incidents of that kind; and yet the chauffeur in this case saw the children playing on the side-

walk, could have seen as others in the car saw that they were playing "tag," a game which requires active scampering around and getting out of each other's reach, and then saw them no more (though there was nothing to obstruct his view) until one of them left the sidewalk, backing or sidling in the direction of the car, when he found it impossible to avoid the deplorable tragedy which then resulted.

It is true that he testifies that he had reduced his speed to about 5 miles an hour, and Mr. Whitfield gives similar testimony; but Mr. Maroney says that the speed was 8 or 10, and Mr. McLeod that it was 10 or 12, miles an hour, and the boys that it was unusually high; on the other hand, the acting chauffeur can give no reason why, taking people to their homes at that hour in the evening, he should have traveled at so slow a pace as 5 miles an hour, and admits that he was not thinking of the boys, and that, his speedometer being out of order, he merely guessed at the figure given by him. We are therefore of opinion that the guesses of the others are likely to have been more accurate, particularly Mr. Maroney's since he is shown to have been in the livery business for a long time, and is not unlikely to have acquired proficiency in the art of guessing the speed of vehicles. If, however, it could be conceded that the car was moving at the rate of only 5 miles an hour, it should have been stopped, according to the testimony of the experts in that line, either instantly or within a foot and a half, instead of which it ran not less than 14 feet from the time it struck the boy, whom the acting chauffeur had seen when he left the sidewalk and moved in the direction of the car, with his face turned in the other direction.

The ordinance prohibiting the operation of cars by persons under eighteen years of age is predicated upon the theory that caution and experience are the characteristics of age rather than of youth, and upon the well-founded belief that there are few occupations in which these characteristics are so essential to the public safety as the driving of motor cars through the streets of cities and towns. Those machines, when so used, are, at best, much more dangerous to the children and grown people who jump from the sidewalks than the children and grown people are to them; and it is the duty of the courts to make it plain that, in the hands of incautious and inexperienced chauffeurs, they are a constant menace to human life, and that it is not their owners or operators who have most reason to complain of the danger which surround their operation, but those who, or whose loved ones, are injured and killed by them.

We conclude that the proximate cause of the accident, in this case, was the failure of the acting chauffeur, allowed by defendant to operate his car (though lacking the age qualifications required by the city ordinance for such function), to keep a proper lookout for the safety of the children whom he saw playing upon the sidewalk of the street over which he was about to drive the car, together with his negligence and violation of the ordinance in attempting to pass the children, so situated and occupied, without sounding his horn and at a prohibited rate of speed, and that there was a direct relation of cause and effect between the violations of the ordinance and the injury inflicted. *Crisman v. Shreveport Belt R. Co.* 110 La. 640, 62 L.R.A. 747, 34 So. 718; *Navailles v. Dielmann*, 124 La. 421, 134 Am. St. Rep. 508, 50 So. 449; *Burvant v. Wolfe*, 126 La. 787, 29 L.R.A. (N.S.) 677, 52 So. 1025; *Shields v. Fairchild*, 130 La. 648, 58 So. 497; *Walker v. Rodriguez*, 139 La. 251, 71 So. 499; *Albert v. Munch*, 141 La. 686, L.R.A.1918A, 240, 75 So. 513.

Plaintiffs sued for \$10,000, plus certain expenses, with interest from date of judgment, but (no doubt, in view of the jurisprudence of this court in similar cases) now pray, through the brief of counsel, for a judgment for \$6,000, which amount will be awarded.

It is therefore ordered that the judgment appealed from be set aside, and that there now be judgment in favor of the plaintiffs, each for one half, and against the defendant, in the sum of \$6,000, with legal interest thereon from the date upon which the judgment shall become final, and all costs.

*Leche, J., dissents.*

A petition for rehearing having been filed, on June 29, 1918, *Provosty, J.*, handed down the following opinion:

Upon reconsideration of this case, we have concluded that the accident resulting in the death of plaintiff's child was attributable more to the negligence of the boy than to that of the defendant, if not entirely to the negligence of the boy in running out into the street from the sidewalk, in the middle of a block, right in front of the automobile. In fact, the only negligence which is positively proved against the plaintiff is in the fact that his son, who was running the automobile, was seventeen years and three months old, instead of eighteen years old, as required by the city ordinance. The traffic policeman at the corner saw nothing wrong with the car as it passed the corner 150 or 200 feet before reaching the place of the accident, and the occupants

of the car testify it was moving slowly; and it would hardly have put on speed after passing the policeman, for it was to stop at the next corner to let off one of the passengers. The point of whether the lights were on is unimportant, as there was yet sufficient daylight for the lighting of the auto's lights not to have been as yet necessary. The testimony leaves doubtful whether the lights were on or not. But we are satisfied that if they had not been on, and it had been dark enough for their not being on to be a noticeable fact, the policeman at the street corner, whose business it was to notice such things, would have noticed it. The boys, according to their own evidence, were standing on the sidewalk when the plaintiff's boy joined them, and at once kicked, or tagged, the Hammond boy, and then, in order to avoid the return kick or tag, which he had to expect, left the sidewalk and went into the street. He moved slowly, the Kelly boy says; but the other two boys say he ran, and one of them says it all happened just like a flash, and the probability is that the boy did run, and that, too, in the direction of the automobile, and that it did happen all in an instant. The automobile is not shown to have been closer to the curb than it should have been. So far as blowing the horn is concerned, the horns of automobiles are not re-

quired to be blown midway of blocks, nor because boys or other children are seen on the sidewalk; and after the boy had left the sidewalk, and was running towards the automobile, there was no time to be blowing horns—none sufficient, in fact, even for putting on brakes. That the young chauffeur was experienced and strong, and that he did all that an older man could have done to avoid the accident after the danger had manifested itself, the evidence leaves no doubt. The experts admit that, when it comes to stopping an automobile within a given number of feet, it makes quite a difference whether the stop is being made by way of testing the possibilities in that regard, or is being made in an unexpected emergency. The negligence resulting from the violation of the ordinance fixing the age of chauffeurs could serve as a ground of action only in the absence of contributory negligence on the part of the boy, or only if, after this contributory negligence had ceased, there had been a last clear chance of avoiding the accident, and under the circumstances there was no such chance. The foregoing was the appreciation of the facts by the learned trial judge; the case having been tried without a jury.

Judgment affirmed.

Monroe, Ch. J., and O'Neill, J., dissent.

**COLORADO SUPREME COURT.**

IRA C. SNYDER, PMR. in Err.,  
v.

HAMILTON NATIONAL BANK.

(— Colo. —, 172 Pac. 1069.)

**Bank — credit of check against itself — right to charge back.**

A bank which credits to the account of a customer checks upon itself drawn by another customer against a deposit of a stranger's check on another bank is entitled to charge bank the checks so credited when payment of the one against which they are drawn is stopped, and the fact that the checks were upon itself does not render the transaction a payment of the checks rather than an extension of credit, if such was the intention of the parties as evidenced by the immediate revocation of the credit by the bank, acquiesced in by the depositor.

*For other cases, see Banks, IV. 3, a, in Dig. 1-52 N. 8.*

(May 6, 1918.)

**Note.**—As to right of bank to charge back a credit given, or recover the amount paid, on a check or other paper drawn upon or payable at it, under mistaken be-

**E**RROR to the District Court for the City and County of Denver to review a judgment in favor of defendant in an action brought to recover a deposit in the defendant bank. Affirmed.

The facts are stated in the opinion.

Messrs. Charles K. Philipps, and William A. Reef for plaintiff in error.

Messrs. Bardwell, Hecox, McComb, & Means, for defendant in error:

The bank had a right to charge back to Snyder the two checks.

Ocean Park Bank v. Rogers, 6 Cal. App. 678, 92 Pac. 879; Belsheim v. First Nat. Bank, 77 Wash. 552, 137 Pac. 1055.

The payment by Snyder to the bank of the deficiency in his account was a voluntary act and he cannot now complain.

Steck v. Northern Colorado Irrig. Co. 4 Colo. App. 323, 35 Pac. 919; Heert v. Ride-nour-Raymond Grocer Co. 48 Colo. 42, 139 Am. St. Rep. 259, 108 Pac. 968; Wilson v. Wilson, 55 Colo. 70, 132 Pac. 67; Moffat v. Smith, 41 C. C. A. 671, 101 Fed. 771;

lied that there was sufficient funds to meet it, see annotation following this case, post, 811.

Nisbit v. Siegel-Campion Live Stock Co. 21 Colo. App. 494, 123 Pac. 110; Painter v. Wilcox, 52 Colo. 648, 125 Pac. 503.

HILL, Ch. J., delivered the opinion of the court:

The plaintiff in error seeks to recover from the defendant in error bank \$1,750, which he alleges was the amount he had on deposit in the bank subject to check on November 26, 1915. Trial was to the court, which found the issues in favor of the defendant bank, and gave it judgment for costs.

The record discloses that on September 17, 1915, the plaintiff opened an account with defendant by depositing \$100; that prior to September 29th, following, he had given checks upon this deposit in the sum of \$99.30, leaving a balance due him of 70 cents; that previous to said September 29th Timothy Ross and Alfred Dunham were engaged in a real estate transaction, or negotiations pertaining to a partial exchange and sale of properties, whereby the plaintiff was to receive a commission; that under the assumption that the deal had been consummated, Dunham gave to Ross, in Denver, two checks on a Telluride bank, payable to Ross, for \$4,000 and \$6,000, respectively, dated September 29, 1915; that on the same day Ross gave to plaintiff checks on defendant bank for \$1,000 and \$1,500, respectively, in part payment for plaintiff's services in the real estate deal; that at the time of giving these checks Ross had but a small amount on deposit in defendant bank, but upon the same day and at or about the same time he deposited in the defendant bank to his credit the \$4,000 Dunham check; that upon the same day and at or about the same time the plaintiff deposited to his credit in the defendant bank the two Ross checks. hereinbefore referred to; that on the same day the plaintiff drew a check on his account in defendant bank to the Colorado State & Savings Bank for \$800; that before accepting it the cashier of this bank phoned the defendant bank asking if it was good, and received an answer from some one that it was; that this \$800 check was paid by defendant bank upon the same day.

Thus far there is no conflict in the testimony. From this point on that of the plaintiff and the agents of the defendant differ materially. Mr. Weckbach, the defendant's assistant cashier, testified, in substance, that early on the morning of September 30, 1915, Mr. Dunham, or his attorney, called at the defendant bank and notified the witness that Dunham had stopped payment on the \$4,000 check to Ross; that the witness immediately notified Mr.

Burger, the defendant's cashier, of this fact. Mr. Burger testified, in substance, that after receiving this information he, upon the morning of September the 30th, notified the plaintiff that the checks that Ross had given him were not good, because they had been notified by the maker that payment had been stopped on the Dunham check, and that they would want him to make good the amount already honored on his check, viz., \$800; that the Dunham check was recharged to the Ross account and the Ross checks recharged to the plaintiff's account; that the Dunham check was in due time returned, indorsed "payment stopped," but that he acted in the matter immediately upon being notified that Dunham had stopped payment on it, and before its return; that in response to his demand upon plaintiff that he make the \$800 overdraft good plaintiff said he would do so. he would make it good, etc.; that he had redeemed a debt he had at the Colorado State & Savings Bank, had redeemed some diamonds, and he would make the account good by getting the diamonds and putting them in defendant bank; that he came back and brought the collateral; that he gave his note to the defendant bank for \$795.30 to square up the account, thus closing it: that he put up with the note as collateral certain diamonds; that thereafter he borrowed from defendant bank \$100 or \$150 more, which he repaid, and paid some little interest on the other; that thereafter, when it became due, he renewed the note, or gave two new notes rather in lieu thereof, and that the defendant held these notes at the time plaintiff brought his suit; that all of these notes were payable to the defendant bank. The witness also testified that he secured a note from Mr. Ross, payable to the bank, for \$1,500, as collateral upon the note of Mr. Snyder, given for the purpose of paying up Snyder's deficiency; that this Ross note was obtained at Snyder's request; that on the morning of September 30th, when he notified Snyder of his deficiency and the reason for it, Snyder asked the witness to get Ross to pay it, and that he (Burger) told him he would try to get the money from Ross; that in pursuance of his efforts under such promise Ross told the witness that he would get the money in ten days and that he gave to the witness the \$1,600 note payable to the bank; that he took this note for the protection of the plaintiff and at his request.

The plaintiff testified that when he deposited the Ross checks he said: "Mr. Burger, I have some debts that are past due. can I check on this to do it?" that he (Burger) said: "Sure, this is as good as wheat." He admits that he was notified



by Burger of the stoppage of payment on the Dunham check, etc.; he also admits the giving of the original note and the putting up of the collateral as security for it, which note would represent the amount of his overdraft in defendant bank, were the two Ross checks properly recharged to him. He also admits the giving thereafter of the renewal or new notes representing the purported obligation. His explanation for giving the first note is: That on the morning of September 30th Mr. Burger told him that Dunham had stopped payment upon a check that had got him into difficulty, etc. That the transaction had got him into trouble with his directors and he said: "I wish you would help me out, in some way. I will get the money out of Ross. I am going to get the money out of Ross and Dunham. Dunham is the man. I want you to help me out some way, as a personal accommodation, so I can get the money out of Ross. . . ." That Burger wanted to know if he would not go and get some collateral and put up there with him, personally, so he could not get in trouble with his directors. That he then said: "In the meantime, I had talked it over with my friend. I went back the next morning and he still insisted I could get some collateral, and I went and got collateral and went on my note, and when I got him that collateral I said: 'Mr. Burger, hold this collateral in your hands and don't mix it with the bank's interest. I am doing this as a personal accommodation to you, and you get the money out of Ross.'" That Burger called him the next day and said: "I think I have saved myself and you too; I have taken Ross's note for the amount for ten days. We have known Ross; he always pays his bills; he is sometimes slow, but never refuses to pay his bills. I have his note; as soon as that is paid you can have your money." The witness admits that he renewed his note to the bank on November 24th by giving two notes, and paid some interest on them, but said: I do not know of making the notes to the Hamilton National Bank; I was endeavoring to aid Mr. Burger, in view of his own suggestion, to keep him out of difficulty with his directors and to give him time; Mr. Burger was a stranger to me. . . . Mr. Ross was absolutely a stranger to me." Referring to exhibits 1 and 2, which were the renewal notes executed by the plaintiff to the bank, and not to Burger, on November 24, 1915, the witness says; "I had made, executed, and delivered exhibits 1 and 2 formally." He denies that the Dunham checks were ever mentioned between them until he was informed the next day of the difficulties which had arisen concerning the \$4,000 one,

but, on cross-examination, said: "In fact, I supposed until recently that the full \$10,000 had been deposited there (meaning the two Dunham checks); I learned only \$4,000." This statement concerning his of the disposition of the Dunham checks is hardly consistent with his statement that he knew nothing about their disposition, or with his counsel's contention that he was relying solely upon his (Ross's) checks, regardless of where Mr. Ross was to get the money to pay him, or on the assumption that he then had it, or that the bank would otherwise extend credit to him or Ross, for it, and especially so when, according to his testimony, he was the negotiator or agent between Ross and Dunham, knew all about the transaction, and was to get \$7,500 from Ross's side of it, if it went through.

The witness Burger denied the truth of plaintiff's testimony pertaining to his statements to him or any communication other than as heretofore and hereafter set forth in Burger's testimony, or that there were any personal transactions between them, or any reference to any such. He says that plaintiff's first note was made payable to the bank, which the plaintiff does not deny, as well as the second two (which so show). He also says that Ross was practically a stranger to him; that he opened his first account with the bank at the same time the plaintiff did; and that he was introduced to the witness by the plaintiff. Pertaining to his giving the plaintiff permission to check, as he did, on the strength of the Ross checks, Mr. Burger admits that at the time plaintiff deposited the Ross checks he might have thus asked him.

The plaintiff contends that the record discloses that the bank in no manner predicated the crediting of the \$2,500 Ross checks to plaintiff upon anything but its own reliance on the account Ross maintained with it, and that it positively assured the plaintiff, through its cashier, that the Ross checks drawn on it were good. The difficulty with this position is that it ignores the testimony on behalf of the defendant. As heretofore stated, the testimony was conflicting on this question. It cannot be harmonized. It was the province of the trial court to determine who was telling the truth, and it is not the privilege of this court to disturb that finding. In commenting on this phase of it, the court said: "From the evidence in this case the court is of the opinion that the plaintiff obtained the credit of \$2,500 upon the 29th day of September by reason of the deposit of the \$4,000 check called the Dunham check, which was afterwards repudiated; and when the bank discovered that the check by Dunham, upon which it had a right to

rely, and as the court finds from the evidence did rely, was repudiated in payment by the drawer of the check, that good conscience and the law ought to protect the bank against the payment of the \$2,500 of the fund, which must result, if paid, in an absolute loss to the bank."

There being evidence to support this finding, we are not at liberty to disturb it.

If we understand it correctly, the next contention of plaintiff is that, when the bank received the Ross checks for deposit by plaintiff, credited them to his account, and charged them to Ross's account, because these checks were drawn upon Ross's account at defendant bank, it constituted a payment of them to the plaintiff by the bank, and not an extension of credit to the plaintiff; that if the Ross account proved insufficient to satisfy them, or uncertain upon account of checks deposited by him which might be returned, in accepting the Ross checks the credit was executed to Ross and not to the plaintiff; and for that reason that, regardless of what might thereafter happen concerning the Ross account, the bank was not at liberty to recharge the Ross checks to the plaintiff, and hence was owing him the amount sued for. This, upon the theory that when a bank accepts a check drawn on itself, either by payment or by depositing to the credit in the bank of the person presenting it, it is presumed to know whether the check at that time is good or not, and if it accepts it, it cannot thereafter repudiate its act in this respect. The following cases are cited as sustaining this contention: *City Nat. Bank v. Burns*, 68 Ala. 267, 44 Am. Rep. 138; *National Bank v. Burkhardt*, 100 U. S. 686, 25 L. ed. 766; *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160; *Spokane & E. Trust Co. v. Huff*, 63 Wash. 225, 33 L.R.A.(N.S.) 1023, 115 Pac. 80, Ann. Cas. 1912D, 491; *National Bank v. Berrall*, 70 N. J. L. 757, 66 L.R.A. 599, 103 Am. St. Rep. 821, 58 Atl. 189, 1 Ann. Cas. 630; *Levy v. Bank of United States*, 4 Dall. 234, 1 L. ed. 814; 2 *Michie, Banks & Bkg.* § 124.

Without an agreement, expressed or implied, or understanding directly or indirectly to the contrary, we may concede that the general rule as contended for and supported by these authorities is correct, but, as said in the first of them, viz., *City Nat. Bank v. Burns*, 68 Ala. at page 275, 44 Am. Rep. 138: "Contracts, agreements, transactions between parties should have operation and effect according to their intention."

And again at page 276: "It is the intention of the parties which must govern."

In *Lumsdon v. Gilman*, 81 Hun, 526, 30 N. Y. Supp. 1124, it appears that the depos-

itor and defendant agents both knew, when the draft which was drawn on the defendant bank was offered for deposit, that the drawer was insolvent. He then had an apparent credit with the bank exceeding the amount of the draft, but afterwards an error was discovered which entirely absorbed the apparent credit. The bank's clerk testified that he accepted the draft under an agreement with the plaintiff that, if there was any trouble about it, it should be charged back to plaintiff's account. It was held proper to ascertain the intention of the parties, and that a verdict for the defendant bank on that issue would not be disturbed.

In *Arkansas Trust & Bkg. Co. v. Bishop*, 119 Ark. 373, at page 375, 178 S. W. 423, the court said: "The only question in this case for the decision of the jury was whether the bank accepted the check and became liable to the payment of the amount for which it issued its deposit slip to the drawee thereof. The intention of the parties to the transaction could properly have been shown for the determination of this question."

In *Pollack v. National Bank*, 168 Mo. App. 368, 151 S. W. 774, it is held that a depositor may make a valid agreement with the bank that payment shall be deferred for a reasonable time, until the bank can ascertain whether or not there are sufficient funds of the drawer in its hands to pay it, and that such an agreement may be established from a custom to that effect, etc. These cases, while not exactly like the one under consideration, involve somewhat similar propositions.

The court found, and there is evidence from which it can properly be inferred, that the plaintiff obtained the credit of the \$2,500 evidenced by the Ross checks to him by reason of the deposit of the \$4,000 Dunham check by Ross. This, of course, had to be under the assumption that the Dunham check would be paid, and, in case it was not, that the bank necessarily had the right to recharge the Ross checks to the plaintiff the same as it would have, had the Dunham check been deposited by him. When the shortage created by the Dunham check was disclosed, it immediately did so; he was advised to that effect the next morning after he had deposited the Ross checks, and was requested to make good the amount of his overdraft, given on the strength of this credit. In response to this demand, he voluntarily, when in possession of all the facts, acquiesced in this arrangement, and gave his note and security for the overdraft, which terminated in the closing of his account. His actions at that time were in harmony with

the court's finding, as is his testimony, in part, to the effect that Mr. Burger told him he could draw checks on the strength of his deposit of the Ross checks to pay other indebtedness; otherwise, if the checks were accepted as that much cash when deposited, why the necessity of getting permission at all to check on this account?

In *Lovell v. Goss*, 45 Colo. 304, 22 L. R. A. (N. S.) 1110, 132 Am St. Rep. 184, 101 Pac. 72, this court quotes with approval from *Manhattan L. Ins. Co. v. Wright*, 61 C. C. A. 138, 126 Fed. 82: "The practical interpretation given to their contracts by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and courts that adopt and enforce such a con-

struction are not likely to commit serious error."

This declaration is applicable here, and is just what the trial court did. The plaintiff admits that after he was advised of both his and Ross's shortage, occasioned by the stopping of payment on the Dunham check, and after he had talked it over with a friend, he went back to the bank the next day and gave his note (and secured it with diamonds) to represent the amount of this shortage, which did not exist had he the right to rely upon his deposit of the Ross checks. In such circumstances, when the testimony is considered as a whole, we cannot agree that there is no competent testimony to sustain the finding of the trial court.

The judgment is affirmed.

*Garrigues and Scott, JJ., concur.*

**Annotation—Right of bank to charge back a credit given, or recover the amount paid, on a check or other paper drawn upon or payable at it, under mistaken belief that there were sufficient funds to meet it.**

The earlier cases on this question are discussed in the notes to *Citizens' Bank v. Schwarzschild & S. Co.* 23 L.R.A. (N.S.) 1092, and to *Spokane & E. Trust Co. v. Huff*, 33 L.R.A. (N.S.) 1023.

The right of drawee of forged check or draft to recover money paid thereon is discussed in the notes in 10 L.R.A. (N.S.) 49; 25 L.R.A. (N.S.) 1308, and L.R.A.1915A, 77.

The present note and those supplemented hereby are confined, in general, to cases in which the bank assumed that the account upon which the check was drawn was good, although it may have known that some of the credits therein were made up of checks or drafts not actually paid. An essentially different situation is presented where a bank, with knowledge that the drawer of the check has not sufficient funds to meet it, pays the check.

The cases are agreed that, in the absence of fraud, a bank which has paid a check drawn upon it by a depositor, under the mistaken belief that the drawer had funds to meet it, cannot recover the amount so paid, upon the subsequent discovery of the error. Notes to *Citizens' Bank v. Schwarzschild & S. Co.* and *Spokane & E. Trust Co. v. Huff*, *supra*. This rule, followed in the previous cases, has been followed in the cases decided since the date of the last of the above notes. Thus, it is held in *First Nat. Bank v. Sidebottom* (1912) 147 Ky. 690, 145 S. W. 404, that a bank which

had paid the check of a customer, upon presentation by another bank in which it had been deposited by the payee, could not recover the amount thereof from the payee, where it subsequently developed that a check drawn by the customer upon another bank, and credited to his account, was not paid for want of sufficient funds.

The foregoing rule, denying the right of recovery, has been held not to apply to prevent a bank which had issued a draft in payment of a note which had been sent it for collection, from stopping payment of the draft upon discovery that the maker of the note had not sufficient funds to meet the check which he had given the bank in payment thereof. *Bellevue Bank v. Security Nat. Bank* (1915) 168 Iowa, 707, 150 N. W. 1076. The credit of the maker of the note, upon which the bank relied in making payment, as before stated, had been obtained by a deposit of checks which were subsequently dishonored. The checks thus dishonored were given in pursuance of what the court characterizes as a fraudulent scheme of the maker and payee of the note, but in which the holder of the note, who was an assignee of the payee, had not participated. In denying to the holder of the note, who was the payee of the draft, the right to recover the amount thereof upon its payment being stopped, the court, in distinguishing the case from one in which a bank is held not entitled

to recover cash paid it upon a check which failed for want of sufficient funds to meet it, states that "the plaintiff [the holder of the note] sent its note to the defendant for collection. It made the defendant its agent for that purpose. The relation, therefore, of principal and agent obtained. The duties of the agent were doubtless determined under the law and usage of banking. But at no stage did the relation of debtor and creditor, or of buyer and seller, arise. The plaintiff continued to own the note. The defendant owed the duty of diligence in its collection. If the defendant failed in its duty or overstepped its authority, it was liable to the plaintiff for its resulting loss. The foundation question is, What was the liability of the defendant to the plaintiff immediately before it mailed the draft? If it had not mailed the draft, would it have been liable for the amount supposed to have been collected on the note? The trial court found that the sending of the checks of the [payee of the note], and the depositing of the same by [the maker of the note], and the issuance of the check of [the maker of the note] against its credit in the bank, all constituted one connected transaction. Exception is taken to this conclusion. We think it was clearly correct. All these acts were done in pursuance of the same plan and with the manifest intent to induce the defendant to believe that the acceptance of the check was safe and in such belief, to surrender the possession of the note. . . . The defendant bank, as the collecting agent, was within its duty in accepting from the maker of the note a check, if it had reason to believe the same to be good. The acceptance of such check operated presumptively, however, only as a conditional payment of the note. Upon the dishonor of the check the condition failed, and the holder of the note was entitled to maintain his original cause of action." In denying relief to the plaintiff, who was not a party to the fraudulent scheme of obtaining a fictitious credit, the court states the general rule to be that "money paid through a mistake of fact may be recovered back, provided the recipient thereof shall not thereby be put in any worse position than he would have occupied if the mistaken payment had not been made." The court concludes that the holder of the note was not prejudiced by the transaction, and accordingly refuses a recovery.

There is a dispute in the cases as to whether the foregoing rule, denying re-

covery, applies, where the bank has credited the account of a customer with a check drawn upon itself, instead of paying the cash. The rule followed generally is that the bank cannot charge back to the holder's account, the amount of the check, upon discovery that there are not sufficient funds in the drawer's account to meet it. Note in 23 L.R.A. (N.S.) 1092. But other cases apply the rule applicable to the collection of checks generally, and hold that a bank which has credited the account of a depositor with the amount of a check drawn upon itself by another depositor may charge it back, upon discovery that there are not sufficient funds to meet it, just as it may do in case of a check drawn upon another bank. In adhering to this doctrine the court, in *National Gold Bank & T. Co. v. McDonald* (1875) 51 Cal. 64, 21 Am. Rep. 697, states that "the rule we intend to lay down is, that when a check on the same bank is presented by a depositor with his pass book to the receiving teller, who merely receives the check and notes it in the pass book, nothing more being said or done, this does not, of itself, raise a presumption that the check was received as cash or otherwise than for collection." In *Ocean Park Bank v. Rogers* (1907) 6 Cal. App. 678, 92 Pac. 879, the court, in adhering to this theory, states that "the fact that the amount of the check, with other sums, was entered upon a deposit slip, that the check was stamped 'Paid' and impaled upon a check file, are mere memoranda adopted in aid of the convenient despatch of business." The court, further arguing in favor of this rule, states that "if, upon presentation of the check, the account of the drawer is insufficient to cover it, he may nevertheless make deposit during business hours of the day in amounts sufficient to pay it, in which case such fund, to the amount of the check, should be transferred to the account of the party presenting the check. If, however, at the close of banking hours on the day when the check is presented, the account of the drawer is insufficient to pay it, the bank must then elect to either pay the check itself, charging the amount thereof to the account of the drawer as an overdraft, or return the check to the party presenting it as unpaid for want of funds. If the check is drawn upon another bank, the bank wherein it is deposited has a reasonable time within which to present it for payment, and when drawn upon the bank wherein it is deposited, the bank likewise, in the ordinary transac-

tion of business, has a reasonable time to ascertain the condition of the drawer's account; and, in the absence of a demand for cash, the bank has until the close of banking hours on the day of the deposit, for the reason that the drawer of the check may deposit funds during banking hours sufficient to pay it. This is not an unreasonable rule, inasmuch as the depositor may, by inquiry, ascertain the condition of the drawer's account, or call for cash in payment of the check."

The application of the foregoing rules may, of course, be prevented by agreement of the parties. Courts conceding the correctness of the first of the foregoing theories, denying the bank the right to charge back the amount of the check upon discovery of the lack of funds, have held the bank entitled to charge back the check, where there was an agreement to that effect. *SNYDER v. HAMILTON NAT. BANK*, ante, 807. The same rule applies in case the bank pays the check in cash. If there is an agreement that the amount shall be returned, the bank may recover. *First Nat. Bank v. Sidebottom* (1912) 147 Ky. 690, 145 S. W. 404 (dictum).

And courts adhering to the theory that the bank is entitled to charge back the check have announced the rule in a limited manner. See quotation from opinion in *National Gold Bank & T. Co. v. McDonald* (Cal) supra. It is expressly stated in that case that "there can be no doubt that if the bank, through its teller, expressly or by reasonable implication, from his acts and declarations at the time, agrees to accept the check as cash, and to enter a credit to the depositor for the amount, it will be bound by the agreement, whether the drawer of the check has funds to his credit or not." In holding the bank entitled to charge back the amount of the check, the court, in *Ocean Park Bank v. Rogers* (Cal) supra, states that "there was nothing said or done in connection with the transaction which supports the conclusion that the bank accepted the check as cash. Had it been drawn upon another bank and payment thereof refused, the bank could have charged it back to Rogers, notwithstanding the fact that she had received credit therefor in her pass book. Why should a different rule apply when drawn upon the bank which receives the check and enters the credit in the pass book? In either case, in the absence of any agreement to the contrary, it is received for collection."

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A usage of banks, known to the depositor, of crediting checks drawn by another customer upon the bank in which the deposit is made, in the pass book of the customer presenting them, subject to the right of the bank to reject the deposit and charge the amount back to the depositor at any time within the day on which the deposit is made, if the bank discovers that the drawer of the check has not sufficient funds on deposit to pay the same, is sufficient to raise an implied agreement, authorizing the bank to charge back a credit thus given. *Pollock v. National Bank* (1912) 168 Mo. App. 368, 151 S. W. 774. In *National Gold Bank & T. Co. v. McDonald* (1875) 51 Cal. 64, 21 Am. Rep. 697, there was introduced evidence of a usage in the bank in the city in which the transaction took place, by which, when checks were presented by a depositor to the receiving teller for deposit, he received the checks, whether drawn on that or another bank, and entered a credit for them in the pass book; that the bank then collected the checks and, when paid, entered the proper credit to the depositor on the books of the bank; but if it was ascertained within banking hours on the same day that a check drawn on the same bank in which the deposit was made was not good for want of funds to the drawer's credit, the usage was to return the check to the depositor and cancel the credit in the pass book. This evidence was stricken out upon motion, and the supreme court does not pass upon the admissibility of the evidence, stating that, for other reasons, it was unnecessary to determine whether the trial court erred in striking out the evidence in respect to usage.

If the holder of the check knows that the drawer has no funds to meet the check, the bank may charge it back; no recovery can be had against the bank by the holder to whom it has been credited. *Peterson v. Union Nat. Bank* (1866) 52 Pa. 206, 91 Am. Dec. 146, W. A. E.

#### NEW JERSEY COURT OF ERRORS AND APPEALS.

ANNA M. ROSE et al., Respts.,

v.

MARY COOPER SLOUGH, Appt.

(— N. J. —, 104 Atl. 194.)

Highway — unsafe sidewalk — repair — liability.

1. That an abutting property owner, after

injury to a pedestrian by tripping over a paving block raised by roots growing beneath it, has the roots cut and the walk repaired, does not establish liability on his part for the injury.

*For other cases, see Highways, IV. b, 3, a, in Dig. 1-52 N. S.*

**Same — liability of abutting owner.**

2. The owner of property abutting on a sidewalk, upon which stands a tree of which, under legislative authority, the municipality has assumed control, is not liable for injury to a pedestrian caused by tripping over a paving block raised by the roots of the tree growing beneath it.

*For other cases, see Highways, IV. b, 3, a, in Dig. 1-52 N. S.*

(June 17, 1918.)

**A**PPEAL by defendant from a judgment of the Supreme Court refusing to grant a nonsuit in an action brought to recover damages for personal injuries to the plaintiff wife, for which defendant was alleged to be responsible. Reversed.

The facts are stated in the opinion.

Messrs. Bleakly & Stockwell for appellant.

Messrs. Wescott & Weaver, for respondents:

The owner of a property is responsible for a difficulty created by a previous owner if he continues it.

*Meyer v. Harris*, 61 N. J. L. 83, 39 Atl. 690.

The owner of a tree along a highway must use reasonable care to see that it does not injure pedestrians.

*Weller v. McCormick*, 52 N. J. L. 470, 8 L.R.A. 798, 19 Atl. 1101; *Harrison v. New York Bay Cemetery*, 77 N. J. L. 514, 73 Atl. 546.

Kallsch, J., delivered the opinion of the court:

The respondents, husband and wife and plaintiffs below, were permitted to recover a judgment against the appellant, defendant below, upon the following state of facts: The defendant was the owner of certain premises abutting a public highway in the township of Pesauken. A sidewalk paved with patent composition paving blocks extended along the front of the premises. On this sidewalk stood and grew a shade tree, the roots of which, from natural growth, spread under the paving blocks and caused them to bulge up several inches, thereby rendering the sidewalk uneven and broken in several places. The

**Note.** — As to liability of abutting owner for injuries due to trees in street, see annotation following this case, post, 817, and references therein to annotations on related questions.

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female plaintiff, while walking along this sidewalk, stumbled and fell, as a result of its uneven and broken condition, and sustained injury. These facts are the gravamen of the amended complaint filed in the cause, with the additional averment that the defendant maintained the "shade tree for use, pleasure, and comfort, and for the beautification of her property."

With the exception of this averment, the material facts of the present case are not dissimilar to those set forth in *Rupp v. Burgess*, 70 N. J. L. 7, 56 Atl. 166, 15 Am. Neg. Rep. 132. In the case cited there was a demurrer to the first count of the declaration, which averred "that the defendant was the owner of a certain lot fronting on Newton street, in the city of Newark, and while owning and occupying this lot he wrongfully and knowingly permitted the flagstones with which the sidewalk in front of his property was covered to become and remain in a broken, insecure, and dilapidated condition," and that by reason thereof the female plaintiff, who was walking along upon that portion of the sidewalk, stumbled and fell, etc. Mr. Chief Justice Gummiere, speaking for the supreme court (70 N. J. L. on page 9) said: "The first count, plainly, discloses no cause of action. It is based upon the assumption that the owner and occupant of premises abutting upon a public street is under a legal duty to keep in repair the sidewalk in front of his property. But no such obligation rests upon him, unless by virtue of the requirements of a city or municipal ordinance (*Dill. Mun. Corp. par. 1012*; *Weller v. McCormick*, 47 N. J. L. 397, 54 Am. Rep. 175, 1 Atl. 516), and the declaration fails to allege the existence of any such requirement. And even when the duty of repairing sidewalks is imposed upon the abutting owner by statute or ordinance, the failure to perform that duty does not render the owner responsible to individuals for injuries received by them, resulting from defects in the sidewalk due to want of repair. The only liability which rests upon the property owner for the non-performance of such duty is the penalty provided by the statute or ordinance. *Fielders v. North Jersey Street R. Co.* 68 N. J. L. 343, 352, 59 L.R.A. 455, 96 Am. St. Rep. 552, 53 Atl. 404, 54 Atl. 822, 13 Am. Neg. Rep. 156, and cases cited."

Counsel of respondents argue that the doctrine enunciated in *Weller v. McCormick* supports the theory upon which the plaintiffs were permitted to recover in the present case. It is true that the case referred to, in many of its features, is like the present. It is, obviously, materially unlike in one important respect, and that is

that the injury sustained by the plaintiff was the result of a decayed branch of a tree, which stood in front of the defendants' premises, falling upon the plaintiff while passing along the sidewalk, whereas in the present case the injury to Mrs. Rose resulted from a fall on a sidewalk, by reason of its being out of repair. The bearing of this difference in the facts upon the legal aspects of the present case will be considered later.

In *Weller v. McCormick*, Dixon, J., in a careful and well-reasoned opinion, points out with characteristic perspicuity the essential facts necessary to be established by the plaintiffs, in order to cast a liability upon the landowner to respond in damages for the injury sustained. In 47 N. J. L. on page 398, 64 Am. Rep. 175, 1 Atl. 517, the learned judge said: "It must be conceded that ordinarily, when a person, for his private ends, places or maintains, in or near a highway, anything which, if neglected, will render the way unsafe for travel, he is bound to exercise due care to prevent its becoming dangerous. If, therefore, from the fact that the tree in question stood on a portion of George street owned by the defendant, it is to be inferred that the tree was placed or maintained there by him for his private benefit, it would follow that the alleged duty existed. But we think that in the present case this fact is not sufficient to warrant such an inference against the defendant."

It is to be observed that this alleged duty of the abutting owner is qualified by a condition, that the tree was placed or maintained in the public highway for his benefit, and that the mere fact of the presence of the tree on a portion of the highway in front of the owner's premises gave rise to no presumption that it was there for the private benefit of the defendant, and hence created no legal duty regarding it. The learned justice then proceeds (47 N. J. L. on page 398), to state his reason, as follows: "Shade trees in the streets of a city are of public as well as private utility. They protect and ornament the way for public use, as they also do the adjoining property for private enjoyment. It is therefore clear that, by virtue of the ordinary public right in highways, the public may plant and maintain shade trees therein. Whether the legislature, to whom this power primarily belongs, has in a given case delegated it to a subordinate, depends, of course, upon the terms by which authority is granted. In the charter of the city of New Brunswick the matter is not left in doubt. That instrument (Pamph. Laws 1863, p. 347, §

31) gives the common council power to make, modify, and repeal ordinances, rules, regulations, and by-laws for directing and regulating the planting, rearing, trimming and preserving of ornamental shade trees in the streets, parks, and grounds of the city. It thus appears that, since 1863, the municipality has had the power of planting and preserving shade trees in the streets, and therefore the presence of any such tree in a street may be attributed to the exercise of this power, as well as to any other cause. Under these circumstances, the most that the plaintiffs can properly claim to have proved is that the tree was planted or maintained either by the defendant for private purposes or by the city for public purposes."

The result reached was that the verdict could not be maintained upon an inference that the tree was planted or maintained by the defendant, and that, if the tree in question was planted or preserved by the city, the defendant owed no legal duty concerning it, except such as was imposed by the by-laws of the corporation.

Now, in the case under consideration, the uncontroverted proof is that the tree was on the sidewalk when the defendant acquired ownership of the premises. There is an utter absence of any proof tending to establish that the tree was planted or maintained for the private benefit of the owner. On the contrary, there is a perfectly legitimate inference from the facts that when the tree was set out it was in conformity to a plan to beautify the public highway. It is clear, from an act entitled, "A Further Supplement to an Act Entitled 'An Act to Increase the Powers of Township Committees', Approved March 11, 1880" (Pamph. Laws 1893, p. 130), that the legislature conferred the power upon township committees "to direct and regulate the planting, rearing, trimming and preserving the shade trees" in the highways of the townships, and "to authorize or prohibit the removal or destruction of the same." The plaintiffs introduced an ordinance in evidence, passed by the township committee, regulating the trimming of shade trees standing along the streets, roads, avenues, and highways of the township, and fixing a penalty of \$5 for a violation of the ordinance by the owner, and reserving to the municipality the power to direct such shade trees to be trimmed at the cost and expense of the owner. This situation was not present in *Weller v. McCormick*, supra. The legal effect of the ordinance in the present case is that it is an affirmative act of the mu-

municipal authority, by which it has taken under its care and control the regulation and preserving of shade trees for the public benefit.

The fact that a failure of the owner to observe the behest of the ordinance subjects him to a penalty does not, according to well-settled authority, create a right of action against such owner, by an individual who has sustained an injury arising from the nonobservance, because the ordinance belongs to a class of ordinances, as was well said by Pitney, J., in *Fielders v. North Jersey St. R. Co.* supra, 68 N. J. L. on page 352, 53 Atl. 407, 59 L.R.A. 455, 96 Am. St. Rep. 552, "intended, not for the benefit or protection of individuals comprising the public, but for the benefit of the municipality as an organized government, and more particularly if they impose upon property owners the performance of a part of the duty of the municipality to the public, as legislative intent is indicated that a breach of such ordinance shall be remedial only at the instance of the municipal government, or by enforcement of the penalty prescribed therein, and that there shall be no right of action to an individual citizen especially injured in consequence of such breach."

The circumstance that the defendant, a few days after the accident, employed a contractor to cut away the roots of the tree in order to repair and level the sidewalk, and thus to make it safe, is wholly unimportant. It was not evidential of any legal duty owing from the defendant to the plaintiff, by reason of the presence of the tree in the highway before and at the time the plaintiff was injured. Any citizen may lawfully abate a public nuisance in the highway. The fact, therefore, that the defendant abated a public nuisance created in front of her premises, after the plaintiff was injured, cannot properly raise an inference that she created it, or had any especial control over it. She was under no legal duty to put the sidewalk in repair. The fact that she undertook to do so after the accident cannot properly raise an inference of individual responsibility for the creation of the nuisance, if such existed.

Reverting, now, to the marked distinguishable feature of this case from *Weller v. McCormick*, supra, we find that, in the case cited, the undisputed fact was that it was the falling of a decayed limb of a tree upon the plaintiff that caused his injury. In the present case, it is not pretended that the roots of the tree were the proximate cause of the injury to the plain-

tiff. The testimony is ample to the effect that the pavement of the sidewalk was made uneven by the spreading of the roots of the tree underneath; and that the paving blocks were kicked out of position by some of the public using the sidewalk. It is, therefore, the defective condition of the sidewalk, partly caused by the roots of the tree and the use made of the sidewalk by the public in general, which is made the basis of the defendant's liability. As has already been pointed out, there was no legal duty resting upon the defendant to keep the sidewalk in repair. It would seem, therefore, that the causes which operated to put the sidewalk in a defective condition are inconsequential, unless it is established, that the defendant by some act of her own contributed to such defective condition. There is no proof in the case showing when the pavement was laid, or that the defendant caused it to be put down, or that at the time the paving was done there were any indications of any roots of a tree in the ground likely to disturb the pavement.

The defendant was therefore in a similar position to that of an owner of premises, whose sidewalk becomes defective because of buckling in extreme hot weather, or becomes depressed by heavy rains, or becomes out of repair by reason of any other action of the elements, or by the destructive acts of pedestrians, and permits such sidewalk to remain in that condition. There being no legal duty cast upon the owner to repair, there can be no recovery for an injury sustained by reason of such defective sidewalk, arising from a failure to repair. In the present case, the growing and spreading of the roots, which caused the sidewalk to become uneven, were nature's work, and over which the defendant had no control, and concerning which she owed no duty.

But, irrespective of this fact, where a municipality, in pursuance of state legislative sanction, assumes control of the trees within its territory, an abutting owner, on a street of such municipality, is relieved from the care of a tree standing on the sidewalk in front of his premises, to the extent that he will be exempt from liability to respond in damages in a civil action to an individual who has suffered an injury of which the tree was the producing cause.

The refusal of the learned trial judge to grant defendant's motion for a nonsuit was error, and therefore the judgment must be reversed.



**Annotation—Liability of abutting owner for injuries due to trees in street.**

A diligent search has disclosed no case precisely in point with *ROSE v. SLOUGH*, ante, 814, wherein it is sought to hold an abutting owner liable for defective condition of a sidewalk, caused partly by the roots of a tree and partly by the use made of the walk by the public in general.

The case of *Weller v. McCormick* (1885) 47 N. J. L. 397, 54 Am. Rep. 175, 1 Atl. 516, is discussed in the opinion of *ROSE v. SLOUGH*.

It may be observed that, upon a later hearing in *Weller v. McCormick* (1890) 52 N. J. L. 470, 8 L.R.A. 798, 19 Atl. 1101, it was stated that, in the absence of any statutory or municipal regulations to the contrary, a tree planted by a private person on the sidewalk of the street in front of his premises belongs to and is under the control of the owner and occupant of the abutting property; that, under such circumstances, the owner and occupant of the property is bound to use reasonable care to prevent the tree from becoming dangerous to travelers

upon the street, and every person specially injured through a breach of that obligation is entitled to a private action against the party in fault to recover compensation for the damages arising therefrom.

Generally, as to liability of municipality for personal injuries by trees, see notes to *Elam v. Mt. Sterling*, 20 L.R.A. (N.S.) 607, 649, and *Dyer v. Danbury*, 39 L.R.A. (N.S.) 406.

As to liability of municipality for injuries from unevenness in sidewalk or crosswalk, see notes to *Elam v. Mt. Sterling*, 20 L.R.A. (N.S.) 632 et seq., 640, 641; *Richmond v. Schonberger*, 29 L.R.A. (N.S.) 180; *Lexington v. Cooper*, 43 L.R.A. (N.S.) 1158, and *Meridian v. Crook*, L.R.A. 1916A, 486.

As to liability of a lot owner to one injured by reason of the former's failure to perform the duty imposed by statute to keep in repair the sidewalk in front of his premises, see note to *Hay v. Baraboo*, 3 L.R.A. (N.S.) 84.

J. D. C.

**PENNSYLVANIA SUPREME COURT.**

JOHN L. WOOD, Exr., etc., of Ellie E. Wood, Deceased,  
v.

PHILADELPHIA RAPID TRANSIT COMPANY, Appt.

(260 Pa. 481, 104 Atl. 69.)

**Carrier — injury to one passenger by another — liability.**

A street railway company is not liable for injury to an incoming passenger by the failure of the conductor to require an outgoing passenger, burdened with an iron pipe, to carry it in such manner that no injury can result to those attempting to board the car, in the absence of anything to show that the hazard was increased by noninterference of the conductor.

For other cases, see *Carriers*, II. g, 1, in *Dig. 1-52 N. S.*

(March 11, 1918.)

**A PPEAL** by defendant from a judgment of the Court of Common Pleas for Philadelphia County in favor of plaintiff

**Note.** — As to liability of carrier for injury resulting from negligent or meddling acts of fellow passenger, see annotation following this case, post, 819; and references therein to annotations on related questions.

in an action brought to recover damages for personal injuries to plaintiff's wife, caused by the act of another passenger while alighting from defendant's street car. Reversed.

The facts are stated in the opinion. Mr. David J. Smyth for appellant. Messrs. William T. Connor and Hugh Roberts for appellee.

Walling, J., delivered the opinion of the court:

This is an action against a street railway company for personal injuries to one passenger by the act of another. On the afternoon of February 5, 1915, Mrs. Ellie E. Wood boarded one of the defendant's north-bound cars in Fifty-second street, Philadelphia, at the Market street intersection. It is a transfer point, and, as was customary at that hour, a group of some twenty-five people were waiting, and they took passage on the car with Mrs. Wood, while others, including a man who carried an iron pipe on his left shoulder and a canvas bag in his right hand, left the car at the same place. As he alighted from the rear platform, where Mrs. Wood and other passengers were entering, the pipe came in contact with her head, inflicting a scalp wound, on account of which Mr. and Mrs. Wood brought this suit. Thereafter

she died, and he prosecuted the case in his own right and as her executor.

There was a sliding door on the side of the car at each end; over that in the rear was the word "Entrance" or "Entrance Only," and over that in front was the word "Exit;" but, so far as appears, passengers left the car at either end. The conductor was stationed near the back platform, where he could collect the fares and look after the rear door. It was an old-fashioned car with seats along the sides, and was carrying seven or eight passengers as it came to Market street. The man was riding on or near the back platform, and there was nothing unusual in his appearance or conduct. The pipe was some 5 feet long and 2½ inches in diameter, and, as carried, projected about 2 feet in front of the man. The conductor knew that people were there waiting to board the car as the man started to alight. The trial judge charged the jury, in effect, that as defendant knew the man had the pipe it was its duty to see that he so carried it as not to harm a fellow passenger. The verdicts were for plaintiffs, and the court entered judgments thereon, from which defendant appealed. In our opinion, the judgments cannot be sustained.

Mrs. Wood was a passenger and entitled to protection as such. "The carrier, having impliedly invited the plaintiff to enter the car, was required to exercise the highest degree of care and diligence in protecting her while she was in the act of ascending the steps and going into the body of the car." *Bickley v. Philadelphia & R. R. Co.* 257 Pa. 369, 376, 101 Atl. 654. However, Mrs. Wood was not hurt by any instrumentality connected with the means of transportation; hence, the accident created no presumption against the carrier, and the burden of proof rested upon the plaintiffs. *Pennsylvania R. Co. v. MacKinney*, 124 Pa. 462, 2 L.R.A. 820, 10 Am. St. Rep. 601, 17 Atl. 14, 10 Am. Neg. Cas. 164; *Thomas v. Philadelphia & R. R. Co.* 148 Pa. 180, 15 L.R.A. 416, 23 Atl. 989, 10 Am. Neg. Cas. 173.

Street cars are for the use of the people, with as well as without their luggage, and negligence cannot be inferred because a workman is permitted to enter thereon, carrying the tools and implements of his trade. And the right so to enter implies the right so to depart. There might be some piece of machinery or instrument so dangerous that to suffer a passenger to take it with him on a street car would be evidence of the company's negligence, but that cannot be affirmed of the pipe or bar here in question.

There is no suggestion that the man indicated any want of care in the manner of taking his luggage onto the car, or of placing it while there. Nothing is alleged against him until he shouldered the pipe to leave the platform. No complaint is made down to that point, but it is urged that right there the conductor should have required the man to do something different. Counsel suggest that he should have ordered him to go through the car and out at the front door. If so, he would have been on a level with passengers going out in front of him and of others rushing in behind him—a more dangerous situation, as injury might be caused by either end of the pipe. It is also urged that the conductor should have required him to remain standing on the back platform until all the incoming passengers had entered. The passage there is narrow, and to require a man to stand in it, encumbered with such an iron pipe and bag, while twenty-five passengers rush by, would increase the danger. Had he carried the pipe in his hand or under his arm, it would have occupied equal space, and been more likely to come in contact with incoming passengers. Our conclusion is that there was no safer method for the man to leave the car than the one he pursued, and that the conductor was not at fault in failing to interfere. There is no evidence that the safety of the passengers would have been promoted had the conductor pursued any one of the courses suggested, or that the hazard was increased by his failure to do so, and nothing that justifies a conclusion to that effect.

In the absence of a fixed duty, negligence cannot be inferred from the failure to do an act in some other way, not shown to be safer. The facts being simple and not controverted, their legal value is for the court to determine. *Davidson v. Lake Shore & M. S. R. Co.* 171 Pa. 522, 33 Atl. 86; *Wolf v. Philadelphia Rapid Transit Co.* 252 Pa. 448, 97 Atl. 684.

A carrier is required only to interfere with the voluntary acts of passengers when they constitute a breach of the peace, or are such as to suggest a reasonable probability that injury will thereby result to others. When the car stopped, it required only two or three steps to place the man on the pavement and out of the way. As he was going forward he practically had only to guard the front end of the pipe and that was before his face and held by his hand. The presumption was that he would use due care, and we see no reason why the conductor should have anticipated danger. The conditions were not essentially different from those constantly arising.

It is well settled that a carrier is not liable for injuries sustained by one passenger from the rudeness, crowding, or jostling of another (*Ellinger v. Philadelphia, W. & B. R. Co.* 153 Pa. 213, 34 Am. St. Rep. 697, 25 Atl. 1132, 6 Am. Neg. Cas. 361; *Graeff v. Philadelphia & R. R. Co.* 161 Pa. 230, 23 L.R.A. 606, 41 Am. St. Rep. 885, 28 Atl. 1107, 6 Am. Neg. Cas. 376), nor for injury from the negligent or wilful act of another, unless given an opportunity to prevent it. See *Widener v. Philadelphia Rapid Transit Co.* 224 Pa. 171, 73 Atl. 209; *Kantner v. Philadelphia & R. R. Co.* 236 Pa. 283, 84 Atl. 774; *Hillebrecht v. Pittsburgh R. Co.* 55 Pa. Super. Ct. 204; 10 C. J. 901. To hold otherwise would render a common carrier an insurer of the safety of its passengers, which it is not. This unfortunate accident resulted from the modern method of travel on electric street railways, and was a risk assumed by the traveler as incident thereto.

Knowingly to suffer the luggage of a passenger to remain so placed in a car as to endanger other passengers is evidence of the carrier's negligence. *Burns v. Pennsylvania R. Co.* 233 Pa. 304, 82 Atl. 246, Ann. Cas. 1913B, 811; *Diffenderfer v. Pennsylvania R. Co.* 67 Pa. Super. Ct. 187. And the same rule applies where passengers or trespassers are permitted to engage in a fight upon a car, to the terror or danger of other passengers. *Pittsburgh, Ft. W.*

& C. R. Co. v. Hinds, 53 Pa. 512, 91 Am. Dec. 224, 8 Am. Neg. Cas. 602; *Pittsburgh & C. R. Co. v. Pillow*, 76 Pa. 510, 18 Am. Rep. 424, 8 Am. Neg. Cas. 608. But those cases are different from this.

At popular resorts and other like places where hundreds collect at one time to board the cars, it is sometimes necessary to employ assistants to keep back the people and prevent accidents from crowding. *Coyle v. Philadelphia & R. R. Co.* 256 Pa. 496, 100 Atl. 1005, 14 N. C. C. A. 168; *Kennedy v. Pennsylvania R. Co.* 32 Pa. Super. Ct. 623. But a transfer point where twenty or thirty people gather to take passage on a street car is not such a place, and none of the cases above cited apply to the facts here presented. The diligence of counsel, supplemented by our own research, has failed to find an analogous case where a recovery has been sustained. Defendant's request for binding instructions should have been granted, as the evidence failed to disclose negligence on its behalf. That not having been done, the court should have granted the motion for judgment non obstante veredicto. This being decisive of the case, it is unnecessary to consider the other questions presented in the record.

The first and seventh assignments of error are sustained, and thereupon the judgment is reversed and is here entered for the defendant.

### Annotation—Liability of carrier for injury resulting from negligent or meddlesome acts of fellow passenger.

The present note is supplementary to notes to *Sure v. Milwaukee Electric R. & Light Co.* 37 L.R.A.(N.S.) 724, and to *Pruett v. Southern R. Co.* 49 L.R.A.(N.S.) 810 (see those notes for references to annotations of related questions). It is stated in the note in 37 L.R.A.(N.S.) 724, that the general rule underlying the cases is that a carrier will not be liable for injuries to passengers from negligent or meddlesome acts of other passengers, unless it has notice of such acts, or reason to anticipate them and that injury will result from them.

As to carrier's liability for assault by fellow passenger, see notes to *Illinois C. R. Co. v. Minor*, 16 L.R.A. 627; *Brown v. Chicago, R. I. & P. R. Co.* 2 L.R.A.(N.S.) 105; *Jansen v. Minneapolis & St. L. R. Co.* 32 L.R.A.(N.S.) 1206, and *Lige v. Chicago, B. & Q. R. Co.* ante, 548.

#### Announcements and signals.

Supplementing cases in notes in 37 L.R.A.1918F.

L.R.A.(N.S.) 726, and 49 L.R.A.(N.S.) 811.

Where a passenger attempting to board a standing car was injured when, upon signal given by someone other than the conductor, it started before she could safely get on, it was held, in *Haynes v. Elmira Water, Light, & R. Co.* (1918) 182 App. Div. 472, 170 N. Y. Supp. 369, a question for the the jury to determine whether the conductor was reasonably attentive to his duties in receiving passengers and managing the car at the time of the accident. See also *Lerch v. Hershey Transit Co.* (1916) 255 Pa. 190, 99 Atl. 800, where it was a question for the jury whether the act of prematurely starting a car, causing injury to an alighting passenger, was that of another passenger or of the conductor.

It is held in *Anderson v. Northern P. R. Co.* (1915) 88 Wash. 139, L.R.A. 1917F, 1020, 152 Pac. 1001, 13 N. C. C. A. 451, that the doctrine *res ipsa loquitur* does not apply to render a rail-

road company liable for the death of a passenger thrown from the train by the sudden setting of the emergency brake, if the accident is shown to have been due to a passenger's meddling with the brake apparatus. The court observes that there is no doubt but that the general rule is that a carrier must exercise the highest degree of care and foresight for the safety of its passengers, which is compatible with the practical operation of its trains or cars. The evidence in this case fails to disclose that the respondent railroad company did not meet the requirements of this rule. The proximate cause of the accident was the meddlesome act of a passenger, which the carrier, in the exercise of the highest degree of care, could not have anticipated.

#### Miscellaneous cases.

Supplementing cases in notes in 37 L.R.A.(N.S.) 727, and in 49 L.R.A.(N.S.) 812.

In holding a carrier not liable in *WOOD v. PHILADELPHIA RAPID TRANSIT Co.* ante, 817, where an iron pipe carried on the shoulder of an outgoing passenger, came in contact with another passenger, inflicting injury, the court said that the presumption was that the passenger who caused the injury would use due care, and there was no reason why the conductor should have anticipated danger.

Applying the principle that a common carrier is not responsible for injuries to a passenger, caused by the misconduct of others, which it could not have foreseen and guarded against, a carrier is held not liable in *Eaton v. New York, N. H. & H. R. Co.* (1917) 227 Mass. 113, 116 N. E. 815, where a passenger, while entering the car, was thrown against a brake wheel by an outgoing passenger. The court observed that while there was evidence that the car which the plaintiff boarded was crowded, there was no evidence that there was any commotion or disturbance, or that anyone was pushing or crowding the man who caused the injury. If he was careless or ungentelemanly in his conduct, as the plaintiff contends, the defendant cannot, for that reason, be held liable for her injury. There was no evidence to show that the plaintiff's injuries were due to misconduct on the part of the large crowd at the station, or to the crowded condition of the car, which the defendant ought to have foreseen and guarded against. Accordingly, the principles of law stated in *Kuhlen v. Boston & N. Street R. Co.* (1907) 193 Mass. 341, 7 L.R.A.(N.S.) 729, 118 Am. St. Rep. 516, 79 N. E. 815; *Beverly v. Boston Elev. R. Co.* (1907) 194 Mass. 450, 80 N. E. 507; and *Glenen v. Boston Elev. R. Co.* (1911) 207 Mass. 497, 32 L.R.A.(N.S.) 470, 93 N. E. 700, do not apply. J. D. C.

#### TENNESSEE SUPREME COURT.

FANNIE KATE PRYOR

v.

MARION COUNTY et al., Appts.

(140 Tenn. 399, 204 S. W. 1152.)

#### Tax — judgment appealed from.

1. Under a statute requiring all property to be assessed for taxation, a judgment in favor of the landowner in condemnation proceedings is assessable although it had been appealed from.

For other cases, see *Appeal and Error, III. b, Taxes, I. c, 1, in Dig. 1-52 N. S.*

#### Statute — construction — practical interpretation.

2. Courts are not bound in the interpretation of statutes by the construction put upon them by officers charged with their enforcement.

For other cases, see *Statutes, II. c, in Dig. 1-52 N. S.*

(August 10, 1918.)

Note. — As to tax on judgment, see annotation following this case, post, 823; and see references therein to annotations on related questions.

L.R.A.1918F.

**A** PPEAL by defendants from a decree of the Chancery Court for Marion County overruling a demurrer to a bill filed to enjoin the collection of certain state and county taxes assessed against plaintiff's property. Reversed.

The facts are stated in the opinion.

Mr. L. R. Darr, for appellants:

The chancellor erred in holding that the assessment was illegal and void because of the manner in which it was made.

*Briscoe v. McMillan*, 117 Tenn. 115, 100 S. W. 111; *Louisville & N. R. Co. v. Bates*, 12 Lea, 573.

The chancellor erred in holding that the said judgment belonging to complainant was not such property as is assessable for taxation under the assessment laws.

*Cooley, Const. Lim.* 5th ed. p. 445; 37 Cyc. 783; *Cameron v. Cappeller*, 41 Ohio St. 533; *People ex rel. Lyon v. Halsted*, 26 App. Div. 316, 49 N. Y. Supp. 685.

Messrs. Stewart & Stewart and Brown. Spurlock, & Brown, for appellee:

When the tax is conceived to be illegal, and when no method of revision is provided

other than a resort to the courts, then, clearly, the taxpayer has that right.

*Benedict Bros. v. Davidson County*, 110 Tenn. 183, 67 S. W. 806; *Little Rock & M. R. Co. v. Williams*, 101 Tenn. 146, 46 S. W. 448.

In every case of doubt statutes are construed most strongly against the government, and in favor of the citizen or subject, because burdens are not to be imposed beyond what those statutes expressly and clearly import.

*Chattanooga Plow Co. v. Hays*, 125 Tenn. 155, 140 S. W. 1068; *Memphis v. Bing*, 94 Tenn. 644, 30 S. W. 745; *Black, Interpretation of Laws*, 2d ed. § 92.

The judgment was not a proper subject for taxation.

*Arnold v. Middleton*, 41 Conn. 206; *Lowell v. Street Comrs.* 106 Mass. 540; *Bucksport v. Woodman*, 68 Me. 33.

*Fentress, J.*, delivered the opinion of the court:

The question presented for determination is: Are judgments in condemnation proceedings, pending upon appeal, taxable?

At the April term, 1914, of the circuit court of Marion county, complainant recovered a judgment for \$55,918.38 against the Chattanooga & Tennessee River Power Company for her lands, which had been appropriated and submerged by the building of a dam by the company across the Tennessee river at Hale's Bar.

It appealed from this judgment to the court of civil appeals, and on October 17, 1914, that court rendered a judgment in favor of the complainant for \$49,500. The company filed a petition for certiorari in the supreme court, which was granted prior to January 10, 1915. On January 30, 1915, the judgment of the court of civil appeals was affirmed by this court, and a short time thereafter was paid.

Upon her tax list for the year 1915, filed with the county assessor, the complainant did not return this judgment. The assessor thereafter made a supplemental list for her, assessing the judgment at \$40,000. She appeared before the county board of equalization and protested against the action of the assessor, but without success.

Complainant not having paid the tax upon the judgment, the county trustee issued execution, and a levy was threatened. She then paid the state's portion of the tax, and sought to recover the same by this bill, and to enjoin the county from making a levy for the amount due it.

The case was heard before the chancellor, upon an agreed statement of facts, and he entered a decree for the recovery of the amount paid the state, and enjoined the

county from making a levy. The county trustee has appealed to this court.

By Acts 1907, chap. 602, § 5 (1) (Thompson's Shannon's Code, subsec. 1, § 774), it is provided that all property shall be assessed for taxes for the current year as of January 10th.

We think the action of the chancellor was erroneous, and that the judgment is a proper subject for taxation.

In *Cameron v. Cappeller*, 41 Ohio St. 533, it was held that a judgment which was pending upon appeal was taxable. The judge who delivered the opinion of the court observed: "Surely, when a legal claim is reduced to judgment, although there is alleged error in so doing it, it does not so lose its taxable character as to excuse its owner from returning it for taxation at its true value."

In *People ex rel. Lyon v. Halsted*, 26 App. Div. 316, 49 N. Y. Supp. 685, it was held that a claim against the city of New York for property taken under condemnation proceedings, which was pending upon an appeal from an appraisal, was a proper subject for assessment.

It is insisted, however, that in the following cases the contrary was held: *Arnold v. Middletown*, 41 Conn. 207; *Bucksport v. Woodman*, 68 Me. 33; *Lowell v. Street Comrs.* 106 Mass. 540. An attentive examination, however, of these cases shows that they do not support this contention.

In the Connecticut case, the municipality had the plaintiff's property appraised, but it never appropriated it, and, under the statute, it had sixty days within which to decide whether it would take it. The court held that during this period the plaintiff had no cause of action.

In the Maine case, it appeared that there was a claim for some ships which had been destroyed. The opinion states that it was a debt due by one government to another, and that no appropriation had been made by Congress to pay the claim, and for that reason it was not a proper subject for taxation.

In the Massachusetts case, it was sought to assess a claim for damages for land condemned by the city of Boston to widen a street. The court held that in view of the fact that the damages were uncertain, and had not been passed upon by a jury, therefore the claim should not be taxed. However, in the later case of *Powers v. Worcester*, 210 Mass. 471, 97 N. E. 95, the soundness of the opinion in *Lowell v. Street Comrs.* was doubted. But the court held that, in view of the long-standing judicial interpretation of the statute, it was im-

proper for the court to change the meaning given it.

It is insisted with great earnestness that, after diligent inquiry, no instance has been found in Tennessee where a judgment has been assessed for taxes, and that the revenue officials of the state have construed the tax laws not to include pending judgments. Counsel contend that the interpretation put upon the revenue statutes by the officers charged with the duty of applying them should be followed by the courts. Furthermore, it is urged that all questions of doubt should be resolved against the government.

In *Chattanooga Plow Co. v. Hays*, 125 Tenn. 155, 140 S. W. 1068, it was said: "The construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration. *United States v. Cerecedo Hermanos y Compania*, 209 U. S. 337, 52 L. ed. 821, 28 Sup. Ct. Rep. 532; *Union Ins. Co. v. Hoge*, 21 How. 35, 16 L. ed. 61; 36 Cyc. 1140. . . . It is also a settled rule of interpretation in this state that statutes levying taxes or duties upon citizens will not be extended, by implication, beyond the clear import of the language used, nor will their operation be enlarged so as to embrace matters not specifically pointed out, although standing upon a close analogy. All questions of doubt arising upon the construction of the statute will be resolved against the government, and in favor of the citizen, because burdens are not to be imposed beyond what the statute expressly imports."

See *English v. Crenshaw*, 120 Tenn. 531, 17 L.R.A. (N.S.) 753, 127 Am. St. Rep. 1025, 110 S. W. 210; *Memphis v. Bing*, 94 Tenn. 644, 30 S. W. 745; *Crenshaw v. Moore*, 124 Tenn. 528, 34 L.R.A. (N.S.) 1161, 137 S. W. 924; *Ann. Cas.* 1913A, 165; *Gulf Ref. Co. v. Chattanooga*, 136 Tenn. 505, 190 S. W. 463.

The court was there speaking of matters which were manifestly ambiguous. Under such circumstances what was said was applicable. In cases where doubts arise as to whether the property sought to be taxed is taxable, this court, following the rule quoted, resolves the doubt in favor of the taxpayer, and in interpreting revenue statutes has followed, where consistent, the common understanding and interpretation of the fiscal officers of the state; but it is a fixed rule, and heretofore has been so declared, that the courts are not bound by the construction put upon statutes by the officers charged with their enforcement. *State v. Murphy*, 101 Tenn. 516, 47 S. W. 1098. To hold otherwise would make the judgments of the courts subservient to the opinion of the tax officials, and this would be an abandonment by the court of its func-

tion to construe all laws. However, we shall presently see that rules for the construction of statutes have no place in this case.

Finally, it is insisted that judgments pending upon appeal cannot be properly assessed. The insistence is that they may be reversed and eventually prove of no value. It is also contended, with much earnestness, that judgments having as their basis something intangible would likewise have to be assessed, as well as judgments having a tangible basis, and that there is thus presented great difficulty in placing a valuation on them. We are not called upon to pass on the question as to whether judgments having an intangible basis are taxable. The facts here do not present the question. The argument that a judgment in a condemnation proceeding may be reversed cannot avail. In *Southern R. Co. v. Jennings*, 130 Tenn. 455, 171 S. W. 82, it was said that the attitude of a condemnor in possession of property appropriated was that of a claimant to ownership, with the concession of liability for compensation. The right to condemn being out of the way, the only question is as to the amount the owner is entitled to recover. Error in the judgment cannot result in depriving the owner ultimately of a recovery for some amount. What good reason, then, can be suggested for permitting it to escape taxation.

The fact that it may be difficult to assess property at its actual worth is not a valid argument for permitting it to escape taxation. It is, perhaps, impossible to accurately value anything that is not readily marketable. This reason, however, is not an excuse for exempting such property from bearing its proportionate part of the burden of government, and is no answer to the mandate of the Constitution of the state.

Article 2, § 28, of the Constitution, says: "All property, real, personal or mixed, shall be taxed, but the legislature may except such as may be held by the state by counties, cities or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational, and shall except one thousand dollars' worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer and his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state."

This language is simple and unambigu-

ous. It is not necessary to invoke rules of construction to ascertain its meaning. In *State Nat. Bank v. Memphis*, 116 Tenn. 653, 7 L.R.A.(N.S.) 663, 94 S. W. 606, 8 Ann. Cas. 22, this court in interpreting it said: "Its force cannot be dissipated by construction." It is positive and imperative. *Memphis v. Memphis City Bank*, 91 Tenn. 588, 19 S. W. 1045; *Nashville & K.*

*R. Co. v. Wilson County*, 89 Tenn. 608, 15 S. W. 446; *Chattanooga v. Nashville, C. & St. L. R. Co.* 7 Lea, 576.

The decree sustaining the bill is reversed, and the cause will be remanded, in order that the chancellor may fix the fee of the solicitor of the defendant. *Nashville, C. & St. L. R. Co. v. Marion County*, 120 Tenn. 347, 108 S. W. 1058.

### Annotation—Tax on judgment.

The question of the constitutionality of specific tax upon judgment is treated in note to *St. Louis, I. M. & S. R. Co. v. Pritchard*, 32 L.R.A.(N.S.) 179.

The case, *PRYOR v. MARION COUNTY*, ante, 820, holding that a judgment in condemnation proceedings pending appeal is taxable, is supported by *Cameron v. Cappeller* (1885) 41 Ohio St. 533, where a judgment pending appeal is said to be taxable, the court stating that when a legal claim is reduced to judgment, although there is alleged error in so doing, it does not so lose its taxable character as to excuse its owner from returning it for taxation at its true value.

Appraisement of damages for land taken for a railroad, however, was, in *Arnold v. Middletown* (1874) 41 Conn. 206, held not taxable property. By statute, observed the court, a railroad company may lay out a line for its road and cause an appraisement of damages occasioned to landholders by such layout to be made in writing. This writing must be filed with the clerk of the superior court in the county where the land lies, to be by him recorded, and this record is to have the effect of a judgment, and execution may issue at the end of sixty days from the time of such return, in favor of the persons, respectively, to whom damages may be appraised. The statute also provides that if, after such layout and appraisement of damages, the railroad company shall abandon or discontinue any part or branch thereof before the same shall have been opened and worked, no action shall be brought against the company for the recovery of such appraisement by any owner of land over which the road had been laid out and discontinued. Therefore, during the period of sixty days next after the filing of the written appraisement in the clerk's office, the layout of the railroad and the consequent appraisement of damages are provisional and experimental acts, only; it is within the power of the company to render both entirely void. During that

period the plaintiff had no fixed debt or cause of action against the railroad company; nothing certain in the present; nothing certain to become due at any future time. He had only an expectancy, a possibility; and this liable to be destroyed, without or in spite of any act on his part. In this case, this period of sixty days included the 1st day of October, 1870, from which day the law of taxation speaks. All things are to be taken as they stand on that day; and on that day this appraisement of \$6,000 in favor of the plaintiff against the railroad company was not, in the eye of the law, taxable property; he did not then own it; nor was it liable to taxation as against him. Therefore, it was improperly placed in the list filled out by the assessor, as a basis for taxation.

It was held in *Smith v. Byers* (1871) 43 Ga. 191, that a judgment in equity, directing the removal of trustees for maladministration, and that they pay a certain amount into the hands of a receiver that it may go into the hands of a new trustee, to be managed according to the terms of the trust, is not such a debt as the plaintiffs in the bill, the beneficiaries, are bound to pay taxes upon.

The decision in *Lowell v. Street Comrs.* (1871) 106 Mass. 540, holds that damages for taking land to widen a street do not constitute a debt taxable under statute, against a landholder, until they become fixed and receivable as his absolute personal estate.

So, it is held in *Bucksport v. Woodman* (1877) 68 Me. 33, that an award of the commissioners of Alabama claims does not constitute a debt taxable under statute, until an appropriation is made by Congress for the payment of the award.

The case of *People ex rel. Lyon v. Halsted* (1898) 26 App. Div. 316, 49 N. Y. Supp. 685, affirmed in (1899) 159 N. Y. 533, 53 N. E. 1130, is sufficiently set out in the opinion of *PRYOR v. MAR-*

ION COUNTY, ante, 820, where comment is made upon the cases, *Arnold v. Middletown* (1874) 41 Conn. 207; *Bucksport*

*v. Woodman* (1877) 68 Me. 33, and *Lowell v. Street Comrs.* (Mass.) supra.  
J. D. C.

### NEW YORK COURT OF APPEALS.

CARROLL H. JOHNSON, Appt.,  
v.  
AUBURN & SYRACUSE ELECTRIC RAIL-  
ROAD COMPANY, Respt.

(222 N. Y. 443, 119 N. E. 72.)

#### Civil rights — place of public accommodation — dancing pavilion.

A dancing pavilion maintained by an electric railway company as part of a public park operated in connection with its railway system is within the provision of a statute entitling all persons to full and equal accommodation, advantages, and privileges of any place of public accommodation, resort, or amusement, and therefore the company is liable in damages for excluding a negro from its use.

*For other cases, see Civil Rights, in Dig. 1-52 N. S.*

(February 12, 1918.)

**A** PPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, reversing a judgment of a Trial Term for Cayuga County in his favor, in an action brought to recover a penalty for alleged violation of the Civil Rights Law. Reversed.

The facts are stated in the opinion.

Mr. Oscar Tryon, for appellant:

The learned trial court held, as matter of law, that the "dancing pavilion" was such a "place of public accommodation, resort and amusement" as is contemplated by the statute under which this action is brought, and submitted to the jury the questions, whether or not the plaintiff was excluded and deprived of the privilege of dancing there because of his color.

*Fruchey v. Eagleson*, 15 Ind. App. 94, 43 N. E. 146; *Hubert v. Jose*, 148 App. Div. 718, 132 N. Y. Supp. 811; *Baylies v. Curry*, 128 Ill. 287, 21 N. E. 595.

The exclusion of plaintiff from the pavilion, and the denial to him of the privileges and enjoyment accorded to others there, rendered the defendant liable for the penalty imposed by the statute.

*Grannan v. Westchester Racing Asso.* 16 App. Div. 8, 44 N. Y. Supp. 795; *Joyner v. Moore-Wiggins Co.* 152 App. Div. 266,

**Note.**—As to what places are within Civil Rights Statutes, see annotation following *Gibbs v. Arras Bros.* post, 829; and references therein to annotations on related questions.

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136 N. Y. Supp. 578, affirmed in 211 N. Y. 522, 105 N. E. 1086; *Youngstown Park & F. Street R. Co. v. Tokus*, 4 Ohio App. 276, 22 Ohio C. C. N. S. 417; *Johnson v. Humphrey Pop Corn Co.* 24 Ohio C. C. 135; *Jones v. Broadway Roller Rink Co.* 136 Wis. 595, 19 L.R.A.(N.S.) 907, 118 N. W. 170; *People v. King*, 110 N. Y. 423, 1 L.R.A. 293, 6 Am. St. Rep. 389, 18 N. E. 245; *Ferguson v. Gies*, 82 Mich. 358, 9 L.R.A. 589, 21 Am. St. Rep. 576, 46 N. W. 718.

Messrs. Nottingham, Nottingham, & Edgcomb, for respondent:

Statutes imposing penalties are strictly construed, and the party seeking to enforce such penalty must bring himself within the very letter of the law. A person sued for a penalty is entitled to every reasonable doubt in the construction of the statute under which the action is brought.

*Goodspeed v. Ithaca Street R. Co.* 184 N. Y. 351, 77 N. E. 392; *Wysocki v. Erie R. Co.* 155 App. Div. 798, 140 N. Y. Supp. 950; *McCarthy v. International R. Co.* 126 App. Div. 182, 110 N. Y. Supp. 936; *Kevand v. New York Teleph. Co.* 159 App. Div. 628, 145 N. Y. Supp. 414; *Chase v. New York C. R. Co.* 26 N. Y. 523; *Wood v. Erie R. Co.* 72 N. Y. 196, 28 Am. Rep. 125; *Gifford v. Glen Teleph. Co.* 54 Misc. 468, 106 N. Y. Supp. 53; *Stewart v. Metropolitan Street R. Co.* 20 Misc. 605, 46 N. Y. Supp. 414; *Wichelman v. Western U. Teleph. Co.* 30 Misc. 450, 62 N. Y. Supp. 491.

The dancing floor in question, the free and equal accommodation and privileges of which, it is claimed, were denied the plaintiff on account of his color, is not such a place of public accommodation, resort, or amusement as is contemplated by the statute in question.

*Burks v. Bosso*, 180 N. Y. 341, 105 Am. St. Rep. 762, 73 N. E. 58; *Cecil v. Green*, 161 Ill. 265, 32 L.R.A. 568, 43 N. E. 1105; *People ex rel. Gaskill v. Forest Home Cemetery Co.* 258 Ill. 36, L.R.A.1917B, 946, 101 N. E. 219, Ann. Cas. 1914B, 277; *Brown v. J. H. Bell Co.* 146 Iowa, 89, 27 L.R.A.(N.S.) 407, 123 N. W. 231, 124 N. W. 901, Ann. Cas. 1912B, 852; *People v. Phyfe*, 136 N. Y. 554, 19 L.R.A. 141, 32 N. E. 978; *Bristor v. Smith*, 158 N. Y. 157, 53 N. E. 42; *State Bd. of Pharmacy v. Gasau*, 195 N. Y. 197, 88 N. E. 55; *Lantry v. Mede*, 127 App. Div. 557, 111 N. Y. Supp. 833, affirmed in 194 N. Y. 544, 87 N. E. 1121; *Harmance v. Ulster County*, 71 N. Y.



481; *People ex rel. Barnett v. Bartlett*, 169 Ill. App. 304.

The dancing pavilion in question is a private and not a public place, and therefore is not covered by the statute.

*People ex rel. Suiter v. Holstein-Friesian Asso.* 41 Hun, 439.

**Chase, J.**, delivered the opinion of the court:

Section 40 of the Civil Rights Law (Laws 1909, chap. 14, amended by Laws 1913, chap. 265; Consol. Laws, chap. 6), provides as follows: "All persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages and privileges of any place of public accommodation, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons. No person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any such place, shall directly or indirectly refuse, withhold from or deny to any person any of the accommodations, advantages, or privileges thereof, or directly or indirectly publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed or color, or that the patronage or custom thereof, of any person belonging to or purporting to be of any particular race, creed or color is unwelcome, objectionable or not acceptable, desired or solicited. . . . A place of public accommodation, resort or amusement within the meaning of this article, shall be deemed to include any inn, tavern or hotel, whether conducted for the entertainment of transient guests, or for the accommodation of those seeking health, recreation or rest, any restaurant, eating house, public conveyance on land or water, bathhouse, barber shop, theater and music hall. . . ."

Any person violating the provisions of the section quoted is liable to a penalty for each and every violation of not less than \$100 nor more than \$500, to be recovered by the person aggrieved thereby. Civil Rights Law, § 41.

The plaintiff, a colored man whose character and conduct would appear to have been unobjectionable, alleges that he was by the defendant denied full and equal accommodations, advantages, and privileges at a place in this state of public accommodation, resort or amusement on the 12th day of

June, 1914, and he brings this action to recover the penalty provided by statute.

There is no denial of the statement that the defendant railroad company owns and maintains in connection with its trolley railroad, a public park, consisting of several acres of land, known as Lakeside park, on Owasco lake, near the city of Auburn. Passengers are carried by it from the city to the north side of the park. From the place where the passengers alight from its cars there is a cement walk to the lake, and at about the middle of the park there is a large building called a pavilion. The walk passes through an open part of the pavilion. In such open part of the pavilion is a fountain, and in one end of the pavilion a restaurant, and in the other end thereof a dancing floor. On the south side of the pavilion is a wide platform or veranda. There are chairs and tables on this platform and in the grounds. Swings and other places of accommodation, resort, and amusement are maintained in different places throughout the grounds. The day in question was maintained as a memorial day by the colored people, in memory of a colored woman who, in her lifetime, was well known in different parts of the state. Between 2 and 3 o'clock in the afternoon the plaintiff with three women friends, all young colored people, took one of the defendant's cars at Auburn for Lakeside park. They spent most of the afternoon walking about the grounds and enjoying the various amusements, and then went to the pavilion and watched the dancers. The dancing floor accommodated 800 to 1,000 dancers. An orchestra of seven pieces was maintained by the defendant, and a director of dancing was employed by it. Before a person would be admitted to the dancing floor it was necessary for such person to obtain a button from an attendant with a uniform similar to the ones worn by the men employed on the defendant's cars. The attendant sold the buttons to men for 10 cents each, and to women for 5 cents each. The attendant testified that he had never seen anyone excluded from the dancing floor except for drunkenness or disorderly conduct. The plaintiff and his friends had some conversation, and they saw in a conspicuous place a sign reading: "Procure your buttons from uniformed attendant." Plaintiff then, with the money necessary to purchase the buttons, applied for them to the attendant, and the plaintiff's testimony relating thereto is as follows: "I said I wanted to get some dancing buttons, and he replied: 'You don't want any dance buttons, do you?' I said: 'Yes, sir.' He said: 'I can't sell you any dancing but-

ton.' I said: 'What is your reason?' He said: 'Those are my orders.' I said: 'From whom did you get your orders, Mr. Roseboom?' He said: 'I got my orders from the railroad company.'"

The jury has found, in substance, that the plaintiff on account of his being a colored man was refused equal accommodations, advantages, and privileges at a place of public accommodation, resort and amusement. We think the evidence is such as to justify its conclusion upon the facts. *People v. King*, 110 N. Y. 418, 422, 1 L.R.A. 293, 6 Am. St. Rep. 389, 18 N. E. 245.

The important question for our consideration is whether the dancing floor was, under the circumstances described, included within the provisions of § 40 of the Civil Rights Law which we have quoted. This court has recently had the Civil Rights Law under consideration in *Gibbs v. Arras Bros.* 222 N. Y. 332, *infra*, 118 N. E. 857. In that case the court, speaking by Judge Collins says: "The clear intention of the legislature is not to be defeated through interpretation."

Referring to the classification stated in the statute, the court further says: "Those places include each of those utilities, facilities and agencies created and operated for the common advantage, aid, and benefit of the people, the denial of which to any person would be a discriminatory obstruction or deprivation in achieving prosperity, health, development, or happiness. The existing legislative classification is not based upon the existence of a license or franchise from the state to the proprietor of the place or to the place itself."

The court further says: "The legislature clearly had in mind in enacting this statute that it should apply only to those it selected and named and to such others, if any, devoted to the general advantage, comfort, or benefit, and essential or directly auxiliary

to the prosperity, health, development, or happiness of the citizen."

In that case it was held that a liquor saloon corresponds closely with an ordinary store or shop, and is not a place of public accommodation, within the letter or spirit of the statute. We sustain the ruling in that case, but are of the opinion that the dancing floor, under the particular circumstances disclosed in this case, was a place of public accommodation, resort, or amusement.

The defendant, in its business as a public service corporation, comes within the express language of the statute so far as it maintains a "public conveyance on land or water." The park in question was concededly maintained as a public place. It was not maintained as an independent business, but as an auxiliary to the defendant's passenger business and in connection therewith. It and the amusements afforded therein are maintained for the health, comfort, benefit, pleasure, happiness, and accommodation of the defendant's passengers. The purpose of its effort in their behalf is to increase its transportation business. It is, in fact and as a matter of law, an incident and auxiliary thereto. By the express language of the statute the bathhouses and restaurant are subject to its provision, and the other accommodations and amusements of the park, including the dancing floor, maintained as they are by the defendant as an electric railroad and public service corporation, cannot be separated therefrom, and held to be an independent and private enterprise.

The judgment of the Appellate Division should be reversed, and that of the trial court affirmed, with costs in the Appellate Division and in this court.

**Hiscock, Ch. J., and Hogan, Cardozo, Pound, McLaughlin, and Andrews, JJ., concur.**

#### NEW YORK COURT OF APPEALS.

BENJAMIN D. GIBBS, Resp't.,  
v.

ARRAS BROTHERS, Appt.

(222 N. Y. 332, 118 N. E. 857.)

#### Civil rights — right in saloon.

A liquor saloon is not within the operation of the Civil Rights Act, entitling all persons to the equal accommodations, ad-

vantages, and privileges of any place of public accommodation, resort, or amusement and declaring such places to include any inn, tavern, or hotel, any restaurant, eating-house, public conveyance, bathhouse, barber shop, theater and music hall.

*For other cases, see Civil Rights, in Dig. 1-52 N. S.*

(Chase, Hogan, and Cardozo, JJ., dissent.)

(January 15, 1918.)

**Note.**—As to what places are within Civil Rights Statutes, see annotation following this case, post, 829; and references therein to annotations on related questions.

L.R.A.1918F.

**A** PPEAL by defendant from an order of the Appellate Division of the Supreme Court, First Department, affirming a de-

termination of the Appellate Term which affirmed a judgment of the Municipal Court of the city of New York in plaintiff's favor, in an action brought to recover the statutory penalty provided by the Civil Rights Law, for unlawful discrimination against plaintiff and his assignor. Reversed.

The facts sufficiently appear in the opinion.

Messrs. Theodore B. Chancellor and Walter E. Ernst, with Olcott, Bonynge, McManus, & Ernst, for appellant:

There is no obligation on the part of the owner of a liquor saloon to serve all persons. The term "saloon" is not expressed in the Civil Rights Act; and no term is used that is inclusive of a liquor saloon.

Cromwell v. Stephens, 3 Abb. Pr. N. S. 26; Re Brewster, 39 Misc. 689, 80 N. Y. Supp. 666; People v. Jones, 54 Barb. 311; Crown Point v. Warner, 3 Hill, 150; Mechan v. Board of Excise, 75 N. J. L. 557, 70 Atl. 383, 37 Cyc. 670; Schwankamp v. Modern Woodmen, 44 Mont. 526, 120 Pac. 806.

A saloon is not within the purview of § 40 of the Civil Rights Law.

Rhone v. Loomis, 74 Minn. 200, 77 N. W. 31; Kellar v. Koerber, 61 Ohio St. 388, 55 N. E. 1002; Cecil v. Green, 161 Ill. 265, 32 L.R.A. 566, 43 N. E. 1105; Brown v. J. H. Bell Co. 146 Iowa, 89, 27 L.R.A. (N.S.) 407, 123 N. W. 231, 124 N. W. 901, Ann. Cas. 1912B, 852; People ex rel. Gaskill v. Forest Home Cemetery Co. 258 Ill. 36, L.R.A. 1917B, 946, 101 N. E. 219, Ann. Cas. 1914B, 277; Jones v. Broadway Roller Rink Co. 136 Wis. 598, 19 L.R.A. (N.S.) 907, 118 N. W. 170; Burks v. Bosso, 81 App. Div. 530, 81 N. Y. Supp. 384, 180 N. Y. 341, 105 Am. St. Rep. 762, 73 N. E. 58; Faulkner v. Solazzi, 79 Conn. 541, 9 L.R.A. (N.S.) 601, 65 Atl. 947, 9 Ann. Cas. 67; Alsberg v. Lucerne Hotel Co. 46 Misc. 617, 92 N. Y. Supp. 851.

Mr. Samuel Schwartzberg, for respondent:

A saloon is a place of public accommodation.

People v. King, 110 N. Y. 418, 1 L.R.A. 293, 6 Am. St. Rep. 389, 18 N. E. 245; Jones v. Broadway Roller Rink Co. 136 Wis. 595, 19 L.R.A. (N.S.) 907, 118 N. W. 170; Johnson v. Humphrey Pop Corn Co. 24 Ohio C. C. 135; Tobias v. Riehm, 162 N. Y. Supp. 976; Babb v. Elsinger, 147 N. Y. Supp. 98; Bryant v. Rich's Grill, 216 Mass. 344, 103 N. E. 925, Ann. Cas. 1915B, 869; Bryan v. Adler, 97 Wis. 124, 41 L.R.A. 658, 65 Am. St. Rep. 99, 72 N. W. 368; Ferguson v. Gies, 82 Mich. 358, 9 L.R.A. 589, 21 Am. St. Rep. 576, 46 N. W. 718.

L.R.A. 1918F.

Section 40 of chapter 265 of the Laws of 1913 includes saloons.

People v. Dwyer, 215 N. Y. 46, 109 N. E. 103; Hibberd v. Slack, 84 Fed. 571; Dumas v. Boulin, McGloin (La.) 274; Re Goetz, 71 App. Div. 272, 75 N. Y. Supp. 750; Cooper v. Stinson, 5 Minn. 522, Gil. 416; Boley v. McMillan, 60 Fla. 159, L.R.A. —, —, 63 So. 703; Manhattan Co. v. Kaldenberg, 165 N. Y. 7, 58 N. E. 790; People v. King, 110 N. Y. 418, 1 L.R.A. 293, 6 Am. St. Rep. 389, 18 N. E. 245; Joyner v. Moore-Wiggins Co. 152 App. Div. 266, 136 N. Y. Supp. 578, affirmed in 211 N. Y. 522, 105 N. E. 1088; Johnson v. Auburn & S. Electric R. Co. 169 App. Div. 864, 156 N. Y. Supp. 93.

Collin, J., delivered the opinion of the court:

In June, 1914, the plaintiff and a companion were refused, in the liquor saloon of the defendant, drinks, respectively, of beer and gin, because they were colored men. Thereupon the plaintiff, in his own right and as the assignee of his companion, brought, this action in the municipal court of the city of New York to recover, and did recover, the penalties provided for violations of § 40 of the Civil Rights Law. The appellate term and the appellate division have affirmed the recovery.

Section 40, in so far as relevant to this action reads: "All persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages and privileges of any place of public accommodation, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons. No person being the owner, lessee, proprietor, manager, superintendent, agent, or employee of any such place, shall directly or indirectly refuse, withhold from or deny to any person any of the accommodations, advantages or privileges thereof . . . on account of race, creed or color. . . . A place of public accommodation, resort or amusement within the meaning of this article, shall be deemed to include any inn, tavern or hotel, whether conducted for the entertainment of transient guests, or for the accommodation of those seeking health, recreation or rest, any restaurant, eating house, public conveyance on land or water, bathhouse, barber shop, theater and music hall . . ." [Laws 1913, chap. 265, p. 481.]

The next following section prescribes the penalty for a violation recoverable by the person aggrieved or an assignee of his cause of action, and, further, that each violation shall constitute a misdemeanor punishable by a fine or imprisonment, or both fine and

imprisonment. Civil Rights Law (Consol. Laws, chap. 6) §§ 40, 41, amended by Laws 1913, chap. 265.

The parties recognize and express the fact that the legislature did not specifically declare a liquor saloon included within either of the designations, "a place of public accommodation, resort or amusement." The question, therefore, as presented by the facts, the briefs and arguments of the counsel for the parties, and correctly, is, Is a liquor saloon a place of public accommodation, within the intendment of the statute?

The intention of the legislature must dictate our determination. We must effectuate the legislative purpose and design as through legitimate rules of interpretation, we find them expressed by the language and spirit of the statute. By virtue of those rules, the statute must be strictly construed, for the reasons that it imposes restrictions upon the control or management of private property by the owner, and is both penal and criminal. Its effect is not to be extended through implication or analogy. Equally true it is, however, that the clear intention of the legislature is not to be defeated through interpretation; but beyond that clear intention the penalty will not be enforced. *Burks v. Bosso*, 180 N. Y. 341, 105 Am. St. Rep. 762, 73 N. E. 58; *Butts v. Merchants' & M. Transp. Co.* 230 U. S. 126, 57 L. ed. 1422, 33 Sup. Ct. Rep. 964; *Woolcott v. Shubert*, 217 N. Y. 212, L.R.A.1916E, 248, 111 N. E. 829, Ann. Cas. 1916B, 726.

The classifications by the legislature, in Civil Rights Statutes, of the places expressly and specifically included in the general designations, "a place of public accommodation" or "a place of public amusement," or "a place of public resort," are trustworthy evidence or explanation of the legislative meanings of those designations. The original Civil Rights Statute of 1873 secured to each citizen the "equal enjoyment of any accommodation, advantage, facility or privilege furnished by innkeepers, by common carriers, whether on land or water, by licensed owners, managers or lessees of theaters, or other places of amusement, by trustees, commissioners, superintendents, teachers and other officers of common schools and public institutions of learning, and by cemetery associations." Laws 1873, chap. 186, § 1. This provision became in 1881 a part of § 383 of the Penal Code. Laws 1881, chap. 676, § 383. In 1893, the legislature, retaining the substance of the provision, forbade by an independent subdivision the denial, by reason of race, color, or previous condition of servitude, of the full enjoyment of the accommodations and privileges "of any hotel, inn, tavern, restaurant, public

conveyance on land or water, theater or other place of public resort or amusement." Laws 1893, chap. 692, § 1. As thus amended, the provision has remained. Penal Law, § 514. In 1895, the statute commonly known as the Civil Rights Act was enacted. Laws 1895, chap. 1042. It applied to "inns, restaurants, hotels, eating houses, bath-houses, barber shops, theaters, music hall, public conveyances on land and water, and all other places of public accommodation or amusement." In 1913 it was amended to the language of the § 40 we have already quoted.

The classifications denote the character and purpose which the places deemed, within the legislative intention and enactment, of public accommodation, resort or amusement, must possess. Those places include each of those utilities, facilities, and agencies created and operated for the common advantage, aid, and benefit of the people, the denial of which to any person would be a discriminatory obstruction or deprivation in achieving prosperity, health, development or happiness. The existing legislative classification is not based upon the existence of a license or franchise from the state to the proprietor of the place or to the place itself; nor is it based upon the accessibility of the place for the public. The places of business of lawyers, physicians, dentists, embalmers, and of many other occupations are operated under licenses, and are accessible for the public. Stores, shops, the studios or galleries of artists or photographers, and very many other places are accessible for the public. It has never been, and could not be, claimed that civil rights in behalf of the citizen attach to those places under the existing or any prior Civil Rights Act. Having in view the common advantage and benefit, the distinction between a restaurant or barber shop and the ordinary shop or store is not broad and conspicuous, but is real and indestructible. On the other hand, many of the places specifically named in the statute are neither licensed nor operated under a license.

A liquor saloon is a shop or room wherein is kept a varied assortment of liquors, which are sold by the glass, drink, or at retail. Having in view a place of public accommodation, a liquor saloon corresponds closely with that of a tobacco and cigar shop, and corresponds generally with that of the ordinary store or shop. It is not a place of public accommodation within the letter or spirit of the statute. All successful occupations and every kind of business satisfies wants or needs of citizens; but the legislature clearly had in mind, in enacting this statute, that it should apply only to those it selected and named and to such

others, if any, devoted to the general advantage, comfort, or benefit, and essential or directly auxiliary to the prosperity, health, development, or happiness of the citizen. *Burks v. Bosso*, supra.

The order appealed from and the judgment of the Municipal Court and the determination of the Appellate Term should

be reversed, and the complaint dismissed, with costs to appellant in all the courts.

Hiscock, Ch. J., and Crane and Andrews, JJ., concur. Chase, Hogan, and Cardozo, JJ., dissent.

Petition for rehearing denied.

### Annotation—What places are within civil rights statutes.

Many of the cases on this subject will be found in the notes to *Hynes v. Brewer*, 9 L.R.A.(N.S.) 601, on the question as to what are places of public accommodation, within the meaning of civil rights acts, and to *Jones v. Broadway Roller Rink Co.* 19 L.R.A.(N.S.) 907, on the question as to what are places of amusement within civil rights acts. Only the later cases on the questions treated in those notes are included herein.

The decision in *GIBBS v. ARRAS BROS.* ante, 826, that a saloon is not within the provisions of the New York Civil Rights Statute therein set out, is in accord with the results in *Kellar v. Koerber* (1899) 61 Ohio St. 388, 55 N. E. 1002, cited in the note in 9 L.R.A.(N.S.) 601, and *Rhone v. Loomis* (1898) 74 Minn. 200, 77 N. W. 31, cited in the note in 19 L.R.A.(N.S.) on page 908.

However, it is apparently assumed in *Tobias v. Riehm* (1917) 162 N. Y. Supp. 976, that a saloon is within the New York statute.

And a saloon was held to be a "place of public accommodation" in *Babb v. Elsinger* (1914) 147 N. Y. Supp. 98, within the meaning of a statute entitling all persons to the full and equal accommodations and privileges of "inns, restaurants, hotels, eating houses, bathhouses, barber shops, theaters, music halls, public conveyances on land and water, and all other places of public accommodation or amusement."

In *Baer v. Washington Heights Cafe* (1917) 168 N. Y. Supp. 567, it was held that a place in the rear of a saloon, where food and liquor were served, was a place of public accommodation within the meaning of the Civil Rights Statute quoted in *GIBBS v. ARRAS BROS.* The court said: "The defendant urges also that this place was not a restaurant but a mere saloon, where the service of food was an incident. I do not consider this contention to be well founded, because, in my judgment, the place was clearly an eating place where food was sold, and constituted beyond any doubt

a place of public accommodation, within the language of § 40 of the Civil Rights Law."

The racing of horses was held to be an amusement within the meaning of the New York Civil Rights Act of 1895, entitling all persons to the full and equal accommodations and privileges of inns, restaurants, hotels, eating houses, bathhouses, barber shops, theaters, music halls, public conveyances on land and water, "and all other places of public accommodation or amusement." *Granman v. Westchester Racing Assn.* (1897) 16 App. Div. 8, 44 N. Y. Supp. 790. The decision was reversed on other grounds in (1897) 153 N. Y. 449, 47 N. E. 896, but the applicability of the statute is apparently assumed by the court of appeals.

A dancing pavilion, for admission to which a small fee was charged, maintained by an electric railway company in a public park also owned and maintained by it, was held in *JOHNSON v. AUBURN & S. ELECTRIC R. Co.* ante, 824, reversing (1915) 169 App. Div. 864, 156 N. Y. Supp. 93, to be a place of public accommodation, resort, or amusement, within the meaning of the New York Civil Rights Law which is set out in *GIBBS v. ARRAS BROS.*

And a public dancing pavilion was held, in *Youngstown Park & F. S. R. Co. v. Tokus* (1915) 22 Ohio C. C. N. S. 417, to be a place of public accommodation and amusement, within the meaning of the Ohio statute, imposing a fine for denial of the privileges thereof by the proprietor or keeper of an inn, restaurant, eating house, barber shop, public conveyance by land or water, theater or other place of public accommodation and amusement, except for reasons applicable alike to all citizens. In this case a colored person was, because of his color, ejected from the pavilion, which was located in a park, after he had purchased a ticket and entered the pavilion for the purpose of dancing. Notices were posted at various places in the park, reserving the right to eject any

person deemed objectionable; and the owner of the pavilion had adopted rules for the use of the pavilion by white and colored people at different times. Nevertheless, it was held that the owner was liable for the statutory penalty, the court saying that the provisions of the statute could not be avoided by notices of the kind in question, when the public generally were admitted, and no limitations were placed thereon except that of color; and that the question as to the rules for separate times for white and colored people to occupy the dancing pavilion was not before the court, for the reason that the party ejected was permitted to purchase a ticket and enter the floor of the pavilion, without any reference to his violation of this rule.

In *Alsberg v. Lucerne Hotel Co.* (1905) 46 Misc. 617, 92 N. Y. Supp. 851, it was held that a building in which apartments, arranged in small suites for small families, were rented upon annual leases, transient tenants not being solicited, was not a hotel, within the meaning of a statute entitling all persons to the full and equal accommodations of inns, restaurants, hotels, or other places of public accommodation.

But in *Piluso v. Spencer* (1918) — Cal. App. —, 172 Pac. 412, it was held that the term "hotel," in a statute entitling all citizens to the full and equal accommodations, advantages, facilities, and privileges of "inns, restaurants, hotels . . . and all other places of public accommodation or amusement," included a public resort not only for temporary refreshment, but also for protracted accommodation, and that an action for violation of the statute might be maintained against a keeper of a resort advertised as a hotel by one who was not merely a temporary "guest," but a "lodger" for an indefinite period.

It was held in *People ex rel. Gaskill v. Forest Home Cemetery Co.* (1913) 258 Ill. 36, L.R.A.1917B, 946, 101 N. E. 219, Ann. Cas. 1914B, 277, that a statute giving colored persons the right to equal accommodations in public conveyances and funeral hearses, "and all other places of public accommodation and amusement," did not entitle them to accommodation in cemeteries. See notes to this case and to *Richmond Cemetery Co. v. Walker*, 7 L.R.A.(N.S.) 155, on the forbidding of burial of negroes in a cemetery controlled by white persons.

And it was held in *Brown v. J. H. Bell Co.* (1909) 146 Iowa, 89, 27 L.R.A.(N.S.) 407, 123 N. W. 231, 124 N. W.

901, Ann. Cas. 1912B, 852, that a merchant who leased space in a pure food show for demonstration or advertising purposes, at which to permit patrons of the show to sample his wares, and who was in no way interested in the management of the show or of the profits therefrom, did not, in refusing to serve negroes at the booth, violate a statute entitling all persons to the full and equal enjoyment of the privileges of inns, restaurants, eating houses, lunch counters and any place where refreshments are served, theaters and all other places of amusement.

Under the above statute, it was held in *Humbard v. Crawford* (1905) 128 Iowa, 743, 105 N. W. 330, that, in an action for refusing to serve the plaintiff because of his color, an instruction was not erroneous that if the defendants conducted a place where those who came were received as guests and served with meals, without previous agreement as to the duration of their stay or the terms of their entertainment, the jury would be authorized to find that the defendant kept a public eating house; the objection being that the instruction was erroneous in that the element of publicity, or invitation to the public, was omitted. The court said: "Not from advertisements or signs alone was the true character of the establishment to be ascertained, but from the manner of conducting the business as well, and, if meals were served by defendants to whosoever came, at a uniform price, as the evidence tended to show, this was a sufficient holding out to the world to constitute it a public eating house."

In an action to recover the penalty for violation of a statute, declaring that all persons shall be entitled to the full and equal enjoyment of the accommodations and privileges of inns, it was held, in *Lewis v. Hitchcock* (1882) 10 Fed. 4, that a complaint alleging that the defendants were proprietors "of a certain inn, to wit, a restaurant" at a certain street number, was not subject to demurrer on the ground that the place designated was not within the statute. The court said that the plaintiff could not recover except upon proof that the place was an inn in the legal sense, that is, a place for the lodging and entertainment of travelers; but that the term "restaurant" had no such fixed and definite legal meaning as necessarily to exclude its being an inn in the legal sense, and that the description under the *vide licet* as a restaurant was not therefore

necessarily repugnant to the previous averment that the place was an inn.

Generally, as to refusal of innkeepers to accept or serve one as a guest, see note to *Morningstar v. Lafayette Hotel Co.* 52 L.R.A.(N.S.) 740.

As to right to control or revoke admission to theater or other place of amusement, see note to *Woolcott v. Shu-*

*bert*, L.R.A.1916E, 253, and earlier notes therein referred to.

And as to right of educational, charitable, or religious institution to exclude person on account of race or color, see note to *Booker v. Grand Rapids Medical College*, 24 L.R.A.(N.S.) 447.

R. E. H.

# **SOUTH DAKOTA SUPREME COURT.**

P. A. HOSFORD, Respt.,  
v.

D. G. ENO, Appt.

(— S. D. — 168 N. W. 764.)

**Attorney and client — contract by prosecutor to defend accused.**

A city attorney whose duty is to prosecute for violation of city ordinances cannot contract to defend one violating such ordinances against a criminal charge based on the same act.

For other cases, see *Contracts*, III. c, 1, in Dig. 1-52 N. S.

(September 3, 1918.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Charles Mix County in favor of plaintiff in an action brought to recover an amount alleged to be due for services rendered as attorney for defendant. Reversed.

The facts are stated in the opinion.

Messrs. Roy E. Willy and French, Orvis, & French, for appellant:

Plaintiff, who was attorney for the city of Platte, charged with the duty of prosecuting defendant, could not, for violation of its ordinance, legally accept employment from him to represent him, in court or out, against a charge of adultery arising out of the same transaction and depending upon the same state of facts as the prosecution for violation of the city ordinance.

*Strong v. International Bldg. L. & Invest. Union*, 183 Ill. 97, 47 L.R.A. 792, 55 N. E. 675; *Farwell v. Great Western Teleg. Co.* 161 Ill. 522, 44 N. E. 891; *Weeks, Attys.* § 271; *Heffron v. Flower*, 35 Ill. App. 200; *Adams v. Woods*, 8 Cal. 306; *MacDonald v. Wagner*, 5 Mo. App. 56; *DeCells v. Brunson*, 53 Cal. 372; *Spinks v. Davis*, 32 Miss. 152; *McArthur v. Fry*, 10 Kan. 233; *Herrick v. Catley*, 30 How. Pr. 208; *State v.*

*Rocker*, 130 Iowa, 239, 106 N. W. 645; *Stebbins v. Brown*, 65 Barb. 272; *Gooch v. Peebles*, 105 N. C. 411, 11 S. E. 415; *Arrington v. Arrington*, 116 N. C. 170, 21 S. E. 181; *People v. Gerold*, 265 Ill. 448, 107 N. E. 166; *Ann. Cas.* 1916A, 636; 1 *Thornton, Attys.* § 174; *State v. Halstead*, 73 Iowa, 376, 35 N. W. 457; *Price v. Grand Rapids & I. R. Co.* 18 Ind. 137; *Re Cowdery*, 69 Cal. 32, 58 Am. Rep. 545, 10 Pac. 47; *Gaulden v. State*, 11 Ga. 47; *People v. Spencer*, 61 Cal. 130; *Valentine v. Stewart*, 15 Cal. 387; *United States v. Costen*, 38 Fed. 24.

Mr. Ambrose B. Beck for respondent.

McCoy, J., delivered the opinion of the court:

Plaintiff, as an attorney at law, instituted this action to recover from defendant the sum of \$400 and interest, under a contract retaining him to act as attorney for defendant. Defendant answered, admitting the contract, but denied that plaintiff had ever rendered him any service as attorney by virtue thereof, and that there had been no consideration for said contract under which the plaintiff seeks to recover. Defendant also alleged that said contract was illegal and void as being against public policy, by reason of facts hereafter appearing. There was verdict and judgment in favor of plaintiff, and defendant appeals.

The sole question to be determined in this case is whether the respondent, who was city attorney of Platte, charged with the duty of prosecuting appellant for a violation of the ordinances of said city, might legally accept employment from defendant to represent him in the circuit court, or out of court, on a criminal charge against appellant arising out of the same transaction upon which was based the prosecution for the violation of the said city ordinances. It is the contention of appellant that it is against public policy and sound legal ethics to permit respondent to accept such services or enter into a contract to perform services for appellant under such circumstances, and that therefore the contract sued upon was void and of no effect. We are of the view, and so hold,

**Note.** — As to right of prosecuting attorney to represent individuals having an interest adverse to or dissociated from the public interest; see annotation following this case, post, 832; and references therein to annotations on related questions.

that the contention of appellant is right. It appears from the record beyond all question that appellant had been arrested for violating certain ordinances of the city of Platte, and that the respondent then and there held the office of city attorney of that city, and was charged by law with the duty of prosecuting appellant for the violation of said ordinances, and that, after the said arrest of appellant, the respondent entered into a contract whereby the respondent agreed, for the sum of \$400, to represent and defend appellant, either in or out of the circuit court, against a criminal charge in relation to the same subject-matter and transaction upon which the charge for violating the city ordinances was based; in other words, the respondent, by entering into said contract, placed himself in the position of attempting to serve two masters at once, whose interests were legally hostile to each other. One of the professional services incident to the office of city attorney is the duty of prosecuting actions brought on behalf of the city for violation of its ordinances. The contract entered into by respondent with appellant was in direct conflict with his duties as city attorney. The rule is rigid, and designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. *Strong v. International Bldg. L. & Invest. Union*, 183 Ill. 97, 47 L.R.A. 792, 55 N. E. 675. An attorney cannot recover for legal services rendered by him both to plaintiff and defendant, concerning the same transaction. A lawyer, under no circumstances, can recover for services rendered to parties having opposing interests growing out of the same circumstances. *MacDonald v. Wagner*, 5 Mo. App. 56. Based upon statute, and every consideration of professional ethics, it is generally held by all courts that an attorney that has once been made the recipient of the confidence of a client concerning certain subject-matter is thereafter disqualified from acting for any other party adversely interested in the same subject-matter. *State v. Rocker*, 130 Iowa, 239, 106 N. W. 645. In the case of

*Re Cowdery*, 60 Cal. 32, 58 Am. Rep. 545, 10 Pac. 47, a disbarment proceeding, where Cowdery who was acting for the city and county of San Francisco, and was charged with the duty of handling certain litigation on the part of said city and county then pending, entered into a contract to defend in such cases after his term of office had expired, the court said: "Proper public policy dictates that one employed by the choice of the people for a stated period in the capacity of an attorney and counsel for the state, or any portion of it, should not be allowed to say that he had received no confidential communications in his official capacity, and therefore he was at liberty to be retained by the adversaries in the same case after his term of office had expired. It would be placing before gentlemen of the bar a temptation to neglect their duties when called to such public employment, which no principle of law justifies. A just public policy forbids it."

In the case at bar the contract was entered into to defend appellant while respondent was still acting as city attorney, and before his term of office had expired. A contract of this character might have a tendency to cause the city attorney of Platte to be more lenient and to more readily disregard the legal duties he owed to said city. As city attorney he was presumed to have become acquainted with all the facts upon which the prosecution by the city was based. Hence, we are of the view that the contract in question was wholly void as being against public policy.

While having no binding force as a judicial decision or legislative act, but as indicating the general view of members of the bar, we call attention to the following provisions of the "Canons of Ethics," adopted by the American Bar Association and the Bar Association of this state: "It is unprofessional to represent conflicting interests, except by express consent of all concerned, given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."

The judgment and order appealed from are reversed, and the cause remanded, for further procedure in harmony with this decision.

**Annotation—Right of prosecuting attorney to represent individuals having an interest adverse to or dissociated from the public interest.**

The question of the right of a prosecuting attorney to compensation from individuals is treated in a note to *Cog-*

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*geshall v. Conner*, 39 L.R.A.(N.S.) 81. It will be observed that that note deals with the question whether a prosecuting



attorney may obtain compensation from individuals for prosecuting cases which it is his duty to prosecute as a public officer, whereas the present note deals with the question of the prosecuting attorney's right to represent persons having interests which are adverse to the interests of the public, or at least dissociated therefrom.

There are few decisions directly in point, although the general principles which prevent attorneys from representing adverse interests are discussed in many cases. *HOSFORD v. ENO*, ante, 831, in holding that a city attorney whose duty it was to prosecute one for violation of city ordinances, should not be permitted to accept employment from the same party, to represent him on a criminal charge arising out of the same transaction, appears to be sound on principle.

One who, after being employed to assist in a criminal prosecution, accepts money from the defendant, in consideration that he will dismiss the proceeding is, of course, guilty of malpractice, and may be suspended or disbarred. *TUDOR v. COM.* (1905) 27 Ky. L. Rep. 87, 84 S. W. 522.

And in *Re Voss* (1902) 11 N. D. 540, 90 N. W. 15, a disbarment proceeding, it was held that the defendant, a state's attorney, was guilty of reprehensible conduct in remaining in court in a criminal proceeding, after his motion to dismiss the case had been denied, and acting virtually as attorney for the defendant in the further proceedings in the case. It was said that a state's attorney who renders professional assistance to a defendant in a criminal action violates his duty as state's attorney and as an attorney at law; that if he in good faith believes, after thorough investigation, that the defendant is not guilty as charged, it is his duty to move the dismissal of the case; but that his duty ends with such motion, and he has no right to remain in the case thereafter for the purpose of assisting the defendant, directly or indirectly.

In *Re Bunston* (1916) 52 Mont. 83, 155 Pac. 1109, it was held a ground for disbarment of a county attorney that he had used his office as a means of furthering his private practice, by threatening with criminal prosecution persons who failed to pay claims which he, as attorney, held against them.

And in *Re Cowdery* (1886) 69 Cal. 32, 58 Am. Rep. 545, 10 Pac. 47, from which the court quotes in the *HOSFORD CASE*,

the fact that a prosecuting attorney, after his term of office expired, agreed with the adverse parties, for a certain sum of money, not to accept employment by the city in cases against it which were pending on appeal, and which had been under his control during his term of office as city attorney, was held a ground for suspension from practice.

And in *Gaulden v. State* (1852) 11 Ga. 47, it was held that, on grounds of public policy, a solicitor general who had prosecuted a defendant for violation of law by preferring an indictment against him should not be permitted, after his term of office expired, to appear as such defendant's counsel to defend him from the charge.

So, the fact that one who, as district attorney, had drawn an indictment which was returned by the grand jury "a true bill," seven years later, as counsel for the defendant in the indictment, moved to set it aside for omission of certain forms, was held a ground for suspension from practice as an attorney, in *People v. Spencer* (1882) 61 Cal. 128, although, in acting as counsel, the attorney was not assisted by information received by him in his capacity of district attorney, and had no actual knowledge of the statutory provision which made his act a misdemeanor. The court said that, independent of the statute (which is not set out), there could be no doubt that the attorney's conduct was reprehensible; that, by appearing both for plaintiff and defendant in the same action, he was guilty of a violation of his duty as attorney, for which it was its duty to remove or suspend him.

But the mere fact that one, who, while district attorney, filed an information, accepted employment as counsel for the accused after the expiration of his term of office, was held not a ground for disbarment, where he had accepted such employment with the consent of the trial court, who was informed by him of the facts, and without objection by his successor in office. *People ex rel. Bar Asso. v. Johnson* (1907) 40 Colo. 460, 90 Pac. 1038. The court said: "Inasmuch as respondent presented his connection with the case fully and frankly to the court in the presence of the district attorney, and the court entered an order authorizing and permitting him to enter his appearance for the defendant . . . and to defend him, the district attorney making no objection thereto, we cannot see that respondent violated his oath of office or any of the duties which he owed to the state or to the pro-

fession as an attorney at law. While this is a practice which should not be engaged in and only permitted under very rare circumstances, we believe that where the trial court, having knowledge of all the circumstances, makes an order permitting counsel to defend one against whom the same counsel has prepared an information, and where the district attorney is cognizant of the making of such order and makes no objection thereto, in the absence of any proof showing that the attorney made use of any information which he had previously secured while in the employment of the state, it does not present a case which would justify us in disbarring counsel."

It was held in *Flynn v. Neosho* (1893) 114 Mo. 567, 21 S. W. 903, that the court properly refused to permit the defendant in an action against a city for injuries on a defective sidewalk to show that one of the plaintiff's attorneys was city attorney at the time of the accident, and, while such attorney, drew and procured the passage by the board of aldermen of an ordinance with regard to the street upon which the injury occurred. The court stated merely that the plaintiff's rights could not in any way have been affected by what the attorney did at that time, and that his conduct as an attorney could not be inquired into.

Several cases within the scope of the present note involve statutes prohibiting private employment, under certain circumstances, of prosecuting attorneys. Thus, a civil action for damages, under statute, for the sale of intoxicating liquor to the plaintiff's husband, was held in *Bellison v. Apland* (1902) 115 Iowa, 599, 89 N. W. 22, not based upon substantially the same facts as an indictment proceeding against the defendant for illegal sales of liquor, so as to preclude employment by the plaintiff in the civil action of the county attorney, under a statute prohibiting county attorneys from employment in an action or proceedings based upon substantially the same facts upon which proceedings had been prosecuted in the name of the county or state, where, although it appeared that the defendant had shortly before been indicted for sales of liquor made during the same time as that covered by the petition in the civil action, the plaintiff's husband was not one of the witnesses before the grand jury, and it did not appear that the indictment was based on any sales made to him.

And under statute prohibiting state's attorneys from employment for any par-

ty other than the state or county, in any civil action depending on the same state of facts as a pending criminal prosecution, it was held in *Re Johnson* (1911) 27 S. D. 386, 131 N. W. 453, not a ground for disbarment of a prosecuting attorney that, during the pendency of criminal proceedings instituted by him for the larceny of horses, the firm of which he was a member began civil actions against the accused for conversion of the horses, where it appeared that, at the time the civil actions were begun, the prosecuting attorney was of the opinion that the only question involved would be as to the amount of damages, and honestly believed that the civil and criminal proceedings did not depend on the same state of facts, and that later the firm, after consultation with the trial judge as to the propriety of its remaining in the civil action, withdrew therefrom. It was held also, in *Re Johnson* (S. D.) supra, that such misconduct on the part of the prosecuting attorney, in subpoenaing and examining a witness in a criminal case for the purpose of using his testimony in a subsequent civil action, was not shown as warranted his disbarment, where there was uncontradicted evidence tending to show that the examination was such as was usual in the investigation of criminal complaints, and was not instituted or conducted from improper motives, although the criminal proceedings were dropped after the examination, and the following month a civil action arising out of the same transaction as constituted the basis of the criminal proceedings was instituted against the witness by an attorney who was in the same office as the prosecuting attorney's firm, and received from the latter a nominal salary, but acted, in part, as attorney on his own account, it not appearing that the prosecuting attorney received any compensation from or was in any way connected with the subsequent civil action.

Under the Oklahoma statute, prohibiting county attorneys from engaging in the private practice of law, it was held in *Aldridge v. Capps* (1916) — Okla. —, 156 Pac. 624, that where a county attorney, over the objection of his opponent, appeared and prosecuted a civil action, in which his official duty did not require him to act, and a judgment was secured in favor of his client, the judgment would be reversed on appeal. The court said that it was not only against public policy, but a direct violation of the statute, for a county attorney to engage in

the practice of law in civil cases in which the statute did not make it his duty to act; that "the county attorney, to whom is intrusted the criminal affairs of the county, will probably exert a greater influence over a jury than a judge, from the fact that there are liable to be members on the jury so desirous of procuring his good offices as to cause them to view his side of the case with special favor, and thus prevent that fair and impartial trial to which every litigant is entitled. Certainly, to permit the possibility of such partiality is against public policy, and in direct violation of a statute of this state. Regardless of the fact that such violation of said § 1557 does not render the county attorney liable to a fixed penalty for the violation of said law, we think the want of such penalty being fixed cannot be urged as warranting the violation of the statute."

But in *Alexander v. Smith* (1918) — *Okl.* —, 173 *Pac.* 648, it was held that the above statute might be waived by the parties in litigation; and that, if they desired to take advantage of it, they must do so at or during the progress of the trial, and not wait until an adverse verdict was returned against them, and then for the first time urge the objection on appeal.

A state law prohibiting any lawyer who is a partner of a prosecuting attorney in the state from appearing for or defending, in any of the courts of the state, any person charged with a misdemeanor or felony, was held in *Re Lyons*

(1912) 162 *Mo. App.* 686, 145 *S. W.* 844, to refer only to partnerships with state prosecutors and not to apply to a partnership with a United States district attorney.

But, independently of statute, a secret partnership between a United States district attorney and one regularly defending persons in the United States district court, with a division of fees between them, justifies disbarment of such district attorney. *Ibid.*

Although not directly within the scope of the title to the note, attention is called to the case of *Loew v. Gillespie* (1915) 90 *Misc.* 616, 153 *N. Y. Supp.* 830, affirmed on opinion of lower court in (1916) 173 *App. Div.* 889, 157 *N. Y. Supp.* 1133, holding that public policy forbids an attorney in the employment of a city from accepting a retainer to bring an action, in which the judgment recovered would be payable by the city, even if the acceptance does not call for the performance of acts directly interfering with his duties as a municipal employee, and he does nothing under the retainer until he has severed his relations with the city. In this case, an attorney employed as a law clerk in the finance department of New York city was held not entitled to recover for services in prosecuting against the board of education an action begun by him after he had severed his connection with the city, but where such action was brought pursuant to a retainer accepted while he was in the city's employ. *R. E. H.*

**WASHINGTON SUPREME COURT.**  
(Department No. 1.)

**NORTHERN PACIFIC RAILWAY COMPANY, Appt.,**

**v.**

**WILLIAM R. SHOEMAKE et al., Respts.**

(69 *Wash.* 140, 124 *Pac.* 385.)

Courts — jurisdictional amount — sufficiency — counterclaim.

A counterclaim cannot be added to the amount claimed in the complaint in determining whether or not a cause involves a sufficient amount to confer jurisdiction upon the court, under a constitutional provision

**Note.** — For counterclaim as affecting question whether amount involved equals or exceeds minimum jurisdictional amount for purpose of appellate jurisdiction, see annotation following this case, post, 837; and references therein to annotations on related questions.

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that such jurisdiction shall not extend to actions when the "original amount in controversy" does not exceed a specified sum. *For other cases, see Courts, II. a, 3, in Dig. 1-52 N. S.*

(June 21, 1912.)

**A**PPEAL by plaintiff from a judgment of the Superior Court for Pierce County in defendants' favor, and dismissing their counterclaim, in an action brought to recover demurrage charges for the detention of three loaded cars, and for the cost of unloading them. Appeal dismissed.

The facts are stated in the opinion.

Messrs. George T. Reid, J. W. Quick, L. B. da Ponte, for appellant:

Jurisdiction *vel non* is to be determined without reference to the judgment, but from an inspection of the pleadings.

*Bleecker v. Satsop R. Co.* 3 *Wash.* 77, 27 *Pac.* 1073; *Kirby v. Rainier-Grand Hotel*

Co. 28 Wash. 705, 69 Pac. 378; *Fidelity & D. Co. v. Faben*, 51 Wash. 308, 98 Pac. 764.

The counterclaim should be considered.

*Lister v. Campbell*, — Tex. Civ. App. —, 46 S. W. 876; *Winder v. Weaver*, — Tex. Civ. App. —, 37 S. W. 376; *Lake Shore & M. S. R. Co. v. Van Auken*, 1 Ind. App. 492, 27 N. E. 120; *Lauridsen v. Lewis*, 47 Wash. 504, 92 Pac. 440; *Sorrill v. McGougan*, 44 Wash. 558, 87 Pac. 825; *Gabriel v. Seattle & M. R. Co.* 7 Wash. 515, 35 Pac. 410.

Messrs. Browder D. Brown and J. W. A. Nichols for respondents.

Gose, J., delivered the opinion of the court:

The plaintiff brought this suit to recover the sum of \$105 demurrage charges for the detention of three loaded cars for thirty-five days each at \$1 per day per car, and \$4.25, the cost of unloading the cars. The defendants pleaded a counterclaim for demurrage charges in a like amount, and for damages. The case was submitted to the trial court upon an agreed statement of facts. The facts essential to a correct understanding of the case are these: The plaintiff is a common carrier of state and interstate freight and passengers. In pursuance of a written order therefor, it placed three cars on its loading track at Lacey station, which the defendant loaded with piling, with instructions to ship to South Aberdeen. After the cars were loaded, and before they could be moved, the plaintiff was served with certain notices of liens claimed upon the piles for labor performed in cutting them. The plaintiff promptly notified the defendants thereof, and advised them that it could not move the cars as directed. The defendants refused to satisfy the liens or to unload the cars, but demanded that they be shipped according to instructions. After the cars had been loaded and standing in the station at Lacey for thirty-five days beyond the forty-eight hours allowed by law the plaintiff unloaded the cars at a cost to it of \$4.25. It was further stipulated that, if the court held that the plaintiff had a lawful right to refuse to move the cars in consequence of the filing and serving of the lien notices, a judgment should be entered for it for the amount claimed. Otherwise the judgment to be entered for the defendants. Upon these facts, a judgment was entered in favor of defendants for their costs, and their counterclaim was dismissed.

The first question presented is one of jurisdiction. Section 4, art. 4, of the Constitution, provides that the appellate jurisdiction of this court "shall not extend to

civil actions at law for the recovery of money or personal property, when the original amount in controversy, or the value of the property, does not exceed the sum of \$200," etc. The appellant thus concretely states its contention: "Under these pleadings, it was competent for the court to have rendered a judgment in favor of appellant for \$105 and against respondents on their counterclaim, or in favor of respondents on the counterclaim for \$105 and against appellant, dismissing its cause of action. In either case the pecuniary loss to the losing party would be \$210, viz., the difference between collecting \$105 and paying out \$105, or \$210." While the reasoning is ingenious, we do not think it is sound. We think that, when the framers of the Constitution used the words "original amount in controversy," they had reference to the amount severally claimed by the respective parties in their pleadings. They did not mean that, if the sum of the opposing claims exceeded \$200, the court would have appellate jurisdiction. When an action is commenced, the amount sued for is the test of jurisdiction. If the adverse party asserts a counterclaim, he to that extent becomes an actor, and, in so far as the question of jurisdiction is involved, he will be treated as if he were commencing an independent suit. We do not think the view urged by the appellant is a correct interpretation of the Constitution. The contention that the defeated party would lose \$210, "the difference between collecting \$105 and paying out \$105, or \$210," is not sound. The law frequently denies a suitor a part or the whole of his claim, but this is upon the ground that he has no claim which the law recognizes. This view we think harmonizes with the decisions of this court. *Bleecker v. Satsop R. Co.* 3 Wash. 77, 27 Pac. 1073; *Fidelity & D. Co. v. Faben*, 51 Wash. 308, 98 Pac. 764; *Lauridsen v. Lewis*, 47 Wash. 504, 92 Pac. 440. In the *Bleecker Case* the words "original amount in controversy" were construed to mean "the amount sued for." In the *Faben Case* the court, in construing these words, said: "It seems manifest from a consideration of the above definition that the amount in controversy to which the appellate jurisdiction of this court extends must be that which was in actual dispute in the beginning before the action was brought." In the *Lauridsen Case*, the court quoted with approval from 1 Enc. Pl. & Pr. p. 734, as follows: When the defendant files a counterclaim in the trial court, and then appeals from a judgment against him, he occupies substantially the position of a plaintiff appealing from an

adverse judgment, and therefore the amount so claimed affirmatively by him becomes the appellate amount in controversy." The appellant, in support of its contention on this question, has cited *Lister v. Campbell* — Tex. Civ. App. —, 46 S. W. 876; *Winder v. Weaver* — Tex. Civ. App. —, 37 S. W. 376; *Lake Shore & M. S. R. Co. v. Van Auken*, 1 Ind. App. 492, 27 N. E. 119. The first two cases were decided by the court of appeals of Texas. The last case was decided by the appellate court of Indiana. In each of these cases the appellate jurisdiction was sustained by adding the plaintiff's claim to the defendant's counterclaim for damages. They are

seemingly based upon statutes which used the words the "amount in controversy." Whether the difference in phraseology would justify the divergent views we need not consider. The soundness of these cases is not so apparent as to incline this court to adopt their views. The real dispute here is which party is entitled to the demurrage charge of \$105.

The appeal is dismissed for want of jurisdiction.

Chadwick, Parker, and Crow, JJ., concur.

### Annotation—Counterclaim as affecting amount involved for purpose of appellate jurisdiction.

#### *I. Introductory, 837.*

#### *II. Where jurisdiction depends upon the sum demanded, 837.*

#### *III. Where jurisdiction depends upon the amount in controversy:*

##### *a. In general, 838.*

##### *b. Majority rule:*

##### *1. In general, 841.*

##### *2. Judgment against the appellant on his claim and in favor of the appellee on his, 841.*

##### *3. Judgment against the appellant on his claim and against the appellee on his, 842.*

##### *4. Both claims sustained in whole or in part, 843.*

##### *5. Judgment in favor of appellant for part of his claim, 843.*

#### *III.—continued.*

##### *c. Rule that it must be possible to render judgment against one of the parties for at least the jurisdictional minimum, 844.*

##### *d. Rule that the claim of at least one party must equal or exceed the jurisdictional minimum, 844.*

##### *e. Rule upon appeal by defendant whose claim is over the jurisdictional minimum, 847.*

##### *f. Counterclaim or set-off pleaded only as defensive matter, 848.*

##### *g. Cross appeals, 848.*

##### *h. Rule where there is an admission of a claim or claims, 849.*

##### *i. Necessity that appellant's claim be a valid one, 850.*

#### *I. Introductory.*

It is intended to include in the present note pleas in set-off, reconvention, and other cross demands as well as counterclaims.

Whether a counterclaim is to be considered in determining the appellate jurisdiction so far as such jurisdiction depends upon the amount involved in the action depends upon the governing constitutional or statutory provision. These provisions vary in the different states and different rules have been announced. These rules will be taken up in detail in the note.

A counterclaim may be waived or abandoned by the defendant, in which

event it cannot be considered.<sup>1</sup> If the defendant's counterclaim has been satisfied pending the action, it cannot be added to the plaintiff's claim to make up the jurisdictional amount.<sup>2</sup>

The effect of filing a counterclaim in excess of the sum to which the jurisdiction of the court in which it is filed is limited has been discussed in a previous note in this series of reports.<sup>3</sup>

#### *II. Where jurisdiction depends upon the sum demanded.*

As stated above, appellate jurisdiction is governed by constitutional and statutory provisions. Some such provisions have been construed as making the ap-

<sup>1</sup> See text to notes 91 and 96.

<sup>2</sup> *Chicago, R. I. & P. R. Co. v. Minick* (1900) 62 Kan. 867, 62 Pac. 1007.

<sup>3</sup> Note to *Stacey Cheese Co. v. Pitkin*, 37 L.R.A. (N.S.) 606.

pellate jurisdiction depend solely upon the amount of the plaintiff's demand. Thus, under a constitution conferring appellate jurisdiction upon the supreme court when the demand amounts to a stated sum, the ad damnum clause of the complaint is the test of jurisdiction; such jurisdiction is in no way dependent upon the counterclaim set up by defendant.<sup>4</sup> So, under a statute conferring upon an intermediate court appellate jurisdiction where the "sum demanded" exceeds a stated sum, the right to appeal is determined wholly by plaintiff's claim.<sup>5</sup>

But under a very similar constitutional provision conferring appellate jurisdiction upon an intermediate appellate court, there was held to be jurisdiction where the defendant pleaded a set-off over the minimum limit.<sup>6</sup> It is stated that whether the litigation is produced directly by the claim set up by the plaintiff or by the plea of defendant against his adversary, the principle is the same.<sup>7</sup>

Other provisions expressly make the appellate jurisdiction depend upon the "amount claimed in the complaint." Un-

der such a provision the right of appeal is determined altogether by the amount claimed by plaintiff.<sup>8</sup>

### *III. Where jurisdiction depends upon the amount in controversy.*

#### *a. In general.*

By far the largest number of constitutional and statutory provisions make the appellate jurisdiction depend upon the amount involved in the action. These provisions<sup>9</sup> vary in wording, but the basis of the appellate jurisdiction is in all of them, as above stated, the amount involved in the action. The appellate jurisdiction in such case depends upon a construction of these statutory provisions. To determine the amount in dispute the court is not confined to the judgment or the pleadings, but may look to the whole record,<sup>10</sup> even to the evidence.<sup>11</sup> As will hereinafter appear, there are various theories for determining the amount in controversy.

There are a number of cases in which no rule is laid down, the result simply being announced.<sup>12</sup>

<sup>4</sup> Lord v. Goldberg (1889) 81 Cal. 596, 15 Am. St. Rep. 82, 22 Pac. 1126 (appeal by defendant from a judgment against him on plaintiff's claim, there being no finding as to the counterclaim).

<sup>5</sup> Fowler v. Stocking (1813) 5 Day (Conn.) 539, appeal by defendant from a general judgment against him in favor of plaintiff.

<sup>6</sup> Reedy v. Helms (1875) 54 Ga. 121; Wheelless v. Carter (1904) 120 Ga. 725, 48 S. E. 121. The constitutional provision set out in Reedy v. Helms was that inferior courts shall have jurisdiction "where the principal sum claimed does not exceed \$100 . . . but in cases where the sum claimed is more than \$50 there may be an appeal to the superior court." The appeal in Wheelless v. Carter was from the county court to the superior court. The appeal in both these cases was by the defendant, whose claim was within the jurisdictional limits. It is stated in Reedy v. Helms that the plaintiff would have had the same right of appeal had judgment been rendered against him for the full amount of the set-off.

These cases are followed in Croft v. Broxton Artificial Stone Works (1908) 4 Ga. App. 92, 60 S. E. 1015 (defendant's appeal).

<sup>7</sup> Reedy v. Helms (Ga.) supra, cited with approval in Wheelless v. Carter (Ga.) supra.

A plea of set-off was a cross action, and under the Georgia Code the plaintiff could not dismiss his action so as to interfere with such plea except by leave of court, upon sufficient cause.

<sup>8</sup> Ross v. Evans (1883) 30 Minn. 206, 14

N. W. 897. Plaintiff's claim was below the jurisdictional minimum; defendant's above; but judgment was rendered for defendant for an amount below minimum, and plaintiff appealed. Appeal was dismissed.

<sup>9</sup> The "amount in dispute," "amount in controversy," "amount involved," or "the sum or value in the controversy," "matter in dispute," "matter in controversy," are various statements of the basis of appellate jurisdiction.

<sup>10</sup> State ex rel. Lingenfelder v. Lewis (1888) 96 Mo. 146, 8 S. W. 770; Roosevelt v. Linkert (1876) 67 N. Y. 447.

<sup>11</sup> Blake v. Krom (1891) 128 N. Y. 64, 27 N. E. 97.

<sup>12</sup> All that appears in the report of Myres v. Liening (1859) 13 Cal. 650, is the statement that an offset being pleaded which, added to the amount sued for, exceeds \$200, does not give jurisdiction.

In an action for \$200 damages in Simons v. Brainard (1857) 14 Cal. 278, in which the defendant pleaded an offset of \$125 and obtained judgment for \$86, it was held that the supreme court had no jurisdiction of an appeal by the plaintiff, since the amount was less than \$200. The theory of this case is not plain. The appeal is stated to have been from a judgment for the amount of the verdict found on the offset; but whether the appeal was taken on this only, and not from the denial of plaintiff's claim, is not clear.

In Crandel v. Blen (1860) 15 Cal. 406, it was held that an appeal would not lie from the denial of a motion by a judgment creditor to set off a judgment held by his debtor against him on the amount of his

A question similar to the one under discussion herein arises over the right of removal of a cause from a state to a Federal court. Some of the Federal courts make the right of removal depend entirely upon the plaintiff's claim. It is the theory of these decisions that the

"matter in dispute" at the commencement of the action determines the right to remove the controversy, and if this is under the limit, no right to remove exists although the defendant should thereafter file a claim in excess of the jurisdictional limit.<sup>13</sup> It is the claim of the

judgment against the debtor, where the amount of the debtor's judgment was less than the jurisdictional sum.

As to the rule in this jurisdiction under the Constitution in force at the date of the decision in *Lord v. Goldberg* (1889) 81 Cal. 596, 15 Am. St. Rep. 82, 22 Fed. 1126, see that case, note 4, *supra*.

In *Heraughty v. Grant* (1897) 6 Kan. App. 923, 50 Pac. 506, an action by the plaintiff to recover \$90, to which the defendant filed a bill of particulars claiming that an accounting would show the plaintiff to be indebted to him in the sum of \$80, and also averred that plaintiff owed him \$57.68 in various items on another account, and asked judgment in the sum of \$137.68, the defendant, against whom a judgment was rendered in favor of the plaintiff for the sum of \$65, was held to have no right to appeal, where he offered evidence tending to prove the existence of the various items constituting his account to the amount of \$57.68 only. The court states that it thus affirmatively appears from examination of the record that the amount in controversy is less than \$100.

*Berger v. Rife* (1898) 7 Kan. App. 639, where the plaintiff began an action for an amount over the jurisdictional minimum, but made an admission which reduced it to less than the jurisdictional minimum, and the defendant filed a counterclaim for much less than the jurisdictional minimum, the plaintiff was held to have no right of appeal; at least, not where the amount of the defendant's claim, which was disputed by the plaintiff, when added to the amount to which the admissions of the plaintiff reduced his claim, did not total the jurisdictional minimum.

In *Richard v. Goodpaster* (1903) 116 Ky. 637, 76 S. W. 831, the joint property of a tenant and his landlord had been levied upon in an action under executions against the tenant, and the property left in the hands of the landlord and afterwards sold by him; the tenant subsequently brought an action against the landlord to recover his share of the proceeds of the property, and made the execution creditor a party defendant; the amount claimed by the landlord and his tenant to be due the tenant as his share of the proceeds of the property was less than the execution creditor claimed to be due; the judgment of the court was for the amount claimed by the landlord and the tenant, and from this judgment the execution creditor appealed. It is stated by the court that the amount claimed by the execution creditor to be due the tenant was the amount in controversy.

In *International Harvester Co. v. Smith*

(1906) 105 Va. 683, 54 S. E. 859, an action on one of three notes which had been given by the defendant as the purchase price of a machine, in which the defendant claimed that he had been damaged to an amount equal to the purchase price of the machine through the failure of the plaintiff to furnish him the machine bargained for, which amount he offered to set off against the plaintiff's demand, the appellate jurisdiction was sustained on the theory that the action on the one note of the series really involved the right to recover upon the other notes, and as the amount of the purchase price was within the jurisdictional limit, the appeal would lie. No stress is put upon the set-off of the defendant.

See *Kendrick v. Spotts* (1893) 90 Va. 148, 17 S. E. 853, *infra*, text to notes 36 and 37; *Bunting v. Cochran* (1901) 99 Va. 558, 39 S. E. 229, *infra*, note 74.

Where the sole question upon an appeal is whether a contract for the sale of three carriages is entire, so as to preclude the vendor from recovering \$85 for one of the carriages by reason of his failure to deliver the other two, the appellate court acquires no jurisdiction without a certificate from the lower court, under a statute requiring such a certificate in appeals involving less than \$100. *Troy Carriage Co. v. Bonell* (1899) 102 Wis. 424, 78 N. W. 752.

The judgment from which the defendant appealed in *Nagle v. Rutledge* (1880) 100 U. S. 675, 25 L. ed. 772, was for \$969.63. In order to give the Supreme Court of the United States jurisdiction, the matter in dispute had to exceed \$1,000. The defendant claimed jurisdiction was acquired by reason of a counterclaim set up by him for \$340. It is stated by the court that the only question presented on the counterclaim was whether the plaintiff below was liable for interest on a note of \$210 at the rate of 3 per cent a month for three years and one month, or for some shorter period; and that in no event could the amount thus put in controversy reach \$1,000.

A matter in dispute exceeding the value of \$2,000 is presented by a cross bill which seeks to recover a balance of \$1,700, due on a contract for the exchange of soda fountain apparatus, where the original bill, which was dismissed on complainant's own motion, asked for the cancellation of his agreement to pay \$2,025 in consideration of the exchange. *Kirby v. American Soda Fountain Co.* (1904) 194 U. S. 141, 48 L. ed. 911, 24 Sup. Ct. Rep. 619.

<sup>13</sup> *La Montagne v. T. W. Harvey Lumber Co.* (1891) 44 Fed. 645; *McKown v. Kansas & T. Coal Co.* (1901) 105 Fed. 657.

A matter in dispute exceeding the value

plaintiff, and not that of the defendant, that determines jurisdiction, unless the counterclaim belongs to a class which, by state law, is barred unless pleaded in the suit.<sup>14</sup> A defendant who has not complied with a rule of the state court as to filing his counterclaim<sup>15</sup> is not entitled to removal. That the amount at the time of removal must be above the jurisdictional minimum has been held where the set-off was not filed until the case reached the Federal court.<sup>16</sup> On the contrary, it is held in other cases that where the claim of the plaintiff is below the amount which would entitle the defendant to a removal, but, upon the filing of a counterclaim in excess of the removal amount, by the defendant, the plaintiff denies the same, the suit is removable to the Federal court.<sup>17</sup> It has been held that a plaintiff whose claim was less than the jurisdictional minimum may remove the cause when the defendant filed with his answer denying the plaintiff's demand a counterclaim in which he seeks to recover from the plaintiff a judgment for more than the jurisdictional minimum.<sup>18</sup> It is the theory of these cases that where a counterclaim has been filed which is disputed by the plaintiff, this amount is in dispute within the meaning of the Removal Act.<sup>19</sup> But where a counterclaim is first filed by the defendant in the state circuit court upon an appeal from a justice of the peace, and in this condition of the record no judgment could be rendered for the defendant for more than \$500 because of a state statute so providing, this amount is the matter in dispute within the meaning of the removal statute, and such a suit cannot be removed although the set-off of the defendant is an amount largely in excess of \$500.<sup>20</sup>

Under the local prejudice clause of the

Removal Act of March 3, 1887, limiting the right of removal to a "defendant being . . . a citizen of another state" than that in which the suit is brought, and to a case involving over \$2,000, a nonresident plaintiff who denies a counterclaim in excess of \$2,000 filed against him must be regarded as a defendant within the meaning of the statute, and the cause removable.<sup>21</sup> But under §§ 28, 29 (Comp. Stat. 1913, §§ 1010, 1011), which limit the right of removal to the defendant substantially as does the Act of 1887-88, the right of a nonresident plaintiff to remove the cause upon a counterclaim in excess of the minimum jurisdictional amount being filed, has been denied.<sup>22</sup> The court is of the opinion that the plaintiff cannot be regarded as a defendant within the meaning of the Removal Act. The general right of a plaintiff to remove a cause is beyond the scope of the present discussion.

It has been held that a defendant cannot remove a cause upon filing a counterclaim in excess of the jurisdictional minimum; so far as the counterclaim is concerned, the defendant is the plaintiff, and the right of removal does not exist in favor of a plaintiff or party who has voluntarily invoked the jurisdiction of the state court.<sup>23</sup>

In other cases involving counterclaims in excess of the removal limit it was sought to base the right of removal upon the theory that the sum set up in the counterclaim can be added to the amount claimed in the complaint to make up the limit. Removal on this theory has been denied.<sup>24</sup>

But a counterclaim of a character specified in a statute, which, by a subsequent provision of the statute, is required to be set up in the action or be thereafter barred, must be taken into

of \$2,000 is presented by a cross bill which seeks to recover a balance of \$1,700 due on a contract for the exchange of a soda fountain apparatus where the original bill, which was dismissed on complainant's own motion after the cause had been removed to the Federal court, asks for the cancellation of his agreement to pay \$2,025 in consideration of the exchange. *Kirby v. American Soda Fountain Co. (U. S.) supra*. At least the Federal court having acquired jurisdiction while the original claim was pending, its jurisdiction is not ousted by the action of the plaintiff.

<sup>14</sup> *Fearon Lumber & Veneer Co. v. Lawson* (1915) 166 Ky. 123, 178 S. W. 1121. See *Lee v. Continental Ins. Co.* (1896) 74 Fed. 424, *infra*.

<sup>15</sup> *Falls Wire Mfg. Co. v. Broderich* (1881) 2 McCrary, 489, 6 Fed. 654.

<sup>16</sup> *Sturgeon River Boom Co. v. W. H. Sawyer Lumber Co.* (1898) 89 Fed. 113.

<sup>17</sup> *Clarkson v. Manson*, 18 Blatchf. 443, 4 Fed. 257, 60 How. Pr. 45.

An opinion in accord with this theory is expressed in *New York I. & P. Co. v. Milburn Gin. & Mach. Co.* (1888) 35 Fed. 225.

<sup>18</sup> *Price v. Ellis* (1904) 129 Fed. 482.

<sup>19</sup> *Carson & R. Lumber Co. v. Hotzelaw* (1880) 39 Fed. 578.

<sup>20</sup> *New York I. & P. Co. v. Milburn Gin. & Mach. Co. (Fed.) supra*.

<sup>21</sup> *Carson & R. Lumber Co. v. Hotzelaw* (1880) 39 Fed. 578.

<sup>22</sup> *Glover Mach. Works v. Cooke Jellico Coal Co.* (1915) 222 Fed. 531.

<sup>23</sup> *Bennett v. Devine* (1891) 45 Fed. 705.

<sup>24</sup> *Ibid*.



consideration, as it is not only the amount which the plaintiff sues for, but that which of necessity under the statute must be litigated in connection with it, that makes up the matter in dispute.<sup>25</sup>

*b. Majority rule.*

*1. general.*

According to the majority view, it is the amount in controversy in the appellate court that is determinative of the jurisdiction.<sup>26</sup> The claim of the defendant must be taken into consideration in determining the amount in controver-

sy,<sup>27</sup> as well as the claim of the plaintiff upon an appeal by him from a judgment against him both on his claim and the claim of the defendant.<sup>28</sup>

*2. Judgment against the appellant on his claim and in favor of the appellee on his.*

Upon a general appeal by the party whose claim has been defeated and against whom a judgment has been obtained by his opponent, the amount in controversy is the sum of the appellant's claim and the judgment against him. This is true as to an appeal by the plaintiff,<sup>29</sup> as well as to an appeal by the de-

<sup>25</sup> *Lee v. Continental Ins. Co.* (1896) 74 Fed. 424. See *Fearon Lumber & Veneer Co. v. Lawson* (Ky.) *supra*.

<sup>26</sup> *Little v. Dansville & W. L. Pl. Road Co.* (1862) 18 Ind. 86; *Bowlus v. Brier* (1882) 87 Ind. 391; *State ex rel. Lingensfelder v. Lewis* (1888) 96 Mo. 146, 8 S. W. 770; *Hilton v. Dickinson* (1883) 108 U. S. 165, 27 L. ed. 688, 2 Sup. Ct. Rep. 424.

On the contrary, in *Kefauver v. Kefauver* (1904) 26 Ky. L. Rep. 1058, 83 S. W. 119, the court considered the amount put in controversy in the original suit, but did not discuss the question.

<sup>27</sup> *Conrad v. DeMontcourt* (1897) 138 Mo. 311, 39 S. W. 805.

In *Coles v. Peck* (1884) 96 Ind. 333, 49 Am. Dec. 161, upon an appeal by the defendant from a judgment in favor of the plaintiff for the full amount of his claim, a sum below the jurisdictional minimum, in which the defendant filed a counterclaim much above that minimum, the court states the the cross complaint as well as the complaint must be taken into consideration, and taking these into consideration, the sum in controversy was much more than the jurisdictional amount.

<sup>28</sup> *Gillespie v. Benson* (1861) 18 Cal. 409. Just what the "amount in dispute" within the meaning of the constitutional provision is, is not determined in this case. The complaint claimed for an amount over the jurisdictional sum; when the case was called for trial the plaintiff was not present, and thereupon the defendant, who had pleaded a set-off, took judgment thereon in an amount under the jurisdictional sum; upon objection by the defendant that no appeal lay from the judgment, the court states that the complaint is for a demand beyond the jurisdictional amount, and the "amount in dispute," within the meaning of the Constitution, is not determined where the plaintiff is appellant by the amount of the offset pleaded by the defendant or found by the jury. In such a case the amount claimed by the complaint, the action being for a debt or damages only, is to be considered in determining whether this court has appellate jurisdiction.

In the subsequent case of *Skillman v. Lechman* (1863) 23 Cal. 198, 83 Am. Dec.

96, 11 Mor. Min. Rep. 381, the *Gillespie Case* is treated as authority for the proposition that where the plaintiff is appellant, and the judgment is for the defendant, the jurisdiction of the supreme court is determined by the amount claimed by the complaint, "for that is the 'amount in dispute' in such cases."

<sup>29</sup> *Uplinger v. Kettering* (1876) 43 Iowa, 483 (plaintiff's claim under the jurisdictional minimum—judgment against him upon defendant's claim under although defendant's claim was over—total under and appeal denied—a different rule was subsequently announced in this jurisdiction); *Walter A. Wood Mowing & Reaping Mach. Co. v. Taylor*, 104 Ky. 217, 46 S. W. 720 (plaintiff's claim and judgment against him under jurisdictional minimum—total less—appeal denied); *Edmondson v. Bird* (1887) 9 Ky. L. Rep. 406 (plaintiff's claim less than jurisdictional minimum—judgment for defendant less—total less—appeal denied); *Morgan v. Johnson* (1914) 168 Ky. 417, 165 S. W. 649 (see *infra*, note 94); *Barton-Parker Mfg. Co. v. Wheeler* (1915) 164 Ky. 452, 175 S. W. 980 (total under—no appeal lies); *Longacre Colliery Co. v. Creel* (1905) 57 W. Va. 347, 60 S. E. 430.

It seems that the plaintiff's claim was admitted in *Moshier v. Shear* (1881) 100 Ill. 469. At any rate, it is stated that the defendant claimed that the plaintiff, on a settlement of account, would owe him a sum over the jurisdictional minimum. A judgment was rendered in favor of the defendant for a sum less than the jurisdictional minimum, but which, with the claim of the plaintiff, would amount to a sum over the minimum. Upon an appeal by the plaintiff, the court held that the sum of the plaintiff's claim and the judgment against him was in controversy, and thereby over the minimum amount, the appeal was allowed. This case was followed without discussion in *Capen v. De Steiger Glass Co.* (1882) 105 Ill. 185, upon an appeal by the defendant from a judgment against him in favor of the plaintiff for an amount below the jurisdictional limit. The claim of the defendant was for an amount beyond the minimum jurisdictional limit, but he admitted the plaintiff's claim and asked

fendant.<sup>30</sup> The amount of the judgment is not alone in controversy.<sup>31</sup> The United States Supreme Court, although committed to this rule allowing an aggregation of claims, has refused to follow it in one instance.<sup>32</sup>

**3. Judgment against the appellant on his claim and against the appellee on his.**

When no affirmative judgment is rendered in favor of the defendant upon his counterclaim, and the result of the suit is simply to defeat the plaintiff's claim,

only for a balance, which was below the jurisdictional limit.

<sup>30</sup> *Foster v. McKeown* (1901) 192 Ill. 339, 61 N. E. 514 (appellant's claim under jurisdictional minimum—judgment in favor of plaintiff under—total over—appeal allowed); *Merchants' Loan & T. Co. v. Bradley* (1904) 210 Ill. 128, 71 N. E. 343; *Shriver v. Bowen* (1877) 57 Ind. 266 (both claims under—total more—appeal allowed); *Bowlus v. Brier* (1882) 87 Ind. 391 (both claims under—total move—appeal allowed); *Wysor v. Johnson* (1890) 1 Ind. App. 419, 27 N. E. 655 (sufficiency of pleading cannot be considered in determining jurisdiction); *Williamson v. Brandenburg* (1892) 6 Ind. App. 95, 31 N. E. 369 (plaintiff's claim under—defendant's over—see *infra*); *Joseph v. Harrison* (1912) 146 Ky. 65, 141 S. W. 1184 (judgment for plaintiff and part of defendant's counterclaim considered, both below jurisdictional minimum, but totaling more—appeal allowed); *Hunt Contracting Co. v. Tate* (1913) 152 Ky. 739, 154 S. W. 12; *Ford Lumber & Mfg. Co. v. Cornett* (1916) 171 Ky. 404, 188 S. W. 466; *Meyerfield v. Roberts* (1892) 14 Ky. L. Rep. 473; *Co-operative Mfg. Produce & Home Co. v. Rusche* (1907) 30 Ky. L. Rep. 790, 99 S. W. 677; *Singer Mfg. Co. v. Witt* (1904) 118 Ky. 344, 80 S. W. 1124; *Sire v. Ellithorpe* (1891) 137 U. S. 579, 34 L. ed. 801, 11 Sup. Ct. Rep. 195; *Clark v. Sidway* (1891) 142 U. S. 682, 35 L. ed. 1157, 12 Sup. Ct. Rep. 327; *Buckstaff v. Russell & Co.* (1894) 151 U. S. 626, 38 L. ed. 292, 14 Sup. Ct. Rep. 448; *Harten v. Löffler* (1908) 212 U. S. 397, 53 L. ed. 569, 29 Sup. Ct. Rep. 351; *Export & Import Lumber Co. v. Port Banga Lumber Co.* (1915) 237 U. S. 388, 59 L. ed. 1009, 35 Sup. Ct. Rep. 604; *Pacific Mail S. S. Co. v. Balderach* (1916) 144 C. C. A. 22, 229 Fed. 562.

At any rate, there is no right of appeal where the aggregate of the defendant's claim supported by the evidence and the judgment against him does not amount to the minimum jurisdictional sum. *Bradstreet Co. v. Higgins* (1884) 112 U. S. 227, 28 L. ed. 715, 5 Sup. Ct. Rep. 117.

In *Lake Shore & M. S. R. Co. v. Van Auken* (1891) 1 Ind. App. 492, 27 N. E. 119, the appeal was by the defendant, whose counterclaim in itself exceeded the jurisdic-

the plaintiff's right of appeal is determined by the amount put in controversy by his complaint.<sup>33</sup> If he fails in his appeal he only loses the amount of his complaint, and if he should win his appeal, he could only recover the amount thereof if finally successful in his suit. If this sum is less than the jurisdictional minimum, no appeal lies.<sup>34</sup> This, however, is but an application of the rule discussed in the preceding subdivision, that the sum of the appellant's claim and the judgment against him determine the jurisdiction.

tional minimum; and it is stated that the counterclaim and the judgment which the plaintiff obtained are in controversy, although the counterclaim cannot be allowed: that is, that it is not alone in controversy whether the amount claimed in the counterclaim as damages can be established by the evidence, but also whether the matter pleaded as counterclaim can, under the law and practice, be entertained or considered at all as a defense to the plaintiff's complaint. For a discussion of the latter question, see subdivision III. h, *infra*.

In *Wysor v. Johnson* (1890) 1 Ind. App. 419, 27 N. E. 655, the total of the appellant's claim and judgment against him being more than \$1,000, the jurisdiction of an appellate court whose jurisdiction was limited to cases in which the amount did not exceed \$1,000 was denied. The jurisdiction of the intermediate court was denied also in *Williamson v. Brandenburg* (1892) 6 Ind. App. 95, 31 N. E. 369.

See *Capen v. De Steiger Glass Co.* (1882) 105 Ill. 185, *supra*, note 29. See *Francis v. Leak* (1892) — Ind. App. —, 31 N. E. 212, *infra*, note 68. See *Charlton v. Scoville* (1895) 144 N. Y. 691, 39 N. E. 394, *infra*, note 66.

<sup>31</sup> *Ford Lumber & Mfg. Co. v. Cornett* (1916) 171 Ky. 404, 188 S. W. 466.

<sup>32</sup> It has been held that the value of a mortgaged vessel and the profits from its use, demanded in a dismissed counterclaim in a suit to foreclose the mortgage, cannot be added to the amount of the mortgage debt in determining the value of the matter in controversy, for the purpose of an appeal to the Federal Supreme Court from the supreme court of the Philippine Islands. *Martinez v. International Bkg. Corp.* (1911) 220 U. S. 214, 55 L. ed. 438, 31 Sup. Ct. Rep. 408.

<sup>33</sup> *Pickett v. Hollingsworth* (1892) 6 Ind. App. 436, 33 N. E. 911; *Gorham-Revere Rubber Co. v. Broadway Automobile Co.* (1913) 71 Wash. 578, 129 Pac. 89. But see other Washington cases *infra*, note 49 et seq. This rule would have resulted in the decision arrived at in *NORTHERN P. R. Co. v. SHOEMAKE*, ante, 835, although that decision is based on a different ground.

<sup>34</sup> *Pickett v. Hollingsworth* (Ind.) *supra*.

**4. Both claims sustained in whole or in part.**

Where the claim of each litigant has been allowed at least in part, the application of the principles discussed in the foregoing paragraphs seems to fix the amount in controversy at the sum of the amount allowed the appellee and the amount disallowed the appellant; that is, the amount deducted from his original claim. A judgment for a balance should not be determinative of the right of appeal, nor should the original claims. The courts, however, have not applied this principle nor do they agree on what is the amount in controversy in this situation. Where the defendant's counterclaim has been sustained in part and the plaintiff's claim in part, and a judgment rendered for a difference in favor of the plaintiff, and the defendant appeals merely from the allowance of the plaintiff's claim, the amount in dispute has been held to be the finding in favor of appellee; and where this is over the jurisdictional minimum, the appeal should be allowed although the judgment for the balance of accounts may be less than the jurisdictional minimum.<sup>35</sup> On the contrary, upon a general appeal by the defendant, the amount of the judgment against the defendant has been held to be the "amount in controversy" where the amount of such judgment was determined by deducting the sum found due the defendant on his counterclaim from the sum found due the plaintiff.<sup>36</sup> The Virginia court<sup>37</sup> states: "When the plaintiff appeals in a case of this sort, the test of the juris-

diction is the amount of his demand. But when the defendant is the appellant, 'the matter in controversy' is the sum decreed against him, and by the payment of which he may discharge himself; so that the amount of the decree determines the jurisdiction in the present case, and not that sum plus the aggregate of the disallowed claim set up in the answer."

But it has been held upon an appeal by the defendant from a judgment in favor of the plaintiff for the amount of his claim, less the amount of the defendant's counterclaim, part of which was admitted by the plaintiff, that the amount in controversy is the sum of the appellant's and appellee's claims.<sup>38</sup>

Under a statute denying the right of appeal "where the amount of the judgment or subject-matter in controversy" did not exceed a stated sum, the right of appeal was denied where the claims of both parties were allowed in an amount in excess of the minimum jurisdictional amount, but a judgment was rendered for a difference below this sum, the court being of the opinion that if "either the judgment or the subject-matter in controversy" does not exceed the jurisdictional minimum the appeal must be denied.<sup>39</sup>

**5. Judgment in favor of appellant for part of his claim.**

It has been held upon an appeal by the plaintiff from a judgment in his favor for less than his claim, and against the defendant on his plea in reconvention, that the amount claimed in reconvention

<sup>35</sup> State ex rel. Lingenfelder v. Lewis (1888) 96 Mo. 146, 8 S. W. 770. The plaintiffs here sued in round numbers for \$7,200, and the cause of action was found in their favor for \$4,700. The defendant denied plaintiffs' cause of action and set up a counterclaim for \$3,000, and it was found in favor of the defendant on the counterclaim for the sum of \$2,700. A judgment was rendered in favor of the plaintiffs for this difference of \$2,000. From this judgment the defendant appealed. It seems evident that the appeal was not taken from the disallowance of the remaining part of the defendant's counterclaim; if it had been so taken the amount in controversy would have been increased; nothing is said as to this, it being merely stated that the finding of the circuit court being in defendant's favor on his counterclaim, and the plaintiffs not having appealed, that dispute is eliminated from the case.

<sup>36</sup> Kendrick v. Spotts (1893) 90 Va. 148, 17 S. E. 853. But see International Har-

vester Co. v. Smith (1906) 105 Va. 683, 54 S. E. 859, supra, note 12; Bunting v. Cochran (1901) 99 Va. 558, 39 S. E. 229, infra, note 74; Norfolk & W. R. Co. v. Potter (1909) 110 Va. 427, 66 S. E. 34, infra, note 60.

The reduction of a decree in favor of libellant in excess of the jurisdictional minimum by the amount of freight due the owners of the vessel to an amount below the jurisdictional minimum, for which balance a judgment is rendered in favor of the libellant, prevents an appeal, since the final decree of the court is for a balance below the jurisdictional minimum, and no appeal lies. Sampson v. Welsh (1861) 24 How. (U. S.) 207, 16 L. ed. 632. The governing statute does not appear.

<sup>37</sup> Kendrick v. Spotts (1893) 90 Va. 148, 17 S. E. 853.

<sup>38</sup> Kefauver v. Kefauver (1904) 26 Ky. L. Rep. 1058, 33 S. W. 119.

<sup>39</sup> Roosevelt v. Linkert (1876) 67 N. Y. 447.

must be considered, as it is an issue upon the trial of the case.<sup>40</sup>

The principle of the foregoing paragraphs has been applied to this situation and where the defendant is appealing from a judgment in his favor upon his counterclaim, the amount in dispute has been stated to be the difference between the appellant's claim and the amount of the judgment in his favor.<sup>41</sup>

*c. Rule that it must be possible to render judgment against one of the parties for at least the jurisdictional minimum.*

After following the rule discussed above, that the amount in controversy is the sum of the appellant's claim and the judgment against him,<sup>42</sup> the Iowa court departed therefrom and announced the rule that it must appear from the pleadings that it was possible for the trial court, consistent with the pleadings, to have rendered judgment against one of the parties for at least the jurisdictional minimum, and that a case was not brought within this rule by claims of the

parties, each less than the jurisdictional minimum, although totaling more.<sup>43</sup> This rule was applied where the defendant admitted a part of the plaintiff's claim and pleaded a counterclaim in excess of the jurisdictional minimum, but which, after deducting the amount admitted to be due plaintiff, was below the minimum, and the appeal was accordingly denied.<sup>44</sup>

*d. Rule that the claim of at least one party must equal or exceed the jurisdictional minimum.*

In some jurisdictions it is held that in order to give an appellate court jurisdiction, where such jurisdiction depends upon the amount in controversy, either the plaintiff's demand or that of the defendant must of itself reach the jurisdictional sum; the claims cannot be aggregated.<sup>45</sup> The view is taken that where there is a cross action in the way of a counterclaim or plea in reconvention, there are two cases which are triable together. Consequently where both the claims are below the jurisdictional min-

<sup>40</sup> *Gilbert v. York* (1911) — *Tex. Civ. App.* —, 140 S. W. 864. See comment *infra*, note 45.

<sup>41</sup> *Skillman v. Lachman* (1863) 23 *Cal.* 198, 83 *Am. Dec.* 96, 11 *Mor. Min. Rep.* 381 (dictum).

<sup>42</sup> *Uplinger v. Kettering* (1876) 43 *Iowa*, 483.

<sup>43</sup> *Madison v. Spitanogle* (1882) 58 *Iowa*, 369, 12 *N. W.* 317 (plaintiff's appeal); *Centerville v. Drake* (1882) 58 *Iowa*, 564, 12 *N. W.* 594.

It is apparent under this rule that if the aggregate of the claims of the plaintiff and defendant does not amount to the minimum jurisdictional sum, no appeal lies, and this is held in *Adamson v. Funke* (1909) — *Iowa*, —, 119 *N. W.* 700.

See *Berger v. Rife*, *supra*, note 12.

This seems to be the theory of *Heraughty v. Grant*, *supra*, note 12.

<sup>44</sup> *Buckland v. Shephard* (1889) 77 *Iowa*, 329, 42 *N. W.* 311.

The Iowa rule was applied upon cross appeals in an action on notes given for the purchase price of a horse, in which the defendant admitted the execution of the notes, but counterclaimed damages for breach of warranty for wrongfully suing out attachments and for expenses incurred in defending against the same, and it was held that the amount in controversy was not the sum of the claims. *Fox v. Duncan* (1882) 60 *Iowa*, 321, 14 *N. W.* 358. Both claims were under the jurisdictional limit in this case, but the total of the two claims was over; the appeal was denied.

<sup>45</sup> *Crosby v. Crosby* (1899) 92 *Tex.* 441, 49 *S. W.* 359 (defendant's appeal); *Tucker v. Williams* (1900) — *Tex. Civ. App.* —,

56 *S. W.* 585 (plaintiff's appeal); *Kiel v. Campbell* (1901) — *Tex. Civ. App.* —, 63 *S. W.* 659; *Jackson v. Persons* (1910) 61 *Tex. Civ. App.* 97, 129 *S. W.* 639.

There are, however, some cases in Texas that cannot be reconciled with this theory. A rule seemingly contrary to this was announced in *Lester v. Campbell* (1898) — *Tex. Civ. App.* —, 46 *S. W.* 876. Although the judgment in favor of the defendant in that case was for an amount below the jurisdictional minimum, as was also a judgment rendered in favor of the plaintiff on his claim, the amount involved upon plaintiff's appeal is stated to include the plaintiff's debt and the defendant's claim for damages. The original claim of the defendant for damages was in excess of the jurisdictional minimum. Again, in *Winder v. Weaver* (1896) — *Tex. Civ. App.* —, 37 *S. W.* 376, an action by a landlord upon an account for advances and for a fourth part of the cotton raised on the premises, the defendant answered, pleading payment of the account in a settlement with his landlord, and admitting that he owed rent out of the crop unsold, and in reconvention asked for \$50 actual and \$50 exemplary damages for the illegal and unjust suing out of the distress warrants, and prayed judgment for the difference between accounts in his favor and for damages. Upon a motion to dismiss the appeal the court, in refusing the motion, states that the answer of the defendant put a sum amounting to more than \$100 in controversy. In *Schneider v. Luckie* (1898) — *Tex. Civ. App.* —, 47 *S. W.* 685, an action by the plaintiff for an amount below the jurisdictional minimum, in which the defendant

imum no appeal lies.<sup>46</sup> If the claim of one party is over the jurisdictional sum, an appeal lies although that of the other is under.<sup>47</sup>

In Tennessee it is held that a demand for a money judgment in a chancery case over the jurisdictional minimum, asserted either by the complainant or by the defendant in a cross bill, is sufficient to confer jurisdiction upon the appellate court unless such relief is a mere incident to the main case.<sup>48</sup>

In Washington it is the "original amount in controversy," and in *NORTHERN P. R. Co. v. SHOEMAKE*, ante, 835, it is stated that this has reference to the amount severally claimed by the respective parties in their pleadings. The view against aggregating the claims is taken in this case; but a defendant

whose counterclaim is over is entitled to appeal from a judgment against him.<sup>49</sup> But where the plaintiff is appealing from a judgment against the defendant upon the counterclaim and dismissing the plaintiff's action, the amount of the plaintiff's claim is the amount in controversy.<sup>50</sup>

The governing constitutional provision does not appear in the earliest Louisiana cases, but it finally appears<sup>51</sup> and is stated to confer jurisdiction where "the matter in dispute" is above a stated sum. Under the early Louisiana doctrine, a reconventional demand was viewed as an independent action. A defendant whose reconventional demand was within the jurisdictional minimum had the right of appeal, but his appeal only brought for review his demand.<sup>52</sup> Accordingly, when

reconvened for damages in a sum in excess thereof, and in which the judgment apparently was against both parties on their claims, the plaintiff being adjudged to pay the costs. An appeal by the plaintiff was held to lie, the court stating that the amount in controversy was more than the jurisdictional minimum by reason of the reconvention.

<sup>46</sup> *Crosby v. Crosby* (1899) 92 Tex. 441, 49 S. W. 359 (defendant's appeal); *Tucker v. Williams* (1900) — Tex. Civ. App. —, 56 S. W. 585; *Kiel v. Campbell* (1901) — Tex. Civ. App. —, 63 S. W. 659 (the cross demand involved in this case is stated to be a totally independent cause of action); *Jackson v. Persons* (1910) 61 Tex. Civ. App. 97, 129 S. W. 639.

<sup>47</sup> *Texas & P. R. Co. v. Hayes* (1893) 4 Tex. Civ. App. 88, 23 S. W. 443 (defendant, whose claim was over the jurisdictional minimum, was appealing); *Bledsoe v. Gulf, C. & S. F. R. Co.* (1894) 6 Tex. Civ. App. 280, 25 S. W. 314 (dictum); *Ford v. Johnston* (1914) — Tex. Civ. App. —, 164 S. W. 424 (defendant, whose claim exceeded the jurisdictional minimum, was appealing); *Mahany v. Lee* (1914) — Tex. Civ. App. —, 171 S. W. 1093 (defendant, whose claim was over, was appealing).

An appeal was allowed the plaintiff from a judgment against him on the counterclaim of the defendant which was beyond the jurisdictional minimum, but not on his own claim, which was below, in *Canadian Development Co. v. LeBlanc* (1900) 8 B. C. 173.

Where the amount of a judgment in favor of the defendant on his counterclaim is over the minimum jurisdictional amount an appeal lies notwithstanding the defendant has remitted the judgment in his favor. *Barnes v. Bryce* (1911) — Tex. Civ. App. —, 140 S. W. 240. See *New Orleans, Ft. J. & G. I. R. Co. v. McNeely* (1895) 47 La. Ann. 1298, 17 So. 798.

The fact that the trial court found against the plea in reconvention does not

remove it as an issue upon an appeal by plaintiff, where it was not withdrawn by the defendant. *Gilbert v. York* (1911) — Tex. Civ. App. —, 140 S. W. 864.

The failure of the justice to enter the pleadings on his docket, as required by statute, so that the amount of the appellant's claim does not appear of record, does not defeat the right of appeal. *Texas & P. R. Co. v. Hayes* (1893) 4 Tex. Civ. App. 88, 23 S. W. 443. See also *Pennsylvania cases infra*, note 60.

<sup>48</sup> *Street v. Waller* (1910) 123 Tenn. 603, 133 S. W. 1103. There was in this case a distinct alternative prayer for a judgment on the cross bill, and its recovery seemed to be the real object of the bill.

<sup>49</sup> *Lauridsen v. Lewis* (1901) 47 Wash. 594, 92 Pac. 440, sufficiently set out in the opinion.

*Sorrill v. McGougan* (1906) 44 Wash. 558, 87 Pac. 825, sustaining an appeal by the defendant, whose counterclaim was over the jurisdictional minimum, from a judgment in favor of the plaintiff, whose claim was under the jurisdictional minimum, and for whom a judgment was rendered for only a part of his claim.

The amount in controversy in the court in which the trial was begun determined the jurisdiction upon appeal, although, in an intermediate trial court the defendant was allowed to amend his pleadings and set up a counterclaim greater than that filed in the lower court, and over the jurisdictional minimum. *Bertles v. Hawkins Motor Car Co.* (1917) 94 Wash. 680, 163 Pac. 3.

<sup>50</sup> *Gorham-Revere Rubber Co. v. Broadway Automobile Co.* (1913) 71 Wash. 578, 129 Pac. 89.

<sup>51</sup> *Kellar v. Palfrey* (1853) 8 La. Ann. 282.

<sup>52</sup> *Gove v. Kendig* (1843) 3 Rob. (La.) 387; *Hanna v. Baillett* (1845) 10 Rob. (La.) 438; *Ex parte Goodwin* (1845) 11 Rob. (La.) 12; *Overton v. Simon* (1855) 10 La. Ann. 685; *Vincent v. Schweitzer* (1865) 17 La.

no appeal was taken on the reconventional demand, the defendant's appeal from a judgment against him on plaintiff's claim was dismissed where such claim was below the jurisdictional minimum.<sup>53</sup> A plaintiff whose demand was over the jurisdictional minimum was allowed to appeal from an adverse decision on his claim, but this did not authorize the court to consider a reconventional demand under the jurisdictional amount.<sup>54</sup> If the claim of each party was below the jurisdictional minimum, there could be no aggregation of the claims.<sup>55</sup> It has been held in this state that where the principal and reconventional demands were so interlaced that one could not be considered without the other, the whole case was appealable although the plain-

tiff's claim was below the jurisdictional minimum.<sup>56</sup>

It has been stated that the amount determinative of the jurisdiction of the appellate court is the sum in controversy at the time of the judgment.<sup>56a</sup>

Under the Louisiana Constitution of 1898, appeals or reconventional demands lie to the court having jurisdiction of the main demand. It is held that the matter in dispute is the thing demanded in the petition. Where the demand in the petition is below the jurisdictional minimum no appeal lies.<sup>57</sup> A reconventional demand is not to be taken into account in determining the amount involved in a suit for purposes of appellate jurisdiction.<sup>58</sup> But an appeal lies from a judgment upon the reconventional demand

Ann. 199; *Pesant v. Heartt* (1870) 22 La. Ann. 292; *Lamorere v. Avery* (1880) 32 La. Ann. 292; *Lamorere v. Avery* (1880) La. Ann. 1008; *Young v. Wilson* (1882) 34 La. Ann. 385; *Watkins Bkg. Co. v. Louisiana Lumber Co.* (1895) 47 La. Ann. 581, 17 So. 143.

This rule was applied where judgment was rendered for plaintiff and also for defendant for a part of his reconventional demand and defendant appealed. *Colomb v. McQuaid* (1884) 36 La. Ann. 370. The difference between defendant's claim in reconvention and the judgment rendered in his favor was over the jurisdictional minimum.

The remittitur of a part of the verdict entered after the verdict is given does not prejudice the plaintiff's right of appeal. *New Orleans, Ft. J. & G. I. R. Co. v. McNeely* (1895) 47 La. Ann. 1298, 17 So. 798. See *Barnes v. Bryce* (1911) — Tex. Civ. App. —, 140 S. W. 240, *supra*.

See *Kellar v. Palfrey* (1853) 8 La. Ann. 282, *infra*, note 65.

<sup>53</sup> *Blanchard v. Kenison* (1873) 25 La. Ann. 385.

<sup>54</sup> *Dean v. Clarke* (1850) 5 La. Ann. 105.

In the official headnote in *State ex rel. Beauvais v. Judges of Fifth Circuit Ct.* (1896) 48 La. Ann. 672, 19 So. 617, it is stated that "in a suit where the defendant acknowledges a part of the indebtedness, the test of the jurisdiction of the appellate court is the difference between the amount claimed and the amount acknowledged, as judgment can only be rendered for the balance due. But when the defendant denies liability on the entire demand and pleads in reconvention an amount exceeding the acknowledged indebtedness, the test of jurisdiction is the amount of the judgment which could be rendered in the case."

<sup>55</sup> *Breedlove v. Young* (1824) 2 Mart. N. S. (La.) 314. This is held true even though in the action, which was one on an account, transactions to a much larger amount than the jurisdictional minimum were gone into. Accordingly the appeal, which was by plaintiff, was dismissed.

*Jewell v. Andrews* (1827) 5 Mart. N. S. (La.) 566; *Smith v. Merchants' Mut. Ins. Co.* (1881) 33 La. Ann. 1071; *Prejean v. Lecompte* (1880) 41 La. Ann. 747, 6 So. 552; *State ex rel. Bobet Bros. v. Judge of Ct. of Appeals* (1890) 42 La. Ann. 1084, 8 So. 266.

The amounts asked in separate suits which have been consolidated cannot be aggregated. *Bloch & Levy v. Lambert* (1912) 130 La. 978, 58 So. 849.

<sup>56</sup> *Allen v. Nettles* (1887) 39 La. Ann. 788, 2 So. 602, holding, in an action against an administrator for a balance of account below the jurisdictional minimum, in which the defendant reconvened in an amount in excess of such jurisdictional minimum, that the principal and reconventional demands were so interlaced that one could not be considered without the other; and since the issue as framed by the pleadings involved the adjustment of the entire account between the parties, that the claims on both sides must be considered; and as this adjustment included an amount in dispute exceeding \$2,000, the case was appealable.

<sup>56a</sup> *State ex rel. Beauvais v. Judges of Fifth Circuit Ct.* (1896) 48 La. Ann. 672, 19 So. 617.

It has been held in Louisiana, in a case not involving a counterclaim, that the defendant, having been sued for an amount within the jurisdiction of the appellate court, cannot be deprived of his appeal by the acquiescence of the plaintiff in a judgment for an amount below that required to confer jurisdiction; that it is the amount originally in dispute which, quoad the litigant who does not acquiesce in the judgment of the trial court, determines the jurisdiction of the appeal. *Alexander v. Morgan* (1912) 130 La. 378, 58 So. 13.

<sup>57</sup> *Brooks-Scanlon Co. v. Booty* (1909) 123 La. 706, 49 So. 479 (defendant's appeal); *Hood v. Wise* (1911) 128 La. 731, 53 So. 335 (plaintiff's appeal).

<sup>58</sup> *Hood v. Wise* (La.) *supra* (plaintiff's appeal).

which is above the jurisdictional minimum where the plaintiff has dismissed his claim, which was below, without prejudice to the reconventional demand.<sup>59</sup>

*e. Rule upon appeal by defendant whose claim is over the jurisdictional minimum.*

Where the claim of the defendant,

who is appealing from an adverse judgment, is over the jurisdictional minimum, his right of appeal has been sustained although the plaintiff's claim or the judgment in his favor may be below the minimum.<sup>60</sup> At least, the defendant is entitled to appeal where the excess of his

<sup>59</sup> Thompson v. McCausland (1915) 137 La. 14, 68 So. 196 (plaintiff's appeal).

<sup>60</sup> Payne v. Miller (1842) 6 Blackf. (Ind.) 178 (plaintiff here claimed \$19.50; the defendant filed a set-off of \$30.50; the judgment was in favor of the plaintiff for \$12.98; on these facts it was held that the amount in controversy, exclusive of costs, was more than \$20).

Hutts v. Williams (1876) 55 Ind. 237 (in this case the plaintiff's claim was for an amount below the minimum jurisdictional limit; the defendant's set-off was for an amount in excess thereof; a judgment was recovered by the plaintiff for the amount of his claim).

Little v. Danville & W. L. Pl. Road Co. (1862) 18 Ind. 86; Horn v. Carroll (1906) 28 Ky. L. Rep. 839, 90 S. W. 559; District of Highlands v. Michie (1908) 32 Ky. L. Rep. 761, 107 S. W. 216; Gates v. Davis (1905) 28 Ky. L. Rep. 490, 89 S. W. 490; Klingensmith v. Nole (1831) 3 Penr. & W. (Pa.) 120; Downey v. Ferry (1834) 2 Watts (Pa.) 304; Steele v. Walton (1887) 3 Pa. Co. Ct. 211; Sherwin v. Colburn, D. & Co. (1853) 25 Vt. 613; I. & G. N. R. Co. v. Grant (1881) 1 Tex. App. Civ. Cas. (White & W.) 430; Ryan v. Bindley (1864) 1 Wall. (U. S.) 66, 17 L. ed. 559; Dushane v. Benedict (1887) 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. Rep. 696 (the excess of the counterclaim above the plaintiff's claim was above the jurisdictional minimum); Faulconer v. Stinson (1898) 44 W. Va. 546, 29 S. E. 1011; Lovell v. Cragin (1889) 136 U. S. 130, 34 L. ed. 372, 10 Sup. Ct. Rep. 1024; Block v. Darling (1891) 140 U. S. 234, 35 L. ed. 476, 11 Sup. Ct. Rep. 832. See Coles v. Peck (1884) 96 Ind. 333, 49 Am. Rep. 161, supra, note 27.

Without any discussion it is stated in *Arthurs v. Thompson* (1895) 97 Ky. 218, 30 S. W. 628, that while the amount for which judgment was rendered against the appellant was insufficient to give the appellate court jurisdiction, yet the items pleaded by him as a counterclaim exceeded the minimum jurisdictional amount and were sufficient to give jurisdiction of the appeal.

In *Forster Vinegar Co. v. Guggemos* (1887) 24 Mo. App. 444, where the entire controversy was upon a counterclaim which was in excess of the jurisdictional minimum, an appeal was allowed the defendant from a judgment disallowing the counterclaim and finding for the plaintiff on his claim. It does not appear what the amount of the plaintiff's claim was.

In *Faulconer v. Stinson* (W. Va.) supra,

the defendant, after a decree adjudging a mechanics' lien on her property for erecting a house thereon, filed a petition stating that the holder of the lien was indebted to her by reason of a judgment which had been assigned to her, and prayed that the amount of the judgment be allowed as a set-off against the mechanics' lien debt. Upon a denial of relief to her under this petition she appealed, and it is stated that the set-off determined her right to appeal, and this being over the jurisdictional minimum, an appeal was allowed; and this is stated to be true notwithstanding the set-off may be found in the end not to be sustained by the evidence.

*Lovell v. Cragin* (1890) 136 U. S. 130, 34 L. ed. 372, 10 Sup. Ct. Rep. 1024, the action in this case involved real property, and it is stated by the court that the claim in the cross bill was one growing out of or appurtenant to the property, and was really incident to the suit, as it was a part of the original transaction relating to the property out of which the claim in the original bill was derived, and therefore the amount claimed by the cross bill can properly be taken into consideration in determining the jurisdiction of the appellate court.

A counterclaim which is large enough to give the court jurisdiction should be considered although it has been rejected by a peremptory instruction of the trial court. *Conrad v. De Montcourt* (1897) 138 Mo. 311, 39 S. W. 805. See subdivision III. h, infra, for general discussion of what claims can be considered.

Under a statute relative to appeals from justice courts, which provides that "where the sum for which judgment was demanded by either party in his pleading shall exceed \$50" the appellant is entitled to a new trial, a defendant who has pleaded a counterclaim for an amount in excess of \$50 is entitled to appeal from a judgment against him in favor of the plaintiff, whose demand is for less than \$50. *Dudley v. Brinckerhoff* (1888) 2 N. Y. Supp. 321.

Where the claim pleaded by way of set-off is above the jurisdictional minimum, the appellate court has jurisdiction, since the set-off is equivalent to an action. *Norfolk & W. R. Co. v. Potter* (1909) 110 Va. 427, 66 S. E. 34.

The fact that the clerk did not mark the set-off "filed," and that there was no entry in the order book showing the filing, does not defeat the right to appeal, where it appears that the set-off was in the record and that plaintiff had notice of it. *Ibid.*

claim over that of plaintiff is more than the jurisdictional minimum.<sup>61</sup>

Where the defendant's counterclaim exceeds the jurisdictional minimum, an appeal by the defendant lies although the plaintiff's claim is below, under a constitutional provision making the appellate jurisdiction depend upon the "original amount in controversy."<sup>62</sup> In some of these cases the amount claimed in the set-off or counterclaim is stated to determine the jurisdiction.<sup>63</sup> It was not necessary in these cases to determine the exact amount in controversy, or whether the plaintiff's judgment might be added to the defendant's claim to make up the jurisdictional minimum; at least the amount of the defendant's claim was in controversy, and this being over the jurisdictional minimum, the appeal would lie.

The rule was announced in *Vernon*

that an appeal lies in every case where the matter in offset would have entitled the parties to an appeal if the action had been brought upon it.<sup>64</sup>

*f. Counterclaim or set-off pleaded only as defensive matter.*

Where the counterclaim is set up as defensive matter merely, no judgment being asked thereon, and the plaintiff's claim is under the jurisdictional amount, no appeal lies by defendant from a judgment against him, even though his claim is more than the jurisdictional minimum.<sup>65</sup>

*g. Cross appeals.*

Where both parties appeal from a judgment in favor of the plaintiff for part of his claim, and against the defendant on his counterclaim, it has been held that the amount in controversy is

See *International Harvester Co. v. Smith* (1906) 105 Va. 683, 54 S. E. 859, supra, note 12, and other Virginia cases there referred to.

The failure of a defendant who has made a statement of his claim in writing and left it with the justice, to have the amount of his claim entered upon the justice's docket, does not deprive him of the right of appeal, where the statute does not require such an entry. *Klinginsmith v. Nole* (1831) 3 Penr. & W. (Pa.) 120. The amount may be ascertained by the oath of the justice or of the arbitrators, or by other competent parol testimony. *Downey v. Ferry* (1834) 2 Watts (Pa.) 304. The justice's failure to so enter it cannot be charged to the defendant. *Klinginsmith v. Nole* (Pa.) supra. See *Texas & P. R. Co. v. Hayes*, supra, note 47.

The only question involved in *Church v. French* (1882) 54 Vt. 420, was as to whether a trustee was entitled to an appeal the same as the parties. That he did have such right was affirmed and an appeal allowed in an action for an amount below the jurisdictional limit, in which the trustee claimed an offset in excess of such limit.

<sup>61</sup> *Dushane v. Benedict* (1887) 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. Rep. 696.

<sup>62</sup> *Sorrill v. McGougan* (1906) 44 Wash. 558, 87 Pac. 825; *Lauridsen v. Lewis* (1907) 47 Wash. 594, 92 Pac. 440. See supra, note 49.

<sup>63</sup> *Little v. Danville & W. L. Pl. Road Co.* (1862) 18 Ind. 86; *Hutts v. Williams* (1876) 55 Ind. 257.

The counterclaim is the amount in controversy. *I. & G. N. R. Co. v. Grant* (1881) 1 Tex. App. Civ. Cas. (White & W.) 430.

See Indiana cases cited in note 30 for rule of late cases in this state.

<sup>64</sup> *Baker v. Blodget* (1820) 1 Aik. (Vt.)

342, a case in which the plaintiff, who had begun an action on promissory notes under the jurisdictional minimum, was appealing from a judgment in favor of the defendant, who had pleaded an offset amounting to more than the jurisdictional minimum, the defendant was urging that there was no right of appeal because of a statute providing that no appeal shall be allowed in any action brought on notes on hand and settled accounts, if such notes or settled accounts shall not exceed a stated sum. In laying down the rule stated in the text it is stated that this is as far as it is necessary to go for the purpose of deciding the case, and the court expressly refrains from giving any opinion whether the right of appeal might or might not exist in a case not coming within this principle.

<sup>65</sup> *Kurtz v. Hoffman* (1884) 65 Iowa, 260, 21 N. W. 597 (action on an account; defendant claimed a credit not given him by plaintiff).

In *Kellar v. Palfrey* (1853) 8 La. Ann. 282, it was held in an injunction suit brought by a judgment debtor to restrain the levying of an execution on the judgment, on the ground that it was extinguished by compensation, the debtor averring that he was the transferee of a judgment rendered by the same court in favor of another, against the judgment creditor, for a sum in excess of the jurisdictional minimum, that the extinguishment of the judgment creditor's claim by compensation was the only matter in dispute; and this being below the jurisdictional minimum, no appeal lay.

Where there is no set-off or counterclaim except to reduce the amount of recovery, there can be no appeal by the defendant from a decree against him for less than the jurisdictional minimum. *Lamar v. Micon* (1882) 104 U. S. 465, 26 L. ed. 774



the sum of the counterclaim and the judgment in favor of the plaintiff.<sup>66</sup>

In Iowa, in a case of cross appeals, the rule announced in an earlier Iowa case, that unless the trial court could render judgment against one of the parties for an amount within the minimum jurisdictional limit, no appeal would lie although the sum of the claims of the two parties is in excess of such minimum, was followed and the appeal denied.<sup>67</sup>

*h. Rule where there is an admission of a claim or claims.*

The fact that the claim set up by one party was admitted has not always been considered.<sup>68</sup>

**Plaintiff's claim admitted.**

Where the defendant admits the claim of the plaintiff, but sets up a counterclaim which is denied by the plaintiff, the amount in controversy upon an appeal by the defendant from a judgment in favor of the plaintiff for the full amount of his claim is the amount of the counterclaim.<sup>69</sup>

The counterclaim has been held to be the amount in dispute where the plaintiff's claim is admitted, although part of the counterclaim was allowed, and a

judgment rendered for the plaintiff for the balance due, and where the counterclaim is below the jurisdictional minimum no appeal lies.<sup>70</sup> This rule was adhered to where the suit was upon notes given for a machine, a warranty on which defendant claimed had been broken, and therefore that he did not owe but a part of the amount called for by the notes; the amount in controversy was held to be the credit which the defendant was thus seeking.<sup>71</sup> It has been held where the amount of defendant's counterclaim was in excess of the jurisdictional minimum that the amount in controversy was over the limit, although the plaintiff's claim was admitted. The argument that the amount in controversy is the difference between what defendant admitted he owed and what he claimed by way of set-off and counterclaim was held not tenable.<sup>72</sup> Where the defendant admitted the plaintiff's claim and pleaded a counterclaim, both claims being below the jurisdictional amount, and asked for judgment for the excess of his claim, the amount in controversy was held to be less than the minimum jurisdictional limit; but just what amount was regarded as being in controversy is not stated.<sup>73</sup>

<sup>66</sup> Charlton v. Scoville (1895) 144 N. Y. 691, 39 N. E. 394.

<sup>67</sup> Fox v. Duncan, 60 Iowa, 321, 14 N. W. 358.

<sup>68</sup> Thus, in Francis v. Leak (1892) — Ind. App. —, 31 N. E. 212, where the defendant set up a counterclaim which he held by assignment from another, to which the plaintiff set up an indebtedness from the assignor in excess of the sum claimed by the defendant, and offered to set off an amount of such indebtedness equal to the amount set up in the claim of the defendant, the court held that the claims thus set up by way of cross demands were involved in the decision of the cause. In this case the defendant was appealing from a judgment in favor of the plaintiff for the amount of his original claim, the court apparently having allowed the set-off claimed by the plaintiff in answer to the claim set up by the defendant. In this case the jurisdiction of an appellate court whose jurisdiction was limited to cases in which the amount was less than the claim thus set up was denied.

See Moshier v. Shear (1881) 100 Ill. 469, and Capen v. De Steiger Glass Co. (1882) 105 Ill. 185, supra, note 29.

<sup>69</sup> Dickey v. Smith (1896) 42 W. Va. 805, 26 S. E. 373.

Thus, in an action on an insurance policy for an amount beyond the jurisdictional minimum, in which the insurance company admits the issuing of the policy, but sets up a counterclaim of various loans made to the holder of the policy, the sum in controversy upon an appeal by the company

from a judgment against it in favor of the plaintiff for the full amount of his claim, is the amount of the counterclaim. Pennie v. Continental L. Ins. Co. (1876) 67 N. Y. 278.

In an action against a bank to recover a deposit in which the bank pleaded various set-offs, but did not dispute the balance of the claim, the amount which the bank pleaded as set-offs was held to constitute the amount in controversy upon an appeal by the bank from a judgment against it for the amount admitted due. Fordsville Bkg. Co. v. Gray (1901) 22 Ky. L. Rep. 1258, 60 S. W. 372.

<sup>70</sup> Alsip Bros. v. Hard (1874) 38 Iowa, 697. It does not appear which party appealed. See Schultz v. Holbrook (1892) 86 Iowa, 569, 53 N. W. 285, infra, notes 82 and 87.

<sup>71</sup> Thompson v. French (1881) 57 Iowa, 559, 10 N. W. 900 (appeal by defendant). But see Fox v. Duncan (1882) 60 Iowa, 321, 14 N. W. 358, supra, text to note 67.

In Buckland v. Shepard (1889) 77 Iowa, 329, 42 N. W. 311, there was held to be no jurisdiction on appeal where the defendant admitted the plaintiff's claim in part, and pleaded a counterclaim in excess of the jurisdictional minimum, but which, after deducting the amount admitted to be due plaintiff, would not entitle him to a judgment above the minimum.

<sup>72</sup> Ward v. Rhorer (1899) 21 Ky. L. Rep. 947, 53 S. W. 649 (defendant's appeal).

<sup>73</sup> Chestnut v. Corbin Bkg. Co. (1906) 29 Ky. L. Rep. 665, 94 S. W. 633. A similar

Upon an appeal by the plaintiff, whose claim was admitted by the defendant, who pleaded a set-off and asked for judgment for the balance, from a judgment for the balance, the amount involved was held to be the amount of the set-off, and not merely the amount of the judgment.<sup>74</sup> Under the Louisiana Constitution of 1898, making the appellate jurisdiction depend solely upon the amount of the plaintiff's claim, the amount involved for such purpose where a part of the plaintiff's claim is admitted is the difference between the claim as made and the amount admitted to be due.<sup>75</sup>

**Set-off or counterclaim admitted.**

In accordance with the weight of authority as shown above, that where the claim of the plaintiff is admitted, the amount in controversy is the claim of the defendant, where the claim of the defendant is admitted, the amount in controversy has been held to be the amount of plaintiff's claim, although judgment may have been rendered for a balance resulting from deducting the amount of the defendant's claim from the amount found due the plaintiff. Consequently, when the plaintiff's claim is over the jurisdictional minimum an appeal lies although the judgment is below.<sup>76</sup> But it has been held upon an appeal by the defendant from a judgment in favor of the plaintiff for the difference between plaintiff's claim and the part of a set-off admittedly due the defendant that the amount involved could not exceed the difference between the plaintiff's claim and the amount admittedly due the defendant, and this being below the jurisdictional minimum, no appeal lies.<sup>77</sup>

It has been held where the defendant claims payment of the plaintiff's demand

and sets up a counterclaim which is admitted in part by the plaintiff, but denied in part, that the value in controversy upon an appeal by the defendant from a judgment against him for the amount of the note, subject to the credits of his counterclaim, is the amount of the plaintiff's claim plus the counterclaim; and if this is beyond the jurisdictional amount an appeal lies.<sup>78</sup>

**4. Necessity that appellant's claim be a valid one.**

In practically all of the foregoing cases the claim of one or both of the parties is to be taken into consideration in determining the jurisdiction of the appellate court. In some jurisdictions the judgment rendered in the action is to be taken into consideration also. In so far as the judgment is to be considered it seems clear that the claim of the party in whose favor it is rendered is conclusively established to the extent of the judgment, so far as concerns the validity of the claim, its support by the evidence, and in fact all questions connected with its validity. But where the appellate jurisdiction depends upon the claim or claims of the parties irrespective of the judgment, the validity of such claim or claims is not established. How far the court will inquire into the validity thereof for the purpose of fixing the amount to be considered is the subject of investigation in this subdivision. It is necessary that the amount of the appellant's claim be pleaded in good faith in order to be in controversy within the meaning of such constitutional provisions; a sham plea, or one pleaded simply for the purpose of conferring jurisdiction upon the appellate court, cannot be considered.<sup>79</sup>

opinion is expressed in *Crosby v. Crosby* (1899) 92 Tex. 441, 49 S. W. 359.

<sup>74</sup> *Bunting v. Cochran* (1901) 99 Va. 558, 39 S. E. 229. See *Kendrick v. Spotts* (1893) 90 Va. 148, 17 S. E. 853, notes 36 and 37.

<sup>75</sup> *Hood v. Wise* (1911) 128 La. 731, 55 So. 335 (plaintiff's appeal).

<sup>76</sup> *Reed v. Trowbridge* (1887) 106 N. Y. 657, 12 N. E. 625.

Where a part of the counterclaim of the defendant is admitted, that cannot be considered in controversy, but it will be conclusively presumed that it was applied to a reduction of the amount of the plaintiff's claim. *Bradstreet Co. v. Higgins* (1884) 112 U. S. 227, 28 L. ed. 715, 5 Sup. Ct. Rep. 117.

<sup>77</sup> *Merchants' Loan & T. Co. v. Bradley* (1904) 210 Ill. 128, 71 N. E. 343 (set-off as claimed by defendant was less than plaintiff's claim).

<sup>78</sup> *Kefauver v. Kefauver* (1904) 26 Ky. L. Rep. 1058, 83 S. W. 119 (the amount of the

plaintiff's claim was below the jurisdictional minimum). See *Berger v. Rife*, *infra*, note 97.

<sup>79</sup> *Foster v. McKeown* (1901) 192 Ill. 339, 61 N. E. 514; *Cumberland Teleph. & Teleg. Co. v. Logsdon* (1911) 142 Ky. 639, 134 S. W. 1159; *Brown v. School Directors* (1851) 18 Pa. 78; *Steele v. Walton* (1887) 3 Pa. Co. Ct. 211; *Texas & N. O. R. Co. v. Jones* (1906) — Tex. Civ. App. —, 95 S. W. 746; *Brush v. Hurlburt* (1830) 3 Vt. 46 (see *infra*, text to note 95); *Manchester Paper-Mills Co. v. Heth* (1893) 1 Va. Dec. 776, 18 S. E. 169; *McDonald Colliery Co. v. Crotty* (1911) 69 W. Va. 407, 71 S. E. 568; *Jaklewicz v. Lenhart* (1915) 86 Wash. 138, 149 Pac. 642 (no proof was offered in support of counterclaim).

A defendant who lays the damages in his counterclaim at a sum which renders it apparent that it is a sham pleading, filed for the purpose of bringing the case within the

That the claim is sustained by the evidence is frequently held determinative of the good faith of the claimant.<sup>80</sup> At least so much of the claim as is sustained by the evidence and pleaded in good faith has been made the test in determining the appellate jurisdiction. It has, however, in some such cases, not been necessary to go beyond this, since the amount of the appellant's claim which is regarded as sustained by the evidence, when added to the judgment against him, equals or exceeds the jurisdictional minimum, and therefore it has not been necessary to consider the balance.<sup>81</sup>

If pleaded in good faith, the claim has usually been regarded as fixed at the amount claimed in the pleadings.<sup>82</sup> It is the facts alleged in the pleadings, and

not the prayer, that determine the amount of the controversy, and if, from these facts, the amount in controversy is less than the jurisdictional amount, no appeal lies.<sup>83</sup> Thus, where it is evident from the cause of action stated in the reconventional demand that the amount involved is not above the jurisdictional amount, although an amount in excess of the jurisdictional minimum is prayed for, there is no right of appeal.<sup>84</sup> The fact that in the end the plea may not be sustained by the evidence does not change the rule.<sup>85</sup>

If the defendant's counterclaim shows on the face of the pleadings that it presents no cause of action and therefore no claim for recovery, it raises no controversy as to any amount.<sup>86</sup> Or, if the

jurisdiction of the appellate court, has no right of appeal. *St. Louis & S. F. R. Co. v. Bradford* (1907) 18 Okla. 154, 88 Pac. 1050.

A sham plea filed by plaintiff cannot be considered. *Barton-Parker Mfg. Co. v. Wheeler* (1915) 164 Ky. 452, 175 S. W. 980.

<sup>80</sup> *Foster v. McKeown* (1901) 192 Ill. 339, 61 N. E. 514. It is stated by the court that evidence was offered in the trial court by the defendant touching all the items of his counterclaim, and it cannot be said that such counterclaim was made in bad faith or was fictitious and for the mere purpose of making a possible amount by which a final appeal might reach this court.

It has been held that where the claim is not sustained by the evidence, it cannot be considered. *Kurtz v. Hoffman* (1884) 65 Iowa, 260, 21 N. W. 597. But see discussion of the case *supra*, note 65. See also *Brush v. Hurlburt* (1830) 3 Vt. 46, *infra*, note 96.

<sup>81</sup> *Smith v. Rountree* (1900) 185 Ill. 219, 56 N. E. 1130, the original amount of the defendant's counterclaim was in excess of the jurisdictional minimum, but the court considered only the part fairly supported by the evidence in determining the "amount involved."

*Joseph v. Harrison* (1911) 146 Ky. 65, 141 S. W. 1184. It was here urged that the defendant's claim should not be considered because the evidence did not support it. The court, however, holds that it was supported in a part sufficient to, when added to the judgment against the defendant, make up the jurisdictional amount.

<sup>82</sup> *Sterner v. Wilson* (1886) 68 Iowa, 714, 28 N. W. 34; *Buekland v. Shephard* (1880) 77 Iowa, 329, 42 N. W. 311; *Schultz v. Holbrook* (1892) 86 Iowa, 569, 53 N. W. 285.

Where, in a suit involving an amount below the minimum jurisdictional limit, in which the defendant did not set up a counterclaim, but in which, during the progress of the trial, he asked to be allowed to amend his answer by setting up a counterclaim, a request which was refused, the amount of the counterclaim cannot be con-

sidered in controversy, although the refusal to allow the amendment may have been based upon an erroneous view of the law, since the defendant did not have an absolute right to the amendment. *Wiley v. Brigham* (1880) 81 N. Y. 13.

See *Barnes v. Bryce* (1911) — *Tax. Civ. App.* —, 140 S. W. 240, *supra*, note 47.

<sup>83</sup> *Nash v. Beckman* (1892) 86 Iowa, 249, 53 N. W. 228. This was an action to recover the price of certain machinery below the jurisdictional minimum. The defendants alleged in their defense that the machinery was worthless and that it had been returned to the plaintiff. Judgment was then prayed by the defendants for a stated sum. It is held by the court that, under the allegations of the counterclaim, there could have been no greater recovery than the value of the machinery, and this being below the jurisdictional minimum, the appellate court had no jurisdiction.

*Gray v. Blanchard* (1878) 97 U. S. 564, 24 L. ed. 1108. It is here stated that while, in the absence of anything to the contrary, the prayer for judgment by the defendant in his counterclaim or set-off will be taken as indicating the amount in dispute, yet, if the actual amount in dispute does otherwise appear in the record, reference may be had to that for the purpose of determining jurisdiction.

See *Blake v. Krom* (1891) 128 N. Y. 64, 27 N. E. 977, *infra*, text to note 89.

<sup>84</sup> *Gagné v. Barrow* (1860) 15 La. Ann. 135.

In *Young v. Wilson* (1882) 34 La. Ann. 385, where the reconventional demand prayed for damages in excess of the minimum jurisdictional limit, it is stated that the defendant's right to recover on his reconventional demand must be governed by the prayer for damages made in his answer. Nothing is stated as to whether the prayer was in excess of the amount due him as shown by the pleading.

<sup>85</sup> *Faulconer v. Stinson* (1898) 44 W. Va. 546, 29 S. E. 1011.

<sup>86</sup> *Campbell v. Lewis* (1891) 83 Iowa, 583,

claim of the defendant as shown by the pleadings is barred by the Statute of Limitations except in so far as it may be urged as a defense to the plaintiff's claim, the amount in controversy, where the plaintiff's claim is admitted, is only so much of the defendant's counterclaim as is necessary to offset plaintiff's claim.<sup>87</sup>

It has been held that if, upon the whole record, the counterclaim is not supported, it will not be considered.<sup>88</sup> It has been held, also, that only so much of the counterclaim can be considered as is supported by the pleadings and evidence.<sup>89</sup>

As heretofore shown, it is the general doctrine of some cases that it is the claim asserted in the pleadings that fixes the amount for jurisdictional purposes. The fact that no evidence was introduced in support of the claim has been held to be immaterial,<sup>90</sup> unless, in addition to the failure to support by evidence, there is in effect an abandonment of the counterclaim.<sup>91</sup> In other cases it is held that only the amount of the appellant's claim that is supported by proof can be considered.<sup>92</sup> At least, it cannot be considered for the full amount if the evidence shows that there is no real foundation for the

50 N. W. 208; *Wells-F. & Co. v. Burford* (1910) 59 Tex. Civ. App. 645, 126 S. W. 927. See *Blake v. Krom* (1891) 128 N. Y. 64, 27 N. E. 977, *infra*, note 89.

In an action by a vendor of land against the vendee, in which the vendee counterclaims for the value of certain crops which the vendor is charged with having converted to his own use, and in which the defendant prays judgment for the value of such crops, their value cannot be taken as the amount in controversy where it appears that the land was rented by the vendor, and that, by the terms of the rental contract, the vendor through whom the vendee claimed was entitled to only a fourth of the crop; but the fourth of the crop must be taken as the value of the defendant's claim. *Jackson v. Persons* (1910) 61 Tex. Civ. App. 97, 129 S. W. 639.

<sup>87</sup> *Schultz v. Holbrook* (1892) 86 Iowa, 569, 53 N. W. 285.

<sup>88</sup> *Gray v. Blanchard* (1878) 97 U. S. 564, 24 L. ed. 1108. See cases cited in notes 10 and 11, *supra*.

<sup>89</sup> In *Blake v. Krom* (1891) 128 N. Y. 64, 27 N. E. 977, the claim of the plaintiff was admitted, but counterclaims were interposed by the defendant in excess of the jurisdictional minimum. From the evidence and pleading the court held the defendant not entitled to the full amount of his counterclaim, but only to an amount below the jurisdictional minimum; and this being true, the appeal was dismissed.

<sup>90</sup> *Sterner v. Wilson* (1886) 68 Iowa, 714, 28 N. W. 34. It was accordingly held in this case that a counterclaim of the defendant in excess of the jurisdictional minimum, filed in an action for an amount below the minimum, gave the circuit court jurisdiction although, upon the trial of the cause in the circuit court, the defendant gave no evidence which tended in any manner to establish an item pleaded in the counterclaim which brought the amount of the claim within the jurisdictional minimum.

In *Heraughty v. Grant* (1897) 6 Kan. App. 923, 50 Pac. 506, an appeal by the defendant, whose claim exceeded the jurisdictional minimum, from a judgment in favor of the plaintiff for an amount below the jurisdictional minimum, it is stated

that the defendant produced evidence tending to prove a part of his claim less than the jurisdictional minimum, but did not offer any evidence concerning any other or further indebtedness to him, and it thus affirmatively appears that the amount in controversy is less than the jurisdictional minimum.

See *Faulconer v. Stinson* (1898) 44 W. Va. 546, 29 S. E. 1011, *supra*, text to note 85, and *Chatfield v. Appleton* (1881) 8 Ohio Dec. Reprint, 214, 6 Ohio L. J. 327, *infra*, note 102.

<sup>91</sup> In an early Iowa case it was held that even if the claim of one of the parties is in excess of the jurisdictional minimum, if he fails to introduce evidence in support of it and does not object to an instruction to the jury to disregard the claim for this reason, it cannot be taken into consideration in determining the amount in controversy, but this is confined to plaintiff's claim. *Kurtz v. Hoffman* (1884) 65 Iowa, 260, 21 N. W. 507. The defendant here urged the counterclaim merely as a defense, not asking judgment thereon. The answer was treated, however, by the trial court, as pleading a counterclaim. It is stated that, even though this view be correct, he must be considered as having abandoned it by failure to support it by evidence.

In *Farnsworth v. Crabb* (1916) 178 Iowa, 565, 159 N. W. 1042, where, at the close of the plaintiff's case, the defendant elected not to present any testimony, but to rely upon the supposed weakness of the plaintiff's case, and move for a judgment on plaintiff's testimony, it was held that nothing was involved except the plaintiff's claim; the court stating that, by standing on his motion to direct a verdict, he waived his counterclaim.

<sup>92</sup> *Heraughty v. Grant* (1897) 6 Kan. App. 923, 50 Pac. 506; *Schineller v. Herrman* (1885) 1 Pa. Co. Ct. 145; *Jaklewicz v. Lenhart* (1915) 86 Wash. 138, 149 Pac. 642 (see *supra*, note 79, and text thereto); *Bradstreet Co. v. Higgins* (1884) 112 U. S. 227, 28 L. ed. 715, 5 Sup. Ct. Rep. 117.

Where the defendant offers very little testimony in support of his counterclaim, so little that in no view could a finding in its support be warranted, and no request is

demand.<sup>93</sup> Upon an appeal by the plaintiff, the full amount of his claim cannot be added to the judgment against him where his own proof, construed most favorably in his behalf, conclusively shows that if there had been a finding in his favor he could not have recovered the sum sued for, but only a part thereof.<sup>94</sup>

The fact that the defendant produced no evidence in favor of his counterclaim has been held to afford reasonable ground to conclude that his claim was fictitious.<sup>95</sup> Other cases hold that although the defendant's plea in reconvention or counterclaim confers jurisdiction upon the appellate court if it is within the jurisdictional minimum, yet, if the defendant introduces no evidence in support of his plea in reconvention, it will be treated as having been abandoned, and cannot be looked to in determining jurisdiction.<sup>96</sup>

Where the plaintiff has made admissions which reduce his claim, only the reduced amount is to be considered.<sup>97</sup>

The courts are not agreed as to whether the amount claimed in a counterclaim may be considered when there is a dispute as to whether the counterclaim is a proper one to make in the action. Where no valid counterclaim is pleaded and the defendant is required to abandon it upon trial, it has been held that it cannot be taken into consideration in determining the "amount in controversy."<sup>98</sup> It has been held, where a demurrer to the counterclaim has been correctly sustained by the trial court and the counterclaim dismissed, that it is no longer in controversy, and that, upon an appeal by the defendant from a judgment in favor of the plaintiff, only the amount of the judgment is in controversy;<sup>99</sup> at least, where the appellate proceedings are such as to make this determination conclusive,

made in regard to the counterclaim, and a judgment is rendered in favor of the plaintiff for the exact amount claimed by her, the amount in controversy is the plaintiff's claim, which being under the minimum jurisdictional limit, no appeal lies. *St. Clair v. Day* (1882) 89 N. Y. 357.

It is stated in *Schneider v. Herrman* (1885) 1 Pa. Co. Ct. 145, that where an appeal depends upon the amount of a set-off, the right is governed not by the amount defendant claims, but by the amount the evidence tends to establish as his damages. But in this case the defendant was not allowed to give any evidence, and so the appeal was allowed where damages over the jurisdictional minimum were claimed.

<sup>93</sup> *Gagne v. Barrow* (1860) 15 La. Ann. 135.

<sup>94</sup> In *Morgan v. Johnson* (1914) 158 Ky. 417, 165 S. W. 649, the owner of a mule which had been seized under execution by the officer levying the execution sued the officer for unlawful detention of the mule. The officer counterclaimed for the amount of the impounding fee and the costs of keep. The plaintiff was adjudged to be the owner of the mule, and the officer to have a lien for a certain amount. It is stated that as the plaintiff was thus adjudged to be the owner, the amount in controversy on the appeal is the actual damages for the detention of the mule and the defendant's lien debt, and that the damages were conclusively shown by the proof to have been, on the whole, an amount less than, if added to the amount of the defendant's lien, would aggregate the minimum jurisdictional limit.

<sup>95</sup> *Brush v. Hurlburt* (1830) 3 Vt. 46.

<sup>96</sup> *Schulz v. Tessman* (1899) 92 Tex. 488, 49 S. W. 1031; *Houston, E. & W. T. R. Co. v. Perkins* (1898) — Tex. Civ. App. —, 44 S. W. 547; *Texas & N. O. R. Co. v. Hook* (1902) 30 Tex. Civ. App. 325, 70 S. W. 233;

*Galveston, H. & S. A. R. Co. v. Schlather* (1904) — Tex. Civ. App. —, 78 S. W. 953.

A counterclaim that has been abandoned and left unsupported cannot be considered. *Bledsoe v. Gulf, C. & S. F. R. Co.* (1894) 6 Tex. Civ. App. 280, 25 S. W. 314.

A defendant who has relied upon his plea in reconvention in a justice court to give the county court jurisdiction of an appeal cannot, after insisting on his rights upon appeal to the county court, defeat the right to appeal to the court of civil appeals by a failure to perfect an appeal which he has begun, on the theory that his failure to perfect his appeal is an abandonment of his plea in reconvention, and thereby the amount is reduced to a sum from which no appeal would lie. *Benchoff v. Stephenson* (1902) — Tex. Civ. App. —, 72 S. W. 106.

See *Kendall v. Blinn* (1896) 6 Ohio S. & C. P. Dec. 4; *State ex rel. Argo v. Linn* (1878) 7 Ohio Dec. Reprint, 468; *Chatfield v. Appleton* (1881) 8 Ohio Dec. Reprint, 214, 6 Ohio L. J. 327, *infra*, note 102.

<sup>97</sup> *Berger v. Rife* (1898) 7 Kan. App. 639, 53 Pac. 152.

<sup>98</sup> *Societa Italiana Di Beneficenza v. Sulzer* (1893) 138 N. Y. 468, 34 N. E. 193.

In *Koch v. Godchaux* (1894) 46 La. Ann. 1382, 16 So. 181, the defendant in an executory process on notes aggregating less than the jurisdictional minimum obtained an injunction setting up a defense to the notes and claiming judgment against one who was not a party to the action, but for whose benefit it was alleged the suit was brought. The denial of appellate jurisdiction is based not only on lack of proper parties, but also on the ground that the counterclaim was not a proper issue in the case.

See *State ex rel. Argo v. Linn* (1878) 7 Ohio Dec. Reprint, 468, *infra*, note 102.

<sup>99</sup> *Chesapeake & O. R. Co. v. Roe* (1899) 21 Ky. L. Rep. 1145, 54 S. W. 1.

the counterclaim cannot be taken into consideration.<sup>100</sup>

A set-off which cannot be properly pleaded in the action, although it may have constituted a good cause of action by the defendant against the plaintiff, and which is stricken out by the trial court, cannot be taken into consideration in estimating the amount in controversy.<sup>101</sup>

But if the counterclaim or set-off has been improperly dismissed by the trial court, then it is to be considered; and if

over the jurisdictional minimum, an appeal lies.<sup>102</sup>

On the contrary, it has been held that the counterclaim must be considered in determining the jurisdictional amount although the question is not merely whether defendant can establish the amount therein claimed, but whether the matter pleaded can be entertained as a defense to the plaintiff's complaint.<sup>103</sup>

Whether a counterclaim is properly pleaded cannot be considered in determining jurisdiction.<sup>104</sup>

<sup>100</sup> *Campbell v. Lewis* (1891) 83 Iowa, 583, 50 N. W. 208.

Where, upon a demurrer to a defense setting up a counterclaim, on the ground that the defense does not state facts sufficient to constitute a cause of action, the demurrer is sustained in the justice court and a general appeal taken to the superior court, where evidence in support of the defense is rejected, the supreme court cannot acquire jurisdiction of the case, where the plaintiff's claim is less than the jurisdictional minimum of such court, since the defense, including the counterclaim, was disposed of in the court below, and if the defendant desired to review the ruling of the justice thereon it should have been removed to the superior court by certiorari proceedings, and not by taking a general appeal. *Gabriel v. Seattle & M. R. Co.* (1893) 7 Wash. 515, 35 Pac. 410.

See *Conrad v. De Montcourt* (1897) 138 Mo. 311, 39 S. W. 805, supra, note 80.

<sup>101</sup> *Montgomery v. Montgomery* (1904) 119 Ky. 761, 78 S. W. 465, 80 S. W. 1108 (defendant's appeal).

But it has been held in this jurisdiction, where a counterclaim has been struck from the record on motion of plaintiff, that it is to be considered in determining the jurisdictional amount. *District of Highlands v. Michie* (1908) 32 Ky. L. Rep. 761, 107 S. W. 216. Whether the counterclaim was rightfully stricken from the record, the court does not say.

So, where the appellate court properly strikes out a counterclaim in excess of the jurisdictional minimum, the counterclaim can no longer be considered as a basis for further appellate jurisdiction. *Miller v. Black* (1909) 56 Tex. Civ. App. 320, 120 S. W. 559.

A counter set-off which has been filed by the plaintiff after the filing of a set-off by the defendant, which is improperly filed and cannot be set up as a counter set-off, can-

not be considered in determining the plaintiff's right to appeal. *Case Mfg. Co. v. Sweeney* (1900) 47 W. Va. 638, 35 S. E. 853.

<sup>102</sup> *Schineller v. Herrman* (1885) 1 Pa. Co. Ct. 145.

Under a statute providing that if either the plaintiff or defendant in his bill of particulars claims more than \$20, the case may be appealed to the common pleas court, but if neither party demands a greater sum and the case is tried by a jury, there shall be no appeal, it is not necessary, to entitle the defendant to an appeal, that his counterclaim be submitted to the jury, where it was filed and made subject to issue for the jury trial demanded, but the justice denied the right of the defendant to file the counterclaim on erroneous grounds (*Kendall v. Blinn* (1896) 6 Ohio S. & C. P. Dec. 4); but if the counterclaim has no connection with the subject of the action, and is disregarded by the justice, no appeal lies (*State ex rel. Argo v. Linn* (1878) 7 Ohio Dec. Reprint, 468).

So, under this statute, if the counterclaim is ruled out by the justice because no evidence is offered to sustain it, an appeal is allowable. *Chatfield v. Appleton* (1881) 8 Ohio Dec. Reprint, 214, 6 Ohio L. J. 327.

<sup>103</sup> *Lake Shore & M. S. R. Co. v. Van Auken* (1891) 1 Ind. App. 492, 27 N. E. 119. This was held, although the lower court sustained a demurrer to the counterclaim,—a decision which the appellate court upheld.

But upon an appeal by the plaintiff from a judgment on an erroneous set-off, the amount of the set-off was considered in determining the jurisdiction for the purpose of appeal, in *Bunting v. Cochran* (1901) 99 Va. 558, 39 S. E. 220.

<sup>104</sup> *Wysor v. Johnson* (1890) 1 Ind. App. 419, 27 N. E. 655; *Williamson v. Brandenburg* (1892) 6 Ind. App. 95, 31 N. E. 369.

W. A. E.

## MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL. FARIBAULT WOOLEN MILLS COMPANY,  
et al.,

v.

DISTRICT COURT OF RICE COUNTY  
et al.

(138 Minn. 210, 164 N. W. 810.)

**Workmen's compensation — typhoid fever.**

The Workmen's Compensation Law provides compensation for personal injury caused by accident, and then defines the word "accident," as used therein, to mean "an unexpected or unforeseen event, happening suddenly and violently . . . and producing at the time, injury to the physical structure of the body." Held, that typhoid fever caused by drinking infected water is not caused by an accident of the character defined in the law.

For other cases, see *Master and Servant*, II. a, 1, in Dig. 1-52 N. S.

(October 26, 1917.)

**P**ETITION for a writ of certiorari to review an allowance of compensation to relator's employee under the Workmen's Compensation Act. Reversed.

The facts are stated in the Commissioner's opinion.

Mr. Raymond N. Caverly, for relators:

The award should have covered only expense actually incurred or money actually spent.

*Milwaukee v. Miller*, 154 Wis. 652, L.R.A. 1916A, 1, 144 N. W. 188, Ann. Cas. 1915B, 847, 4 N. C. C. A. 149.

The accident must be an unusual circumstance, connected with the work. Something other than an ordinary or reasonably anticipated result of pursuing the work.

*Rayner v. Sligh Furniture Co.* 180 Mich. 168, L.R.A.1916A, 227, 146 N. W. 665, Ann. Cas. 1916A, 386, 4 N. C. C. A. 851.

Mr. James P. McMahon, for respondents:

Plaintiff was entitled to the benefits of the Workmen's Compensation Act.

*New York C. R. Co. v. White*, 243 U. S. 188, 61 L. ed. 667, L.R.A.1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; *Hawkins v. Bleakly*, 243 U. S. 210, 61 L. ed. 678, 37 Sup. Ct. Rep. 255, Ann. Cas. 1917D, 637, 13 N. C. C. A. 959;

Headnote by TAYLOR, C.

**Note.** — As to what constitutes an "accident" or "personal injury" within the meaning of the Workmen's Compensation Acts, see annotation following *Re Maggelet*, post, 867. Also see that annotation for references to other annotations on various questions arising under the Compensation Acts.

L.R.A.1918F.

*Mountain Timber Co. v. Washington*, 243 U. S. 219, 61 L. ed. 685, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927; *Vennen v. New Dells Lumber Co.* 161 Wis. 370, L.R.A.1916A, 273, 154 N. W. 640, Ann. Cas. 1918B, 293, 10 N. C. C. A. 729; *McPhee's Case*, 222 Mass. 1, 109 N. E. 633, 10 N. C. C. A. 257; *State ex rel. People's Coal & Ice Co. v. District Ct.* 120 Minn. 502, L.R.A.1916A, 344, 153 N. W. 119, 9 N. C. C. A. 129; *Klawinski v. Lake Shore & M. S. R. Co.* 185 Mich. 643, L.R.A.1916A, 342, 152 N. W. 213; *Andrew v. Failsworth Industrial Soc.* [1904] 2 K. B. 32, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 Week. Rep. 451, 90 L. T. N. S. 611, 20 Times L. R. 429; *Heileman Brewing Co. v. Industrial Commission*, 161 Wis. 46, 152 N. W. 446; *Bystrom Bros. v. Jacobson*, 162 Wis. 180, L.R.A.1916D, 966, 155 N. W. 919; *H. P. Hood & Sons v. Maryland Casualty Co.* 206 Mass. 223, 30 L.R.A.(N.S.) 1192; 138 Am. St. Rep. 379, 90 N. E. 329; *Ætna L. Ins. Co. v. Portland Gas & Coke Co.* L.R.A.1916D, 1027, 144 C. C. A. 12, 229 Fed. 552.

**Taylor, C.**, delivered the opinion of the court:

We are called upon to review the action of the district court of Rice county in allowing compensation under the Workmen's Compensation Act to an employee of the relator for temporary disability caused by typhoid fever, the germs of which are alleged to have been ingested by drinking infected water furnished in the relator's factory for the use of its employees. If contracting this disease by drinking infected water was an accident within the definition thereof contained in the law, the evidence is probably sufficient to sustain the findings of the district court. Our statute, so far as here important, provides for compensation "in every case of personal injury . . . caused by accident, arising out of and in the course of employment," and then provides that the word "accident," as used therein, shall "be construed to mean an unexpected or unforeseen event, happening suddenly and violently, with or without human fault and producing at the time, injury to the physical structure of the body." Gen. Stat. 1913, §§ 8203, 8230.

The evidence shows that typhoid fever is a germ disease; that it is produced by taking typhoid bacilli into the alimentary canal; that no deleterious effects result until the bacilli taken into this canal have multiplied enormously; and that it requires more than a week after the infection for the disease to develop sufficiently for its symptoms to be discernible. The disease does not result from an event which happens "suddenly and violently," nor from an event

which produces "injury to the physical structure of the body" at the time it happens.

Under statutes which provided compensation for personal injury by accident without defining the meaning of the terms used, there was a diversity of opinion among the courts as to whether diseases, and especially the so-called "occupational diseases," were accidents within the meaning of the statute. The American statutes seem to have been framed largely along the lines of the prior English statute. The English courts held that a disease, unless contracted in consequence of some injury to the physical structure of the body, was not a "personal injury by accident," within the meaning of the English law, until by amendment the law was expressly made to include occupational diseases. See cases cited in L.R.A.1916A, p. 33, note 28, and page 35, notes 33 and 34. In *Findlay v. Tullamore Union*, 48 Ir. L. T. 110, 7 B. W. C. C. 973, it was held that typhoid fever was not an accident within the meaning of the law. The courts of Michigan, New Jersey, and Ohio seem to have taken the same view as the English courts. *Adams v. Acme White Lead & Color Works*, 182 Mich. 157, L.R.A.1916A, 283, 148 N. W. 485, Ann. Cas. 1916D, 689, 6 N. C. C. A. 482; *Bleach Liondale-Dye & Paint Works v. Riker*, 85 N. J. L. 426, 89 Atl. 929, 4 N. C. C. A. 713; *Industrial Commission v. Brown*, 92 Ohio St. 309, L.R.A.1916B, 1277, 110 N. E. 744. The Massachusetts court distinguished their statute from the English statute on the ground that it omitted the element of accident as a condition to recovery, and held that contracting a disease was "a personal injury," although it might not be an accident. *Hurle's Case*, 217 Mass. 223, L.R.A. 1916A, 279, 104 N. E. 336, Ann. Cas. 1915C, 919, 4 N. C. C. A. 527; *Johnson's Case*, 217 Mass. 388, 104 N. E. 735, 4 N. C. C. A. 843. The Wisconsin court held that contracting typhoid fever was an accident with-

in the meaning of their law, but forceful reasons for the opposing view are set forth in the dissenting opinion of Justice Barnea. *Vennen v. New Dells Lumber Co.* 161 Wis. 370, L.R.A.1916A, 273, 154 N. W. 640, Ann. Cas. 1918B, 293, 10 N. C. C. A. 729. The circuit court of appeals for the ninth circuit held that contracting typhoid fever was an accident, within the terms of an insurance policy indemnifying against claims "on account of bodily injuries accidentally suffered." *Ætna L. Ins. Co. v. Portland Gas & Coke Co.* L.R.A.1916D, 1027, 144 C. C. A. 12, 229 Fed. 552.

To avoid the uncertainty previously existing and to make clear the class of injuries to which our Compensation Law was intended to apply, the legislature inserted therein the above-quoted definition of what shall be deemed an accident, within the purview of such law. By restricting the injuries for which compensation is to be made to those caused by accident, and by defining the term accident to mean "an unexpected or unforeseen event, happening suddenly and violently, . . . and producing at the time, injury to the physical structure of the body," the legislature clearly manifested an intention to exclude from the operation of the law disabilities caused by disease, unless the disease resulted from an accident of the character above described; and the courts must give effect to such intention. *Industrial Commission v. Brown*, 92 Ohio St. 309, L.R.A.1916B, 1277, 110 N. E. 744.

The disease in the present case was not caused by an accident, as that term is defined in the law. The disease germs were not taken into the system in consequence of anything which happened "suddenly and violently," or which at the time produced "injury to the physical structure of the body."

Judgment reversed.

Petition for rehearing denied.

#### CALIFORNIA SUPREME COURT. (In Banc.)

FIDELITY & CASUALTY COMPANY OF  
NEW YORK et al.

v.

INDUSTRIAL ACCIDENT COMMISSION  
OF CALIFORNIA et al.

(— Cal. —, 171 Pac. 429.)

Workmen's compensation — blindness  
— use of wood alcohol.

Blindness of a show card sign writer who uses wood alcohol in his work, due to its excessive use during a rush period, is an

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accident within the meaning of a statute providing compensation for personal injuries sustained by accident arising out of and in the course of employment.

For other cases, see *Master and Servant*, II a, 1, in *Dig.* 1-52 N. S.

(February 25, 1918.)

Note. — As to what constitutes an "accident" or "personal injury" within the meaning of the Workmen's Compensation Acts, see annotation following *Re Maggelet*, post, 867. Also see that annotation for references to other annotations on various questions arising under the Compensation Acts.



**P**ETITION for a writ to review an award by the Industrial Accident Commission to claimant in a proceeding by him under the Workmen's Compensation Act to recover for personal injuries alleged to have been sustained during the course of his employment. Denied.

The facts are stated in the opinion.

Messrs. Jennings & Horton and R. P. Jennings, for petitioners:

The injuries complained of by the injured employee were not occasioned by accident within the meaning of the Boynton Act, and, therefore, the Commission was without jurisdiction to make the award against petitioner.

McNicol's Case, 215 Mass. 497, L.R.A. 1196A, 306, 102 N. E. 697, 4 N. C. C. A. 522; Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; Rakiec v. Delaware, L. & W. R. Co. — N. J. L. —, 88 Atl. 953; Borgnis v. Falk Co. 147 Wis. 327, 37 L.R.A. (N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; Buckley's Case, 218 Mass. 354, 105 N. E. 979, Ann. Cas. 1916B, 474, 5 N. C. C. A. 613; United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; Marshall v. East Holywell Coal Co. 93 L. T. N. S. 360, 21 Times L. R. 494; McCarthy v. Travelers' Ins. Co. 8 Bias. 362, Fed. Cas. No. 8,682; Re Scarr [1905] 1 K. B. 387, 2 B. R. C. 358, 92 L. T. N. S. 128, 74 L. J. K. B. N. S. 237, 21 Times L. R. 173, 1 Ann. Cas. 787; Niskern v. United Brotherhood, C. J. 93 App. Div. 364, 87 N. Y. Supp. 640; Smouse v. Iowa State Traveling Men's Asso. 118 Iowa, 436, 92 N. W. 53; Carnes v. Iowa State Traveling Men's Asso. 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683; Feder v. Iowa State Traveling Men's Asso. 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252; Shanberg v. Fidelity & C. Co. 19 L.R.A. (N.S.) 1206, 85 C. C. A. 343, 158 Fed. 1; Appel v. Aetna L. Ins. Co. 86 App. Div. 83, 83 N. Y. Supp. 238; Southard v. Railway Pass. Assur. Co. 34 Conn. 574, Fed. Cas. No. 13,182; Cobb v. Preferred Mut. Acci. Asso. 96 Ga. 818, 22 S. E. 976; Fidelity & C. Co. v. Carroll, 5 L.R.A. (N.S.) 657, 74 C. C. A. 409, 143 Fed. 271, 6 Ann. Cas. 955; Sinclair v. Maritime Pass. Assur. Co. 3 El. & El. 478, 121 Eng. Reprint, 521, 30 L. J. Q. B. N. S. 77, 7 Jur. N. S. 367, 4 L. T. N. S. 15, 9 Week. Rep. 342; Dozier v. Fidelity & C. Co. 13 L.R.A. 114, 46 Fed. 446; Kerr v. Ritchies, 50 Scot. L. R. 434, [1913] S. C. 613, 6 B. W. C. C. 419; Jacob v. Marine Engineers Institute Australasia, 14 N. Z. Gaz. L. R. 306; Clarkson v. Charente S. S. Co. [1913] W. C. & Ins. Rep. 422, 6 B. W. C. C. 540; Walker v. Murray [1911] S. C. 825, 48 Scot.

L. R. 741, 4 B. W. C. C. 409; John Watson v. Brown [1913] S. C. 593, W. C. & Ins. Rep. 223, 50 Scot. L. R. 415, 6 B. W. C. C. 416; Warner v. Couchman [1912] A. C. 35, 81 L. J. K. B. N. S. 45, 105 L. T. N. S. 676, 28 Times L. R. 58, 56 Sol. Jo. 70, 5 B. W. C. C. 177, 49 Scot. L. R. 681; Martin v. Manchester Corp. [1912] W. N. 105, W. C. Rep. 289, 106 L. T. N. S. 741, 76 J. P. 251, 28 Times L. R. 344, 5 B. W. C. C. 259; Coe v. Fife Coal Co. [1909] S. C. 393, 46 Scot. L. R. 328; Evans v. Dodd [1912] W. C. Rep. 149, 5 B. W. C. C. 305; McMillan v. Singer Sewing Mach. Co. [1913] W. C. & Ins. Rep. 70; Eke v. Hart-Dyke, [1910] 2 K. B. 677, 80 L. J. K. B. N. S. 90, 103 L. T. N. S. 174, 26 Times L. R. 613, 3 B. W. C. C. 488, 3 N. C. C. A. 230; Petschett v. Preis, 31 Times L. R. 156, 8 B. W. C. C. 44; Walker v. Lilleshall Coal Co. [1900] 1 Q. B. 488, 81 L. T. N. S. 769, 69 L. J. Q. B. N. S. 192, 64 J. P. 85, 48 Week. Rep. 257, 16 Times L. R. 108; Steel v. Cammell, L. & Co. [1905] 2 K. B. 232, 93 L. T. N. S. 357, 74 L. J. K. B. N. S. 610, 53 Week. Rep. 612, 21 Times L. R. 490, 2 Ann. Cas. 142; Finlay v. Tullamore Union [1914] 48 Ir. L. T. 110, 7 B. W. C. C. 973; Broderick v. London County Council [1908] 2 K. B. 807, 99 L. T. N. S. 669, 77 L. J. K. B. N. S. 1127, 24 Times L. R. 822, 15 Ann. Cas. 885; Williams v. Duncan, 1 W. C. C. 123; Cheek v. Harmsworthy Bros. 4 W. C. C. 3; Black v. New Zealand Shipping Co. 6 B. W. C. C. 720; Walker v. Hockney Bros. 2 B. W. C. C. 20.

Messrs. Christopher M. Bradley and Frank P. Doherty, for respondents:

The manner in which De Witt was injured and the character of his injuries constituted a "personal injury by accident," within the provisions of § 12 of the Boynton Act.

Fenton v. J. Thornley & Co. [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684; Kelly v. Trim Joint Dist. School, [1914] A. C. 667, W. C. & Ins. Rep. 359, 83 L. J. P. C. N. S. 220, 111 L. T. N. S. 305, 30 Times L. R. 452, 58 Sol. Jo. 493, 48 Ir. L. T. 141, 7 B. W. C. C. 274, Ann. Cas. 1915A, 104; Warner v. Couchman, [1912] A. C. 35, 81 L. J. K. B. N. S. 45, 105 L. T. N. S. 676, 28 Times L. R. 58, 56 Sol. Jo. 70, 49 Scot. L. R. 681, 5 B. W. C. C. 177; Sponatski's Case, 220 Mass. 526, L.R.A. 1916A, 333, 108 N. E. 466, 8 N. C. C. A. 1025; Beile v. Travelers' Protective Asso. 155 Mo. App. 629, 135 S. W. 497; American Acci. Co. v. Reigart, 94 Ky. 547, 21 L.R.A. 651, 42 Am. St. Rep. 374, 23 S. W. 191; Maryland Casualty Co. v. Hudgins, — Tex. Civ. App. —, 72 S. W. 1047; Horsfall v. Pacific Mut. L. Ins. Co. 32 Wash. 132, 63

L.R.A. 425, 98 Am. St. Rep. 846, 72 Pac. 1028; Atlantic Acci. Asso. v. Alexander, 104 Ga. 709, 42 L.R.A. 188, 30 S. E. 939, 4 Am. Neg. Rep. 616; Ætna L. Ins. Co. v. Hicks, 23 Tex. Civ. App. 74, 56 S. W. 87; Morgan v. The Zenaida, 25 Times L. R. 446, 2 B. W. C. C. 19; H. P. Hood & Sons v. Maryland Casualty Co. 206 Mass. 223, 30 L.R.A.(N.S.) 1192, 138 Am. St. Rep. 379, 92 N. E. 329; Columbia Paper Stock Co. v. Fidelity & C. Co. 104 Mo. App. 157, 78 S. W. 320; Hurle's Case, 217 Mass. 223, L.R.A.1916A, 279, 104 N. E. 337, Ann. Cas. 1915C, 919, 4 N. C. C. A. 527; Heileman Brewing Co. v. Industrial Commission, 161 Wis. 46, 152 N. W. 446; Voorhees v. Smith Schoonmaker Co. 86 N. J. L. 500, 92 Atl. 280, 7 N. C. C. A. 646; Boardman v. Scott [1902] 1 K. B. 43, 71 L. J. K. B. N. S. 3, 85 L. T. N. S. 502, 18 Times L. R. 57, 66 J. P. 260, 50 Week. Rep. 184, 4 W. C. C. 1; Thompson v. Ashington Coal Co. 84 L. T. N. S. 412, 17 Times L. R. 345, 65 J. P. 356, 3 W. C. C. 21; Clover, C. & Co. v. Hughes [1910] A. C. 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 3 B. W. C. C. 275, 47 Scot. L. R. 885; Ismay, I. & Co. v. Williamson [1908] A. C. 437, 77 L. J. P. C. N. S. 107, 99 L. T. N. S. 595, 24 Times L. R. 881, 32 Sol. Jo. 713; Dotzauer v. Strand Palace Hotel, 3 B. W. C. C. 387; Kelly v. Auchenlea Coal Co. [1911] S. C. 864, 48 Scot. L. R. 768, 4 B. W. C. C. 417; Sheerin v. Clayton & Co. [1910] 2 Ir. R. 105, 44 Ir. L. T. 23, 3 B. W. C. C. 583; Brintons v. Turvey [1905] A. C. 230, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 7 W. C. C. 1, 2 Ann. Cas. 137; Brown v. John Watson [1914] W. N. 195, W. C. & Ins. Rep. 228, 83 L. J. P. C. 307, 111 L. T. N. S. 347, 30 Times L. R. 501, 58 Sol. Jo. 533, 7 B. W. C. C. 259, [1914] S. C. 44, 51 Scot. L. R. 492; Maskery v. Lancashire Shipping Co. [1914] W. C. & Ins. Rep. 290, 7 B. W. C. C. 428; Alloa Coal Co. v. Drylie [1913] W. C. & Ins. Rep. 213; Southwestern Surety Ins. Co. v. Pillsbury, 172 Cal. 768, 158 Pac. 762; Robbins v. Original Gas Engine Co. 191 Mich. 122, 157 N. W. 437; La Veck v. Parke, D. & Co. 190 Mich. 604, L.R.A.1916D, 1277, 157 N. W. 72; Bayne v. Riverside Storage & Cartage Co. 181 Mich. 378, 148 N. W. 412, 5 N. C. C. A. 837; Fowler v. Risédorph Bottling Co. 175 App. Div. 224, 161 N. Y. Supp. 535; Munn v. Industrial Bd. 274 Ill. 70, 113 N. E. 110, 12 N. C. C. A. 652; Manning v. Pomerene, 101 Neb. 127, 162 N. W. 492; Yates v. South Kirkby Collieries [1910] 2 K. B. 538, 79 L. J. K. B. N. S. 1036, 103 L. T. N. S. 170, 26 Times L. R. 596, 3 B.

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W. C. C. 418, 3 N. C. C. A. 225; Plass v. Central New England R. Co. 169 App. Div. 826, 155 N. Y. Supp. 854; Zappala v. Industrial Ins. Commission, 82 Wash. 314, L.R.A.1916A, 295, 144 Pac. 54; Poccardia v. Public Service Commission, 75 W. Va. 542, L.R.A.1916A, 299, 84 S. E. 242, 8 N. C. C. A. 1065; Schneider v. Provident L. Ins. Co. 24 Wis. 28, 1 Am. Rep. 157, 7 Am. Neg. Cas. 174; Glasgow Coal Co. v. Welsh [1916] 2 A. C. 1, W. C. & Ins. Rep. 79, 85 L. J. P. C. N. S. 130, 114 L. T. N. S. 809, 32 Times L. R. 359, 60 Sol. Jo. 336, 9 B. W. C. C. 371, [1916] S. C. 141, 53 Scot. L. R. 34; Scott v. Pearson [1916] 2 K. B. 61, W. C. & Ins. Rep. 128, 85 L. J. K. B. N. S. 825, 114 L. T. N. S. 833, 32 Times L. R. 412, 60 Sol. Jo. 428, 9 B. W. C. C. 229.

**Richards, Judge pro tem., delivered the opinion of the court:**

This is an application for a writ of review after an award by the Industrial Accident Commission in favor of one Lester M. De Witt against his employers, Jacoby Brothers, a corporation, and its insurer, the Fidelity & Casualty Company of New York, a corporation, the petitioners herein.

The facts of the case upon which it is alleged by the petitioners that the Commission arrived at an erroneous conclusion, as a matter of law, are set forth in the findings of the Commission, which, it is conceded, there was evidence adduced before it sufficient to support. Said findings are as follows:

"(1) That Lester M. De Witt, applicant herein, was injured by accident on the 7th day of January, 1914, while in the employment of defendant Jacoby Brothers, and that said accident arose out of and happened in the course of said employment and in the manner following:

"(a) Said Lester M. De Witt was for about two years prior to the happening of said accident a show card sign writer, and the better to shade in colors in the artistic writing of said cards, he was, and for about one and one-half years had been, in the habit of using dyes dissolved in wood alcohol and forced through a fine needle by air pressure.

"(b) That ordinarily he used this appliance only a very small portion of the time, but during the holidays immediately preceding said accident there was a very much greater use of [this] apparatus, and directly after the holidays, when the pressure of work had somewhat slackened, said De Witt used an extraordinary quantity of wood alcohol in cleaning the apparatus and in washing and cleaning his hands; that he used

such extraordinary quantity by pouring it on cloths.

"(c) That on the 7th day of January said De Witt had not noticed anything the matter with his eyesight, but on that day he suddenly found that his vision was very greatly affected and went to see an oculist who fitted him with glasses, but told him that glasses would do him very little good because there was a degeneration of the optic nerves.

"(d) By the 13th day of January he was entirely unable to use his eyes for the work he had been doing, and from and after that date until the date of hearing had been barely able to make his way about the streets, and was unable to do any work requiring even ordinary vision.

"(e) That, while using wood alcohol, as hereinbefore described, for such cleaning purposes, on or about the 7th of January, 1914, the eyes and optic nerve were exposed to and came in contact with the vapor of wood alcohol in unusual quantities, involving the sudden impairment of the vision of said applicant, and that said injuries so received constituted an accident which arose out of and happened in the course of said employment, and were not the result of an occupational disease."

It is the concluding phrase of the foregoing findings which the petitioners assail as a legal conclusion, not justified by the language of the Workmen's Compensation Act as it read at the time of the injury upon which the award herein was made. Section 12 of the Workmen's Compensation Act, the so-called Boynton Act, as it stood in January, 1914, the time of the applicant's injury, provided that "liability for the compensation provided by this act, in lieu of any other liability whatsoever, shall, without regard to negligence, exist against an employer for any personal injury sustained by his employees by accident arising out of and in the course of the employment." [Stat. 1913, p. 283.]

It is the contention of the petitioners herein that the injury suffered by the applicant under the state of facts as found by the Commission was not an "injury sustained by accident," within the meaning of that phrase as used in the foregoing excerpt from the Workmen's Compensation Act. In support of this contention the petitioners urge that the words "injury sustained by accident" are to be given a meaning which would confine their application to cases where the means or cause of the injury was accidental; as where it was the result of a casualty, or of the happening of some precedent circumstance or event which, being itself unexpected or out of the ordinary,

was thus to be deemed accidental; and that the word "accident," as employed in the act, cannot be given application to the instant case, where the result in the way of injury to the applicant, however unexpected and unintended, was due to the doing by him of acts which he intended to do, and to the use of means which he intended to use in the course of his ordinary employment. In support of this contention the petitioner herein chiefly relies on the cases of *Rock v. Travelers' Ins. Co.* 172 Cal. 463, L.R.A.1918E, 1196, 156 Pac. 1029, and the cases cited therein, where this doctrine is laid down as applicable to actions to recover upon ordinary life or accident insurance policies. There can be no doubt as to the correctness of the principle announced in these cases, in respect to the construction to be placed upon such insurance policies which, as in the case of the policy sued upon in the *Rock Case*, limited their application to "injuries effected through external, violent and accidental means."

This court has, however, heretofore held that the phrase "injuries sustained by accident," as used in the Workmen's Compensation Act, is to be given the broader interpretation, in harmony with the spirit of liberality in which it was conceived and in which, by the terms of the act, we are required to construe it, so as to make it applicable to injuries to workmen which are unexpected and unintentional, and which thus come within the meaning of the term "accidents," as it is popularly understood. In adopting this interpretation of the terms of the act above referred to, we have been mindful of the source from which our statute was evidently derived, viz., the Workmen's Compensation Act of England, enacted by Parliament in the year 1897, under § 1 of which employers are declared to be liable to their employees for "personal injuries by accident arising out of and in the course of the employment." Construing this act of Parliament, Lord MacNaghten, in the leading case of *Fenton v. J. Thorley & Co.* [1903] A. C. 443, said: "The expression 'accident' is used in the public and ordinary sense of the word, as denoting an unlooked-for event which is not expected or designed."

In the case of *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398, 10 N. C. C. A. 1, this language was expressly adopted as defining the word "accident" as used in our Workmen's Compensation Act. In the case of the *Southwestern Surety Ins. Co. v. Pillsbury*, 172 Cal. 769, 158 Pac. 762, this court drew attention to the distinction to be drawn between cases arising out of the more limited phraseology of life

or accident insurance policies, as illustrated in the Rock Case, and the broader meaning to be applied to the language employed in the Workmen's Compensation Act; while in the yet more recent case of *Ocean Acci. & G. Co. v. Industrial Acci. Commission*, 173 Cal. 313, L.R.A.1917B, 336, 159 Pac. 1041, the words of the act in question were again considered as having been taken literally from the Workmen's Compensation Act of England, with the construction they had there received prior to their incorporation into our California statutes. Applying this current of authority to the facts of the case at bar, it must be evident that the injury suffered by the applicant, as set forth in the findings of fact of the Industrial Accident Commission, and for which he was awarded compensation, was an "accident" within the meaning of the act. Many cases might be cited from other states having similar statutes, and from England, in which like unforeseen, unexpected, and unintended

injuries to employees have been classed as "accidents," and held sufficient to justify awards, such as injuries sustained by persons while lifting heavy objects, or through exposure to drafts or chilly air, or icy water in mines, or through the rupture of blood vessels brought on by unusual heat or over-exertion, or through the inhalation of poisonous gases, and the like; but we think the reasoning of the decisions of this court above cited sufficient to define the scope and meaning of the act, so as to justify its application to the instant case.

For the foregoing reasons the petition herein is denied, and the award of the Commission affirmed.

We concur: Angellotti, Ch. J.; Shaw, J.; Sloss, J.; Wilbur, J.; Melvin, J.

Petition for rehearing denied, March 25, 1918.

#### MICHIGAN SUPREME COURT.

IDA M. KROUT

v.

J. L. HUDSON COMPANY et al., Plffs. in  
Certiorari.

(— Mich. —, 166 N. W. 848.)

**Workmen's compensation — injury from vaccination — arising out of employment.**

Injury through infected vaccination which the employer required under penalty of a lay-off, at request of the public health authorities, does not arise out of the employment within the meaning of the Workmen's Compensation Act.

For other cases, see *Master and Servant*, II. a, 1, in *Dig.* 1-52 N. S.

(March 27, 1918.)

**C**ERTIORARI to the Industrial Accident Board to review its action affirming an award of the arbitration committee in favor of claimant in a proceeding under the Workmen's Compensation Act to recover for injuries alleged to have been sustained through infection from vaccination while in defendants' employ. Award set aside.

The facts are stated in the opinion.

**Note.** — As to what constitutes an "accident" or "personal injury" within the meaning of the Workmen's Compensation Acts, see annotation following *Re Maggelet*, post, 867. Also see that annotation for references to other annotations on various questions arising under the Compensation Acts.

L.R.A.1918F.

Messrs. Douglas, Eaman, & Barbour, for plaintiffs in certiorari:

Claimant's injury was not an accident.

*Blaess v. Dolph*, 195 Mich. 137, 161 N. W. 885; *Dove v. Alpena Hide & Leather Co.* — Mich. —, 164 N. W. 253; *Eke v. Hart-Dyke* [1910] 2 K. B. 677, 80 L. J. K. B. N. S. 90, 103 L. T. N. S. 174, 26 Times L. R. 613, 3 B. W. C. C. 489, 3 N. C. C. A. 230; *Steel v. Cammell, L. & Co.* [1905] 2 K. B. 232, 74 L. J. K. B. N. S. 610, 53 Week. Rep. 612, 93 L. T. N. S. 357, 21 Times L. R. 490, 2 Ann. Cas. 142.

Claimant has not discharged the burden of showing that the accident arose out of and in the course of her employment.

*McCoy v. Michigan Screw Co.* 180 Mich. 456, L.R.A.1916A, 323, 147 N. W. 572, 5 N. C. C. A. 455; *Hills v. Blair*, 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 409; *Blaess v. Dolph*, 195 Mich. 137, 161 N. W. 885; *Perry v. Woodward Bowling Alleys*. 196 Mich. 742, 163 N. W. 52; *Chandler v. Great Western R. Co.* 106 L. T. N. S. 479, 5 B. W. C. C. 254; *Bellamy v. J. Humphries & Sons*, 6 B. W. C. C. 53.

Messrs. Edward A. Rich and Russell L. Freyman, for defendant in certiorari:

Claimant is entitled to compensation, as she sustained an accidental injury which arose out of and in the course of her employment.

*Blaess v. Dolph*, 195 Mich. 137, 161 N. W. 885; *Dove v. Alpena Hide & Leather Co.* — Mich. —, 164 N. W. 253; *Daich v. Studebaker Corp.* 195 Mich. 482, 161 N. W. 927; *Van Gordon v. Packard Motorcar Co.*

195 Mich. 588, L.R.A.1917E, 522, 162 N. W. 107; Bell v. Hayes-Ionia Co. 192 Mich. 90, 158 N. W. 179; Oniji v. Studebaker Corp. 196 Mich. 397, 163 N. W. 23; McNichol's Case, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522; Kennelly v. Sterns Salt & Lumber Co. 190 Mich. 628, 157 N. W. 378; Hopkins v. Michigan Sugar Co. 184 Mich. 87, L.R.A. 1916A, 310, 150 N. W. 325; Beaudry v. Watkins, 191 Mich. 445, L.R.A.1916F, 576, 158 N. W. 16; Rayner v. SHigh Furniture Co. 180 Mich. 168, L.R.A.1916A, 22, 146 N. W. 665, Ann. Cas. 1916A, 386, 4 N. C. C. A. 851; Archibald v. Workmen's Compensation Comr. (Archibald v. Ott) 77 W. Va. 448, L.R.A.1916D, 1013, 87 S. E. 791; Zabriskie v. Erie R. Co. 85 N. J. L. 157, 88 Atl. 824, 4 N. C. C. A. 778; State ex rel. Duluth Brewing & Malting Co. v. District Ct. 129 Minn. 176, 151 N. W. 912.

Brooke, J., delivered the opinion of the court:

For some time prior to February 8, 1916, claimant was employed as a fitter for the J. L. Hudson Company, respondent. On that day a general vaccination of the employees of the J. L. Hudson Company was performed by Dr. James A. McVeigh, an official of the board of health of the city of Detroit, who acted in the premises at the request of the board of health. He testified that the request of the board of health was communicated to the officers of the J. L. Hudson Company, and those officers, through subordinates, conveyed the same to the several departments.

He said:

A. It was not an order, but a request for their co-operation.

Q. For the co-operation of who?

A. The J. L. Hudson Company, to prevent the possibility of smallpox in their institution.

Q. What alternative was offered by the board of health in the event any employee did not wish to be vaccinated?

A. Following our usual procedure in such cases, I told them that if any employees who had not been successfully vaccinated, if they were not successfully vaccinated within five years, should be excluded from the place of employment for a period of twenty-one days.

Q. In the event that they refused to be vaccinated, what was the remedy of the J. L. Hudson Company?

A. The alternative was a twenty-one day lay-off covering the period of incubation of smallpox.

Claimant, together with several hundred other employees, submitted to the opera-

tion. It is her claim that within half an hour after the operation she felt pain in her arm extending upwards into her neck, and that this condition continued for four days, when she was obliged to discontinue work. Two days later on February 14, she called a physician who diagnosed her trouble as "acute mastoiditis, lymphatic infection." He operated upon her on the 19th. Claimant remained in the hospital some two or three weeks, and was convalescent for a considerable period thereafter. No notice of the accident was served upon respondent, and no formal claim for compensation ever made by claimant until January 19, 1917. It is undisputed, however, that the respondent knew of claimant's illness, and that one of the nurses connected with the welfare department of the respondent called upon her at her home during her said illness. It is likewise undisputed that some time in June, 1916, claimant called upon the manager of the respondent for the purpose of ascertaining "if they could not do something for me, or what they could do for me." As a result of this interview claimant was paid two weeks' salary, which, we gather from the record, was in accordance with the usual custom of the respondent company. Respondent having denied liability, an arbitration followed and an award was made, which, upon appeal to the Industrial Accident Board, was affirmed.

Respondent reviews the case in this court asserting that "(1) Claimant's injury was not accidental; (2) claimant failed to sustain the burden imposed upon her of showing that the alleged accidental injury arose out of and in the course of her employment; (3) claimant has not discharged the burden of showing that the alleged accidental injury was the cause of her disability."

While Dr. McVeigh, who had himself vaccinated approximately 100,000 persons, testified that he never knew or heard or read of a case of acute mastoiditis being caused by vaccination, it was the opinion of Dr. Williams, claimant's physician, that the mastoiditis was the result of a lymphatic infection, the germ of which (streptococcus or pneumococcus) found entrance to the system through the vaccination. Asked what he meant by an infected vaccination he said: "Any open wound or sore exposed to the air, infection from clothing or any surroundings is liable to become infected. What I mean by that is, a man cutting a corn and wearing a black sock is liable to get streptococcus or pneumococcus."

Assuming, then, as found by the board, that the mastoiditis was caused by the invasion of the germs through the vaccination wound (though the testimony contained in the record seems strongly to dis-

credit this theory), there is still an absolute lack of evidence tending to show that the germ secured lodgment in claimant's arm in the course of her employment. In this respect the case is distinguishable from *Blaess v. Dolph*, 195 Mich. 137, 161 N. W. 885, and *Dove v. Alpena Hide & Leather Co.* — Mich. —, 164 N. W. 253. See also *Chandler v. Great Western R. Co.* 106 L. T. N. S. 479, 5 B. W. C. C. 254; *Bellamy v. J. Humphries & Sons*, 6 B. W. C. C. 53.

It seems quite clear to us that claimant has failed to show any connection between her employment in the store of respondent and the infection following vaccination. There was nothing in her employment which made her more susceptible to the reception of the germ infection than if she were walking upon the street or attending a theater

or church. In other words, the risk or infection was such, and such only, as that to which the general public is exposed. Claimant's injury, if it can be traced to the vaccination, arose, not out of her employment with respondent, but through the active agency of the Detroit board of health, which for the benefit of the claimant as well as for the benefit of the general public requested her to submit to the operation. The right of the board of health to insist upon general vaccination is not involved. Claimant submitted to the operation, though, she asserts, under protest.

We are not here passing upon the sufficiency of the notice of injury or the claim for compensation.

The award is set aside.

## LOUISIANA SUPREME COURT.

JOHN BEHAN

v.

JOHN B. HONOR COMPANY, Limited,  
et al., Appts.

(— La. —, 78 So. 589.)

### Workmen's compensation — aggravation of disease.

The fact that an employee, injured in performing services arising out of and incidental to his employment in the course of his employer's occupation, was already afflicted with a dormant disease that might some day have produced physical disability, is no reason why the employee should not be allowed compensation, under the Employers' Liability Statute, for the injury which, added to the disease, superinduced physical disability.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(June 30, 1917.)

**A**PPEAL by defendants from a judgment of the Civil District Court for the Parish of Orleans in favor of plaintiff in a suit brought under the Employers' Liability Act, to recover compensation for personal injuries sustained by plaintiff while working for the defendant employer. Affirmed.

The facts are stated in the opinion.

Headnote by O'NIELL, J.

**Note.** — As to what constitutes an "accident" or "personal injury" within the meaning of the Workmen's Compensation Acts, see annotation following *Re Maggelet*, post, 867. Also see that annotation for references to other annotations on various questions arising under the Compensation Acts.

Mr. J. C. Henriques for appellants.

Messrs. E. M. Stafford and Howell Carter, Jr., for appellee:

Where a pre-existing disease is brought to a crisis by an accident, it is an injury by accident and plaintiff is entitled to recover.

*Thomas v. St. Louis, I. M. & S. R. Co.* 187 Mo. App. 420, 173 S. W. 728, 9 N. C. C. A. 92; *Hilliard v. Chicago City R. Co.* 163 Ill. App. 282; *Larson v. Boston Elev. R. Co.* 212 Mass. 262, 98 N. E. 1048; *Voorhees v. Smith Schoonmaker Co.* 86 N. J. L. 500, 92 Atl. 280, 7 N. C. C. A. 646; *Milwaukee v. Industrial Commission*, 160 Wis. 238, 151 N. W. 247; *Madden's Case*, 222 Mass. 487, L.R.A.1916D, 1000, 111 N. E. 379; *Crowley's Case*, 223 Mass. 288, 111 N. E. 786; *Poccardi v. Public Service Commission*, 75 W. Va. 542, L.R.A.1916A, 299, 84 S. E. 242, 8 N. C. C. A. 1065; *Carroll v. Knickerbocker Ice Co.* 169 App. Div. 450, 155 N. Y. Supp. 1; *Sullivan v. Industrial Engineering Co.* 173 App. Div. 65, 158 N. Y. Supp. 970; *Zappala v. Industrial Ins. Commission*, 82 Wash. 314, L.R.A.1916A, 295, 144 Pac. 54.

It is an injury by accident where the accident merely accelerates an otherwise probable result of disease.

*Golder v. Caledonian R. Co.* 40 Scot. L. R. 89, 10 Scot. L. R. 373; *Willoughby v. Great Western R. Co.* 6 W. C. C. 28; *Woods v. Wilson Sons & Co.* [1915] W. N. 109, 84 L. J. K. B. N. S. 1067, 113 L. T. N. S. 243, 31 Times L. R. 273, 59 Sol. Jo. 348, 8 B. W. C. C. 288; *Lloyd v. Sugg & Co.* [1900] 1 Q. B. 486, 69 L. J. Q. B. N. S. 190, 81 L. T. N. S. 768, 16 Times L. R. 65, 2 W. C. C. 5.

O'Neill, J., delivered the opinion of the court:

While the plaintiff was working as longshoreman for the John B. Honor Company, a skid that he was attempting to remove from the ship to the wharf slipped, and caused him to fall into the river. He fell upon some wooden piling or stringers and hurt his head and spine. This suit was brought against the employer and the latter's liability insurer, for compensation, under the Employers' Liability Act, Act No. 20 of 1914. The plaintiff claimed compensation at the rate of \$10 a week for 400 weeks, less certain payments he had received. The district court allowed him compensation at the rate of \$6.50 a week, for 400 weeks, less the credits. The defendants prosecute this appeal; and the plaintiff, answering the appeal, prays that the compensation allowed be increased to the amount sued for.

The only defense urged—and it was not specially urged in the answer of either of the defendants—is that the plaintiff's disability was not caused by the accident, but is the result of a disease that was lurking in his system before the accident.

There is scientific evidence in the record that the plaintiff was, after the accident and at the time of the trial, afflicted with locomotor ataxia—what physicians call *tabes dorsalis*—and that an accident such as the one on which this suit is founded could not, of itself, have produced that disability. But it also appears, from the expert testimony, that the one and only disease that does cause locomotor ataxia can remain dormant and undiscovered in the human system a very long time; that there have been cases where the disease did not assert itself within twenty years from the time of infection. There is no proof in this case that the plaintiff would be now or ever disabled by locomotor ataxia, if the accident he complains of had not happened. On the contrary, until the accident, he was apparently in ordinary sound health, attending to his daily occupations, unconscious of being diseased, working regularly, earning large wages, and supporting his wife and daughter. The injuries he suffered by the accident, and the immediate change in his physical condition, leave no reasonable doubt that the accident superinduced and was the proximate cause of the disability of which he complains. He was rendered unconscious by the injury to his head and spine, and remained unconscious more than twenty-four hours after the accident. The surgeon who first attended him at the hospital found that he had concussion of the brain. He remained in the hospital two weeks, and was then

taken in an ambulance to his home, not that he had recovered sufficiently, but because, as the surgeon in charge of the hospital testified, "about that time some change was made in the company handling these cases." His arms and legs were yet paralyzed, and he remained confined to his room, physically helpless, in the care of a physician, nearly two months longer. The paralysis that had immediately followed the accident was succeeded by, as if it had developed into, what the attending physician suspected was locomotor ataxia, or *tabes dorsalis*. On his advice, a specialist on nervous and mental diseases was consulted, and his diagnosis and tests confirmed and proved the correctness of the opinion of the attending physician.

The proof goes no further, in support of the defense of this suit, than to show that the plaintiff might and perhaps would, at some time, have become disabled by the disease that was lurking in his system, even if the accident complained of had not happened. And that is not much more of a defense than to say that every man must some day come to the end of his worldly career, accident or no accident.

The evidence leaves no doubt that the plaintiff's physical disability resulting from the accident is worse than it would be if he had not been diseased at the time of the accident. But the accident was, none the less, the proximate cause of the present disability. We are not aware of a decision of this court on the subject, but it is well settled in the jurisprudence elsewhere that the fact that a person was already afflicted with a dormant disease, that might some day produce physical disability, is no reason why he should not be allowed damages or compensation for a personal injury that causes the disease to become active or virulent, and superinduces physical disability. See *Hilliard v. Chicago City R. Co.* 163 Ill. App. 282; *Larson v. Boston Electric R. Co.* 212 Mass. 262, 98 N. E. 1048.

The rulings in the two cases cited by the learned counsel for the defendants, decided by the Industrial Accident Commission of California (*Hensen v. Patterson Ranch Co.* and *Johnson v. Lowe*, vol. 2, Reports of Industrial Accident Commission of the State of California, pp. 767 and 543), were based upon facts that distinguish them from the present case. In *Hansen's Case*, it was proven that the disability due to the accident could not have lasted longer than three weeks, and that the remaining disability was due to the onset of paresis. In *Johnson's Case*, the proof was that the seven weeks for which compensation was allowed was ample time for complete re-

covery from the injury complained of, being an injury to his wrist, and that the remaining ailment was due to a disease that he had before the accident.

The plaintiff worked sometimes as screwman and sometimes as longshoreman. As screwman his wages were \$6 a day, and as longshoreman 40 cents an hour for a day of ten hours, 60 cents an hour for night work, and 80 cents an hour on Sundays. The evidence is that he had a good reputation as a workman, and his services were in demand. Hence, it seems that his average weekly wages should have been enough to allow him compensation at the maximum rate of \$10 a week. But the Employers' Liability Act is so worded that it would be extraordinary for any laboring man to show that his average weekly wages amounted to enough to allow him the maximum rate of compensation. The plaintiff in this case, like most of the longshoremen, worked for a number of stevedores. During the year preceding the accident, he had worked principally as screwman; but, at the time of the accident, he was employed as longshoreman. It was therefore impracticable to compute the

"average weekly wages" by the method first indicated in § 3 of the Act No. 20 of 1914. The judge adopted the alternative method provided by the statute, of taking the average weekly amount earned by another employee in the same grade, employed at the same work and by the same employer, during the twelve months preceding the accident. Accordingly the rate of compensation allowed by the judgment is so nearly accurate that it is approved.

The judgment appealed from is affirmed at the cost of the appellants.

Leche, J., takes no part.

A rehearing having been granted, Leche, J., on April 29, 1918, handed down the following response:

We have considered again the issues presented in this case, and do not find any error in the judgment.

The decree heretofore rendered is reinstated and made final.

O'Neill, J., was absent during the argument on rehearing.

#### MASSACHUSETTS SUPREME JUDICIAL COURT.

RE FRANK MAGGELET.

TRAVELERS' INSURANCE COMPANY,  
Insurer, Appt.

(228 Mass. 57, 116 N. E. 972.)

**Workmen's compensation—neurosis—personal injury.**

1. Neurosis arising from pressure on the brachial plexus because of bad posture in the performance of one's daily work is not a personal injury within the meaning of the Workmen's Compensation Act.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

**Judgment—correction—partial statement of the case.**

2. The court may correct a decree entered in a workman's compensation case which is erroneous because of petitioner's failure truly and fully to state the case to the court.

*For other cases, see Judgment, I. g, in Dig. 1-52 N. S.*

(July 24, 1917.)

**Note.**—As to what constitutes an "accident" or "personal injury" within the meaning of the Workmen's Compensation Acts, see annotation following this case, post, 867. Also see that annotation for references to other annotations on various questions arising under the Compensation Acts.

L.R.A.1918F.

**A**PPEAL by insurer from a decree of the Superior Court for Suffolk County affirming a decision of the Industrial Accident Board in favor of claimant in a proceeding under the Workmen's Compensation Act, to recover compensation for personal injuries sustained by him. Reversed.

The facts are stated in the opinion.

Messrs. Walter I. Badger and Louis C. Doyle, for appellant:

The employee did not receive a personal injury arising out of and in the course of his employment.

Kenney's Case, 222 Mass. 401, 111 N. E. 47; Madden's Case, 222 Mass. 487, L.R.A. 1916D, 1000, 111 N. E. 379; Johnson's Case, 217 Mass. 388, 104 N. E. 735, 4 N. C. C. A. 843; Hurle's Case, 217 Mass. 223, L.R.A. 1916A, 279, 104 N. E. 336, Ann. Cas. 1915C, 919, 4 N. C. C. A. 527; Walker v. Hockney Bros. 2 B. W. C. C. 20.

Mr. Benjamin A. Lockhart for appellee.

Rugg, Ch. J., delivered the opinion of the court:

This case comes before us on a finding and decision of the Industrial Accident Board with a report of all the material evidence. The finding is that "the employee was totally incapacitated for work by reason of a condition of occupational neurosis, which arose out of and in the course of his em-



ployment." It is undisputed that the employee was a cigar maker by trade and had worked for the subscriber twenty-five years; and in March, 1916, he stopped work and, on consulting a physician, was told that he was troubled with "occupational neurosis;" and that during the preceding six months his arm had troubled him. Dr. Joel E. Goldthwait, the impartial physician appointed by the board, testified that: "he could find no evidence of disease whatever.

. . . At the time he saw this man he believed that his posture and habit of carrying himself was really the cause of his present pain in the arms; he could not say that there was anything outside the posture peculiar to his trade, that causes him to have that pain. If this man would adopt a different posture, keep himself straight, he thinks he would recover from this trouble without much question; any occupation he might follow where he carried himself in that same position would cause the same trouble as the cigar maker's occupation, will produce the same result; he found no evidence of the man being nuerasthenic, and he does not believe that the continual rolling of cigars has caused the trouble that this man now has; he examined him for evidences of organic disease and found none; his muscles were practically all in normal tones and normal responses. . . . He has a posture which is not good and which he has had for many years; if he was standing up at his work and had this posture when he sat down, he would not be leaning on that group of nerves all the time, but, because he is all the time leaning on that group of nerves, it has aggravated and brought this condition to a place where he had to quit work. If the man is handled right he can be made splendidly well, and he thinks he can go on with that trade, but he thinks he has to be seated properly at his work."

There was further medical evidence to the effect that "he is nervous and thinks about his arm and hand and makes an entirely abnormally slight response to the request for any muscular action in that arm. He has no sign of any organic disease in arm at all and evidence of neurosis, and I think the condition is a pure neurosis that arises from his occupation."

And that "his work as cigar maker would influence the condition of neurosis to this extent: The position of cigar makers which causes them to bend forward with shoulders forward, as Dr. Goldthwaite states, would cause pressure on the brachial plexus, and make the condition worse. The employee should be able to work if he could be kept in proper position so that the pressure on the brachial plexus would not be caused by

his position. . . . He deduced that the trouble was occupational neurosis from the fact that an occupational neurosis is the result of the use of certain muscles or group of muscles, to such an extent that they cause a neurosis of the nerves supplying these muscles. . . . It is very possible that there is a certain amount of pressure on the brachial plexus from the position cigar makers assume in their work. He traces it to the continued use of these muscles. It is not peculiar to the cigar makers' trade."

There is here no foundation for a finding that the employee sustained "personal injury," which arose out of and in the course of his employment. "Personal injury," as used in the Workmen's Compensation Act, has been held to be more comprehensive than the "personal injury by accident" of the English act. The cases which have arisen heretofore under our act have been of a different character from that here presented. In *Hurle's Case*, 217 Mass. 223, L.R.A.1916A, 279, 104 N. E. 336, Ann. Cas. 1915C, 919, 4 N. C. C. A. 527; *Johnson's Case*, 217 Mass. 388, 104 N. E. 735, 4 N. C. C. A. 843; and *Doherty's Case*, 222 Mass. 98, 109 N. E. 887, the evidence showed that the employee was suffering from poisoning by the inhalation of gases or other noxious substances, plainly connected with the performance of his work. Poisoning always has been regarded as a tortious act in the nature of a personal injury, for which damages might be recovered in an action at law if other elements of liability are present. *Thompson v. United Laboratories Co.* 221 Mass. 276, 108 N. E. 1042; *Madden's Case*, 222 Mass. 487, 491, L.R.A.1916D, 1000, 111 N. E. 379; *Hurle's Case*, 217 Mass. 223, and cases collected at 224, L.R.A.1916A, 279, 104 N. E. 336, Ann. Cas. 1915C, 919, 4 N. C. C. A. 527; *Pinkley v. Chicago & E. I. R. Co.* 246 Ill. 370, 35 L.R.A.(N.S.) 679, 92 N. E. 986, 1 N. C. C. A. 480; *Canfield v. Iowa Dairy Separator Co.* 172 Iowa, 164, 154 N. W. 434; *Wagner v. H. W. Jayne Chemical Co.* 147 Pa. 475, 30 Am. St. Rep. 745, 23 Atl. 772; *Cox v. American Agri. Chemical Co.* 24 R. I. 503, 60 L.R.A. 629, 53 Atl. 871, 13 Am. Neg. Rep. 434; *Fox v. Peninsular White Lead & Color Works*, 84 Mich. 676, 682, 48 N. W. 203. In *McPhee's Case*, 222 Mass. 1, 109 N. E. 633, 10 N. C. C. A. 257, pneumonia brought on by sudden exposure during a fire was held to be a personal injury. That would be a personal injury by accident under the English Act. *Coyle v. John Watson* [1915] A. C. 1, [1914] W. N. 195, 83 L. J. P. C. N. S. 307, 11 L. T. N. S. 347, 30 Times L. R. 501, 53 Sol. Jo. 533, 7 B. W. C. C. 259 [1914] S. C. 44, 51

Scot. L. R. 492; Glasgow Coal Co. v. Welsh [1916] 2 A. C. 1, 85 L. J. P. C. N. S. 130, 114 L. T. N. S. 809, 32 Times L. R. 359, 60 Sol. Jo. 336, 9 B. W. C. C. 371 [1916] S. C. 141, 53 Scot. L. R. 311. In Brightman's Case, 220 Mass. 17, L.R.A. 1916A, 321, 107 N. E. 527; Fisher's Case, 220 Mass. 581, 108 N. E. 361, and Madden's Case, 222 Mass. 487, L.R.A.1916D, 1000, 111 N. E. 379, persons suffering from an organic infirmity of the heart were held to have sustained a personal injury when the exertion of the employment caused a lesion or further impairment of that organ, destroying or affecting adversely its usefulness. These all are instances of a definite and appreciable attack upon some vital faculty or function, having a specific connection with the employment. See also, in this connection, Vennen v. New Dells Lumber Co. 161 Wis. 370, L.R.A.1916A, 273, 154 N. W. 640, Ann. Cas. 1918B, 293, 10 N. C. C. A. 729; Plass v. Central New England R. Co. 169 App. Div. 828, 155 N. Y. Supp. 854; Archibald v. Workmen's Compensation Comr. (Archibald v. Ott) 77 W. Va. 448, L.R.A.1916D, 1013, 87 S. E. 791. No case has gone so far as to hold that a "neurosis of the nerves" supplying certain muscles, resulting from a posture which causes the employee "to bend forward with shoulders forward" so as to induce "pressure on the brachial plexus" is a personal injury.

The words "personal injury" in their connection in this statute do not naturally lend themselves to a situation such as that here disclosed. The act relates to industrial conditions. It has to do with employment of labor. The act affords no relief against general disease. It is not a scheme for health insurance. It deals only with personal injuries following as an immediate result from the employment as its direct cause. In general it was intended as in the nature of a substitute for actions of tort for personal injuries at common law and under the Employers' Liability Act (Rev. Laws, chap. 106) by employees against their employers. That is apparent from the provisions of part 1 of the Workmen's Compensation Act as well as the legislative resolves and reports preceding its enactment. But, as has been pointed out, the act goes beyond those limits and includes such diseases as fairly may be termed personal injuries. The act does not mention disease or occupational disease. See Stat. 1913, chap. 813, § 12. It awards compensation for disease when it rightly may be described as a personal injury. A disease of mind or body which arises in the course of employment, with nothing more, is not within the act. It must come from or be an injury, although that injury need

not be a single definite act but may extend over a continuous period of time. Poisoning, blindness, pneumonia, or the giving way of heart muscle, all induced by the necessary exposure or exertion of the employment, fall within well-recognized classes of personal injuries. On the other hand, the gradual breaking down or degeneration of tissues caused by long and laborious work is not the result of a personal injury within the meaning of the act. A person may exhaust his physical or mental energies by exacting toil, and become unfit for further service, but he is not, because of this, entitled to compensation, for the reason that this condition cannot fairly be described as a personal injury. The disease must be or be traceable directly to a personal injury peculiar to the employment. A nervous condition dependent upon poor posture of the body, in our opinion, does not constitute a commonly known and well-recognized personal injury consequent upon employment. It is difficult to establish and define a plain line of division between what is personal injury within the act on the one hand and simple disease on the other hand. But personal injury and disease are not synonymous. They are different in meaning. One does not include the other. They are classifications differing from each other in kind, although they may overlap in some instances.

There is not enough in this record to show that the condition of the employee is a necessary result of his work. It arose on all the evidence, from a bad posture of the body while at work. But there is nothing to show that this was a necessary incident of the employment. Scarcely anything is more difficult to control or influence than the position of the body of another. Whether one shall be erect or stooping of figure, whether the carriage of the person shall be lithe or stiff, whether the chest shall be narrow or broad and the space for the lungs correspondingly cramped or enlarged, whether breathing shall be deep and full, or short and impaired, depend in large degree upon the habit, temperament, and appreciation of the requisites of right living on the part of the individual. Interference on these matters by the employer might be regarded as an unwarranted impairment of personal privilege. There are few employments which, pursued without regard to the laws of health and the requirements of correct method of life, may not invite some form of disease. This record is bare of any evidence to show that it is a reasonably necessary result of the employment that those following it should have neurosis, or that the inducing prox-

mate cause of that condition is the employment.

This court has gone further than any other, so far as we are aware, in holding that poisoning, heart lesion and kindred physical ills may be found to be personal injuries under the act. The courts of other states of the Union, in construing Workmen's Compensation Acts more or less similar to our own, have declined to follow *Hurle's Case*, 217 Mass. 223, L.R.A.1916A, 279, 104 N. E. 336, Ann. Cas. 1915C, 919, 4 N. C. C. A. 527, and the principle there established, and have held that poisoning arising out of the employment through the inhalation of gases or other substance was not a personal injury under the act. *Adams v. Acme White Lead & Color Works*, 182 Mich. 167, L.R.A.1916A, 283, 148 N. W. 485, Ann. Cas. 1916D, 689, 6 N. C. C. A. 482; *Industrial Commission v. Brown*, 92 Ohio St. 309, L.R.A.1916B, 1277, 110 N. E. 744; *Miller v. American Steel & Wire Co.* 90 Conn. 349, L.R.A.1916E, 510, 97 Atl. 345, 14 N. C. C. A. 842. See *Liondale Bleach, Dye & Paint Works v. Riker*, 85 N. J. L. 426, 89 Atl. 929, 4 N. C. C. A. 713. Nevertheless we remain content with our decisions in this particular. But the doctrine has not been established by these decisions that every disease caught by an employee in the course of his employment is a personal injury under the act. See, in this

connection, *Britons v. Turvey* [1904] 1 K. B. 328, 338, 73 L. J. K. B. N. S. 158, 68 J. P. 103, 52 Week. Rep. 195, 89 L. T. N. S. 660, 20 Times L. R. 129, s. c. [1905] A. C. 230, 238, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 7 W. C. C. 1, 2 Ann. Cas. 137; *Eke v. Hart-Dyke* [1910] 2 K. B. 677, 682, 80 L. J. K. B. N. S. 90, 103 L. T. N. S. 174, 26 Times L. R. 613, 3 B. W. C. C. 482, 3 N. C. C. A. 230.

It seems clear, for these reasons, that the present case cannot rightly be termed a personal injury within the meaning of those words in the act.

The case is before us properly. The entry of the first decree was manifestly caused by the failure of the employee to state the case truly and fully to the court, and therefore was entered, at least, through mistake and accident. It was within the power of the court to correct such an error. *Karrick v. Wetmore*, 210 Mass. 578, 97 N. E. 92; *Hathaway v. Congregation Ohab Shalom*, 216 Mass. 539, 104 N. E. 379. The only decree from which an appeal could be taken properly was the one of December 19, 1916. It follows that the decree must be reversed and a new decree entered, to the effect that the insurer is under no liability.

So ordered.

### **Annotation—What constitutes an "accident" or "personal injury" within the meaning of the Workmen's Compensation Acts.**

#### **In general.**

The general subject of Workmen's Compensation Acts is treated in annotations in L.R.A.1916A, 23, and L.R.A. 1917D, 80. For later cases, and annotations on Workmen's Compensation Statutes generally, consult the L.R.A. Indexes for volumes subsequent to L.R.A. 1917D, under the title "Workmen's Compensation."

As to injuries "arising out of and in the course of" the employment, within the meaning of the Compensation Statute, see annotation to *Mueller Constr. Co. v. Industrial Bd.* post, 891. As to compensation for injuries caused by weather conditions such as lightning, sunstroke, freezing, etc., see annotation to *Wiggins v. Industrial Bd.* post, 932.

The cases discussing what constitutes an accident will be found in the annotation in L.R.A.1916A, 29 and 227, and in the annotation in L.R.A.1917D, 103. The earlier cases discussing recovery of compensation for incapacity resulting from disease are reviewed briefly in

an annotation attached to *Adams v. Acme White Lead & Color Works*, L.R.A.1916A, 283. The present annotation is supplementary to the annotations here referred to.

Frequent references will be made to the earlier annotation, so that all of the cases on particular phases of the general question may be found, without the necessity of an extended search.

The word "accident," as used in the Compensation Statute, is generally defined as any unlooked-for mishap or untoward event, not expected or designed, and is not to be taken in any technical sense, but is to be given a popular meaning. *Haskell & B. Car Co. v. Brown* (1917) — Ind. App. —, 117 N. E. 555, *Indian Creek Coal & Min. Co. v. Caivert*, (1918) — Ind. App. —, 119 N. E. 519. And see the annotation in L.R.A.1917D, 103.

In the great majority of cases in which the court has to construe the word "accident," the incapacity from which the employee suffered or which caused his

death was the immediate result of a disease, and the problem before the court was to determine whether or not the disease in question was to be considered as an accident, or as the proximate result of an accident, so as to make the Compensation Act applicable.

**Where disease is caused by, or follows an accident.**

In case it may be found that the disease from which the employee was suffering or from which he died was caused by the accident, compensation is recoverable on the theory that the accident was the proximate cause of the disability or death.

Thus, where there was evidence, apparently in harmony with the medical authorities, to the effect that the accident was a sufficient producing cause of the acute pericarditis with its accompanying condition; that the bruising of the chest from the accident was sufficient to produce a traumatic injury to the membrane surrounding the heart, and in this way to bring about the ultimate death, the finding of the commission will be sustained. *La Fleur v. Wood* (1917) 178 App. Div. 397, 164 N. Y. Supp. 910.

So, a finding that pneumonia resulted from an accident will be sustained, where the accident itself was admitted, and there was evidence in addition to the expert testimony of doctors, tending to show discoloration on parts of the employee's body, pain and suffering, headache and restlessness, indicating that the trauma caused by the fall was likely to result in pneumonia. *A. Breslauer Co. v. Industrial Commission* (1918) — Wis. —, 167 N. W. 256.

An award of compensation was sustained in *Balzer v. Saginaw Beef Co.* (1917) — Mich. —, 165 N. W. 785, where an employee suffered an accidental injury arising out of and in the course of his employment, and was thereafter found to be suffering from diabetes, where the expert testimony was that the disease might have been caused by the injury, and he had previously been an apparently strong, healthy man, and had been pronounced a healthy man after an examination for life insurance, which was made about three months prior to the injury.

Incapacity may be found to be the result of an injury, where the substance of the testimony of a number of physicians who examined the plaintiff was that his condition at that time was or might have been the result of the injury, although physicians testifying for the defendant

stated that his condition was the result of a progressive arterio sclerosis, and could not have been the result of the injury. *Manning v. Pomerene* (1917) 101 Neb. 127, 162 N. W. 492.

In two New York cases, awards of compensation have been upheld, where the employee died from delirium tremens, which developed while he was suffering from the effect of an accident.

Thus in *Rzepczynski v. Manhattan Brass Co.* (1917) — App. Div. —, 165 N. Y. Supp. 1110, the appellate division unanimously affirmed a ruling of the commission that death from delirium tremens, brought on as the result of an accident, is traceable to the accident, and that it makes a case for compensation.

So, in *Bechwith v. F. Bastian Bros. Co.* (1917) — App. Div. — 167 N. Y. Supp. 1087, the appellate division, without opinion, unanimously affirmed an award to a widow of a deceased workman, who, while undergoing an operation necessitated by his injury, developed delirium tremens, and while in that condition committed suicide.

For other cases in which recovery has been sought for death from delirium tremens, which developed while the employee was suffering from the effects of an accident, see the annotation in L.R.A.1917D, 111, note 64.

Compensation is also recoverable where a fatal disease supervenes after the accident, which has lowered the employee's powers of resistance.

Thus, compensation is recoverable where the injury resulted in nephritis, which lowered the employee's power to resist an attack of tuberculosis, which caused his death. *Retmier v. Cruse* (1918) — Ind. App. —, 119 N. E. 32.

So, the death of a workman may be found to be due to accident, where he strained himself while at work and sustained an inguinal hernia, which necessitated an operation, and thereafter within two or three days, pneumonia developed, from which he died. *Coons v. Endicott-Johnson Co.* (1917) — App. Div. —, 168 N. Y. Supp. 1105, unanimously sustaining the award of the commission.

And in *Vogele v. Detroit Lumber Co.* (1917) 196 Mich. 516, 162 N. W. 975, an award of compensation to a widow of a deceased workman was sustained, where the testimony tended to show that the deceased was struck, while at his work, by a broken belt, and injured about the face, nose, and right side; and as a result thereof traumatic pleurisy set in and

later developed into pneumonia; that, while he was suffering from pneumonia, typhoid fever set in and, as a result of both maladies, he died, although the evidence showed no connection between the typhoid fever and his employment.

The California commission may award compensation for nervousness, resulting from the original accident, and causing incapacity after the direct physical effects of the injury have disappeared. *Employes Credit Co. v. Industrial Acci. Commission* (1917) — Cal. —, 169 Pac. 1001.

**Aggravation of pre-existing disease.**

The earlier cases on the effect of a pre-existing disease upon the right to compensation will be found in the annotation in L.R.A.1916A, page 33, notes 28 et seq., and on page 231, notes 56 et seq., and in the annotation in L.R.A.1917D, page 109, notes 53 et seq.

It has been said that compensation is not made to depend upon the condition of health of the employee, nor upon his freedom from liability to injury through a constitutional weakness or latent tendency. Acceleration of a pre-existing disease to a mortal end, sooner than otherwise it would have come, says the Massachusetts court in *Brightman's Case* (1914) 220 Mass. 17, L.R.A.1916A, 321, 107 N. E. 527, 8 N. C. C. A. 102, is an injury within the meaning of the Workmen's Compensation Act.

This view has also been adopted by practically every court to which the question has been presented.

"The fact that an employee injured in performing services arising out of and incidental to his employment, in the course of his employer's occupation, was already afflicted with a dormant disease that might some day have produced physical disability, is no reason why the employee should not be allowed compensation, under the Employers' Liabilities Statute, for the injury which, added to the disease, superinduced physical disability." *BEAHAN v. JOHN B. HONOR Co.* ante, 862 (headnote by the court).

"If an employee has a disease and, having the same, receives an injury 'arising out of and in the course of the employment,' which accelerates the disease and causes his death, such death results from such injury, and the right to compensation is secured, even though the disease itself may not have resulted from the injury." *Van Keuren v. Dwight Divine & Sons* (1917) 179 App. Div. 509, 165 N. Y. Supp. 1049, affirmed in (1918) 222 N. Y. 648, 119 N. E. 1083.

The fact that an employee, at the time of the accident, was predisposed to the development of a hernia by any undue straining of his muscles in the region where the protrusion occurred, does not render the Compensation Act inapplicable, where, but for the mishap, there would not have been any disability. *Casper Cone Co. v. Industrial Commission* (1917) 165 Wis. 255, L.R.A.1917E, 504, 161 N. W. 784. The court said: "If there is a definite mishap to an employee, happening to him while performing service growing out of and incidental to his employment, proximately causing him physical injury and damaging results, the misfortune is compensable under the Workmen's Compensation Law, though he was physically unsound at the time of such mishap, and otherwise such results would not have been caused by such mishap."

So, too, in *Indian Creek Coal & Min. Co. v. Calvert* (1918) — Ind. App. —, 119 N. E. 519, in holding that an employee suffered injury arising out of the employment, where he suffered a rupture of the aorta after a strain, the court said: "Assuming that decedent was afflicted with a fatal malady certain to result in his decease sooner or later, and that such malady was a cause of decedent's death here, these facts alone are not sufficient to defeat appellees' claim. Such result would follow only in case his decease was in fact the result of his ailment, progressing naturally, and dissociated from any injury that he may have suffered by accident arising out of and in the course of his employment. If there was such an injury, and it occurred with the ailment in hastening the latter to a fatal termination, then the right to an award exists."

"Where an employee, afflicted with disease, receives a personal injury under such circumstances as that he might have appealed to the act for relief, on account of the injury, had there been no disease involved, but the disease, as it in fact exists, is, by the injury, materially aggravated or accelerated, resulting in disability or death earlier than would have otherwise occurred, and the disability or death does not result from the disease alone, progressing naturally, as it would have done under ordinary conditions, but the injury, aggravating and accelerating its progress, materially contributes to hasten its culmination in disability or death, there may be an award under the Compensation

Acts." *Re Bowers* (1917) — *Ind. App.* —, 116 N. E. 842.

So, an employee is entitled to compensation, notwithstanding he was suffering from a pre-existing disease, if the accident in question accelerated the disease to the stage of disability. *Indianapolis Abattoir Co. v. Coleman* (1917) — *Ind. App.* —, 117 N. E. 502.

Even where a workman dies from a pre-existing disease, if the disease is aggravated or accelerated under certain circumstances which can be said to be accidental, his death results from injury by accident. *Peoria R. Terminal Co. v. Industrial Bd.* (1917) 279 Ill. 352, 116 N. E. 651.

This principle has been applied and compensation awarded in a large number of cases.

Thus, an employee who, while engaged in the heavy work of prying car plates apart, suffered from an aneurism, may be found to suffer an accident, although the heart was in a diseased condition prior to the accident. *Haskell & B. Car Co. v. Brown* (1917) — *Ind. App.* —, 117 N. E. 555.

So, the bursting of a blood vessel in the lungs from lifting, while in the course of the employment, may be found to arise out of the employment, although the vessels had previously been ruptured and had healed over. *Southwestern Surety Ins. Co. v. Owens* (1917) — *Tex. Civ. App.* —, 198 S. W. 662.

A finding that the deceased received a personal injury, arising out of and in the course of the employment, is warranted, where it appeared that the employee died from the combined effect of a heart weakness, the exertion of his work in a close room, and a high temperature, caused by the heat of the room and the especially hot weather, and that he would not have been overcome and have met his death with either of these factors absent. *Re Moorabjian* (1918) 229 *Mass.* 521, 118 N. E. 951.

In *Cook v. New York C. R. Co.* (1917) — *App. Div.* —, 166 N. Y. Supp. 1090, the appellate division, without opinion, unanimously sustained an award of compensation to the dependents of an employee who was struck in the stomach by the breaking of the drill with which he was working, which resulted in his death two months afterwards, although, at the time of his injury, he was suffering from the disease which caused his death, but was able to work substantially all the time, at rather light work, up to the time of his injury and, al-

though under the care of physicians, was still able to live with comparative comfort, doing the ordinary duties of a husband around the house, and might have lived for a number of years in the same condition, but for the injury.

The evidence is sufficient to sustain the finding of the trial court that the death of the deceased employee resulted from the injuries which he had sustained, and not solely from disease, where several witnesses testified that he had worked continuously at hard labor until the accident, and had apparently been in good health at all times theretofore, but had never been able to leave his bed thereafter, although the autopsy disclosed that he had pulmonary tuberculosis in such an advanced stage that one lung had been entirely destroyed, and the other to a considerable extent, and that he was suffering from other diseases, and three physicians, called by the respondent, testified that in their opinion his death was caused by pulmonary tuberculosis, and that the injuries which he had sustained were not sufficient, either to cause or to hasten his death. *State ex rel. Jefferson v. District Ct.* (1917) 138 *Minn.* 334, 164 N. W. 1012.

Findings of the commission that a deceased employee, at the time of his injury, had dormant tuberculosis, which was aggravated by his injury so that it became acute and caused his death, if supported by the evidence, are conclusive upon the courts, on appeal. *Van Keuren v. Dwight Divine & Sons* (1917) 179 *App. Div.* 509, 165 N. Y. Supp. 1049, affirmed in (1918) 222 N. Y. 648, 119 N. E. 1083.

In some cases the pre-existing disease from which the employee suffered has been rendered more acute by a fall which he suffered in the course of his employment. In these cases, the increased incapacity or death of the employee has been held due to the fall.

Thus, an employee suffering from dormant tuberculosis, which is aggravated by a fall so that it becomes acute and causes his death, is within the protection of the statute. *Ibid.*

And in *Bucyrus Co. v. Townsend* (1917) — *Ind. App.* —, 117 N. E. 656, an award of compensation for the death of an employee was sustained, although it appeared that the employee was suffering from heart disease at the time of his death, which was aggravated and accelerated by a fall which he received in the course of his employment.

So, the death of a locomotive fireman, who fell from a train and suffered a fractured skull and a hemorrhage of the brain, may be found to result from an accident, although the hemorrhage emanated from a soft portion of the brain, caused by disease, where it appeared that the hemorrhage would not have occurred but for the fall. *Peoria R. Terminal Co. v. Industrial Bd.* (1917) 279 Ill. 352, 116 N. E. 651.

In some cases of this character, it has been held that the compensation recoverable is for the total amount of incapacity, particularly since it is not possible to distinguish between that caused by accident and that caused by the disease.

Thus, in a case in which an accident accelerated a pre-existing disease to the stage of disability, the employee is entitled to compensation for the total disability, and not merely for that degree of the disability which was caused by the accident, as distinguished from that which was caused by the pre-existing disease. *Indianapolis Abattoir Co. v. Coleman* (1917) — Ind. App. —, 117 N. E. 502.

So, the mere fact that an employee was, at the time of the injury, suffering from a pre-existing disease, is not sufficient to release the plaintiff in error from liability, where there is no means by which it can be ascertained what portion, if any, of the claimant's incapacity, was due to such disease and what portion to the accident. *Big Muddy Coal & I. Co. v. Industrial Bd.* (1917) 279 Ill. 235, 116 N. E. 662.

There can be no recovery for compensation, however, where the pre-existing disease was the sole cause of the incapacity or death of the employee.

Thus, the pre-existing disease, rather than the accident which necessitated an operation must be held to be the cause of the death of an employee, where none of the attending physicians were willing to express the opinion that the operation or the anæsthesia was the cause of the death, or that the deceased would not have died from the disease at the time he did, if the operation had not been performed. *Tucillo v. Ward Baking Co.* (1917) 180 App. Div. 302, 167 N. Y. Supp. 666. The court said: "To establish the fact that a death resulted from an injury, it is clearly not sufficient to prove that the person received the injury; that an operation was performed on account thereof: and, after he had apparently recovered from the

effects of the operation and anæsthesia, he died from a disease that existed before the injury."

So, it may be found that a man's death did not arise out of the employment, where the condition of his health was such that he was liable to die anywhere at any moment, and there was no proof that, at the time of his death, he was doing anything which caused a strain likely to make his disability fatal. *Maxwell v. Ruabon Coal Co.* [1916] 142 L. T. Jo. (Eng.) 146, 10 B. W. C. C. 138.

**Where employee receives a second injury while suffering from a former injury.**

Incapacity which is caused or aggravated by a second injury, received while the employee is suffering from another injury which he had received in his employment, is the result of the first injury, according to the great weight of authority, and consequently compensation may be recovered therefor.

Thus, a subsequent accident, aggravating the original injury, may be of such a nature, and occur under such circumstances, as to make such aggravation the proximate and natural result of the original injury. *Head Drilling Co. v. Industrial Acci. Commission* (1918) — Cal. —, 170 Pac. 157. In this case the employee had received a very serious fracture of the leg, and three days after his discharge from the hospital he accidentally hit the heel of the injured leg against the table or chair, in an attempt to save himself from falling, with the result that the fragments of the bone were shoved out of place; and it was held that the commission might find that the later injury was the approximate result of the former injury, since such a result must have been reasonably contemplated at the time when he was discharged from the hospital.

So, where an employee broke his leg, and, upon the advice of the defendant's physician, returned to work before the leg was entirely healed, and again broke it, it may be found that the subsequent injury was the direct effect of the first. *Reiss v. Northway Motor & Mfg. Co.* (1917) — Mich. —, 166 N. W. 841.

And the second injury must be held to arise from a condition produced by the first injury, where such first injury consisted of the breaking of a leg, and the employee, at the time of the second injury, was obeying his doctor's instructions to exercise the leg, and fell, and

the fibrous connection which had been established was torn loose at the point of the previous fracture. *Shell Co. v. Industrial Acci. Commission* (1918) — *Cal. App.* —, 172 Pac. 611.

Where an employee was injured so that he was obliged to go about on crutches, and fell, again injuring himself so that his recovery was delayed, the Board is justified in continuing compensation, where there was nothing wilful or intentional, or even negligent, in his action and conduct at the time he was injured the second time. *Cook v. Charles Hoertz & Son* (1917) — *Mich.* —, 164 N. W. 464.

**Occupational diseases and diseases of like character.**

Although the term "personal injury," as used in the Massachusetts statute, has been held broad enough to include occupational diseases (see annotation in *L.R.A.1917D*, 104, note 31), such diseases are not included in the term "accident" or "personal injury," as used in the statutes of other states.

Thus, an employee engaged as a stainer of mahogany furniture cannot recover for compensation, because of a disease of the hand from coming in contact with the paint, since the Michigan act does not provide compensation for occupational diseases. *Jerner v. Imperial Furniture Co.* (1918) — *Mich.* —, 166 N. W. 943. The court said: "If the injury to claimant occurred by reason of the character of his work, he is precluded from recovery, because the act does not provide compensation for those suffering injury from occupational diseases. The testimony seems to indicate that those engaged in dyeing furniture with mahogany stain frequently suffer with sore hands. If, however, claimant's injury is due not to the general character of his occupation, but to some accidental occurrence, then the record is entirely barren of any evidence of an accident. If claimant suffered a scratch or abrasion, through which the germ entered, the record is silent as to when and how he sustained the accident."

And even the Massachusetts statute does not provide compensation for incapacity due to neurosis, caused by pressure on the brachial plexus because of bad posture in the performance of one's daily work. *RE MAGGELET*, ante, 864.

An award of compensation was sustained in *Hartford Acci. Indemnity Co. v. Industrial Acci. Commission* (1917) 32 *Cal. App.* 481, 163 Pac. 225, in the case of an employee, who, while engaged in the work of grinding and packing

wheat and barley for feed, became afflicted with an affection of the nose and the mouth, which was diagnosed as actinomycosis. The contention in this case, however, was, apparently, that the disease could not have arisen out of the employment, and the fact that it might not be an accident or personal injury does not appear to have been discussed.

The contraction of anthrax while handling diseased hides is an accidental injury, within the meaning of the New York act. *Hiers v. John A. Hull & Co.* (1917) 178 App. Div. 350, 164 N. Y. Supp. 767. This decision is based upon the theory that anthrax is a germ disease, and not an occupational disease; that the injury was similar in nature to that which would have been suffered by the employee had a serpent been concealed in the hides and bitten him while he was at work in his employment. The famous anthrax case in England, *Brintons v. Turvey* [1905] A. C. (Eng.) 230, 74 L. J. K. B. N. S. 475, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 7 W. C. C. 1, 2 Ann. Cas. 137, will be found discussed in the annotation in *L.R.A.1916A*, at page 37.

The California supreme court in *FRIDELITY & C. Co. v. INDUSTRIAL ACCI. COMMISSION*, ante, 856, has held that the blindness of a show card sign writer, due to the excessive use of wood alcohol during a rush period, is an accident within the meaning of the California act. On first impression, this appears to be a case of an occupational disease, but the Industrial Accident Commission had found that the injury was not due to the continual engaging in the employment, but happened at a particular time and upon a specified day; consequently the decision can be likened to those in the anthrax cases cited above, in which the courts compared the germ of anthrax to some poisonous animal, which suddenly springs out and injures the employee.

**Injuries caused by overheating or by wetting.**

For the earlier authorities upon this interesting question, see the cases and references cited in the annotation in *L.R.A.1917D*, 106, notes 39 et seq.

An employee who became overheated while engaged in flushing steaming pulp out of a basement, the work being rendered necessary by an accident to the pipes, and who, while thus overheated, came into contact with the open air, which caused him to chill for several days, and, as a final result of such overheating, the disease of acute nephritis



developed, causing disability, may be found to have suffered an accident. *United Paperboard Co. v. Lewis* (1917) — *Ind. App.* —, 117 N. E. 276. The court said: "In the various decisions on this subject, it is generally recognized that diseases are of two classes: First, the so-called industrial or occupational diseases, which are the natural and reasonably to be expected results of a workman following a certain occupation for a considerable period of time; second, diseases which are the result of some unusual condition of the employment. The first class is illustrated by lead poisoning and the second by pneumonia following an enforced exposure. As a rule such industrial or occupational diseases are not considered injuries by accident and, in the absence of special statutory provision, compensation is not allowed therefor. On the other hand, it is generally accepted that a disease, which is not the ordinary result of an employee's work, reasonably to be anticipated as a result of pursuing the same, but contracted as a direct result of unusual circumstances connected therewith, is to be considered an injury by accident, and comes within the provision of acts providing for compensation for personal injury so caused."

But the Michigan court has held that, as the wetting to which a fireman at a fire is subjected is a mere incident to his regular employment, and not an unusual or unexpected event, a member of a city fire department, who, while serving at a fire, became drenched with water and contracted pneumonia, from which he subsequently died, does not suffer an accident. *Landers v. Muskegon* (1917) 196 *Mich.* 750, L.R.A.1918A, 218, 163 N. W. 43.

So, an employee, who contracts sciatic rheumatism while at work in severe cold with clothing wet from dripping water, does not suffer a personal injury, within the meaning of the Nebraska statute, which defines personal injury to mean "only violence to the physical structure of the body," and such disease or infection as naturally results therefrom. *Blair v. Omaha Ice & Cold Storage Co.* (1917) — *Neb.* —, 165 N. W. 893.

Under the Massachusetts act, a physical impact is not an essential prerequisite to a personal injury, and a personal injury resulting in death may be found to have resulted from overheating arising from unusually hard labor, after the end of the ordinary work of the day, performed in a close and superheated at-

mosphere. *Re Moorabjian* (1918) 229 *Mass.* 521, 118 N. E. 951.

#### **Incapacity resulting from strains; hernia.**

An accidental straining of a muscle, causing the development of a hernia, is a compensable accidental injury, under the Compensation Act. *Casper Cone Co. v. Industrial Commission* (1917) 165 *Wis.* 255, L.R.A.1917E, 504, 161 N. W. 784.

But the burden of proof rests upon the claimant to establish the fact that a hernia with which he is afflicted was caused by accident while in the defendant's employ. *Nagy v. Solvay Process Co.* (1918) — *Mich.* —, 166 N. W. 1033.

Since hernia is a disease arising out of natural causes, as well as from accidents, it is incumbent upon the claimant to offer some evidence that the employment caused or could have caused his injury. *Alpert v. Powers* (1918) 223 N. Y. 97, 119 N. E. 229.

Upon the subject, "hernia as an accident or personal injury," see the annotation to *Poccardi v. Public Service Commission*, L.R.A.1916A, 303, and the annotation in L.R.A.1917D, p. 108, note 46, and p. 111, notes 62, 63, 65, and 66.

The Michigan court has adopted a rule that an injury such as hernia, or a rupture of the heart, does not result from accident, within the meaning of the Michigan statute, when the injury is received at a time when the employee is doing his regular work in the usual way, and there occurs no unusual, unexpected, or fortuitous happening which causes the injury, and which is accidental in character.

Thus, an employee who receives an injury in the nature of a hernia, while engaged in his usual and ordinary employment, without the intervention of any untoward or accidental happening, is not within the provisions of the Compensation Act, which provides compensation for accidental injuries only. *Kutschmar v. Briggs Mfg. Co.* (1917) — *Mich.* —, L.R.A.1918B, 1133, 163 N. W. 933. In this case the employee was required, in the course of his employment, to lift a beam weighing about 90 pounds, and to do this about ninety or one hundred times a day. Upon the occasion of the injury he said, and the court bases its findings upon his own testimony: "This time I say I was hurt, I did not fall or stumble when I lifted the beam. I picked it right up, and something snapped in my side."

So, too, the court has said that it can-

not be held that a workman, who suffered a rupture of the right auricle of the heart, suffered an accidental injury, where his work consisted in lifting and moving heavy rolls of wire, weighing 150 to 160 pounds, from a tier in a car to the car door, where he was doing the work he agreed to do, in the way he intended to do it, and there was nothing fortuitous or unexpected in the manner of doing it, and he had a disease of the heart, of long standing, the wall of the auricle being so thin that any exertion at all might have been the cause of its breaking. *Stombaugh v. Peerless Wire Fence Co.* (1917) — *Mich.* —, 164 N. W. 537.

So, the dependents of an employee who died of heart disease, while he was doing the work which he had been engaged to do in the usual way, are not entitled to compensation, although the work was of a hard and laborious character, where it is not made to appear that, at the time of the death, any fortuitous or unusual circumstances occurred. *Johnson v. Mary Charlotte Min. Co.* (1917) — *Mich.* —, 165 N. W. 650.

An employee, who, while performing his usual duties, was injured while lifting a heavy block of timber weighing approximately 200 pounds, feeling a severe pain in his right groin while lifting, does not suffer an accidental injury, where he did not slip or fall, was not struck by the timber he was lifting, and nothing out of the ordinary happened, because he had lifted such timbers before when such action was necessary in the performance of his duty. *Tackles v. Bryant & D. Co.* (1918) — *Mich.* —, 167 N. W. 36.

So, too, it has been held that working in a room with the temperature from 75 to 78, with portholes and doors open, and lifting and putting in place, with the aid of two men, a heavy casting which had been recently lifted and put in place by only two men, and working for eight hours, then resting two, and again working eight hours, where the employee had recently worked for thirty-one and one-fourth hours in two days, does not show accidental or fortuitous circumstances which would make the death of an employee accidental, where, immediately after lifting the casting in question, he fell from the platform upon which he had been working, and the autopsy showed that he had died from heart failure. *Guthrie v. Detroit Shipbuilding Co.* (1918) — *Mich.* —, 167 N. W. 37.

An employee who suffers a heat stroke does not suffer an accidental injury,

within the meaning of the Michigan act, where it appears that he was doing the work which he and his associates were employed to do, exactly in the manner they expected to do it, although the employees' work was pulling down a brick work around a boiler which was still warm, and the work was being done in a temperature around 136, and the attack came on him while he was taking a rest, as he and his fellow employees were moving a heavy truck loaded with brick and other material, and the testimony shows that they would shove the truck out a little and then take a rest, and then give it another push, and that the attack came while he was resting between the pushes. *Roach v. Kelsey Wheel Co.* (1918) — *Mich.* —, 167 N. W. 33.

The earlier cases cited in support of this rule are *Adams v. Acme White Lead & Color Works* (1916) 182 *Mich.* 157, L.R.A.1916A, 283, 148 N. W. 485, Ann. Cas. 1916D, 689, 6 N. C. C. A. 482, holding that the Michigan act does not embrace occupational diseases, and *Van Gorder v. Packard Motorcar Co.* (1917) 195 *Mich.* 588, L.R.A.1917E, 522, 162 N. W. 107, holding that the death of a plumber, by falling from a scaffold on which he was at work in the course of his employment, because of an epileptic seizure, does not arise out of his employment within the meaning of the Workmen's Compensation Act.

In so far as the Michigan cases set out above can be supported by the *Van Gorder Case*, and the decisions based upon the proposition that there can be no compensation recovered in a case in which death or injury was due solely to the pre-existing disease of the employee, the conclusions of the court are undoubtedly correct.

The *Adams Case* laid down the principle that the Michigan act covered accidental injuries only, but this was a case of an industrial disease, namely, lead poisoning. Of course there is no comparison between a case of an occupational disease and a case in which a man receives a strain while doing his work, and it would seem that the Michigan rule deprives of compensation a large number of injured employees who, in fact, suffered an accident, if the word "accident" is to be taken, as it is so commonly said to be taken, in the ordinary sense of the word.

The proposition that there must be some external happening, unusual and unexpected, of an accidental character, before there can be an accidental injury

within the meaning of the Compensation Statutes, has been squarely rejected by many courts.

The English House of Lords has repeatedly sustained awards in cases in which there was no external happening that could be designated as an accident.

Thus, in *Clover, C. & Co. v. Hughes* [1910] A. C. (Eng.) 242, Lord Loreburn, in speaking of a case in which a workman strained himself in doing his usual work, said: "I do not think we should attach any importance to the fact that there was no strain or exertion out of the ordinary. It is found by the county court judge that the strain, in fact, caused the rupture, meaning, no doubt, that if it had not been for the strain the rupture would not have occurred when it did. If the degree of exertion beyond what is usual had to be considered in these cases, there must be some standard of exertion varying in every trade."

Other English cases taking this same view will be found in the annotation in L.R.A.1916A, 32, note 25.

A number of American cases are to the same effect.

Thus, the rupture of a blood vessel in the lungs, caused by lifting boxes of paint in the course of the employment, which results in traumatic pneumonia, causing death, was held in *Southwestern Surety Ins. Co. v. Owens* (1917) — *Tex. Civ. App.* —, 198 S. W. 662, to be an "accidental injury" within the meaning of the Texas act, although it appeared that he was injured while doing his work in the usual way, and there was no external happening that could be called an accident. The court said that it was clear that the injuries referred to in the act are designated accidental, only as contra-distinguished from intentional injuries, and that it could not be contended upon any sound theory that if the employee, in lifting a heavy box of paint, ruptured a blood vessel, such injury was not an accident, as that term is used in the act.

So, an employee who, while attempting to move iron beams out of his way by pushing against them with his body felt pain in his stomach, became faint and weak, and was compelled to cease work and be assisted home, and who, on the third day afterwards, vomited blood, and after that had a slight paralytic stroke, may be found to have suffered an accident. *Manning v. Pomerene* (1917) 101 *Neb.* 127, 162 N. W. 492. It was insisted that no unexpected or unforeseen event, happening suddenly and violently, oc-

curred; that sickness, arising from the placing of his body against the beams and surging back and forward, could not reasonably be said to be an unforeseen event; but the court said: "The unforeseen event was the straining, weakening, or lesion of the blood vessels of the brain or stomach, and this was an unforeseen event, happening suddenly."

The court further said: "It is also said that no 'objective symptoms' of an injury appeared at the time, and that these elements are essential. We agree with this argument so far that the accident must produce, 'at the time, objective symptoms of an injury;' but the difficulty is as to what constitutes objective symptoms. Defendant's idea is that by objective symptoms are meant symptoms of an injury which can be seen or ascertained by touch. We are of opinion that the expression has a wider meaning, and that symptoms of pain and anguish, such as weakness, pallor, faintness, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition, may constitute objective symptoms as required by the statute."

So, the rupture of a blood vessel causing paralysis may be found to be accidental, where the employee was, at the time he was stricken, engaged in wheeling a heavily loaded wheelbarrow through an alley, the medical testimony being to the effect that the rupture was the result of his exertion. *State ex rel. Puhlmann v. District Ct.* (1918) 137 *Minn.* 30, 162 N. W. 678. There was no evidence of any unusual external happening at the time of the injury.

A coal miner suffered a personal injury by accident, where, a few minutes after assisting in pushing a partially loaded car over a grade, he suffered a rupture of the aorta, from which he died within a short time, although an autopsy disclosed a diseased condition at the point of rupture, and there existed an unnatural thinness of the wall. *Indian Creek Coal & Min. Co. v. Calvert* (1918) — *Ind. App.* —, 119 N. E. 519. The court said: "The following is either directly established by or reasonably deducible from the evidence: That the shoving of the partially loaded car up over the grade required of decedent, and that he actually exerted, an unusual physical effort, both when assisted by his son alone, and also when assisted by the Snaps [fellow employees] in addition; as based on the expert evidence that such

would be the effect, that such effort augmented the speed and increased the force of the decedent's heartbeats, with consequent added internal pressure on his diseased and weakened blood vessels; that the rupture of the aorta followed very shortly after the moving of the car, as indicated by the fact that the Snaps had thrown only about a half dozen shovels of coal, until summoned back to decedent's assistance; and that such pressure on his blood vessels, induced as aforesaid, continued as a causative force until it terminated in the rupture; that the decedent became somewhat abnormal in physical condition while pushing the car, as indicated by his first outcry and his changed demeanor, continuing thereafter; and that it is not improbable that the process of rupturing the aorta may have commenced when the car was being pushed."

So, an employee may be found to have suffered injury by accident arising out of the employment, where he suffered a sudden dilatation of an artery while he was engaged in work requiring a severe strain. *Haskell & B. Car Co. v. Brown* (1917) — *Ind. App.* —, 117 N. E. 555.

In *Goeppner v. Henning* (1917) 178 App. Div. 943, 164 N. Y. Supp. 1093, the appellate division, without opinion, unanimously affirmed an award of compensation made to the dependents of a workman, who was engaged in putting ore into a crusher and, while lifting a very heavy piece of ore, received the strain in his right side which compelled him to quit working immediately and who, while walking to his home, was exposed to severe cold and was compelled to walk through heavy snowdrifts, and, by reason of his exposure to the cold in the weakened condition in which the injury had left him, he became predisposed to lobar pneumonia, which immediately developed, resulting in his death.

In *Alpert v. Powers* (1918) 223 N. Y. 97, 119 N. E. 229, the court said that it refrained from expressing any opinion as to whether the words "accidental injuries" include internal injuries of an accidental nature, caused by the usual and customary employment.

#### **Blood poisoning and other infections.**

Blood poisoning from a scratch received while the employee was in the course of his usual work, and which arose out of such work, may be found to be an accident within the meaning of the Minnesota act. *State ex rel. Albert Dickinson Co. v. District Ct.* (1917) — *Minn.* —, 165 N. W. 478.

*L.R.A.1918F.*

So, an employee who, in the course of his employment and as the result thereof, received an abrasion on his hand, and had contracted anthrax in such abrasion while handling diseased hides, is entitled to compensation as suffering from a disease or infection such as would naturally and unavoidably result from the injury. *Hiers v. John A. Hull & Co.* (1917) 178 App. Div. 350, 164 N. Y. Supp. 767. The court said: "There is a broad distinction between the present case and the case of an occupational disease. The latter is incidental to the occupation, or a natural outcome thereof. It is expected, usual, and ordinary. This disease incurred by the claimant was unexpected, unusual, and extraordinary, as much so as if a serpent concealed in the hide had attacked him. There is no difference in principle because the attack, instead of being made unexpectedly by a concealed serpent, was made unexpectedly by a concealed disease germ."

The infection of an old wound is an accident.

Thus, in *Monson v. Battelle* (1918) 102 Kan. 208, 170 Pac. 801, the employee had a wound on his foot, and he was obliged to wade through foul water in his work, and the wound became infected as the result. The court said: "The infection of an existing wound by contact with foreign matter seems to be within the ordinary meaning of the term, 'an unlooked-for and untoward event which is not expected or designed.'"

So, incapacity caused by the infection of an open wound which resulted from the work in which the employee was engaged, arises out of and in the course of the employment, although the source of the infection cannot be determined. *Saddington v. Inslip Iron Co.* [1917] 87 L. J. K. B. N. S. 184.

An injury may be found to be accidental within the meaning of the Minnesota act, where the workman received an injury to his eye caused by a flying particle of iron ore, which was removed from the eye by a fellow workman by means of a match and a handkerchief, which handkerchief had been in use for several days, and the eye was then washed with water from a trough used in common by numerous other miners, and a gonorrheal infection soon set in, causing the total loss of the sight of the eye, the workman not having been inflicted with the disease. *State ex rel. Adriatic Min. Co. v. District Ct.* (1917) 137 Minn. 435, L.R.A.1917F, 1094, 163 N. W. 755.

As to recovery of compensation for loss of eyes through infection, see annotation attached to *McCoy v. Michigan Screw Co.* L.R.A.1916A, 323. See also the cases cited in the annotation in L.R.A.1917D, 130, notes 70 and 71.

An employee who contracted an infection by inhaling infected animal matter thrown off from hides, which he was handling, may be found to have suffered accidental injury, the court saying that the accidental feature of the case is that, by chance, the septic germ or germs were taken up by his respiratory organs and carried into his system, an occurrence which, the testimony showed, probably did happen, but which was unusual in the work at which he was engaged. *Dove v. Alpena Hide & Leather Co.* (1917) — *Mich.* —, 164 N. W. 253.

An employee cannot be denied recovery upon the ground that his incapacity, due to an infection from the wound that he had received, was due to carelessness in the treatment of the wound instead of the wound itself, where the employee, upon his being unable to secure the services of the doctor employed by the employer, used due diligence in securing other doctors, who were admittedly reputable practitioners. *Dobish v. Cudahy Packing Co.* (1918) 101 *Kan.* 764, 171 *Pac.* 915.

In *Blaess v. Dolph* (1917) 195 *Mich.* 137, 161 N. W. 885, an award was sustained, when the evidence showed that the employee was an undertaker's assistant, and that a cut on his finger became infected with germs of a malignant character, while he was sterilizing instruments used upon the body of a woman who had been infected with the same germ.

So, too, in *KROUT v. J. L. HUDSON Co.* ante, 860, infection of the wound caused by vaccination was treated as an accident, but recovery was denied on the ground that it did not appear that the infection was in any way caused by the employment.

#### Drinking infected water.

Typhoid fever caused by drinking infected water is not caused by accident within the meaning of the Minnesota statute, which defines an accident as "an unexpected or unforeseen event, happening suddenly and violently, with or without human fault, and producing at the time, injury to the physical structure of the body." *STATE EX REL. FARIBAULT WOOLEN MILLS Co. v. DISTRICT CT.* ante, 855. This decision is undoubtedly correct under the terms of the statute, since, as

the court says, the disease in question did not result from an event which happened suddenly and violently, and which produced, at the time it happened, injury to the physical structure of the body.

#### Conclusiveness of findings and sufficiency of evidence.

The findings of the industrial board that the disease from which the employee was suffering was the result of an accident is conclusive upon the court, where it is a legitimate inference from the facts proved by competent evidence in the record. *Squire-Dingee Co. v. Industrial Bd.* (1917) 281 *Ill.* 359, 117 N. E. 1031.

Whether an employee's disability has recurred or increased, or whether it is simply a continuation of the original injury, is a question of fact, and the finding of the industrial board on such question is conclusive on the court. *Ibid.*

A court will not disturb a finding by the commission that the workman died because of an injury, where there was some evidence to support it, although there was other evidence tending to show that he died of pneumonia. *Homan v. Boardman River Electric Light & P. Co.* (1918) — *Mich.* —, 166 N. W. 860.

But the Indiana appellate court has held, in *Inland Steel Co. v. Lambert* (1917) — *Ind. App.* —, 118 N. E. 162, that general conclusions of the board as to whether the injury was the result of an accident, and whether it arose out of and in the course of the employment, is reviewable by the court.

The mere facts that an employee was injured, and was receiving compensation for that injury, does not establish that his death, while being so compensated, was the result of the injury. *Perry v. Woodward Bowling Alley Co.* (1917) 196 *Mich.* 742, 163 N. W. 52.

So, where there is in the record no testimony fairly tending to show that the described injury was the cause of the death of the employee, an award to his dependents must be set aside, although the employee was himself, at the time of his death, receiving compensation for the injury. *Scheer v. Holmes* (1917) — *Mich.* —, 164 N. W. 423.

The death of an employee by accident may be shown by circumstantial evidence. *Dixon v. Andrews* (1918) — *N. J. L.* —, 103 *Atl.* 410.

Absolute proof that death was the result of the accident is not necessary. *Santa v. Industrial Acci. Commission.* (1917) 175 *Cal.* 235, 165 *Pac.* 689.

And while the burden of proof is upon

the applicant, it is not necessary that every possibility of death by other than accidental means should be negatived. *United States Fidelity & G. Co. v. Industrial Acci. Commission* (1917) 174 Cal. 616, 163 Pac. 1013.

So, it is not necessary for the dependent to exclude the possibility that her husband's death might have been due to an apoplectic shock, but only to satisfy the board, by a fair preponderance of the evidence, that it was due to a fall. *Re Uzzio* (1917) 228 Mass. 331, 117 N. E. 349.

And dependents are not required to present such proof as would entirely exclude the possibility that decedent's death was due, in part, to a diseased condition of the heart. *Bucyrus Co. v. Townsend* (1917) — Ind. App. —, 117 N. E. 656.

As between accidents and suicides, the law supposes accidents until the contrary is shown, and, where the evidence is not conclusive of suicide, it will sustain a finding of accident. *State ex rel. Oliver Iron Min. Co. v. District Ct.* (1917) 138 Minn. 138, 164 N. W. 582.

In the following cases, the court has passed upon the question whether or not the evidence in the case was sufficient to sustain the finding of the board as to whether or not the employee suffered an accident within the meaning of the Compensation Acts.

The testimony of a pathologist, showing that conceivable causes of the death of an employee other than accident were excluded by the conditions which were shown by the autopsy, is a sufficient basis for an award. *Santa v. Industrial Acci. Commission* (1917) 175 Cal. 235, 165 Pac. 689.

The death of an employee may be found to be the result of an accident arising out of and in the course of the employment, where the evidence showed that he was a strong, robust man, fifty-one years of age, a good steady worker with regular habits, and during the day had been using a twenty-pound hammer for breaking stone, and subsequently used a fifteen-pound hammer, and then was engaged in manipulating an overhead traveler, and fell over a pile of chips of stone, striking his head against a piece of granite, and the medical testimony was to the effect that his death was the result of the severe strain of his work and falling on the rock. *State ex rel. Simmers v. District Ct.* (1917) 137 Minn. 318, 163 N. W. 667, 14 N. C. C. A. 527.

Evidence of the wife, son, and attending physician of a deceased employee,

who was engaged in the construction of the barge canal, that his foot slipped while he was attempting to climb out of the prism of the canal, and he fell down the bank, striking his abdomen, causing severe pain, and that he told his wife that "something broke inside," together with the employer's report, stating positively that the accident happened on the barge canal location while the deceased was climbing out of the prism of the canal, is sufficient to sustain an award of compensation. *Lindquest v. Holler* (1917) 178 App. Div. 317, 164 N. Y. Supp. 906.

Where there was evidence that the injured employee died from the plugging of an artery in a lung by a blood clot, which came from the site of the fracture, an award of compensation will be sustained, although other doctors testified that the blood clot came from the diseased condition of the arteries. *Klage v. Bunsen Coal Co.* (1915) 201 Ill. App. 58.

The death of an employee may be found to be the result of an accident, where the accident necessitated an operation, and a few hours thereafter his stomach filled with gas and became greatly distended, his heart collapsed, and he died, although it was conceded, that other causes might have operated to cause the accumulation of gas, where the medical testimony was to the effect that no other factor was disclosed by the record, which might have produced the condition referred to. *Shell Co. v. Industrial Acci. Commission* (1918) — Cal. App. —, 172 Pac. 611.

In *Henry v. George A. Fuller Co.* (1917) — App. Div. —, 165 N. Y. Supp. 1091, the appellate division unanimously affirmed the finding of the commission, that no compensation was due for the death from pleurisy of a workman who had been injured a number of weeks previous, but whose injuries in no way contributed to the disease. W. M. G.

#### CALIFORNIA SUPREME COURT. (In Banc.)

B. M. BROOKER et al.

v.

INDUSTRIAL ACCIDENT COMMISSION  
et al.

(— Cal. —, 168 Pac. 126.)

Workmen's compensation — epileptic seizure.

Death of an employee from a fall from a proper scaffold, because of an epileptic seizure.

ure, does not arise out of his employment, within the meaning of the Workmen's Compensation Act.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(October 11, 1917.)

**A**PPPLICATION for a writ to review an award made by the Industrial Accident Commission to petitioners for the death of their son, caused by injuries received while in the employ of defendant Brooker. Award annulled.

The facts are stated in the opinion.

Mr. Lloyd S. Ackerman for petitioners.

Mr. Chris. M. Bradley for respondents.

Shaw, J., delivered the opinion of the court:

This is a petition to review an award made by the Industrial Accident Commission against the United States Fidelity & Guaranty Company, insurance carrier for Brooker, in favor of Rodrigo and Amelia Fuente, on account of the death of R. R. Fuente, caused by injuries received by Fuente while he was in the employment of the defendant Brooker as a laborer. Fuente was the son of the petitioner Rodrigo and the stepson of the petitioner Amelia. The petition is based upon the claim that the injury which caused the death of Fuente, and the accident which produced the injury, although they happened to him in the course of his employment, did not arise "out of" his employment.

The decedent was a laborer employed by Brooker in the erection of a building. He was working upon a scaffold 5 feet in width and 39 feet above the ground. The scaffold was guarded, in compliance with the law or ordinance, by a rope 3 feet high along its outer edge. While so engaged, the decedent fell to the surface of the scaffold, rolled off the edge, and thence fell to the ground. Death resulted from the injuries caused by the fall to the ground. There was evidence sufficient to show that he was subject to epileptic fits at long intervals, and that he was seized with one of these fits while at work on the scaffold, as a consequence of which he fell down upon the scaffold, and that as a result of the contortions incident to such fit he rolled off the edge and was precipitated to the ground.

**Note.**—As to injuries from accidents "arising out of and in the course of" the employment, within the meaning of the Workmen's Compensation Acts, see the annotation following *Mueller Constr. Co. v. Industrial Bd.* post, 891. Also see that annotation for references to other annotations covering various questions arising under the Workmen's Compensation Acts.

There was no evidence to the contrary. The Commission did not find that the epileptic fit caused the fall, as it should have done, but found in general terms that the injury which caused the death of Fuente arose out of and happened in the course of his employment. It is practically conceded that the sole cause of his fall was a fit of epilepsy.

The contention of the petitioners is that the proximate cause of the fall was the epileptic fit, with which his employment had no causal connection, and hence that the accident and resulting injury arose from the fact that he was an epileptic and had the fit, and not out of his employment. We are of the opinion that this contention must be sustained. The Workmen's Compensation Act allows compensation to the dependents of an employee only where the proximate cause of the death of such employee is a personal injury sustained by him "by accident arising out of and in the course of the employment." Section 12. There was nothing in the nature of the work which the deceased was doing at the time that had any tendency to bring on a fit of epilepsy. Neither the fit nor the fall nor the injury was produced by the nature of the work in which he was engaged. The injury was doubtless the greater by reason of the distance from the scaffold to the ground, but this distance was not due to the nature of the work itself. The question whether or not such an injury arises "out of" the employment cannot and does not depend upon the height from which the employee falls or the extent of the injury he receives as the result of the fit.

The exposition of this question by the supreme court of Michigan in *Van Gorder v. Packard Motorcar Co.* 195 Mich. 588, L.R.A. 1917E, 522, 162 N. W. 107, is so clear and so well fits the conditions of the case at bar that we cannot do better than to quote it here. The employee, while at work on a scaffold 6 feet in height, was seized with an epileptic fit, which caused him to fall off the scaffold to the floor, whereby his skull was fractured and his death ensued. The court, after an elaborate review of the authorities, says: "There is no claim that the scaffold was improperly constructed or in any way unsuitable for the service. Due to no conditions arising out of his employment, but solely to his predisposition to epilepsy, of which his employer had no notice, he fell from the scaffold, receiving an injury from which death resulted. The fall was caused, and caused only, by the epileptic fit. The fit was the direct and only cause of his injury. We do not think it would be seriously contended that, had

he fallen in an epileptic fit while standing on the floor and received the injury he did, the injury arose out of the employment, and that the defendant was liable. . . . The height from which he fell, here only a short distance, could not change the liability for the injury. The most that can be said is that the height from which the deceased fell may have aggravated the extent of the injury. A person falling a greater distance may be more seriously injured than one falling a lesser distance; but it does not change the question of responsibility, of liability. The distance of the fall might contribute to the extent of the injury, but it was not a contributory cause to the fall. When the deceased was seized with the epileptic fit, he would have fallen, no matter where he was; and the employer cannot be held responsible because that unfortunate seizure occurred when the workman was on the scaffold, a few feet from the floor."

The other authorities are for the most part, to the same effect. In *Butler v. Burton-on-Trent Union*, 106 L. T. N. S. 824, 5 B. W. C. C. 355, the decedent, while on duty, was sitting at the top of a stairway. A fit of coughing, due to the fact that he was affected by tuberculosis, came on and made him giddy, causing him to fall down the steps. From the injuries resulting therefrom he died in a few days. It was held that "the accident did not arise out of the employment, in the sense that it was due to the nature of the employment, or to anything to which the nature of the employment required him to expose himself," and that to say that it "arose out of," because it took place on premises where he was in fact engaged," would make the fact that it arose "in the course of" the employment the sole test, whereas the law requires that it shall also arise "out of" the employment. In *Nash v. Rangatira*, [1914] 3 K. B. 978, 83 L. J. K. B. N. S. 1496, 111 L. T. N. S. 704, 58 Sol. Jo. 705, a sailor, while drunk, was walking up the gangway of the steamer, and solely because of his intoxication fell therefrom and was killed. The court said that the accident and injury did not arise "out of" the employment, and that the fact that he was on the gangway did not make it so, although it increased the peril from a fall. *Frith v. Louisianian*, 5 B. W. C. C. 410, [1912] 2 K. B. 155, 81 L. J. K. B. N. S. 701, 106 L. T. N. S. 607, 28 Times L. R. 331, was a similar case of a sailor who fell over the side of the vessel because of his intoxication and was drowned. He was "within the ambit of his employment," but the court held that his death did not arise out of that employment. In *Rodger v. Paisley*

*School Bd.* [1912] S. C. 584, 49 Scot. L. R. 413, 5 B. W. C. C. 547, a messenger, while carrying a message on the street, fainted and fell, thereby injuring him so that he died. This injury did not, the court says, arise out of the employment. In *Collins v. Brooklyn Union Gas Co.* 171 App. Div. 381, 156 N. Y. Supp. 957, the decedent, while at work, fell to the ground in a swoon due to heart disease, and thereby received the injury which caused his death. The court said that it did not arise out of the work, and that to make it so it must appear that the injury was "a consequence of something that had a relation to the work of the employer," and that the act does not "make the employer an insurer of the life, health, or regular heart action, of an employee," and that it should have been shown that the swoon, for example, arose out of over exertion in the employer's service. See also *McCoy v. Michigan Screw Co.* 180 Mich. 454, L.R.A.1916A, 323, 154 N. W. 572, 5 N. C. C. A. 455; *Klawinski v. Lake Shore & M. S. R. Co.* 185 Mich. 643, L.R.A.1916A, 342, 152 N. W. 213; *Hawkins v. Powell's Tillery Steam Coal Co.* [1911] 1, K. B. Div. 988, 80 L. J. K. B. N. S. 769, 104 L. T. N. S. 365, 27 Times L. R. 282, 55 Sol. Jo. 329, 4 B. W. C. C. 178; *Barnabas v. Bersham Colliery Co.* 103 L. T. N. S. 513, 55 Sol. Jo. 63, 4 B. W. C. C. 119—all involving the same principle.

A distinction is to be made between cases of this character, and those where the accident, though partly caused by the idiopathic condition of the employee, is due in part also to the overexertion of the employee in performing his work, or to the nature of the work or the appliances furnished to him with which to work, or to the lack of proper safeguards against the ordinary dangers of the place of work the injury being sometimes greater because of his idiopathic condition. In those cases the injury is held to arise out of the employment. An example of those cases is *Fannah v. Midland, & G. W. R. Co.* 45 Ir. L. T. 192, 4 B. W. C. C. 440, where the decedent, an engine driver, was tightening a nut in the engine, and suddenly fainted and fell. The court from the evidence was of the opinion that his fainting fit was brought on by the work, and held that the injury arose out of the employment. Where the idiopathic condition and the employment are each contributing causes of the accident, the employer is liable, but not where the idiopathic condition is the sole cause.

The case of *Carroll v. What Cheer Stables Co.* 38 R. I. 421, L.R.A.1916D, 154, 96 Atl. 208, Ann. Cas. 1918B, 346, 12 N. C. C. A. 174, is cited in support of the opposite view.



It is, however, distinguishable on the principle just stated. A hack driver, while driving on the highway, fell from his seat and was injured by the fall. The fall was probably caused in part by a faint or dizziness, induced by a disease from which he was suffering. But there was evidence that his horses were in a kind of gallop, and that he was "pitched out" by the motion, and the court said that the fall was more than the mere inert fall or collapse of an unconscious man; that it was a positive throwing or pitching of the driver from his seat by the movement of the hack turning or lurching into the gutter, toward or against the curbstone, and might have happened to a driver in full possession of his senses. Upon this ground the court based its decision in his favor.

The only case to the contrary is *Wicks v. Dowell & Co.* [1905] 2 K. B. 225, 74 L.

J. K. B. N. S. 572, 53 Week. Rep. 515, 92 L. T. N. S. 677, 21 Times L. R. 487, 2 Ann. Cas. 732. The deceased was seized with an epileptic fit while standing on a wooden stage in a ship, close to the edge of a hatchway opening into the hold, and while guiding the descent of a bucket into the hold by means of a long pole, and as a result he fell into the hold and was injured. The award was made. The court held that the accident arose "out of" his employment. The facts are somewhat similar to the case at bar. But it stands alone, and is contrary to the later decisions, above cited, arising in England under the same law. We think the better reason is with the later cases.

The award is annulled.

We concur: *Angellotti*, Ch. J.; *Henshaw*, J.; *Melvin*, J.

#### MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL. DANIEL MILLER.

v.

DISTRICT COURT OF HENNEPIN COUNTY et al.

(138 Minn. 326, 164 N. W. 1012.)

**Workmen's compensation — messenger catching ride — scope of employment.**

A messenger boy, who in performing his duties traverses the streets of a city, departs from the scope of his employment when he climbs upon a passing vehicle, not owned or controlled by his employer, for the purpose of expediting his work, so that an accident which befalls him when upon such vehicle cannot be said to arise out of and in the course of his employment under the Workmen's Compensation Act.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(Holt, J., dissents.)

(November 16, 1917.)

**P**ETITION for a writ of certiorari to review a judgment of the District Court for Hennepin County dismissing a proceed-

Headnote by *HOLT*, J.

**Note.**—As to injuries from accidents "arising out of and in the course of" the employment, within the meaning of the Workmen's Compensation Acts, see the annotation following *Mueller Constr. Co. v. Industrial Bd.* post, 891. Also see that annotation for references to other annotations covering various questions arising under the Workmen's Compensation Acts.

ing for compensation under the Workmen's Compensation Act. Affirmed.

The facts are stated in the opinion.

Messrs. *W. H. McGrath* and *B. W. Wilder*, for relator:

The court erred in ordering a dismissal of plaintiff's action on the ground that the accident complained of by plaintiff did not arise out of and in the course of plaintiff's employment.

*State ex rel. Duluth Brewing & Malting Co. v. District Ct.* 129 Minn. 176, 151 N. W. 912; *Brice v. Edward Lloyd* [1909] 2 K. B. 804, 101 L. T. N. S. 472, 25 Times L. R. 759, 53 Sol. Jo. 744, 2 B. W. C. C. 26; *M'Laren v. Caledonian R. Co.* [1911] S. C. 1075, 48 Scot. L. R. 885, 5 B. W. C. C. 492; *Watkins v. Guest* [1912] W. C. Rep. 150, 106 L. T. N. S. 818, 5 B. W. C. C. 307; *Sanderson v. Wright*, 110 L. T. N. S. 517, 30 Times L. R. 279, [1914] W. C. & Ins. Rep. 177, 73 W. C. C. 141; *Barnes v. Nunnery Colliery Co.* [1910] W. N. 248, 45 L. J. N. C. 757, affirmed in [1912] A. C. 44, W. C. Rep. 90, 81 L. J. K. B. N. S. 213, 105 L. T. N. S. 961, 28 Times L. R. 135, 56 Sol. Jo. 159, [1911] W. N. 251, 5 B. W. C. C. 195; *Harding v. Brynadu Colliery Co.* [1911] 2 K. B. 747, 80 L. J. K. B. N. S. 1052, 105 L. T. N. S. 55, 27 Times L. R. 500, 55 Sol. Jo. 599, 4 B. W. C. C. 269; *Chilton v. Blair*, 30 Times L. R. 623, 58 Sol. Jo. 669, 7 B. W. C. C. 607, affirmed by the House of Lords in 31 Times L. R. 437, [1915] W. N. 203, 8 B. W. C. C. 1; *Martin v. John Lovibond & Sons* [1914] 2 K. B. 227, 6 B. R. C. 466, 83 L. J. K. B. N. S. 806, 110 L. T. N. S. 455, [1914] W. C. & Ins. Rep. 78, 7 B. W. C. C. 243, 5 N. C. C. A. 985; *Robertson v. Allen Bros.* 77 L. J. K. B. N. S. 1072, 98

L. T. N. S. 821, 1 B. W. C. C. 172; Harrison v. Whittaker Bros. 16 Times L. R. 108, 64 J. P. 54; Hapelman v. Poole, 25 Times L. R. 155; M'Lauchlan v. Anderson [1911] S. C. 529, 48 Scot. L. R. 349, 4 B. W. C. C. 376; Carroll v. What Cheer Stables Co. 38 R. I. 421, L.R.A.1916D, 154, 96 Atl. 208 Ann. Cas. 1918B, 346, 12 N. C. C. A. 174; Heitz v. Ruppert, 218 N. Y. 148, L.R.A. 1917A, 344, 112 N. E. 750; McNicol's Case, 215 Mass. 498, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522; Beaudry v. Watkins, 191 Mich. 445, L.R.A.1916F, 576, 158 N. W. 16; Clem v. Chalmers Motor Co. 178 Mich. 340, L.R.A.1916A, 352, 144 N. W. 848, 4 N. C. C. A. 876; Rayner v. Sligh Furniture Co. L.R.A.1916A, 52-55 and note, 180 Mich. 168, 146 N. W. 665, Ann. Cas. 1916A, 386, 4 N. C. C. A. 851; Gignac v. Studebaker Corp. 186 Mich. 574, 152 N. W. 1037; State ex rel. Virginia & R. L. Co. v. District Ct. 128 Minn. 43, 150 N. W. 211, 7 N. C. C. A. 1076.

Messrs. K. A. Campbell and B. Burness, for respondents:

In climbing upon and attempting to ride on the truck, plaintiff was acting outside of the scope of his employment, and his injuries could not reasonably be said to have arisen "out of and in the course of" his employment.

State ex rel. Duluth Brewing & Malting Co. v. District Ct. 129 Minn. 176, 151 N. W. 912; Mahowald v. Thompson-Starrett Co. 134 Minn. 117, 158 N. W. 913; State ex rel. Nelson-Spellisey Implement Co. v. District Ct. 128 Minn. 221, 150 N. W. 623.

Holt, J., delivered the opinion of the court:

Certiorari to review a judgment dismissing a proceeding under the Workmen's Compensation Act. The judgment recites that, when the cause came on for hearing, defendant's motion to dismiss was granted on the ground that the matter alleged in plaintiff's complaint showed on its face that the accident, on account of which compensation was sought, did not arise out of or in the course of plaintiff's employment. The facts stated in the complaint are, in substance, these: Plaintiff, seventeen years old, was in the employ of defendant as a messenger at \$7 per week. In this work he was provided with car fare when the distance to carry the message was considerable, but not when the distance was as short as the one from defendant's place of business to the Shubert Theater, or five blocks. On November 20, 1916, at 3 o'clock in the afternoon, plaintiff, who had been sent by an employee of defendant, having authority to so do, to the Shubert Theater

for tickets, was returning with them to defendant's office. It is alleged that plaintiff was unusually busy that day and, in his haste to return to the office to continue his duties, he climbed upon an automobile truck which was proceeding in that direction, and while so riding he slipped on a roller upon the floor of the truck, became entangled in the gears thereof, and was severely injured. Upon the hearing of the motion, it was conceded that the truck was not the property of defendant or under its control.

No doubt the facts alleged show that the accident happened while plaintiff was in the course of his employment. But it must also appear that it arose out of the same. It must grow out of it or be incidental thereto. State ex rel. Duluth Brewing & Malting Co. v. District Ct. 129 Minn. 176, 151 N. W. 912; Mahowald v. Thompson-Starrett Co. 134 Minn. 117, 158 N. W. 913, 159 N. W. 565; State ex rel. Virginia & R. L. Co. v. District Ct. 138 Minn. 131, 164 N. W. 585. This definition of the phrase "arising out of the employment," often quoted with approbation, is by Chief Justice Rugg in McNicol's Case, 215 Mass. 497, L.R.A. 1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522: "It [the injury] 'arises out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

The majority of the court are of the opinion that plaintiff's employment was such that reasonable men could not conclude that, as an incident thereto, it might be expected that the hazard of accidental

injury from obtaining rides on passing vehicles was connected therewith. It is thought that since plaintiff was provided with car fare when the messages were to go beyond a certain distance, he was to walk on all other occasions, and, therefore, when he sought other methods by which to accomplish his tasks he departed from the scope or ambit of his employment, and while so doing was not protected by the Compensation Act.

The writer dissents from this conclusion and the disposition accordingly made of the appeal herein. The statute contemplates findings to be made after hearing of testimony, or, perhaps, upon stipulated facts. Whether an accident arises out of and in the course of an employment is ordinarily the ultimate decisive question of fact, to be determined upon a consideration of various facts and circumstances and the inferences to be drawn therefrom. It seems to me that the allegations of the complaint herein are broad enough to admit proof which would warrant a finding that the accident arose out of the employment. It is entirely possible that, had testimony been received, it would have appeared that plaintiff was required at all times to carry messages over and along crowded streets, that he had to proceed with despatch, that no order had been given him how to cover the ground, that his work was such, at the time in question, that he had to be back quickly, that messenger lads usually avail themselves of such "lifts" as they may be able to obtain from vehicles on the streets. And it is conceivable that from such testimony reasonable men might well conclude that one of the hazards of a messenger in defendant's employ was from accidents upon vehicles which he might ride, or be permitted to ride, on his errands. In other words, that the accident was attributable to the peculiar liability to street risks inherent in the employment. *Beaudry v. Watkins*, 191 Mich. 445, L.R.A.1916F, 576, 158 N. W. 16; *Kunze v. Detroit Shade Tree Co.* 192 Mich. 435, L.R.A.1917A, 252, 158 N. W. 851. I concede that employers of messenger boys may limit the scope or sphere of the employment. And a departure from such limit might constitute an added risk, for which compensation could not be had under the law. But in this case there may not have been any restriction. Defendant may even have known and acquiesced in the method adopted by plaintiff in despatching its business. If plaintiff availed himself of the opportunity to ride on passing vehicles, with the knowledge and assent of defendant, his so doing could not be considered an added risk. *Mann v.*

L.R.A.1918F.

*Glastonbury Knitting Co.* 90 Conn. 116, L.R.A.1916D, 86, 96 Atl. 368, 12 N. C. C. A. 891. In the absence of proof and finding, it should not be assumed that plaintiff, in getting on his truck, did a wrongful act or turned aside from the employment to serve his own purpose, so as thereby to place himself outside the pale of the act, as was held in *Brice v. Edward Lloyd* [1909] 2 K. B. 804, 101 L. T. N. S. 472, 25 Times L. R. 759, 53 Sol. Jo. 744, 2 B. W. C. C. 26; *Spooner v. Detroit Saturday Night Co.* 187 Mich. 125, L.R.A.1916A, 17, 153 N. W. 657, 9 N. C. C. A. 647. If the employees in certain vocations ordinarily pursue some customary method of doing their work, the risks or hazards connected with the method thus pursued grow out of or become incident or peculiar to those vocations. And does not ordinary observation convince us that the customary method pursued by messenger lads of seventeen years and younger, in performing their work upon the streets of a city, is to avail themselves of a ride on the way, afforded by the opportunity of boarding passing vehicles? That this may be a negligent method of doing the work does not affect the right to be compensated for accidental injuries under this law. I therefore think the court should not have dismissed the case, but should have heard the evidence and made proper findings, the controlling one of which would have been whether or not the accident which caused the injury arose out of and in the course of plaintiff's employment.

But for the reason first above stated the decision of the learned trial court must be sustained.

Judgment affirmed.

Petition for rehearing denied.

#### CALIFORNIA SUPREME COURT. (In Banc.)

R. A. BOGGESE et al.

v.

INDUSTRIAL ACCIDENT COMMISSION  
et al.

(— Cal. —, 169 Pac. 75.)

**Workmen's compensation — injury while riding toward work — course of employment.**

An injury to a miner by an accident to the truck on which he has taken passage

**Note.** — As to injuries from accidents "arising out of and in the course of" the employment, within the meaning of the Workmen's Compensation Acts, see the annotation following *Mueller Constr. Co. v.*

does not arise out of or in the course of his employment where, when returning to his place of employment after visiting another city on business of his own, he met a truck of his employer and assisted in loading it under the promise of pay for his services and transportation to the mine on the truck, which would relieve him of the necessity of patronizing a public conveyance.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(November 22, 1917.)

**A**PPPLICATION for a writ to review an award of the Industrial Accident Commission to respondent Fenner in a proceeding by him under the Workmen's Compensation Act to recover compensation for personal injuries. Award annulled.

The facts are stated in the opinion.

Messrs. Redman & Alexander, for petitioners:

The injury did not arise out of and in the course of Fenner's employment. It was sustained not while he was performing service for his employer, but while he was on his way to work.

*Ocean Acci. & G. Co. v. Industrial Acci. Commission*, 173 Cal. 313, L.R.A.1917B, 336, 159 Pac. 1041; *Northwestern P. R. Co. v. Industrial Acci. Commission*, 174 Cal. 297, L.R.A.1918A, 286, 163 Pac. 1000; *Forman v. Industrial Acci. Commission*, 31 Cal. App. 441, 160 Pac. 857; *Nolan v. Porter*, 2 B. W. C. C. 106.

Messrs. Christopher M. Bradley and S. S. McCahill, for respondents:

The injury "arose out of and in the course of the employment, was proximately caused thereby, and occurred while the injured employee was performing services growing out of and incidental thereto."

*Donovan's Case*, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778, 4 N. C. C. A. 549.

Shaw, J., delivered the opinion of the court:

The Industrial Accident Commission made an award in favor of Jack Fenner to compensate him for injuries which he suffered from an accident, which, he claims, arose out of his employment and happened in the course thereof. The petitioners ask that the said award be annulled, on the ground that the finding of the Commission that the accident happened in the course of employment and arose out of it is not sustained by any evidence.

Industrial Bd. post, 891. Also see that annotation for references to other annotations covering various questions arising under the Workmen's Compensation Acts.

L.R.A.1918F.

Fenner was a miner, employed to work as such in a quicksilver mine owned by Boggess, known as the Abbott mine, situated near Wilbur Springs, some 30 miles from the town of Williams, on the Southern Pacific Railroad. A few days before the accident he was given leave of absence to go to Sacramento on his own affairs, and he was to return and resume work when his business was concluded. After transacting his business there he returned to Williams, intending to take the stage from Williams to Wilbur Springs. At Williams he met Luther Johnson, who was the bookkeeper for Boggess, and who acted as superintendent of the mine in the absence of Boggess. Johnson had come to Williams with two auto trucks, for the purpose of taking goods therein from Williams to the mine. Fenner told Johnson that he intended to go to Wilbur Springs on the stage. Thereupon Johnson told him that he wanted to load the trucks and return to the mine that day, and suggested that Fenner assist in the loading, saying that they could get them loaded in time for Fenner to go to the mine in the truck, instead of taking the stage to Wilbur Springs, and that Boggess would pay him for the time occupied in loading the trucks. Fenner assented to this and proceeded to assist in loading the trucks. Thereupon Johnson started with the trucks for the mine, and Fenner accompanied him. Somewhere on the road, while Fenner was riding on the truck driven by Johnson, the accident happened whereby he received the injury for which the compensation was awarded. While on the journey from Williams to the mine he was engaged in no service whatever for Boggess. His duties as a miner did not require him to assist in loading trucks at Williams, but it was understood at the time he was employed as a miner that he was to do any work which he was directed to do, and it occasionally happened that miners were detailed to do work of this character outside. All these facts are established by the evidence without conflict.

It is apparent that the accident did not happen in the course of the employment, and that it did not arise out of the employment. Fenner was on leave to go from the mine to Sacramento on business of his own, and he was to return to the mine as soon as his business was concluded. There was no evidence showing or tending to show that the employment at Williams provided not only that he was to help unload the truck, but also that he was then, as a part of his service, to travel on the truck to the mine. On the contrary, his employment by Johnson to load the truck was tempo-

rary only, and for the sole purpose of getting the truck loaded. His going to the mine on the truck, instead of by stage, was arranged merely as a matter of convenience to him. It was no part of his service. He was still in the process of returning to the mine in the pursuance of the arrangement by which he had left it temporarily. He has no more right under the law to claim compensation from Bog-gess for the injury which happened to him

on the journey to the mine on the truck than he would have had if he had been riding on the stage, as he first intended.

For these reasons we are of the opinion that the Commission was not justified in making any award against Bog-gess.

The award is annulled.

We concur: Angellotti, Ch. J.; Sloss, J.; Melvin, J.; Henshaw, J.; Victor E. Shaw, Judge pro tem.

**COLORADO SUPREME COURT.**  
(In Banc.)

**INDUSTRIAL COMMISSION OF THE  
STATE OF COLORADO et al., Pliffs in  
Err.,**

v.

**CHARLES ANDERSON.**

(— Colo. —, 169 Pac. 135.)

**Workmen's compensation — injury go-  
ing to work — work at home.**

An injury to one employed to repair in-  
struments at his employer's store while, dur-  
ing working hours, he is going from his  
home to the store to work, does not arise  
out of or in the course of his employment  
within the meaning of the Workmen's Com-  
pensation Act, although, by permission, he  
had been doing some work for his employer  
at home before starting for the store.

*For other cases, see Master and Servant, II.  
a, 1, in Dig. 1-52 N. S.*

(December 3, 1917.)

**ERROR** to the District Court for the  
City and County of Denver to review  
a judgment reversing the determination of  
the Industrial Commission denying com-  
pensation to claimant in a proceeding by  
him, under the Workmen's Compensation  
Act, to recover compensation for personal  
injuries. Reversed.

The facts are stated in the opinion.

Messrs. William R. Eaton, Leslie E.  
Hubbard, Attorney General, and Walter  
E. Schwed for plaintiffs in error.

Mr. Leroy McWhinney, for defendant  
in error:

Permissive conditions of work are with-  
in the scope of employment.

Bryant v. Fissell, 84 N. J. L. 72, 86

**Note.**—As to injuries from accidents  
"arising out of and in the course of" the  
employment, within the meaning of the  
Workmen's Compensation Acts, see the an-  
notation following Mueller Constr. Co. v.  
Industrial Bd. post, 891. Also see that  
annotation for references to other annota-  
tions covering various questions arising un-  
der the Workmen's Compensation Acts.

L.R.A.1918F.

Atl. 458, 3 N. C. C. A. 585; Kingsley v.  
Donovan, 169 App. Div. 828, 155 N. Y.  
Supp. 801; Parkinson Sugar Co. v. Riley,  
50 Kan. 401, 34 Am. St. Rep. 123, 31 Pac.  
1090; Jesson v. Bath, 113 L. T. N. S. 206,  
4 W. C. C. 9; Molloy v. South Wales An-  
thracite Colliery Co. 4 B. W. C. C. 65;  
Von Ette's Case, 223 Mass. 56,  
L.R.A.1916D, 641, 111 N. E. 696, 12 N. C.  
C. A. 551.

Where an employee's duties require him,  
or the terms of the employment permit  
him, to be at any time in the street, then  
the risks of the street are, for such period,  
incident to his employment, and injuries  
therefrom arise out of his employment.

Pierce v. Provident Clothing & Supply  
Co. [1911] 1 K. B. 797, 80 L. J. K. B. N. S.  
831, 104 L. T. N. S. 473, 27 Times L. R.  
299, 55 Sol. Jo. 363, 4 B. W. C. C. 242;  
M'Neice v. Singer Sewing Mach. Co. [1911]  
S. C. 13, 48 Scot. L. R. 15, 4 B. W. C. C.  
351; Elliott, Workmen's Compensation, 6th  
ed. p. 78; McDonald v. The Banana [1908]  
2 K. B. 926, 24 Times L. R. 887, 52 Sol. Jo.  
741, 1 B. W. C. C. 185; Martin v. John  
Lovibond & Sons [1914] 2 K. B. 227, 6 B.  
R. C. 466, 88 L. J. K. B. N. S. 806, 110  
L. T. N. S. 455, [1914] W. C. & Ins. Rep.  
78, 7 B. W. C. C. 243, 5 N. O. C. A. 985;  
Milwaukee v. Althoff, 156 Wis. 68,  
L.R.A.1916A, 327, 145 N. W. 238, 4 N. C.  
C. A. 110; Kunze v. Detroit Shade Tree  
Co. 192 Mich. 435, L.R.A.1917A, 252, 158  
N. W. 851; 1 Bradbury, Workmen's Com-  
pensation Law, p. 452.

Bailey, J., delivered the opinion of the  
court:

Plaintiffs in error bring here for review  
a judgment of the district court, reversing  
the conclusions of the Industrial Commis-  
sion of the state of Colorado, wherein de-  
fendant in error was found not entitled to  
compensation under the Workmen's Com-  
pensation Act. In this opinion, the parties  
will be designated as in the court below.

The facts as disclosed by the findings of  
the Commission are that the plaintiff, a  
man of about seventy-eight years of age,

was employed by the Robert D. Sharp Music Company as a repairer of musical instruments. He worked in Denver at the shop in the store of his employer, downtown, and also had a work room at his home, where he occasionally took instruments to repair. On the morning he was hurt he had worked at his home before breakfast, after which he went out upon the street to take the car for his employer's store. While attempting to board a street car, a passing automobile caused him to step back quickly toward the sidewalk, and in so doing he slipped on the ice and fell, resulting in the injury for which compensation is sought.

It appears that plaintiff had the privilege of taking work home with him from the store, but that this was not required of him, and was in no sense one of the conditions of his employment, and that his prescribed working hours were from 8 o'clock in the morning until 6 in the evening, and that the accident occurred between these hours. The claim was given three hearings before the Commission, but the adverse conclusion first reached was not modified by subsequent hearings. Plaintiff was dissatisfied with the findings, and instituted action in the district court under § 78 of the act. The district court reversed the conclusions of the Commission, and held, upon the facts, that the plaintiff was entitled to compensation. It is this alleged improper application of the law to the facts that we are called upon to review.

Plaintiff's right to recover depends upon certain conditions, enumerated in § 8, Chapter 179, Session Laws 1915, at page 522: "Sec. 8. The right to the compensation provided for in this act, in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury or death accidentally sustained on and after August 1, 1915, shall obtain in all cases where the following conditions concur: I. Where, at the time of the accident, both employer and employee are subject to the provisions of this act. II. Where, at the time of the accident, the employee is performing services arising out of and in the course of his employment. III. Where the injury is proximately caused by accident arising out of and in the course of his employment, and is not intentionally self-inflicted or intentionally inflicted by another."

Under this section, it is necessary that both the service being performed and the injury sustained shall arise out of and in the course of the employment. The intent is to make the industry responsible for in-

dustrial accidents only, and not those resulting from hazards common to all. *Re McCarthy*, Ohio Ind. Com. No. 59526, cited in 7 N. C. C. A. 417 note; *Worden v. Commonwealth Power Co.* (Mich.) cited in 4 N. C. C. A. 853 note; *Hopkins v. Michigan Sugar Co.* 184 Mich. 87, L.R.A.1916A. 310, 150 N. W. 325; *Hilla v. Blair*, 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 414.

In discussing the nature of the relief granted by Workmen's Compensation Acts, the Massachusetts court in *Madden's Case*, 222 Mass. at page 494, L.R.A.1916D, 1004, 111 N. E. 382, said: "The act is not a substitute for disability or old age pensions. It cannot be strained to include that kind of relief. Its ultimate purpose simply is to treat the cost of personal injuries incidental to the employment as a part of the cost of the business. It does not afford compensation for injuries or misfortunes which merely are contemporaneous or coincident with the employment, or collateral to it. . . . The relief is so new that the tendency may be to inquire only as to the employment and the injury, and to assume that these two factors constitute ground for compensation. But the essential connecting link of direct causal connection between the personal injury and the employment must be established before the act becomes operative. The personal injury must be the result of the employment, and flow from it as the inducing proximate cause. The rational mind must be able to trace the resultant personal injury to a proximate cause set in motion by the employment, and not by some other agency, or there can be no recovery. In passing upon this question, an humanitarian emotion ought not to take the place of sound judgment in the weighing of evidence. The direct connection between the personal injury as a result, and the employment as its proximate cause, must be proved by facts, before the right to compensation springs into being."

The same court construes the terms "arising out of" and "in the course of" the employment, in *McNicol's Case*, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522, in the following language: "In order that compensation may be due, the injury must both arise out of and also be received in the course of the employment. Neither, alone, is enough. It is not easy nor necessary to the determination of the case at bar to give a comprehensive definition of these words, which shall accurately include all cases embraced within the act, and with precision exclude those outside its terms. It is sufficient to say that an injury is received 'in the

course of the employment', when it comes while the workman is doing the duty which he is employed to perform. It 'arises out of' the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a casual connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation, as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workman would have been equally exposed, apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

In this case the injury was received while the employee was on his way from his home to his regular place of employment. It is true, he was permitted to do some work at home, both in and out of working hours, and that on the morning he was injured he had been employed in his own shop on work he had taken home on the previous evening. It is shown, however, that he was not obliged to do any work at home. He says he did as he pleased about that; a workroom was provided at the store, and when he worked at home it was of his "own free will and accord." Clearly, then, the trip from his home workshop to the one at the store was neither incident to nor a hazard of his employment.

The rule that compensation must be denied when the injury occurs away from the employer's premises, from causes which are common hazards, and the employee is not hired to work continually upon the streets as part of the contract of his employment, is stated in L.R.A.1916A, in an annotation at page 314: "It is a general rule laid down by the great majority of the cases that an injury cannot be said to arise out of the employment of the injured workman, where it occurs upon a street, from causes to which all other persons upon the street are likewise exposed. Thus,

compensation has been denied in the following cases, where the injury occurred in the manner indicated: *Rodger v. Paisley School Bd.* [1912] S. C. 584, W. C. Rep. 157, 49 Scot. L. R. 413, 5 B. W. C. C. 547 (school janitor taking message from one head master to another, overcome by heat while on the street); *Symonds v. King* (1915) 8 B. W. C. C. 189 (painter's laborer, obliged to cross street to obtain some paint, knocked down by a tram car); *Sheldon v. Needham.* (1914) 30 Times L. R. 590, 58 Sol. Jo. 662, 137 L. T. Jo. 212 [1914] W. C. & Ins. Rep. 274, 111 L. T. N. S. 729, 7 B. W. C. C. 471 (charwoman, sent to post a letter, fell and broke her leg on the street); *Green v. Shaw* [1912] 2 Ir. R. 430, W. C. Rep. 25, 46 Ir. L. T. 18, 5 B. W. C. C. 573 (workman obliged to go but once or twice a day over a quiet country road, injured while riding his bicycle); *Slade v. Taylor* [1915] W. C. & Ins. Rep. 53, 8 B. W. C. C. 65 (manager of branch store, who was compelled to go to another branch store once a week, slipped off his bicycle and injured himself); *Hopkins v. Michigan Sugar Co.* 184 Mich. 87, L.R.A.1916A, 310, 150 N. W. 325 (employee of sugar company employed to inspect plants in different places, who, after returning to his own city, slipped while running to get a street car to return to his home); *Newman v. Newman* (1915) 169 App. Div. 745, 155 N. Y. Supp. 665 (employee in meat market injured while on street, delivering meat on foot); *De Voe v. New York State R. Co.* (1915) 169 App. Div. 472, 155 N. Y. Supp. 12 (motorman, having closed his day's work, slipped on the street while going to have his watch tested)."

In *Hopkins v. Michigan Sugar Co.* supra. the claimant was a general engineer, employed to inspect sugar factories in different cities. He slipped on the ice and fell while attempting to catch a street car to return to his home, after finishing an inspection trip. In discussing whether the accident arose out of and in the course of his employment, the court said: "The question of whether deceased was in any sense within the ambit of his employment at the time and place of the accident is a serious one; but, conceding that the injury befell him in the course of his employment, can it be fairly traced to his employment as a contributing, proximate cause, or did it come from a hazard to which he, in common with others, would have been equally exposed apart from the employment? No direct causal relation is claimed in the particular that the nature of the business of manufacturing sugar, in itself,

exposes its employees to unusual risk or danger of accident of this nature."

After discussing the fact that deceased was protected under the act against the extra hazards to which he was exposed in travel under his contract of employment, the court continued: "At the time of his accident he was passing on foot along a familiar highway, upon which was ice and snow,—a natural condition of that season of the year,—involving an increased risk and added danger of falling, common to all, and known to all. . . . While it is indicated by the record that he desired to take a street car, and was walking or running towards one for that purpose, to assert that he was injured in attempting to take or board a car would be a misleading overstatement. . . . The board found that 'he started from the sidewalk toward the car with the intention of boarding the same.' . . . Slipping upon snow-covered ice and falling while walking or running is not even what is known as peculiarly a 'street risk;' neither is it a recognized extra hazard of travel or particularly incidental to the employment of those who are called upon to make journeys between towns on business missions. These distinctions are recognized and the rule correctly stated in an opinion of the Michigan Industrial Acci. Board, filed in *Worden v. Commonwealth Power Co.* 20 Det. L. N. No. 39 (Dec. 27, 1913) as follows: 'It must also appear that the injury arose out of the employment and was a risk reasonably incident to such employment, as distinguished from risks to which the general public is exposed. To illustrate . . . it might be fairly said that one of the most common risks to which the general public is exposed is that of slipping and falling upon ice. This risk is encountered by people generally, irrespective of employment. . . . This unfortunate accident resulted from a risk common to all; and which arose from no special exposure to dangers of the road from travel and traffic upon it; it was not a hazard peculiarly incidental to or connected with deceased's employment, and therefore is not shown to have a causal connection with it, or to have arisen out of it.'

By the great weight of authority it appears, in the absence of special circumstances bringing the accident within the scope of the employment, that no compensation is recoverable by a workman who is injured while on his way to or from his work. Note in L.R.A.1916A, 331. In *De Constantin v. Public Service Commission*, 75 W. Va. 32, L.R.A.1916A, 329, 83 S. E. 88, the rule is laid down as follows: "If

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the place at which the injury occurred is brought within the contract of employment, by the requirement of its use by the employee, so that he has no discretion or choice as to his mode or manner of coming to work, such place and its use seem logically to become elements or factors in the employment, and the injury thus arises out of the employment and is incurred in the course thereof. But on the contrary, if the employee, at the time of the injury, has gone beyond the premises of the employer, or has not reached them, and has chosen his own place or mode of travel, the injury does not arise out of his employment, nor is it within the scope thereof."

From the undisputed facts in this case it is plain that claimant was not in any sense obliged to work at his home at any time, or at all. As matter of fact he was not working anywhere when the accident occurred, but was on his way to his employer's shop to begin work. Upon principle and authority it must be held that a repairer of musical instruments, who slips on the ice and is injured while going to his work, cannot be held to be injured in the course of his employment, nor does the injury arise out of his contract of employment. Upon facts like these here disclosed, or analogous to them, no case can be found where the Workmen's Compensation Act has been held to apply.

The judgment is therefore reversed, and the cause remanded, with directions to affirm the conclusions and judgment of the Industrial Commission.

Judgment reversed, and cause remanded with directions.

## PENNSYLVANIA SUPREME COURT.

MARY DZIKOWSKA

v.

SUPERIOR STEEL COMPANY et al. Appts.

(259 Pa. 578, 103 Atl. 351.)

**Workmen's compensation — injury from lighting cigarette.**

An injury to a workman by fire when, during a lull in the work, he strikes a

**Note.**—As to injuries from accidents "arising out of and in the course of" the employment within the meaning of the Workmen's Compensation Acts, see the annotation following *Mueller Constr. Co. v. Industrial Bd.* post, 891. Also see that annotation for references to other annotations covering various questions arising under the Workmen's Compensation Acts.



match to light a cigarette, which ignites the oil-soaked apron which the work requires him to wear, arises in the course of his employment within the meaning of the Workmen's Compensation Act.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

(January 7, 1918.)

**A** PPEAL by defendants from an order of the Court of Common Pleas for Allegheny County dismissing exceptions to a decision by the Compensation Board in favor of claimant in a proceeding by her, under the Workmen's Compensation Act, to recover compensation for the death of her husband. Affirmed.

The facts are stated in the opinion.

Messrs. John G. Frazer, David A. Reed, and Reed, Smith, Shaw, & Beal, for appellants:

The accident to Victor Dzikowska did not occur in the course of his employment, within the meaning of the provisions of § 301 of the Workmen's Compensation Act.

Tomkoska v. Pressed Steel Car Co. 2 Dep. Rep. (Pa.) 1709; Peterson v. Davis Lupton's Sons Co. 2 Dep. Rep. (Pa.) 842; Reed v. Great Western R. Co. [1909] A. C. 31, 78 L. J. K. B. N. S. 31, 99 L. T. N. S. 781, 25 Times L. R. 36, 53 Sol. Jo. 31, 2 B. W. C. C. 109; Smith v. Lancashire & Y. R. Co. [1899] 1 Q. B. 141, 68 L. J. Q. B. N. S. 51, 47 Week. Rep. 146, 79 L. T. N. S. 633, 15 Times L. R. 64.

Mr. Allan Davis, for appellee:

Deceased was injured by an accident occurring in the course of his employment, within the meaning of the Workmen's Compensation Act.

Botto v. Hamilton, 20 Dauphin Co. Rep. 57; Beeson v. National Asbestos Co. 3 Dep. Rep. (Pa.) 77; Amerzors v. Jones, 2 Dep. Rep. (Pa.) 2517; McManus v. Winter Garden Co. 2 Dep. Rep. (Pa.) 1980; Chambers v. Woodbury Mfg. Co. 106 Md. 496, 14 L.R.A. (N.S.) 383, 68 Atl. 290; Bolden v. Greer, 2 Dep. Rep. (Pa.) 2677.

Potter, J., delivered the opinion of the court:

This is an appeal by the Superior Steel Company, and the Aetna Life Insurance Company as insurance carrier, from an order of the court of common pleas of Allegheny county, dismissing exceptions to a decision by the Workmen's Compensation Board, awarding compensation to the widow and minor children of Victor Dzikowska, deceased.

There are five assignments of error, all to the dismissal of exceptions filed by appellants. They raise but one question, which is stated in substantially the same form by counsel for appellants and appellee, the statement of the latter being as follows: "During an intermission in the work of a mill an employee struck a match, supposedly for the purpose of lighting a stogie or cigarette, and as a result his clothing caught fire and he was fatally burned. Was he injured by an accident occurring in the course of his employment, within the meaning of the Workmen's Compensation Act of 1915?"

Section 301 of the act of June 2, 1915 (P. L. 736), provides that, when employer and employee shall by agreement, either express or implied, accept the elective compensation provisions of the act, "compensation for personal injury to, or for the death of, such employee by an accident, in the course of his employment shall be made in all cases by the employer, without regard to negligence, . . . provided that no compensation shall be made when the injury or death be intentionally self-inflicted."

In the same section it is further provided: "The term 'injury by an accident in the course of his employment,' as used in this article, shall not include an injury caused by an act of a third person intended to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment; but shall include all other injuries sustained while the employee is actually engaged in the furtherance of the business or affairs of the employer, whether upon the employer's premises or elsewhere. . . ."

In the case at bar Dzikowska, appellee's husband, with other workmen, was engaged in the shipping room, loading steel upon a railroad car. They had loaded all the steel at hand, and were waiting for the arrival of trucks with more steel. Dzikowska wore an apron of burlap, and also had burlap wrapped around his arms for the purpose of protecting him in handling the steel, much of which was oiled, so that his clothing was more or less saturated with oil. He stepped out of the shipping room and went into a box car, supposedly in order to smoke, as he said afterwards that in striking a match upon his trousers the burlap apron caught fire. No one saw him at the moment, but directly afterward he ran out of the car all aflame, and was

so badly burned that his death resulted in a few days.

In the Compensation Acts of some of the states compensation is allowed only for injuries "arising out of and in the course of his employment," thus attaching two conditions to the right to recover. In the Pennsylvania statute the words "arising out of" do not appear, and we are therefore relieved from the necessity of considering the question whether, in this case, the accident arose out of or was due to the character of the employment. Under our statute, compensation is given for personal injury or death of an employee "by an accident in the course of his employment," and it is further provided that, while the term used shall not include certain injuries caused by acts of third persons, it "shall include all other injuries sustained while the employee is actually engaged in the furtherance of the business or affairs of the employer, whether upon the employer's premises or elsewhere."

The fact that, in the present case, Dzikowska met with an accident during a short interval of waiting for the arrival of more material to load made no difference. His period of employment was not broken thereby. He was discharging precisely the duty laid upon him by his employer, and in the manner expected of him. As the court below said: "This was not a rest period. It was not a period when, by the rules of the employment, the employee was free from the duties of his employment. It was an indeterminate period of waiting for the occurrence of an event which would renew the active operations of the employment. That might be a minute, or it might be very much more. But the employee had not been called off from work, and, in renewing his work, would not be called back. He was there ready to work as soon as the material was ready for his hand."

What we regard as a sound statement of the principle involved appears in 1 Honnold on Workmen's Compensation, § 111, as follows: "It cannot be said that the employment is broken by mere intervals of leisure such as those taken for a meal. If an accident happened at such a time, there would be no break in the employment, even though the workman is paid by the hour for the time he is actually at work, especially where the accident occurs on the employer's premises, or about his property, unless the workman is doing something wholly foreign to his employment. Acts of ministration by a servant to himself, such as quenching his thirst, relieving his hunger, protect-

ing himself from excessive cold, performance of which while at work is reasonably necessary to his health and comfort, are incidents to his employment and acts of service therein within the Workmen's Compensation Acts, though they are only indirectly conducive to the purpose of the employment. Consequently, no break in the employment is caused by the mere fact that the workman is ministering to his personal comforts or necessities, as by warming himself, or seeking shelter, or by leaving his work to relieve nature, or to procure drink, refreshments, food, or fresh air, or to rest in the shade."

Nor do we regard the fact that the accident resulted from his striking a match for the purpose of enabling him to smoke at that time and place as being sufficient to debar him and his dependents from the benefits of the statute. It is not unreasonable for workmen to smoke out of doors during intervals of work, where it does not interfere with their duties. And in this instance the foreman testified that he did not interfere with the men when they were smoking outside of the building, but he did not allow smoking inside.

The evidence showed that the burlap apron worn by Dzikowska for the purpose of protecting his clothes while he was working, which was soaked with oil from the steel, first caught fire from the match, and the flames communicated to the burlap wrappings on his arms, worn for the same purpose, and also oil-soaked. If he had not worn these wrappings, or if they had not become unusually inflammable by reason of the work in which he was engaged for his employer, the accident would probably not have occurred. It is not unusual for men to strike matches on their trousers, without thought of danger. The peril in the present case arose, or was at least greatly increased, by the use of burlap wrappings, worn for the purposes of the workmen's employment, and their inflammable condition resulted directly from that employment. Dzikowska was, of course, negligent in striking the match upon his oil-soaked clothes. But, under the Workmen's Compensation Act of 1915, contributory negligence on the part of the workman is not a defense. The employer is liable for accidents in the course of employment, except for injuries "intentionally self-inflicted," or caused by an act of a third person, intended to injure the workman for reasons personal to him.

The assignments of error are overruled, and the judgment is affirmed.

## ILLINOIS SUPREME COURT.

MUELLER CONSTRUCTION COMPANY,  
Plff. in Err.,  
v.  
INDUSTRIAL BOARD OF THE STATE  
OF ILLINOIS et al.

(283 Ill. 148, 118 N. E. 1028.)

**Workmen's compensation — injury before working hours — in course of employment.**

1. That an accident to a foreman of wood construction on a building occurred before his working time began in the morning does not prevent it from being in the course of his employment within the meaning of the Workmen's Compensation Act, if it occurred while he was, according to custom, securing materials for the day's work.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

**Same — arising out of employment.**

2. Injury to a foreman of wood construction on a building, by being struck by an automobile while crossing a public highway to telephone for materials for the work, arises out of his employment within the meaning of the Workmen's Compensation Act.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

**Same — finding by accident board — effect.**

3. A finding by the industrial accident board, on conflicting evidence, of total and permanent disability, is conclusive on the courts.

*For other cases, see Courts, I. c, 1, in Dig. 1-52 N. S.*

(February 20, 1918.)

**E**RROR to the Circuit Court for Cook County to review a judgment affirming a decision of the industrial accident board in favor of claimant in a proceeding by him, under the Workmen's Compensation Act, to recover compensation for accidental injuries sustained by him while in defendant's employ. Affirmed.

The facts are stated in the opinion.

Messrs. Richard J. Lavery and Shepard, McCormick, Thomason, Kirkland, & Patterson, for plaintiff in error:

The accident did not arise out of the employment.

Eugene Dietzen Co. v. Industrial Bd. 279 Ill. 22, 116 N. E. 684, Ann. Cas.

**Note.** — As to injuries from accidents "arising out of and in the course of" the employment, within the meaning of the Workmen's Compensation Statutes, see the annotation following this case, post, 896. Also see that annotation for references to other annotations covering various questions arising under the Workmen's Compensation Acts.

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1918B, 764, 14 N. C. C. A. 125; Hopkins v. Michigan Sugar Co. 184 Mich. 87, L.R.A. 1916A, 310, 150 N. W. 325; Trim Joint Dist. School Bd. v. Kelly [1914] A. C. 667, W. C. & Ins. Rep. 369, 83 L. J. P. C. N. S. 220, 111 L. T. N. S. 305, 30 Times L. R. 452, 58 Sol. Jo. 493, 48 Ir. L. T. 141, Ann. Cas. 1915A, 104; Dennis v. White [1916] 2 K. B. 1, W. C. & Ins. Rep. 106, 85 L. J. K. B. N. S. 862, 114 L. T. N. S. 579, 60 Sol. Jo. 385, 9 B. W. C. C. 250; Reed v. Baker [1916] 1 K. B. 927, W. C. & Ins. Rep. 133, 85 L. J. K. B. N. S. 869, 114 L. T. N. S. 828, 32 Times L. R. 382, 60 Sol. Jo. 402, 9 B. W. C. C. 361; Andrew v. Failsworth Industrial Soc. [1904] 2 K. B. 32, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 Week. Rep. 451, 90 L. T. N. S. 611, 20 Times L. R. 429, 6 W. C. C. 11; Kelly v. Kerry County Council, 42 Ir. L. T. 23, 1 B. W. C. C. 194; Klawinski v. Lake Shore & M. S. R. Co. 185 Mich. 643, L.R.A. 1916A, 342, 152 N. W. 213; Hoenig v. Industrial Commission, 159 Wis. 646, L.R.A. 1916A, 339, 150 N. W. 996, 8 N. C. C. A. 192; Sheldon v. Needham, 111 L. T. N. S. 729, 30 Times L. R. 590, 50 Sol. Jo. 652, 137 L. T. Jo. 212, [1914] W. C. & Ins. Rep. 270, 7 B. W. C. C. 471; Hadwin v. Shepherd [1915] W. C. & Ins. Rep. 503; Kitchenham v. The "Johannesburg" [1911] A. C. 417, 80 L. J. K. B. N. S. 1102, 105 L. T. N. S. 118, 27 Times L. R. 504, 55 Sol. Jo. 599, 4 B. W. C. C. 311; Brown v. Decatur, 188 Ill. App. 147; Newman v. Newman, 169 App. Div. 745, 155 N. Y. Supp. 665, affirmed in 218 N. Y. 325, 113 N. E. 332; DeVoe v. New York State R. Co. 169 App. Div. 472, 155 N. Y. Supp. 12, affirmed in 218 N. Y. 318, L.R.A.1917A, 250, 113 N. E. 256; Symmonds v. King [1915] W. C. & Ins. Rep. 282, 8 B. W. C. C. 189.

The parties were not operating under the Workmen's Compensation Act.

Vaughan's Seed Store v. Simonini, 275 Ill. 477, 114 N. E. 163, Ann. Cas. 1918B, 713, 14 N. C. C. A. 1075; Gibson v. Peuple's Oil Co. 276 Ill. 73, 114 N. E. 515; Newman v. Newman, 169 App. Div. 745, 155 N. Y. Supp. 665, affirmed in 218 N. Y. 325, 113 N. E. 332; DeVoe v. New York State R. Co. 169 App. Div. 472, 155 N. Y. Supp. 12, affirmed in 218 N. Y. 318, L.R.A.1917A, 250, 113 N. E. 256.

Mr. George E. Fidler, for defendant in error:

The accident arose out of the employment.

Chicago Dry Kiln Co. v. Industrial Bd. 276 Ill. 556, 114 N. E. 1009, Ann. Cas. 1918B, 645; Parker-Washington Co. v. Industrial Bd. 274 Ill. 498, 113 N. E. 976; Armour v. Industrial Bd. 273 Ill. 590, 113 N. E. 138; Victor Chemical Works v. In-

dustrial Bd. 274 Ill. 11, 113 N. E. 173, Ann. Cas. 1918B, 627; Pigeon's Case, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737, 4 N. C. C. A. 516; Munn v. Industrial Bd. 274 Ill. 70, 113 N. E. 110, 12 N. C. C. A. 652; Zabriski v. Erie R. Co. 86 N. J. L. 266, L.R.A.1916A, 315, 92 Atl. 386; Brown v. Decatur, 188 Ill. App. 147; McNicol's Case, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522; Donovan's Case, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778, 4 N. C. C. A. 549; Sundine's Case, 218 Mass. 1, L.R.A.1916A, 318, 105 N. E. 433, 5 N. C. C. A. 616; Reithel's Case, 222 Mass. 163, L.R.A.1916A, 304, 109 N. E. 951, 11 N. C. C. A. 235; Milwaukee v. Althoff, 156 Wis. 68, L.R.A. 1916A, 327, 145 N. W. 238, 4 N. C. C. A. 110; Bett v. Hughes, 52 Scot. L. R. 93; M'Neice v. Singer Sewing Mach. Co. 48 Scot. L. R. 15, 4 B. W. C. C. 351; Moore v. Manchester Liners [1910] A. C. 498, 70 L. J. K. B. N. S. 1175, 103 L. T. N. S. 226, 26 Times L. R. 618, 54 Sol. Jo. 703, 3 B. W. C. C. 527; Rowland v. Wright [1909] 1 K. B. 963, 77 L. J. K. B. N. S. 1071, 99 L. T. N. S. 758, 24 Times L. R. 852; McDonald v. The Banana [1908] 2 K. B. 926, 24 Times L. R. 987, 52 Sol. Jo. 741, 1 B. W. C. C. 185.

The parties were operating under the Workmen's Compensation Act.

Suburban Ice Co. v. Industrial Bd. 274 Ill. 630, 113 N. E. 979; Munn v. Industrial Bd. 274 Ill. 70, 113 N. E. 110, 12 N. C. C. A. 652.

Applicant was wholly and permanently incapacitated.

Chicago Dry Kiln Co. v. Industrial Bd. 276 Ill. 556, 114 N. E. 1009, Ann. Cas. 1918B, 645; Parker-Washington Co. v. Industrial Bd. 274 Ill. 498, 113 N. E. 976; Armour v. Industrial Bd. 273 Ill. 590, 113 N. E. 138.

**Craig, J.**, delivered the opinion of the court:

This is a writ of error to review the judgment of the circuit court of Cook county, affirming the decision of the industrial board of this state, awarding defendant in error Joseph Belanger compensation for accidental injuries sustained by him while in the employ of plaintiff in error the Mueller Construction Company. The accident occurred on the morning of November 19, 1914, by defendant in error being struck by an automobile while in the act of crossing Chicago avenue to telephone for materials to be used in the remodeling of a building on which he was at work for plaintiff in error. The industrial board found defendant in error was permanently disabled, and allowed him, in addition to his first hospital and medical aid, compensa-

tion at the rate of \$12 per week until a sum equal to \$3,500 should be paid, and a pension of \$280 per year after that, payable in monthly instalments, as long as he lived.

The main grounds urged for a reversal of the judgment are: First, that the parties were not operating under the Workmen's Compensation Act at the time of the injury; second, that the accident did not arise out of and in the course of the employment; and, third, that the defendant in error was not wholly and permanently incapacitated from work.

At the time of the accident plaintiff in error was engaged in remodeling the Catholic cathedral at the corner of State and Superior streets, in the city of Chicago. Defendant in error was its foreman in charge of the carpenter work. As such foreman, he ordered all materials, hired and discharged the men under him, and had full control of the work. In order to properly perform the duties of his position, it was customary for him to be at the building in the morning from twenty to thirty minutes before the other workmen, to order materials, look over the building, and in a general way make preparation for the day's work. The men under him reported at 8 o'clock in the morning and quit at 5 o'clock in the afternoon. He was paid by the hour, from 8 to 12 in the forenoon and from 1 to 5 o'clock in the afternoon. He received no extra pay for reporting in advance of the other men. On the afternoon of the day preceding the accident, he had directed one of his men to telephone for lumber which he would need the first thing in the morning, and the man had reported to him that the lumber company would be unable to make the delivery before noon of the following day. No telephone had been installed in the building on which the defendant in error was at work, and when the occasion arose for the use of one he was required to go elsewhere. During the three or four months he had been at work on the cathedral, he or the men under his direction had used some telephone in the vicinity a dozen or more times. Defendant in error on these occasions advanced the money to pay the phone charges, and the same was repaid to him by plaintiff in error when he turned in his expense account. This had been the practice during all the time he was at work on this job. On the day of the accident he reached the building at about 7:30 o'clock in the morning. At that time two of the other men who worked on the job were there. He opened the doors in the basement, where the tools were kept, and started to telephone to a lumber company for lumber for use in that day's

work. He went north on Cass street to Chicago avenue, which is about half a block from the building, and started to cross the latter street, when he was struck by an automobile and severely injured. The telephone he was expecting to use was in a saloon on the north side of Chicago avenue. He did not see the automobile before he was struck by it. As a result of the accident, his spine, ribs, shoulder, knee, and ankles were injured. He was confined to his bed about two weeks, after which time he was able to be up only for a short period each day for some time. At the time of the hearing three of his lumbar vertebrae were displaced, and he had ecchymosis of the left side, atrophy of the right leg at the thigh, and only the partial use of his right arm. There is no dispute but that he is totally and permanently incapacitated from doing the kind of work in which he was engaged when injured, or any kind of manual labor requiring lifting, climbing, or heavy physical exertion, although there is some testimony to the effect that he might do certain kinds of office work if it were not for the difficulty of keeping regular hours.

In support of the plaintiff in error's first contention two points are made: First, that the period of employment had not commenced at the time of the accident to defendant in error, and hence the accident did not occur in the course of his employment; and, second, that the injury received in crossing a public street was not one arising out of his employment, but arose from a hazard common to all people who use the public streets.

In support of the first contention, it is urged that, as there is no proof the parties had filed their election to come under the act, but were brought under its provisions automatically because the enterprise in which they were engaged was one of those mentioned in § 3 of the act, there is no liability until the time for the actual commencement of work. The statute makes the employer liable for all accidental injuries sustained, "arising out of and in the course of the employment." The words "arising out of" and the words "in the course of" are used conjunctively. In order to satisfy the statute, both conditions must concur. It is not sufficient that the accident occur in the course of the employment, but the causative danger must also arise out of it. The words "arising out of" refer to the origin or cause of the accident, and are descriptive of its character, while the words "in the course of" refer to the time, place, and circumstances under which the accident takes place. *Fitzgerald v. W. G. Clarke & Sons* [1908] 2 K. B. 796, 77 L. J. K. B. N. S. 1018, 99 L. T. N. S. 101,

1 B. W. C. C. 197; *Eugene Dietzen Co. v. Industrial Bd.* 279 Ill. 11, 118 N. E. 684, Ann. Cas. 1918B, 764, 14 N. C. C. A. 125. By the use of these words it was not the intention of the legislature to make the employer an insurer against all accidental injuries which might happen to an employee while in the course of the employment, but only for such injuries arising from or growing out of the risks peculiar to the nature of the work in the scope of the workman's employment, or incidental to such employment, and accidents in which it is possible to trace the injury to some risk or hazard to which the employee is exposed in a special degree by reason of such employment. Risks to which all persons similarly situated are equally exposed and not traceable in some special degree to the particular employment are excluded. This intention is manifest by the act in confining its automatic provisions to certain hazardous employments enumerated in § 3 of the act. The employments included are restricted, and have special reference to those that are dangerous to lives and limbs of those employed therein. The reason for the classification is that experience has shown that those engaged in such occupations are subject to special risks and hazards peculiar to those occupations, not common to other employments, and that it is but just that society should be made to bear a portion of the burdens arising from the accidental injuries peculiar to the risks of those employments, as a part of the cost of such business.

In *Eugene Dietzen Co. v. Industrial Bd.* supra, on the authority of *Moore v. Manchester Liners* [1910] A. C. 498, 79 L. J. K. B. N. S. 1175, 103 L. T. N. S. 226, 26 Times L. R. 618, 54 Sol. Jo. 703, 3 B. W. C. C. 527, we held an accident arises in the course of the employment if it takes place while the employee is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time to do such thing; and that an accident arises out of the employment when it results from a risk reasonably incidental to the employment, and arising from some cause "which might have been contemplated by a reasonable person, when entering the employment, as incidental to it." In speaking on this same subject the supreme court of Massachusetts in *McNicol's Case*, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522, said that an injury may be said to "arise out of the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting

injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment, but it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workmen would have been equally exposed, apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

See *Milliken's Case*, 216 Mass. 293, L.R.A.1916A, 337, 103 N. E. 898, 4 N. C. C. A. 512; *Sanderson's Case* 224 Mass. 558, 113 N. E. 355.

As a part of defendant in error's duties, he was required to order materials as needed, and it may fairly be said, as an incident to such employment, that he would have occasion to use and did use a telephone. As none was provided, he would go to some nearby place to use a telephone as occasion required. In going to and returning from such a place, we think he was as much in the course of his employment as he would have been in going to and returning from a telephone, if one had been installed on the premises. In such case there can be no question but that, had he been injured, the injury would have occurred in the course of his employment. In the instant case, as was his custom, he had reported at the building in advance of his men, and at the time of the accident was on his way to telephone about a matter which was a part of his employer's business, in the usual course of his employment. Under these facts there can be no serious question but that the accident occurred in the course of the employment. That it occurred before the actual time for the commencement of work is not controlling. Too great stress cannot be placed on the exact time when the earning of wages commenced and ended, but a reasonable time must be allowed before and after such time, and included within such period of employment, where the employee is at a place where he might reasonably be expected to be at such time, and is injured in the course of the duties of his employment. What would be a reasonable time in such

case must, to a large extent, depend upon the particular facts and circumstances of each case. In *Munn v. Industrial Bd.* 274 Ill. 70, 113 N. E. 110, 12 N. C. C. A. 652, we held an injury sustained by an employee an hour after his usual quitting time, by the inhaling of gas in attempting to put out a fire in the coal in and about the boiler and engine room of his employer's premises, arose out of and occurred in the course of his employment. We there said: "The mere fact that at the time of the accident Casparson's day's service, according to the terms of his employment, had ended, is not sufficient to authorize a reversal of the finding that the accident arose out of and was received in the course of his employment. The industrial board found that upon his return to the boiler room the second time he put in some coal. An employee should not be penalized for working overtime if he wishes to do so, or for endeavoring to save his master's property."

What is there said we think is controlling here, and applies as well to an employee coming to work before the time for the commencement of work as it does after the hour for quitting has arrived.

As to the other branch of the case, did the accident arise out of the employment or from any special risk or hazard peculiar to the employment or incidentally connected therewith? This is by far the most difficult question in the case. A risk is said to be "incidental to the employment, when it belongs to or is connected with what a workman has to do in fulfilling his contract of service." In *Rodger v. Paisley School Bd.* [1912] S. C. 584, 49 Scot. L. R. 413, 5 B. W. C. C. 542, it was held that an injury to a janitor, on the street, by being overcome by the heat in the course of his employment in taking messages from one head master to another, did not arise out of such employment. In *Symmonds v. King* [1915] W. C. & Ins. Rep. 282, 8 B. W. C. C. 189, it was held that a painter who was obliged to cross a street to obtain some paint, and was knocked down by a tramcar and injured, did not suffer an injury arising out of and in the course of his employment. In *Sheldon v. Needham*, 111 L. T. N. S. 729, 30 Times L. R. 590, 58 Sol. Jo. 652 [1914] W. C. & Ins. Rep. 274, 7 B. W. C. C. 471, it was held a charwoman sent by her employer to mail a letter, who fell and broke her leg in going to the postoffice, could not recover. The basis of these decisions is that the injury sustained in such case does not arise out of any special risk, peculiar to the line of such employment, greater than that imposed upon others, but from a cause to which all per-

sons who use the public streets, whether employed or not, are in an equal degree exposed. In *Hopkins v. Michigan Sugar Co.* 184 Mich. 87, L.R.A.1916A, 310, 150 N. W. 325, it was held that an employee whose duty it was to visit different factories of his employer, and who, while returning from a visit, slipped and fell on an icy pavement while walking towards a street car, could not recover. On the other hand, it has been held that where there is some extra hazard in the employment, or where the injury occurs through some act of the employer, the injured employee is entitled to recover under the Compensation Act. In *Roland v. Wright* [1909] 1 K. B. 963, 77 L. J. K. B. N. S. 1175, 103 L. T. N. S. 226, 26 Times L. R. 618, 54 Sol. Jo. 703, 3 B. W. C. C. 527, a stableman, while eating his lunch in the stable, was bitten by a cat belonging to the proprietor, and which was kept in the stable. The court held that by reason of the proprietor keeping the cat in the stable the employee was thereby subjected to an extra hazard by the employer, and that the accident was just as much an accident arising out of his employment as if he had been kicked or bitten by a horse in the stable. In *Pierce v. Provident Clothing & Supply Co.* [1911] 1 K. B. 997, 80 L. J. K. B. N. S. 831, 104 L. T. N. S. 473, 27 Times L. R. 299, 55 Sol. Jo. 363, 4 B. W. C. C. 242, it was held, where a man was employed as a collector and, with the knowledge and permission of his employer, traversed the streets of a crowded district of the city on a bicycle, and, while so doing collided with a tramcar, he was exposed more than an ordinary member of the public to the risks of the streets, and compensation could be recovered for his death. In *M'Neice v. Singer Sewing Mach. Co.* 48 Scot. L. R. 15, 4 B. W. C. C. 351, a canvasser and collector, while riding a bicycle in the course of his employment, was kicked by a horse, and it was held that he was entitled to recover. In *Zabriskie v. Erie R. Co.* 86 N. J. L. 266, L.R.A.1916A, 315, 92 Atl. 385, the employer had failed to provide the necessary toilet facilities at the place where the deceased was working, and he and other employees were compelled to cross a street to reach such. While going across the street for that purpose, the deceased was struck by an automobile and thrown onto a railroad track which crossed the street, and was again struck by a train and killed. It was held that a recovery could be had under the Compensation Act.

It is difficult to distinguish and reconcile all the cases, but the gist of the decisions seems to be that there must be

some special risk, incident to the particular employment, which imposes a greater danger upon the employee than upon other persons using the streets. The criterion, however, is not that other persons are exposed to the same danger, but rather than the employment renders the workman peculiarly subject to the danger. The question is, then, Did the circumstances of the employment of the defendant in error require him to incur some special risk in using the street in the way he did? If so, no matter how slight, it cannot be said that no greater danger was imposed upon him than upon an ordinary member of the public. Under the decisions, if the plaintiff in error had employed a messenger to run errands for the foreman in charge of the work on the cathedral, to answer telephone calls and send messages by telephone, there could be no question but that he could recover if he were injured in the same manner that the defendant in error was injured. The principle underlying his right to recover would be the same whether he telephoned frequently or seldom. The status of the defendant in error was not materially different, as to his duties at the time of the injury, from that of a messenger particularly employed as such. He had various duties to perform. If he were injured while in the performance of any of his duties such injury would arise out of his employment. It was peculiarly his duty, among other things, to ascertain the amount of material on hand and the amount needed, and to take the necessary steps to get needed material to the work. He had pursued the practice of going to public telephones to telephone for materials, and had sent employees under him on similar errands, and plaintiff in error, as his employer, had acquiesced in this course of conduct, and had repaid him the amounts expended by him for telephone charges in sending these messages. The defendant in error and the employees he had sent had followed substantially the same practice; that is, of going to convenient telephones in that neighborhood. Plaintiff in error had installed telephones at other buildings, where it was doing work similar to the work in this case.

In *Zabriskie v. Erie R. Co.* supra, it is said: "The danger was one which, in the language of the cases, was peculiar to the employment, in that the absence of proper facilities at the shop, and the necessity of crossing the street to reach them, gave rise to it. It was not the danger of an ordinary member of the public crossing a street on his own business, but was the subjection of the employee to

that danger by the conditions of his employment. The fact that the accident may have been, and probably was due to the negligence of the driver of the automobile, and perhaps also to the contributory negligence of the deceased, tends to cloud the issue, but does not differentiate the situation from that of any workman who is required, in the performance of his work, to go into a dangerous place and incur the dangers connected with that place. There were therefore two concurring causes of the accident, namely, the automobile and the necessity of crossing the street, for the latter of which the employer was responsible. In this aspect the case resembles . . . McNicol's Case, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522, where deceased was put to work next or near to a fellow workman, who was known to the employer to be addicted to drink, and was ugly when in his cups. While deceased was at work, this man, being drunk, attacked and killed him, or injured him so that he died, and the supreme court of Massachusetts held that the injury arose out of and in the course of the employment, putting its decision upon the causal connection between the injury of the deceased and the conditions under which the defendant required him to work. In the language of the Massachusetts court, the act of the automobile driver and the conditions of employment that required the deceased to cross a street were contributing proximate causes, the latter of which was an actual risk of the employment."

While it is undoubtedly true that the danger or liability of injury would have been greater, if the nature of the employment of defendant in error had required him to cross the street several times a day, such liability would be one of degree only. If, as a part of his duties, he was required to cross the public street for the purpose of telephoning on the business of his employer, and, while so doing, was

struck by a passing vehicle, we are unable to see why, under the facts of this case, such an accident does not arise out of his employment as well as in the course of his employment. He was injured in performing a regular duty that was expected of him. It can be readily inferred from the evidence that it was part of his duties to supervise the delivery of material to the building, and that in so doing it was necessary to be on the adjacent streets to direct where such material should be deposited or brought on the premises. Had the accident occurred while he was so engaged, it would have been substantially the same, in legal effect.

As to whether the defendant in error had suffered a complete disability that rendered him wholly and permanently incapable of work, all that need be said is that the evidence was conflicting. The industrial board found, from the evidence, that he was wholly and permanently disabled. There was evidence to support such finding, being the testimony of physicians who had examined the defendant in error that, in their opinion, his disability was permanent and a total one, and that he would not improve. Another physician testified on behalf of plaintiff in error that in his opinion the defendant in error was not totally incapacitated—that he could do some office work. The weight of this testimony was a matter to be passed upon by the industrial board. Where there is evidence to support the finding of the board, even though that evidence is controverted, the courts cannot pass upon its weight or sufficiency. *Parker-Washington Co. v. Industrial Bd.* 274 Ill. 498, 113 N. E. 976; *Chicago Dry Kiln Co. v. Industrial Bd.* 276 Ill. 556, 114 N. E. 1009, Ann. Cas. 1918B, 645.

The judgment of the Circuit Court will be affirmed. Judgment affirmed.

Petition for rehearing denied April 4, 1918.

**Annotation—Injuries "arising out of and in the course of" the employment within the meaning of the Workmen's Compensation Statutes.**

The general subject of Workmen's Compensation Acts is treated in annotations in L.R.A.1916A, 23, and in L.R.A. 1917D, 80. For later cases and annotations on Workmen's Compensation Statutes, consult the L.R.A. Indexes for volumes subsequent to L.R.A.1917D, under the title, "Workmen's Compensation."

As to what constitutes an "accident" within the meaning of the Compensation Act, see annotation to *Re Maggelet*, ante, 864. As to compensation for injuries caused by weather conditions, such as lightning, sunstroke, freezing, etc., see annotation to *Wiggins v. Industrial Bd.* post, 932.

The question, What injuries arise "out of and in the course of" the employment, is treated in the annotation in L.R.A. 1916A, 40 et seq., and 232 et seq., and in the annotation in L.R.A.1917D, 114;



the present annotation is supplementary thereto.

Frequent references will be made to the earlier annotations, so that all of the cases on particular phases of the general question may be found, without the necessity of an extended search.

**General construction to be given to phrase "arising out of and in the course of" the employment.**

It is generally held that each term of the phrase, "arising out of and in the course of" the employment, must be satisfied before compensation may be awarded. It must be shown that the accident not only arose in the course of the employment, but also that it arose out of it.

"It is not sufficient that the accident occur in the course of the employment, but the causative danger must also arise out of it. The words 'arising out of' refer to the origin or cause of the accident, and are descriptive of its character, while the words 'in the course of' refer to the time, place, and circumstances under which the accident takes place." *MUELLER CONSTR. CO. v. INDUSTRIAL BD.* ante, 891.

So, an award of compensation cannot be sustained, where the trial judge merely finds that the deceased was injured while in the "course of his employment." It must be found that he was injured by an accident arising not only in the course of the employment, but also out of it. *Brinsko v. Lehigh Valley R. Co.* (1917) 90 N. J. L. 658, 102 Atl. 390.

And in *Thom v. Sinclair* [1917] A. C. (Fig.) 127, Ann. Cas. 1917D, 188, Viscount Haldane said: "It will be observed that the legislature has imposed a double condition for the liability of the employer for injury from accident, a condition that the injury must arise not only in the course of the employment, but out of it. It is easy in a case like the present to determine the satisfaction of one of these conditions. The appellant was actually employed when the accident occurred, and she was obviously injured by an accident in the course of the employment."

To entitle a workman to an award of compensation, his injuries must result from an accident both arising out of and in the course of the employment. *Holland-St. Louis Sugar Co. v. Shraluka* (1917) — Ind. App. —, 116 N. E. 330.

And in *Griffith v. Cole* (Iowa) post, 923, it was held that an employee of bridge builders who, after his work was done, was killed by a stroke of light-

ning while sitting in the boarding tent which was furnished by the employer, suffered an accident in the course of the employment, but nevertheless his dependents could not recover compensation, as it did not appear that the accident arose out of the employment. The court said: "It does not suffice that he was injured while in the course of his employment. It must further appear that his injury arose out of such employment."

And in *Myers v. Louisiana R. & Nav. Co.* (1917) 140 La. 937, 74 So. 256, the court said: "This phrase, 'out of and in the course of the employment,' which in itself appears to be clear enough, has given occasion, in its interpretation, to a great many decisions, both in this country and in England; for it occurs in the Workmen's Compensation Statute of England, which is the prototype of our American statutes upon the same subject, including our said Act No. 20 of 1914. The courts have had no difficulty in agreeing that 'out of' does not mean the same thing as 'in the course of,' but means something more; that an injury may have been received 'in the course of' the employment, and yet not 'out of' it. Nor has any difficulty been experienced in ascertaining when an injury is to be considered as having arisen 'in the course of' the employment; the difficulty has come in applying to concrete cases the phrase 'out of.'"

Other courts have made similar statements. See, particularly, the annotation in L.R.A.1916A, p. 40, notes 62, 63, and page 232, notes 65 et seq., and annotation in L.R.A.1917D, 114, note 85.

Among the earlier cases there appears to be no dissent from the view that the phrase presents two questions, and each must be satisfied before recovery may be had. But, as was stated in the earlier annotation, it is quite difficult to conceive of a case which could be said to arise "out of" the employment, but not to arise "in the course of" it. Although many courts have stated that there is a distinction between the terms, and have defined them in different language, Lord Finlay, Ld. Ch., in *Davidson v. M'Robb* [1918] A. C. (Eng.) 304, appears to be the only judge who has been able to give concrete examples illustrating the distinction which he had in mind. He says: "The words 'and in the course of' were probably added for this reason: If the nerve or agility of a workman were impaired by the conditions of his work and, in consequence, he met with an accident in the street, which he would

have avoided but for the impairment of his health, occasioned by his work, the accident might be said to arise 'out of the employment.' The same thing might be said in the case of an accident which he would have escaped, but for fatigue induced by working overtime. The introduction of such claims is prevented by the words 'in the course of the employment.' Such an accident as above suggested, although it might arise out of the work, would not be in the course of the work."

There seems to be some disposition among the judges in the later cases to recede somewhat from the position that the phrase presents two distinct branches, each of equal importance in determining the question whether or not compensation is to be awarded.

Thus, in a case in which a sailor was injured while on shore on business of his own, a distinguished English law Lord has stated that the words "in the course of" merely explain the words "out of."

In *Davidson v. M'Robb* (Eng.) *supra*, Lord Dunedin said: "I shall first consider the words of the act apart from authority. It is obvious that the addition of the words 'and in the course of' is meant, in some way, either to qualify or further explain the words 'out of.' My own view is that they do the latter. It is in one sense difficult to imagine that there could be any injury held as arising out of the employment, which would not also be in the course of the employment. But it may well be that the determination of the question whether, at the moment of the injury, the workman was in the course of his employment, might go to solve the question whether the injury arose out of the employment. Let me instance the case of the domestic servant who is run over in the street. Given but the two facts that the man is, e. g., a butler, and that he is run over in the street, you would not be able to decide whether the injury arose out of the employment or not. The facts are consistent with either supposition. But given the further fact that either (1) he has been sent by the master on a message, or (2) that he is enjoying an evening out, then you can determine whether he is in the course of his employment or not, and from that, if being run over is one of the inherent dangers of the street, you will be able to determine whether the injury arose out of the employment or not."

And in *Re Betts* (1918) — *Ind. App.*

L.R.A.1918F.

—, 118 N. E. 551, in the dissenting opinion of Judge Dausman, the following language is used, after the learned judge had referred to a decision by Bulkley, L. J., in which it was said that both branches of the phrase must be satisfied: "Do the words 'out of and in the course of' necessitate two distinct inquiries? The words 'out of' do not appear in the Federal act, nor do they appear in the acts of the following states: Maine, Pennsylvania, Texas. The legislative bodies of these political units, as well as of certain foreign countries other than England, have seen fit to use only the words 'in the course of.' The words of the Louisiana act (Act No. 20 of 1914) are, 'Out of and incidental to.' The words in the title to the English act are 'compensation to workmen for injuries suffered in the course of their employment.' In the title to the Iowa act (Acts 35 Gen. Assem. chap. 147), we find only the words, 'In line of duty.' In the title to the Indiana act the words are, 'To establish rates of compensation for personal injuries or death sustained by employees in the course of employment.' The words 'out of' do not appear in the titles of the acts of several of the states. While the language used in the titles of the various acts is not controlling, yet it is worthy of note as an indication of the legislative intent. . . . The Indiana Compensation Law was enacted in the year 1915; and there is a general rule of statutory construction to the effect that, where a statute is modeled after an act of a foreign country, it will be presumed to have been enacted with reference to the construction put upon it by the courts of the country from which it is taken. This rule is more or less binding, according to circumstances. It does, however, require that this court should heed the interpretation of the act by the English courts, prior to its enactment here. But from a full and complete recognition of the rule it does not follow that we are under any obligation to approve the particular process of reasoning by which a judge arrived at his conclusion. I endorse the conclusion reached by Buckley, L.J., in his assenting remarks *supra*, viz., that the injury for which compensation is allowable must be due to the employment,—must result from a risk incidental to the employment. But the particular bit of reasoning in which he indulged, while it has not been approved generally by the courts, unfortunately has misled some of them, and has burdened the administrative board charged

with the execution of the Compensation Laws. It should be rejected, once for all."

That the attempt to distinguish between the two elements of the phrase, "arising out of and in the course of" the employment, has placed a great burden upon the administrative courts and boards, is apparent to anyone who examines any number of cases discussing this question.

A few judicial statements as to the general meaning of this phrase and the different branches thereof are added.

"An accident arises in the course of the employment if it takes place while the employee is doing what a man so employed may reasonably do within a time during which he is employed, and at a place in which he may reasonably be during that time to do such thing; and that an accident arises out of the employment when it results from a risk reasonably incidental to the employment, and arising from some cause 'which might have been contemplated by a reasonable person, when entering the employment, as incidental to it.'" *MUELLER CONSTR. CO. v. INDUSTRIAL BD.* ante, 891.

"In general terms, an accident may be said to arise out of the employment when there is a causal connection between it and the performance of some service of the employment. . . . The causal relation is established when the accident is shown to have arisen out of a risk which a reasonable person might have comprehended as incidental to the employment at the time of entering into the employment, or when the evidence shows an incidental connection between the conditions under which the employee works and the resulting injury." *Holland-St. Louis Sugar Co. v. Shraluka* (1917) — *Ind. App.* —, 116 N. E. 330.

In *Elk Grove Union High School Dist. v. Industrial Acci. Commission* (1917) 34 *Cal. App.* 589, 168 *Pac.* 392, the court said: "An injury may be said to arise out of the employment, when there exists a causal connection between the conditions under which the work is required to be performed and the resulting injury."

The phrase "in the course of," as used in the Indiana Act, "has reference to the time, place, and circumstances under which the accident takes place, as distinguished from the origin or cause of the accident." *Inland Steel Co. v. Lambert* (1917) — *Ind. App.* —, 118 N. E. 162.

The industrial accident board is warranted in finding that an employee met with his injury in the course of his employment, where the injury occurred "at the time and place of his occupation, and while he was engaged in the duties incidental to it." *Re Uzzio* (1917) 228 *Mass.* 331, 117 N. E. 349.

"The test to determine whether injuries to a workman arise out of his employment is not whether the cause of the injury, that is, the agency producing it, was something peculiar to the line of employment, but whether the nature of the employment was such that the risk from which the injury resulted was greater for the workman than for a person not engaged in the employment." *Myers v. Louisiana R. & Nav. Co.* (1917) 140 *La.* 937, 74 *So.* 256 (headnote by the court).

And in *Re Saenger* (N. Y.) ante, 225, the court said: "The injury must be received as a natural incident of the work; it must be one of the risks connected with the employment, flowing therefrom as a natural consequence, and directly connected with the work." Such was not the case, held the court, where an employee, who had fainted after a quarrel with her employer with regard to her work, was injured by having ammonia thrown in her face, instead of water, by a fellow employee.

So, injury to an employee riding on a wagon loaded with tools for digging post holes, which service he is to perform, by the accidental discharge, by a jolt to the wagon, of a gun belonging to a fellow employee, placed on the wagon with his employer's consent, to enable such employee to hunt after working hours, does not arise out of the employment within the operation of the Workmen's Compensation Act. *Ward v. Industrial Acci. Commission* (1917) 175 *Cal.* 42, L.R.A.1918A, 233, 164 *Pac.* 1123.

Since the language of the Indiana act, by which the right to compensation is limited, namely: "Injury by accident arising out of and in the course of the employment," was taken literally, even if remotely, from the English act, decisions of the English courts of last resort prior to the enactment of the Indiana act, and construing such language as found in the English act, are, at least, very persuasive of what construction should be placed on such language as found in the Indiana act. *Indian Creek Coal & Min. Co. v. Calvert* (1918) — *Ind. App.* —, 119 N. E. 519.

In order that an accident arise "out of" the employment, it is not necessary

that the accident must have arisen because of the nature of the employment in which the injured person was engaged at the time. What constitutes an accident arising "out of" is to be determined not only by the nature of the employment, but also by the general conditions under which the employment is to be carried on.

Thus, it has been held by the English House of Lords, in *Thom v. Sinclair* [1917] A. C. (Eng.) 127, Ann. Cas. 1917D, 188, that an employee at work in a building, who is injured by the fall of the roof of that building, caused by the collapse of a wall on property belonging to someone else, but contiguous to the place of work, is injured by accident arising out of the employment. Viscount Haldane, said: "The appellant was injured because she happened, at the moment of the accident, to be working in the shed where she was employed to work, and I think that, unless authority constrains us to hold the contrary, the act ought to be construed as signifying that an accident such as this comes within the class against which she is insured. Whether the remoter cause of the roof falling was the collapse of a neighboring wall, or the falling down of some high adjacent building, or a stroke of lightning, seems to me immaterial, in the light of this construction. It is enough that, by the terms of her employment, the appellant had to work in this particular shed, and was, in consequence, injured by an accident which happened to the roof of the shed. The accident is one arising out of the employment none the less, if ultimately caused by the fall of someone else's wall, than if it had been caused by inherent weakness of the employer's roof."

Further in his opinion, Lord Haldane said: "There are, no doubt, many kinds of accident which do not in any sense arise out of the employment. There may be no reason why such accidents should happen to a man in one situation rather than to a man in another, and it may therefore be impossible to pronounce truly that they are so connected with the employment as to have arisen out of it. But where a man is ordered to work under a particular roof, and that roof falls in on him, it is not clear that the accident belongs to that category. If the particular accident would not have happened to him had he not been employed to work under the particular roof, there seems to be nothing in the language of the act which precludes an

occurrence from being held within it, which satisfies the test."

"If the conditions of his employment oblige a workman to work in a particular building or position, which exposes him at the time and on the occasion of the accident to the injury for which compensation is claimed, then, although the accident is not consequent on and has no causal relation to the work on which the workman is employed, such accident arises out of his employment, as incident not to the character of the work, but to the dangers and risks of the particular building or position in which, by the conditions of his employment, he is obliged to work." Opinion of Lord Parmoor in the same case.

Lord Shaw of Dunfermline, in his judgment, rejected the contention that the words "arising out of the employment" should be construed to mean "arising out of the nature of the employment," and stated that the words not only mean the nature of the employment in general, but the nature of the injured servant's employment.

The courts very generally hold that, as the Compensation Acts are remedial, they should be liberally construed in harmony with the humane purposes of the act, notwithstanding they are in derogation of the common law. This principle has been applied in a number of decisions, in which the question to be determined was whether or not the injury arose out of and in the course of the employment. *Holland-St. Louis Sugar Co. v. Shraluka* (1917) — Ind. App. —, 116 N. E. 330; *Re Ayers* (1918) — Ind. App. —, 118 N. E. 386; *Re Betts* (1918) — Ind. App. —, 118 N. E. 551; *Indian Creek Coal & Min. Co. v. Calvert* (1918) — Ind. App. —, 119 N. E. 519; *Re Loper* (1917) — Ind. App. —, 116 N. E. 324; *Brienen v. Wisconsin Pub. Service Co.* (1917) 166 Wis. 24, 163 N. W. 182; *White v. Industrial Commission* (1918) — Wis. —, 167 N. W. 816.

#### **Injuries caused by negligence of employee.**

An injured employee otherwise entitled to compensation cannot be denied the benefit of the act, merely because he was guilty of negligence in doing the act which resulted in the injury.

Thus, the mere fact that an employee may have been negligent in taking the more dangerous course in leaving the employer's premises furnishes no defense to the employer, or insurance carrier, and does not bar the right to compensa-

tion. *Bylow v. St. Regis Paper Co.* (1917) 179 App. Div. 555, 166 N. Y. Supp. 874.

And the fact that an employee departed from the usual and customary way of providing hot water for washing, when deprived of the usual means of heating water for such purpose, cannot deprive him of the benefits provided by the Indiana Act. *Re Ayers* (1918) — Ind. App. —, 118 N. E. 386.

So, the mere fact that the act of an employee in going upon a roof in order to pull down a rope was unnecessary, because the rope would, if given time, fall of itself, does not deprive him of right to compensation, where there was no question but what his act tended to facilitate the work in which he was engaged. *Ross v. Genesee Reduction Co.* (1917) 180 App. Div. 846, 168 N. Y. Supp. 51. The court said: "The reasoning is altogether too refined for the very practical results sought to be attained by the Workmen's Compensation Law. The decedent was in the employ of the Genesee Reduction Company at the moment of the accident, and the question of whether he was doing the work in exactly the best manner is not material. It is not seriously questioned that the act which he attempted was designed to facilitate the work of the master, and the fact that it could have been accomplished without his particular effort is not controlling. We are not dealing with the law of negligence; we are considering a system which attempts to compensate for injuries received in the actual performance of duties in hazardous employments, without regard to negligence; and so long as the employee is engaged in the actual service of the master, as distinguished from the personal purposes of the employee, he is entitled to the provision which the law makes for him as an employee."

But an employee of a railroad company, who, in crossing the rails to go to a mess room, as he was entitled to do, attempted to pass under the trucks of a standing goods train, instead of passing around the trucks, exposes himself to an added peril, and is not acting within the sphere of his employment. *Lancashire & Y. R. Co. v. Highley* (1917) A. C. (Eng.) 352, 86 L. J. K. B. N. S. 715, 116 L. T. N. S. 767, 33 Times L. R. 286, 61 Sol. Jo. 397, 10 B. W. C. C. 241, Ann. Cas. 1917D, 200. This decision is based upon the theory that attempting to pass under the train, rather than going around it, constitutes something

more than mere negligence in the manner of performing the work.

#### **Injury caused solely by intoxication of employee.**

There can be no recovery of compensation in a case in which the injury of the employee was due solely to his intoxicated condition.

Thus, if a night watchman, while intoxicated, neglects his duty and goes into a washroom with intent to sleep, lights the gas heater, tightly closes the door and windows, and lies down upon the bench, and while in such condition is killed by escaping gas, he does not suffer an injury arising out of his employment. *John A. Roebling's Sons Co. v. Industrial Acci. Commission* (1918) — Cal. App. —, 171 Pac. 987.

The cases passing upon recovery of compensation, where an injured workman was intoxicated at the time of the injury, are reviewed in an annotation attached to *Nekoosa-Edwards Paper Co. v. Industrial Commission*, L.R.A.1916A, 348.

#### **Injuries received while doing work outside of scope of employment.**

Where an employee is injured while doing something which might ordinarily be considered outside the scope of the employment, he will not be denied compensation if the act is performed in a bona fide attempt to further the employer's business.

Thus, an injury to a school-teacher, caused by an attempt to move a heavy desk which was standing before a bookcase, preventing the opening of a door which the teacher desired to open, to procure a book necessary for her work, arises out of the employment, although the teacher was charged with no part of the work of janitor of the school. *Elk Grove Union High School Dist. v. Industrial Acci. Commission* (1917) 34 Cal. App. 589, 168 Pac. 392.

So, an employee of a builder, who was instructed to take a window frame to a farm about 2 miles distant, and to get it there as best he could, as there was no horse or cart available, did not act outside his employment when, coming up with a pony and cart on the road, he, with the driver's permission, placed the window frame on the cart, and started to climb up himself, and fell and was injured. *Mullinger v. Bidewell* (1916) 10 B. W. C. C. (Eng.) 104.

So, too, a fireman in a rolling mill, whose duty it was to put rock in a furnace with which to heat the iron, does not go outside of his employment when, on

finding no suitable rock in the bin where it was ordinarily kept, he went on to a car beside the bin in order to procure such proper rock, where, in so doing, it was shown that he acted in accordance with the custom of the workmen, which was known to the employer's foreman. *Southern P. Co. v. Industrial Acci. Commission* (1918) — Cal. —, — A.L.R. —, 170 Pac. 822.

An employee of a city, engaged as a teamster in the municipal wood yard, who was injured while engaged in moving the household goods of an indigent person in accordance with directions of the superintendent of the wood yard, may be found to have been acting within the scope of his employment, where the general purpose of the wood yard was to provide employment and relief for indigent persons and their families, and the moving of the goods of an indigent person might be found to be within the general purpose of the yard. *Oakland v. Industrial Acci. Commission* (1917) — Cal. App. —, 170 Pac. 430.

An employee whose duty it was to receive mail from one train and carry it to another did not go, outside of his employment when, in accordance with a custom, he attempted to get onto the mail car to receive the mail, and was injured, although he might have received such mail by remaining upon the station platform, since what he did tended to expedite the performance of his duty. *White v. Industrial Commission* (1918) — Wis. —, 167 N. W. 816.

A railroad employee, who was injured while on his way to aid in the removal of the wreck of a train of another company, on tracks used jointly by the two railroad companies, suffered injury arising out of his employment, where, by the terms of his employment, he was to be treated as being on duty and on pay when called by the other company, from the time when he was called until he reported at his home station at the completion of his work. *Re Maroney* (1917) — Ind. App. —, 118 N. E. 134.

But no recovery is allowable where the work is not only outside of the employment, but engaging in such work creates an added peril which could not be reasonably anticipated as incident to the employment.

Thus, a night watchman went outside of the employment contemplated by his employer, in making use of a circular saw to cut a board with which to brace a door, the lock of which was defective. *Brusster v. Industrial Acci. Commission* (1917) — Cal. App. —, 169 Pac. 258.

The court said that, although it might have been within the scope of the employee's duty to see that the doors of the premises were properly secured by locking, nevertheless his resort to the use of a circular saw for the purpose of making a board that would answer his purpose, was entirely beyond the scope of his employment, and was not a resort to reasonable means for securing the end intended by him at the time.

So, too, a messenger boy, who in performing his duties traverses the streets of a city, departs from the scope of his employment when he climbs upon a passing vehicle not owned or controlled by his employer, for the purpose of expediting his work, so that an accident which befalls him when upon such vehicle cannot be said to arise out of and in the course of the employment, the court holding that, since he was provided with carfare when the messages were to go beyond a certain distance, he was to walk on all other occasions. *STATE EX REL. MILLER v. DISTRICT CT.* ante, 881.

A truckman employed to carry necessary materials to and from a factory does not suffer injury arising out of and in the course of the employment, where he carried a box of books for which the bill of lading had been given him by the shipping clerk, from a railroad station to the house of one of the stockholders of the company, and, after placing the box of books in the front hall, was injured while carrying it up to the second floor, at the request of the maid who came to the door. *Carnahan v. Mailometer Co.* (1918) — Mich. —, 167 N. W. 9. This decision is based both upon the ground that the injury occurred while the employee was engaged in carrying out a mere accommodation, undertaken by the corporation for one of its stockholders, without charge, and on the ground that the injury occurred while he was merely accommodating the maid at the house where the box of books was delivered.

Where an employer nailed down the lower sashes in the windows in a dye house, back of the dyetubs, so as to prevent the men from crawling over the tubs to open the windows, but an employee did pass over the tubs and was injured while attempting to remove the fastening by use of a chisel and hammer, a piece of the chisel striking him in the eye, the injury did not arise out of and in the course of the employment; since he must be held to have worked in the dyehouse as furnished for use by his employer, who had the absolute right

to close the windows permanently, so that the premises should be used as if those windows formed no part in the construction or equipment. *Borin's Case* (1917) 227 *Mass.* 452, L.R.A.1918A, 217, 116 N. E. 817.

A clerk in the auditing department of a railroad, who is traveling under orders to check up the accounts of an agent at a station on the road, is not acting in the course of his employment, within the meaning of the Compensation Act, in leaving the train when an injured passenger attempts to board it, even though he intends to aid in caring for the injured man if called upon to do so, so as to be entitled to compensation, if injured when attempting to re-enter the train. *Northwestern P. R. Co. v. Industrial Acci. Commission* (1917) 174 *Cal.* 297, L.R.A.1918A, 286, 163 *Pac.* 1000.

This principle frequently finds application where an employee, engaged to do one kind of work, is injured while performing labor of a more dangerous character than that which he was hired to do.

Thus, a night watchman whose duties required him to stay at a locomotive during the night, and keep the fire alive, was not acting within the scope of his employment when he took charge of a steam shovel, which duty he assumed voluntarily at the request of a fellow employee. *Sherer v. Industrial Acci. Commission* (1917) 175 *Cal.* 615, 166 *Pac.* 318.

So, an employee engaged to shovel gravel cannot recover for injuries received while driving a team, when he simply exchanged work with the teamster, at the request of the latter, who had been out in the rain and wanted to get warn by shoveling. *Modoc County v. Industrial Acci. Commission* (1917) 32 *Cal. App.* 548, 163 *Pac.* 685.

And a chambermaid in a hotel acts beyond the scope of her employment, where, in the absence of the janitor, and without the employer's knowledge, she attempts to clean up a light well, which was ordinarily the work of the janitor, and not such as a woman would be expected to undertake at all. *Williamson v. Industrial Acci. Commission* (1918) — *Cal.* —, 171 *Pac.* 797. The court said: "It would be an unwarranted extension of the statute to give it application to acts done without the knowledge or consent of the employer, which, however commendable from the viewpoint of loyalty to one's employer, are not only outside of the employee's specific employment and duty, but which are in

themselves of such a hazardous character as that the employee ought not to be reasonably expected or required to do them, except as a matter of immediate necessity or emergency, even though they might be within the scope of the employment."

So, too, the finding of the county court judge that an injury to a joiner, received while engaged in operating a planing machine, does not arise out of the employment, will be sustained, where it appeared that there were special machinists appointed to operate the planing machine and there was no evidence that men who were not machinists ever used it. *Anderson v. Armstrong* (1916) 10 *B. W. C. C. (Eng.)* 67.

But an employee does not go outside of his employment when he attempts to move beams out of a narrow passageway, through which he is obliged to pass in the performance of his duty. *Manning v. Pomerene* (1917) 101 *Neb.* 127, 162 N. W. 492.

The mistaken idea of an employee as to the scope of his employment does not enlarge the scope of his employment.

Thus, an employee in a factory, who goes upon a bridge carrying a traveling crane and is injured, cannot recover compensation, where his duties did not call him upon the bridge, and notices were posted forbidding employees to go thereon, although he did not know of the orders and believed that he had a right to go onto the bridge. *Wardle v. Enthoven & Sons* (1916) 86 *L. J. K. B. N. S. (Eng.)* 309, 116 *L. T. N. S.* 103, 33 *Times L. R.* 123, 10 *B. W. C. C.* 79.

#### **Injuries from fall caused or accompanied by abnormal mental condition.**

A fall resulting from a man's mental condition arises out of the condition, and not out of the employment. *Peterson v. Industrial Bd.* (1917) 281 *Ill.* 326, 117 N. E. 1033.

So, if the fall of an employee was not due to the employment, but was caused by her own physical or mental condition or was brought about by her exertions in her own affairs, or by any cause other than the employment, then there can be no recovery. *Hallett's Case* (1918) 230 *Mass.* 326, 119 N. E. 673.

And an employee at work upon a proper scaffold who, solely because of his predisposition to epilepsy, fell from a scaffold, receiving an injury from which death resulted, did not suffer an injury arising out of the employment, although it arose in the course of it. *Van*

*Gorder v. Packard Motorcar Co.* (1917) 195 Mich. 588, L.R.A.1917E, 522, 162 N. W. 107.

So, too, the death of an employee from a fall from a proper scaffold because of an epileptic seizure, does not arise out of his employment. *BROOKER v. INDUSTRIAL ACCI. COMMISSION*, ante, 878.

In a case in which the death of an employee followed a fall received by him, and the employer claimed that he fell while in an epileptic fit, and that his death was caused by epilepsy and not by the accident, it was held that the court properly instructed the jury that the burden of proof was upon the plaintiff to prove, by preponderance of evidence, that the deceased came to his death by reason of a personal injury, by accident arising out of and in the course of the employment, and that if he fell by reason of an epileptic seizure the verdict must be for the employer. *Madey v. Swift & Co.* (1917) 101 Kan. 771, 168 Pac. 1105.

But an employee who was required to perform his duties while standing on a pile of brick about 15 feet above the ground, and who was seized with an attack of vertigo, or some similar disorder, which caused him to fall to the frozen ground and suffer injury, may be found to be entitled to compensation, where he was in good health at the time, and no reason is given for the fall except the dizziness caused by the conditions under which the man was working. *Santa Croce v. Sag Harbor Brickworks* (1918) 182 App. Div. 442, 169 N. Y. Supp. 695.

**Employee injured while attempting to rescue fellow employee or to save employer's property.**

The earlier cases passing upon the right to compensation where the employee is injured while attempting to rescue a fellow employee, or to save the employer's property, will be found in the annotation in L.R.A.1916A, page 56, notes 21 et seq., and page 238, note 3, and the annotation in L.R.A.1917D, 126, note 51.

Ordinarily, an employee does not go out of his employment when he attempts to rescue a fellow employee from a danger which threatens him.

Thus, in *United States Fidelity & G. Co. v. Industrial Acci. Commission* (1917) 174 Cal. 616, 163 Pac. 1013, the court said that if an employee was overcome when going to the aid of another employee who had been overcome, he was engaged in the employer's business.

L.R.A.1918F.

So, an employee who is injured while attempting to rescue a fellow employee from a dangerous position, arising in the course of his employment, is within the protection of the Texas act, unless his act in attempting the rescue is in disobedience of the positive orders of his employer. *General Acci. Fire & Life Assur. Corp. v. Evans* (1918) — Tex. Civ. App. —, 201 S. W. 705. The court said that it had been held in several jurisdictions that it is the duty of every employee to undertake to prevent injury to fellow employees, and that, in such attempts, they are acting within the course of their employment.

A similar rule has been laid down in cases in which the employee was injured while in an attempt to save the employer's property from destruction.

Thus, an assistant engineer on a dredge boat, whose duties require him to remain on the boat while off duty, suffers injury arising out of his employment, where, at the time of his injury, he was off duty so far as dredging was concerned, but was attempting to save the vessel from shipwreck during a storm. *Southern Surety Co. v. Stubbs* (1917) — Tex. Civ. App. —, 199 S. W. 343.

So, in *Rzepczynski v. Manhattan Brass Co.* (1917) — App. Div. —, 165 N. Y. Supp. 1110, the appellate division unanimously affirmed an award of compensation to the dependents of a man whose ordinary occupation was screening coal, but who was injured while assisting in putting out a fire which had occurred in the plant. Commissioner Lyon, in his opinion, said: "It is probably true that there was no active duty upon the deceased to be present at or assist in the putting out of the fire; but where fire occurs in a manufacturing plant, I do not think that an employee who leaves his actual place of duty, for the time being, to assist or even be present at the attempt to quench the fire, by that act takes himself out of his employment. Surely, there are some things which an employee may do without forfeiting his right to compensation, even if his duties do not require the performance of the act; and I think it would be too harsh a rule to hold that an employee who goes to a place of a fire in the plant, by that act, takes himself out from under the protection of the statute."

**Employee injured while performing personal acts.**

"When an employee is injured through same act of his own, not an incident to



his employment, and not authorized or induced by his employer in connection with his employment, the injury does not arise out of and in the course of his employment." *Gifford v. Patterson*, (1917) 222 N. Y. 4, — A.L.R. —, 117 N. E. 946.

So, the act of an employee relating solely to his own private affairs done while off duty, and while he is neither going to nor coming from his work nor making any preparation therefor, is not service growing out of and incidental to his employment, though at the time he is subject to a call for duty, and the act was done upon the employer's premises, under the sanction of a custom. *Brien v. Wisconsin Pub. Service Co.* (1917) 166 Wis. 24, 163 N. W. 182.

And a night watchman whose duties are to watch the premises during the nighttime, and go around the building for that purpose, and to regularly punch the time clock, does not suffer injuries arising out of and in the course of his employment, where he obtains a chair, sits on the second floor of the building at an open doorway, dozes off, and falls down a chute, receiving the injuries in question. *Gifford v. Patterson* (N. Y.) supra. The court said that his injury was not received as a natural incident of his work.

So, too, there can be no recovery of compensation for the death of an employee whose duties in a building were confined to the top and ground floors, and who was injured by falling through the elevator shaft from an intermediate floor, there being no evidence at all as to why he was on such floor. *Casualty Co. v. Industrial Acci. Commission* (1917) — Cal. —, 169 Pac. 76.

Where a servant girl was engaged in mending her own dress when the bell rang, and she arose to answer it, and in some manner drove the needle into her knee, no compensation is recoverable, since the accident did not arise out of the employment. *Griffiths v. Robins* (1916) 10 B. W. C. C. (Eng.) 90.

Injury suffered by an employee while riding on a vehicle solely for his own convenience does not arise out of the employment.

Thus, an injury to a miner by an accident to the truck on which he had taken passage does not arise out of or in the course of his employment, where, when returning to his place of employment after visiting another city on business of his own, he met the truck of his employer and assisted in loading it, under the promise of pay for his services by

transportation to the mine on the truck, which would relieve him of the necessity of patronizing a public conveyance. *Bogges v. Industrial Acci. Commission*, ante, 883.

So, the act of a switchman in attempting to get onto an engine in motion, while proceeding to the time clock to register his time, was not reasonably incident to his employment, but was done purely for his own convenience, and the danger of injury therefrom was an added danger, not within the scope of his employment. *Inland Steel Co. v. Lambert* (1917) — Ind. App. —, 118 N. E. 162. The court said: "It cannot be said that the attempt to mount the locomotive was in the interest of the employer, or for the purpose of expediting the employer's work, since the employer was not interested in the speedy checking out of the appellee, but interested only in the checking out being accomplished. In our judgment, the facts do not present a situation wherein the employee negligently performed a duty, or was guilty of negligence in the performance of a duty, but rather a case wherein he attempted, unnecessarily, to do a perilous act not reasonably incident to his employment."

There are some acts, however, which, although they may be considered personal from one point of view, are nevertheless necessary for the welfare and comfort of the employee, and it is generally held that an employee does not go outside of his employment, so as to be denied compensation, if injured while performing acts of this character in the ordinary usual manner.

An employee going in the usual manner, for his pay, to a place designated by the employer, is performing a service within his employment.

Thus, an employee is not outside of his employment when, after the actual working hours for the day have ended, he forms in line with other employees, to receive his weekly pay at the office window as he passes out of the building. *Pekin Cooperage Co. v. Industrial Bd.* (1917) 277 Ill. 53, 115 N. E. 128.

So, an employee of a logging camp, which is near the town where the company's office is located, between which and the logging camp employees are furnished transportation by the company on trains used in its business, is an employee of the company when on a train going to the office for his pay, after notifying the company that he intends to lie off a few days, and receiving his time slip; and an injury received through the

management of the train grows out of his employment. *Hackley-Phelps-Bonnell Co. v. Industrial Commission* (1917) 165 Wis. 586, L.R.A.1918A, 277, 162 N. W. 921.

The procuring of food or other refreshments by an employee, although personal in character, is considered so far incidental to the employee's work that injuries received while procuring such food and refreshment may be found to arise out of and in the course of the employment, provided the employee acts in a reasonable and prudent manner, and the injuries occur while he is upon the employer's premises or is subject as an employee to the employer's control.

"Personal injuries suffered in the performance of acts within the scope of his employment, which have not been forbidden by the employer, and are found to have been necessary to the physical welfare of the employee while in the discharge of his duties, are deemed to have arisen not only in the course of but out of the employment." *Borin's Case* (1917) 227 Mass. 452, L.R.A.1918A, 217, 116 N. E. 817.

"Such acts as are necessary to the life, comfort, and convenience of the workman, while at work, though personal to himself and not technically acts of service, are incidental to the service; and an accident occurring in the performance of such acts is deemed to have arisen out of the employment." *Holland-St. Louis Sugar Co. v. Shraluka* (1917) — Ind. App. —, 116 N. E. 330. In the latter case an employee slipped on the stairs as he was going to answer a personal call on the telephone. After calling attention to the fact that the employee was employed twelve hours a day for seven days a week, without even the privilege of leaving the factory for lunch, the court said: "When a workman in a factory goes to a telephone which is maintained in the factory, to answer a call, from whatever source, it will be presumed that he is performing an act necessary to his comfort and convenience, and that such act is an incident of his employment, where the employer has established no rule to the contrary."

The English House of Lords has held in *Lancashire & Y. R. Co. v. Highley* [1917] A. C. (Eng.) 352, 86 L. J. K. B. N. S. 715, 116 L. T. N. S. 767, 33 Times L. R. 286, 61 Sol. Jo. 397, 10 B. W. C. C. 241, Ann. Cas. 1917D, 200, that an employee of a railroad, while waiting at a station for a train to carry him further down the road where he is to work, does

not go out of his employment in going to a mess room to get some hot water for his breakfast, which he has brought with him. It should be stated in this case, however, that a recovery was denied, not because the employee was not entitled to take proper steps to procure his breakfast, but because, in going to the mess room, he attempted to pass under the trucks of a train instead of going around them, as he could easily have done.

Where a door tender of a cooling room, together with other employees, was in the habit of keeping bottles of water, tea, and coffee in the cooling room, for drinking purposes, which habit was known to the superintendent of the plant, injuries to the door tender from drinking the contents of a bottle of muriatic acid, which had been placed with other bottles of liquid in the cooling room by other employees, may be found to arise out of and in the course of the employment. *Osterbrink's Case* (1918) 229 Mass. 407, 118 N. E. 657. The court said: "The placing of bottles of coffee or tea in the cooler had the sanction and approval of the subscriber. There is no evidence that it disapproved the cooling of water in bottles in the refrigerator, and it would be a natural and reasonable expectation that employees would place water in bottles in the cooler in summertime to relieve the thirst of the employees, or to be drunk by them with their meals, in preference to drinking water from the end of a rubber tube, or from a bubble fountain after going to the floor below."

An employee may be found to be performing service "growing out of and incidental to his employment," where he was seated on a large piece of rubber in a room in the factory, at the noon hour, eating his lunch in accordance with the long-established custom known by and tacitly consented to by his employer, when a pile of crude rubber near him unexpectedly fell on him, breaking his leg. *Racine Rubber Co. v. Industrial Commission* (1917) 165 Wis. 600, 162 N. W. 664.

But the employer cannot be held liable for compensation for injuries occurring to an employee during the lunch hour, where the employee goes to a part of the building over which the employer has no control.

Thus, an employee of a contractor engaged to do repair work upon the first and second floors of a building cannot be held to be an employee so as to be entitled to compensation for injuries re-

ceived during the noon hour, when, after he had left the building for lunch, he returned and was passing away the remainder of the noon hour in the boiler room, and was injured by the explosion of the boiler. *Manor v. Pennington* (1917) 180 App. Div. 130, 167 N. Y. Supp. 424.

That the injury occurred while the employee was indulging or preparing to indulge in smoking does not necessarily render the Compensation Act inapplicable.

Thus, the fact that the accident resulted from the employee striking a match for the purpose of enabling him to smoke is not sufficient to debar him and his dependents from the benefits of the Pennsylvania statute, where he was out of doors at the time, during an interval of work, and the smoking did not interfere with his duties. *DZIKOWSKA v. SUPERIOR STEEL CO.* ante, 888.

See also *M'Lauchlan v. Anderson* [1911] S. C. 529, 48 Scot. L. R. 349, 40 W. C. C. 376, cited in the annotation in L.R.A.1916A, 59, note 31, where it was held that a workman, sitting on a wagon drawn by a traction engine, was entitled to compensation for injuries received when he fell from the wagon in an attempt to recover his pipe, which he had dropped.

But an employee of a tinner who, while riding on a conveyance of the employer from the place of business to the place where work was being carried on, leaves the wagon to go to a drug store to purchase tobacco for his own use, and is struck and instantly killed by a passing automobile, does not suffer injury arising out of and in the course of the employment. *Re Betts* (1918) — Ind. App. —, 118 N. E. 551. The court said: "Of course, it cannot be said that Betts, while on an errand for himself, was doing any service required by his employment, and we are unable to see wherein his employment exposed him to the hazard or danger which resulted in his death. To illustrate our meaning, if the employment of the injured party had been of the kind to take him on a roof, and in going for his tobacco he had slipped, or for any other cause had fallen from the roof and been injured, we can see a connection between the employment and the injury, in that his employment placed him where the hazard of indulging in his tobacco was increased. In the instant case the employment did not keep deceased on the street as a pedestrian. If it could be said to expose him to any dangers of the

street, other than that to which the public generally are exposed, it was the danger of traveling in a vehicle to and from his work. In other words, as a pedestrian on the street going for his tobacco, his employment exposed him to no danger that would not have been incurred by any other pedestrian on a like errand, nor was he exposed to any hazard different from or in excess of the hazard to which he would have been exposed when on such errand, though he had not been engaged in the employment indicated."

#### **Injuries received while employee is going to or from work.**

The earlier cases passing upon recovery of compensation for injuries to employees while going to and from their work will be found in the annotation in L.R.A.1916A, page 60, notes 35 et seq., and page 235, notes 85 et seq., and in the annotation in L.R.A.1917D, 119, note 19.

Ordinarily, compensation is not recoverable, where an employee is injured while going to or from his work.

Thus, a repairer of musical instruments, who slips on the ice and is injured while going to his work, cannot be held to be injured in the course of his employment, nor does the injury arise out of his employment. *INDUSTRIAL COMMISSION v. ANDERSON*, ante, 885.

So, a janitor in an office building, who was killed by coming in contact with an electric wire just as he was leaving his home to go to work, was not "in the course of his employment," merely because he was carrying a basket of laundry for his wife, who conducted a restaurant in the defendant's office building, in which the janitor served. *Murphy v. Ludlum Steel Co.* (1918) 182 App. Div. 139, 169 N. Y. Supp. 781.

But in a number of cases the doctrine is laid down that, if an employee, in going to or from his work, is injured while he is on the employer's premises, such an injury may be found to arise out of the employment.

"Ordinarily, the employment of an employee, leaving his work at mealtime and passing through and over the premises of his employer by a course usually taken, is deemed to be continued until he leaves the premises of the employer." *Bylow v. St. Regis Paper Co.* (1917) 179 App. Div. 555, 166 N. Y. Supp. 874.

So, an employee may be found to have received personal injury arising out of and in the course of the employment, where he received the injury while

leaving the building in which he was employed, by means of an outside staircase, and there was a reasonable probability that some employee, in the course of his employment, would fall and receive an injury while descending a stairway constructed and used as the stairway was in the case at bar. *Re O'Brien* (1917) 228 *Mass.* 380, 117 *N. E.* 619.

And one employed on a boat, who, according to his instructions, reported at the boat at about 5 o'clock, but was told that the boat would not sail till 11 o'clock, and that he might go on shore until such time, may be found to have been injured by accident arising out of and in the course of his employment, where he was injured at about 10 o'clock while on his way back to the boat, and making his way through the master's premises. *Carter v. Rowe* (1917) 92 *Conn.* 82, 101 *Atl.* 491.

So, it may be found that an employee is injured by accident arising out of the employment, where the injury occurred as he was leaving the building in which he was employed after his day's work had been done. *Hoffman v. Knisely Bros.* (1916) 199 *Ill. App.* 530. The court based its decision upon the proposition that it is a necessary implication of a contract of employment that the workman shall come to his work and shall leave with reasonable speed when the work is over.

A fence builder on a railroad suffers injury arising out of and in the course of his employment, where the foreman had called at his home and told him to go to work, as he had not intended to do because of the inclement weather, and, instead of going to the substation and waiting an hour or an hour and a half for an electric car, he, with the knowledge and acquiescence of the foreman, started to walk along the track to the place of work, and his pay ordinarily began from the time he reported to the substation for orders, and he was killed while yet on his way to work. *Porritt v. Detroit United R. Co.* (1917) — *Mich.* —, 165 *N. W.* 674.

But the rule that if the employee is injured in going to or returning from his work upon the master's premises or on premises available for the purpose, or if, during intervals of leisure which occur in the course of his employment, he is injured, he may still be found within the scope of his employment and entitled to compensation, does not apply, where the servant leaves the sphere of his employment for some purpose of his own, entirely disconnected with and not

in any way incidental to the employment. *O'Toole's Case* (1917) 229 *Mass.* 165, 118 *N. E.* 303.

And where a workman lived in a house rented of the employer, from which, to get to the plant, he must go out on a public street, he is not, while within his own dooryard, though on his way to work, "upon the premises of the employer," so as to be within the rule that workmen on the way to and from the plant, although not actually working, but about to work or having just worked, if "upon the premises," are protected. *Murphy v. Ludlum Steel Co.* (1918) 182 *App. Div.* 139, 169 *N. Y. Supp.* 781.

A yard engine man who had turned in his engine, having completed his work, and also turned in his slip showing that his run had been completed, and who, instead of leaving the tracks by means of highways to go to his home, walked along the track for a distance of a thousand feet, crossed another street, and onto the track on the other side of the last-mentioned street, and was there struck and killed by a passing freight train, is not injured by accident arising out of and in the course of the employment, since he had no authority from his employer to be at the place where the accident occurred, and was not at that place on any business in behalf of his employer, but was there for purposes of his own. *Ames v. New York C. R. Co.* (1917) 178 *App. Div.* 324, 165 *N. Y. Supp.* 84.

An injury received by an employee while riding, in pursuance with his contract of employment, to or from his work in a conveyance furnished by his employer, is one which arises in the course of and out of the employment. *Swanson v. Latham* (1917) 92 *Conn.* 87, 101 *Atl.* 492.

So, an employee who was injured while riding on an auto truck from the station, to which he had come on train, to the place of work, is entitled to compensation, where the truck was furnished by the employer for that express purpose. *Littler v. George. A. Fuller Co.* (1918) 223 *N. Y.* 369, 119 *N. E.* 554.

Under the Wisconsin statute, an employee is entitled to compensation for injuries received while upon the master's premises, in going to and from his employment "in the ordinary and usual way."

But an employee cannot be said to come from his employment "in the ordinary and usual way," where he at-

tempted to catch a ride upon cars being switched out from the yard in which he was at work, where it appears, without dispute, that the workman had left the premises in that way only two times in fourteen years of employment. *Foster-Latimer Lumber Co. v. Industrial Commission* (1918) — *Wis.* —, 167 N. W. 453.

The House of Lords has laid down the rule that a sailor on a vessel, who goes on shore, although for purposes of his own, may be held to have suffered injury arising out of and in the course of his employment, if he suffers such injury while on the gangway or other means of access expressly provided by the owners of the vessel, for boarding or leaving it, and the fact that the seaman may have gone upon shore for purposes of his own is immaterial.

If, however, the injury occur before the sailor reaches the gangway or private means of access to the vessel, then it cannot be said that the injury arises out of the employment, in cases in which he has gone upon shore for purposes of his own.

Thus, it has been held that the chief engineer of a ship lying in a public harbor, which had been taken over temporarily by the Admiralty and was closed to the public, and to which access was granted only by an Admiralty pass, who was drowned upon returning to the ship after dark, where he had been ashore on leave for purposes of his own, does not suffer injuries arising out of the employment, and the control of the Admiralty did not make the quay the provided access to the ship. *Davidson v. M'Robb* [1918] A. C. (Eng.) 304. Lord Dunedin, said: "It follows that, in my view, the mere fact in the present case that the man was under engagement as an engineer at the time that the accident happened is not enough to entail the consequence that the accident happened in the course of his employment. None the less, it may be that he was in the course of his employment. As the course of his employment was interrupted when he left the ship for his own purposes, so it would be resumed when he returned to the ship. If, therefore, the place at which the accident happened was, in any fair sense, the access to the ship, then the accident would be in the course of his employment. Now, admittedly, it was not shown that he was on the gangway or on anything that served as a gangway. The only ground for holding that

he was within what might be termed the access to the ship lies in the fact that he was in the harbor, and that the harbor on the occasion was not open to the public. I cannot think that the action of the military authorities, in drawing a cordon around certain places, turns what is a public place into an access to the ship."

In *John Stewart & Son v. Longhurst* [1917] A. C. 249, 86 L. J. K. B. N. S. 729, 116 L. T. N. S. 763, 33 Times L. R. 285, 61 Sol. Jo. 414, 10 B. W. C. C. 266, Ann. Cas. 1917D, 196, it was held that a workman on a mine-sweeping barge in a dock, who fell into the water and was drowned while crossing the dock on his way from his work, suffered an injury arising in the course of as well as out of the employment, where the dock was not open to the public, but the man's employer had obtained permission from those in control for the workmen to pass through in going to and from their work. In this case, the court considered that the dock in question was, under all of the circumstances of the case, the means of access to the barge which had been furnished by the employer.

#### **Injuries occurring before or after actual employment, or when employee is not actively engaged.**

The earlier cases on recovery of compensation for injuries received before or after the actual working hours, or where the employee was not actively engaged in work at the time, will be found in the annotation in L.R.A.1916A, 57, notes 24 et seq., and 235, notes 85 et seq., and in the annotation in L.R.A. 1917D, 118, notes 14 et seq.

A reasonable time must be allowed before and after the time when the earning of wages begins and ends, and be included within the period of employment, where the employee is at a place where he might reasonably be expected to be at such time, and is injured in the course of the duties of his employment.

Thus, in *John Stewart & Son v. Longhurst* [1917] A. C. 249, Ann. Cas. 1917D, 196, Lord Finlay, Ld. Ch. said: "It has been established by a series of decisions that employment, for the purposes of the Workmen's Compensation Act, may, in many cases, be regarded as existing before the actual operations of the workman have begun, and that it may continue to exist after the actual work has ceased; for instance, if a workman is employed in a factory, the employment

normally would begin as soon as the workman has entered the premises for the purpose of his work, and continue until he leaves them after the actual work is done."

So, an injury to a switchman, occurring after his active duties have ceased and he is on his way to the clock to register his time on leaving the premises, arises in the course of his employment. *Inland Steel Co. v. Lambert* (1917) — *Ind. App.* —, 118 N. E. 162.

And a locomotive fireman whose duty, among other things, was to see that his engine was properly equipped for service, may be found to suffer injury arising out of the employment, where he went about two hours before his regular time onto his engine, having put on his working clothes, and some time thereafter was found dead, his hands being greasy, both inside and out, and his face having grease upon it. *Meyers v. Michigan C. R. Co.* (1917) — *Mich.* —, 165 N. W. 703.

A miner is within the protection of the Compensation Act, where, after his hours of labor have expired, he revisits the mine in order to make sure that there is no danger to the incoming shift from an unexploded charge, his act in revisiting the mine being in accordance with the custom prevalent at the mine. *Atolia Min. Co. v. Industrial Acci. Commission* (1917) 175 *Cal.* 691, 167 *Pac.* 148.

A cigar packer who works by the piece, and who occasionally delivers cigars for his employer, suffers injury by accident arising out of the employment, when he falls down a stairway upon attempting, at the request of the employer, to deliver some cigars, notwithstanding the injury took place after the hours of work were over, and after he had left the building and had returned thereto, upon seeing a light in the building as he was passing later in the evening. *Grieb v. Hammerle* (1918) 222 N. Y. 382, — A. L. R. —, 118 N. E. 805.

Injuries received by an employee while washing his hands or changing his clothes on the master's premises, after his day's work has been done, may be found to arise out of and in the course of the employment, where the character of the work which the employee had been doing was such as to render such acts necessary.

Thus, an employee who, upon finishing an assigned task of inspecting a tunnel under construction, was covered with dirt and filth, and was injured while taking a bath before proceeding

to other work in the company's offices, suffered injury arising out of the employment. *Sexton v. Public Service Commission* (1917) 180 *App. Div.* 111, 167 N. Y. Supp. 493.

So, where employees had been in the habit of heating a piece of iron and putting it into a pail of water to heat water for washing purposes at the close of the day's work, and this was done with the knowledge and acquiescence of the employer, and the employee, on an occasion when the furnaces had gone out, went into another department where he believed there was a vat containing hot water, which, however, contained an acid, which caused an explosion when he put a pail of cold water into it, may be found to have suffered injury by accident arising out of the employment. *Re Ayers* (1918) — *Ind. App.* —, 118 N. E. 386.

The court said: "A workman who receives an injury while at a place on or reasonably near the premises where he is to work, or at a place where his employment requires him to go while doing something incident to or connected with his employment, or which is reasonably necessary for and preparatory to the beginning of his work, or while doing something reasonably connected with his employment, or incident thereto, after his actual labors in his employment are completed for the day or for any particular period, may be allowed compensation for such injury."

The court further said: "Where an employee is injured while on duty or while doing something incident to his employment and reasonably necessary to his personal health or comfort, though not strictly necessary to his employment, such injury will ordinarily be held to arise out of the employment."

The fact that an employee was not actively engaged in his work at the time of the injury does not necessarily prevent an award of compensation; it may still be found that the injuries arose out of and in the course of the employment.

Thus in *Holland-St. Louis Sugar Co. v. Shraluka* (1917) — *Ind. App.* —, 116 N. E. 330, an award of compensation was sustained for injuries received by an employee while he was answering a personal call upon the telephone, it appearing from all the evidence that he was justified in using the telephone during his employment, and that he had gone to the telephone upon the direction of a superior employee.

So, the fact that an employee in a

shipping room, engaged in loading material onto cars, was injured at a time when he was not at work, but was waiting for more material to come to be loaded, does not prevent him from securing compensation under the Pennsylvania act. *DZIKOWSKA v. SUPERIOR STEEL Co. (Pa.)* ante, 888.

So, too, an employee of a warehouse, engaged in delivering furniture to customers of the owner of the warehouse, suffers injury by accident arising out of the employment, although, at the time of the injury, he was on his way home from his last delivery and his hours of employment for that day had expired. *Friebel v. Chicago City R. Co. (1917)* 280 Ill. 76, 117 N. E. 467.

And where a carpenter employed as a railroad car repairer, while returning along the most practical route to his work shed, after taking measurements on the car for which he was preparing a piece of timber, was knocked down and injured by a swinging door of a car on the adjoining track going against him as he was passing, the injuries arose out of his employment. Taking the measurements was as much working on the car as the nailing of a plank on it would have been. *Myers v. Louisiana R. & Nav. Co. (1917)* 140 La. 937, 74 So. 256.

An employee may be found to be within the protection of the statute, although at the time of the injury he was not actively engaged in work, but was sitting on a keg and fell asleep near a boiler, and shortly afterwards discovered his clothing on fire, where he was at the place where his duty called him to be, was obliged to wait for an elevator until other people had ceased using it, had been working hard out in the cold for several hours, and the falling asleep came as the natural effect of drowsiness from being in a warm place after having been exposed to the cold. *Richards v. Indianapolis Abattoir Co. (1917)* 92 Conn. 274, 102 Atl. 604.

An employee engaged in loading bricks onto a wagon and unloading them at another place does not go outside of his employment, when, after the bricks have been unloaded, he gets onto the wagon to ride to the place where another load is to be loaded. *Horn v. Arnett (1917)* — N. J. —, 102 Atl. 366.

A workman engaged in unloading stone from a car, who was struck by a train while crossing the tracks to get his overalls and tools from a car in which he had left them the night before, suffers injury by accident arising out

of and in the course of his employment. *Alexander v. Industrial Bd. (1917)* 281 Ill. 201, 117 N. E. 1040.

The securing of fresh air has been held to be incidental to the work of an employee. *Borin's Case (1917)* 227 Mass. 452, L.R.A.1918A, 217, 116 N. E. 817. In this case, however, a recovery was denied because the employee sought to procure the air in a way wholly unwarranted, and directly in violation of the regulation of the employer.

An employee of a city, engaged to spread crushed stone on the street, is not entitled to compensation for injuries received after he had quit work and was sitting on the steam roller, talking to the engineer about purely personal matters, and the roller, through some defect, crossed the sidewalk, and the employee was caught between the wheels of the roller and the piazza of a house. *O'Toole's Case (1917)* 229 Mass. 165, 118 N. E. 303.

#### **Injuries to employees while on the street in the course of their employment.**

In the annotation in L.R.A.1917D, 114, 115, it is stated that, where the employment required the workman to be on the street continually, it has been held that he is peculiarly subject to the hazards of the street, and is not outside of the protection of the act, merely because the public generally is exposed to the same risks; but, ordinarily, where an accident occurs upon the street or in some other public place, from causes to which all persons on the street or in such public place are subject, and the employee's presence there is a mere incident to his employment, recovery is denied by the great majority of the courts. This statement is sustained by the cases cited in the annotation referred to, and also by the earlier cases gathered in an annotation attached to *Hopkins v. Michigan Sugar Co. L.R.A. 1916A, 310.*

There seems, however, to be a decided tendency, among the later cases, to permit the recovery of compensation for injuries received by an employee while on the street in the course of his employment, although the employment may not require his presence on the street continually, but only occasionally, or even upon the one occasion on which he was injured, and the members of the public generally were subjected to the same dangers.

Thus, in *Dennis v. White [1917]* A. C. (Eng.) 479, Ann. Cas. 1917E, 325, it

was held that a boy who was injured while riding a bicycle in the course of his employment, and by the orders of his employer, was entitled to compensation, since the risk of collision under some circumstances is incidental to the use of a bicycle, and is a risk inherent in the nature of the employment, and consequently arises out of the employment. Lord Finlay, *Ld. Ch.* said: "It is quite immaterial that the risk was one which was shared by all members of the public who used bicycles for such a purpose. Such as it was, it was a risk to which the appellant was exposed in carrying out the orders of his employer."

The Lord Chancellor further said: "If a servant in the course of his master's business has to pass along the public streets, whether it be on foot or on a bicycle, or on an omnibus or car, and he sustains an accident by reason of the risks incidental to the streets, the accident arises out of as well as in the course of his employment. The frequency or infrequency of the occasions on which the risk is incurred has nothing to do with the question whether an accident resulting from that risk arose out of the employment. The use of the streets by the workman merely to get to or from his work, of course, stands on a different footing altogether; but, as soon as it is established that the work itself involves exposure to the perils of the street, the workman can recover for any injury so occasioned."

Further in the opinion, the following language occurs: "Where the risk is one shared by all men whether in or out of employment, in order to show that the accident arose out of the employment it must be established that special exposure to it is involved. But when a workman is sent into the street on his master's business, whether it be occasionally or habitually, his employment necessarily involves the exposure to the risks of the streets and injury from such a cause arises out of the employment. There is nothing in the act about any necessity for showing that the employment involves an extra or special risk, and once it is clear, as it is in the present case, that the accident was the result of a risk necessarily incidental to the performance of the servant's work, all inquiry as to the frequency or magnitude of the risk is irrelevant. It is quite immaterial whether the nature of the employment involves continuous or only occasional exposure to the dangers of the street. The frequency of the exposure to a risk increases the chance of the

occurrence of an accident, but it has no bearing on the question whether it arose out of the employment, which is settled by the fact that such exposure was one of its terms, whether on many occasions or on one."

A bookkeeper and clerk, who is injured while returning from crossing the street to mail a letter for his employer, in accordance with his custom and in the course of his duty, suffers injury by accident arising out of the employment. *Globe Indemnity Co. v. Industrial Acci. Commission* (1918) — *Cal. App.* —, 171 *Pac.* 1088. The court said: "The condition under which the work here was required to be performed, took Roberts [the employee] upon the street. He was subjected to the perils of the street in the course of such employment, in exactly the same manner as that in which a factory hand is subjected to the dangers of the factory, while in the course of his employment. There is a direct causal connection here between the fact that the man was on the street and the fact that he was injured. The accident was a natural accident of his work, resulting from the exposure occasioned by the necessity of his going upon the street while performing such work. He was not exposed to this danger on the street 'apart from his employment.' The causative danger was peculiar to the work. In that, had he not been upon the street in the course of his duty, he would not have been injured."

So, too, in *MUELLER CONSTR. CO. v. INDUSTRIAL BD.* ante, 891, the court states that it is undoubtedly true that the danger of injury would be greater if the nature of the employment required the employee to cross the street a number of times a day, but in such a case the danger or liability would be one of degree only.

An injury to an employee who worked sometimes in a building on one side of the street, and sometimes in a building upon the other side, which injury occurred by slipping and falling on the ice in passing from one building to the other, arises out of the employment. *Redner v. H. C. Faber & Son* (1917) 180 *App. Div.* 127, 167 *N. Y. Supp.* 242, affirmed in (1918) 223 *N. Y.* 379, 119 *N. E.* 842. The court said: "It was as necessary for the decedent to cross this highway in doing the work appointed as it was for him to cross the room in which he was employed in the factory, and the liability would clearly extend to him if injured in either case, while actually employed." In answer to the



contention that an injury received by slipping on the sidewalk or street in passing from one building to another in the course of his employment did not arise out of a hazardous occupation, the court said: "While it may be true that the Workman's Compensation Law was primarily designed to compensate for the real tragedies inherently involved in the so-called hazardous occupations, our courts have gone too far in sustaining these awards to now hold that only such accidents are covered as arise out of a special hazard of the business. If the general scope of the business in which the injured party is employed, so that he is subjected to the risks incident to such business, is within the statute, then the protection is extended to him throughout the course of such employment, even though the particular accident was not such as to come within the major employment; and whether such an injury occurs in the street in front of the employer's premises, made use of for such employment, or in the factory building itself, can make no difference in the application of the law."

Where the employee is required to travel and visit different places in order that he may discharge the duties of his employment, his place of work is thereby enlarged or extended to include all the places to which he necessarily goes in discharging the duties of his employment.

Thus, in *Re Harraden* (1917) — Ind. App. —, 118 N. E. 142, in holding that an insurance agent suffers an injury arising out of his employment, when he slips on an icy sidewalk in going from the station to a hotel, in a town to which the insurance company had sent him, the Indiana court said: "In the case at bar the duties of the employee required him to visit towns and cities at a considerable distance from the home office, without regard to conditions of the weather. The localities to which he was sent in the discharge of the duties of his employment constituted the place or places in which he was required to work. By reason of his employment he was at the place where he was injured. He was where his employment took him, and the hazard of the icy street was incidental to such employment. This proposition is not changed by the fact that the public, generally, in that vicinity, was exposed to the hazards of the icy street. The facts show that Harraden's employment exposed him to increased hazards, generally, among which was the one which caused his injury. The admitted

facts compel the inference that the injury of Harraden resulted from conditions produced by the weather, and likewise because he was in the particular locality at the time in question. The latter fact is due to his employment. The facts admit of no other inference but that for his employment, he would not have been in that locality at the time of his injury. His employment was, therefore, a contributing proximate cause of his injury. By reason of it, he was exposed to a hazard which, in all reasonable probability, he would not otherwise have encountered. The work he was employed to do required travel and made him particularly subject to hazards, to an extent far greater than like hazards encountered by the general public."

So, a millwright whose duties were to assist in the manufacture and assembling of machinery, and who, whenever his employer secured a contract for the installation of machinery in any particular place, was required to go to that place for the purpose of installing it, is entitled to compensation for injuries received while so proceeding to a place to install machinery. *London & L. Indemnity Co. v. Industrial Acci. Commission* (1917) — Cal. App. —, 170 Pac. 1074. After stating that the general rule was that ordinarily the statute does not apply to injuries to employees while on the street, from risks to which all the public are likewise subjected, the court said: "The exceptional cases are those wherein the employment itself is one in which the employee is required to travel from place to place at the will of the employer, and hence where the risks of such travel are directly incident to the employment itself, and hence wherein the accident occurring by reason of such risks is one arising out of the employment, and therefore a proper subject of compensation under the Employers' Liability Act."

The Massachusetts court had held, however, that a traveling salesman, who, after completing his business with a customer in a town away from the employer's place of business, slipped on the ice and received an injury while on his way to an electric car to go to another place where he was to transact business, does not suffer an injury arising out of the employment, since the risk of slipping upon the icy pavement was common to the public who had occasion to pass over it on foot. *Donahue's Case* (1917) 226 Mass. 595, L.R.A.1918A, 215, 116 N. E. 226, 14 N. C. C. A. 491. The

court said: "An injury arises out of the employment when there is a causal connection between the conditions under which the work is to be performed and the resulting injury. An injury cannot be found to have arisen out of the employment unless the employment was a distributing proximate cause. If the risk of injury to the employee was one to which he would have been equally exposed apart from his employment, then the injury does not arise out of it."

This seems to be an extreme decision. It is to be noted that the place where the employee received his injury was not the place of the employee's business nor in the vicinity of his own home. He was required to be in this place solely because of the employment, and the evidence showed that the sidewalks were very slippery from the ice and he was obliged to walk in the street because of the condition of the sidewalks. It would appear that the decisions of the Indiana and California courts are more reasonable in their construction of the acts.

Two other cases holding that injuries to employees while on the street are not compensable are to be noted, but these cases are distinguishable on these facts.

Where a moving picture company's plant occupied the four corners of intersecting streets in a city, and the two thoroughfares were constantly being used by officers and employees of the company in passing between portions of the plant, and an employee whose services were not immediately needed, but who was required by the rules to remain at the plant of the company, was standing in the street talking with other employees on matters purely social and relating to the private affairs of the participants, he is not entitled to compensation for injuries caused by being struck by an automobile of one of the directors since the accident did not arise out of the employment. *Balboa Amusement Producing Co. v. Industrial Acci. Commission* (1918) — *Cal. App.* —, 171 *Pac.* 108.

In *Bevard v. Skidmore-Patterson Coal Co.* (1917) — *Kan.* —, 165 *Pac.* 657, it was held that a mine employee who was injured while crossing an interurban railway in going from one mine to another did not suffer injury arising out of and in the course of the employment, since the risk was one common to all persons crossing the tracks, and was not incidental to his employment. The decision in the case, however, turned upon another point.

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### **Injuries received while employee is violating the orders of the employer.**

The earlier cases discussing the right to compensation, where the employee was injured while disobeying the orders of the employer, will be found in the annotation in L.R.A.1916A, page 52, notes 10 et seq., and page 238, note 7, and in the annotation in L.R.A.1917D, 121, note 30.

The mere fact that an employee was injured while disobeying the orders of the employer is not sufficient to deprive him of the benefits of the acts; if he was honestly endeavoring to further the business of the employer, compensation may still be recovered.

Thus, an operator of a power press who, contrary to instructions, attempted to remove small pieces of steel which had been caught in the die of the press, and suffered an injury to his hand because thereof, may be found to have suffered injury arising out of and in the course of the employment. *Macechko v. Bowen Mfg. Co.* (1917) 179 *App. Div.* 573, 166 *N. Y. Supp.* 822. The court said: "The accident did not occur by reason of claimant having abrogated to himself duties which he was not required to perform. The removal of a piece or pieces of steel was embraced in and was a necessary incident of his work. The act which he did was no different in kind from that which he was employed to do, but he did it in a prohibitive and, very likely, thoughtless and impulsive manner."

And an employee at a buffing machine who was injured while taking an article from the exhaust pipe connected with the machine, which he had been forbidden to do, does not suffer injury by accident arising out of the employment. *Eugene Dietzen Co. v. Industrial Bd.* (1917) 279 *Ill.* 11, 116 *N. E.* 684, *Ann. Cas.* 1918B, 764, 14 *N. C. C. A.* 125.

So, the disobedience by a household servant of orders relative to the use of kerosene and similar substances for lighting fires will not prevent a recovery of compensation for injuries received from starting the fire with wood alcohol: the disobedience of orders was a disobedience as to the way in which the work should be done, such work being the very work the employee was expected to do, and done at the very place where it was intended to be done. *Kolaszynski v. Klie* (1917) — *N. J. L.* —, 102 *Atl.* 5.

But if the disobedience of orders pertains to something entirely outside of the business of the employee, and his acts

are not performed in an attempt to further the employer's business, then there can be no recovery. It would appear, however, that the decision in these cases is based upon the ground that the employee's acts took him entirely outside of the employment, and not upon the mere fact that he violated the orders of the employer.

Thus, there can be no recovery for the death of an employee in the boiler room of an electric plant, where he went into the transformer room, where he had no business and where he had been forbidden to go, and was killed by coming in contact with a high tension wire. *Northern Illinois Light & Traction Co. v. Industrial Bd.* (1917) 279 Ill. 565, 117 N. E. 95.

And there can be no recovery of compensation for the death of an employee who was killed while returning from his work to spend Sunday in a city, contrary to the orders received from the employer. *International Harvester Co. v. Industrial Bd.* (1918) 282 Ill. 489, 118 N. E. 711.

So, an injury to a workman in a dye-house, in attempting to crawl over dye tubs, to open, for securing fresh air, windows which the master had nailed down for the purpose of preventing such act by employees, does not arise out of his employment. *Borin's Case* (1917) 227 Mass. 452, L.R.A.1918A, 217, 116 N. E. 817.

#### **Injuries received while obeying the direct command of the employer.**

The earlier cases upon the recovery of compensation where the employee was injured while obeying a direct command of the employer will be found in the annotation in L.R.A.1916A, page 62, notes 43 et seq., and page 239, note 12.

An employee who is injured while carrying out the direct and express commands of his employer suffers injury arising out of and in the course of the employment. *Nevich v. Delaware, L. & W. R. Co.* (1917) 90 N. J. L. 228, L.R.A. 1917E, 847, 100 Atl. 234.

So, the night superintendent of a mill may be found to have been injured while in the course of his employment when the injury occurred while he was engaged in building a barn for the employer, and the testimony showed that he was working under the orders and control of the employer, and for his benefit, at the time of the injury. *Southwestern Surety Ins. Co. v. Curtis* (1918) — *Tex. Civ. App.* —, 200 S. W. 1162.

So, injuries to an employee may be found to have arisen out of and in the

course of the employment, where they were received while he was going to answer a call upon the telephone, having been told by his superior that he was wanted at the telephone. *Holland-St. Louis Sugar Co. v. Shraluka* (1917) — *Ind. App.* —, 116 N. E. 330.

#### **Incapacity due to failure to receive proper care after injury.**

An employee cannot recover, under the Alaska act, for the employer's neglect to furnish him timely and sufficient surgical care and medical and hospital care, since injury due to such neglect does not arise out of and in the course of the employment. *Ellamar Min. Co. v. Possus* (1918) — *C. C. A.* —, 247 Fed. 420.

In a case in which there was an admitted accident arising out of the employment, but it was claimed by the employer that the man's incapacity was due to improper treatment at the hospital and not to the accident, the burden of proof is upon the employer to sustain his contention. *Bower v. Meggitt* (1916) 10 B. W. C. C. (Eng.) 146.

#### **Conclusiveness of finding and sufficiency of evidence.**

Whether or not the injury arose out of and in the course of the employment is a question of fact, and if there is any evidence offered before the arbitrator or administrative board, fairly tending to prove that it did so arise, the award of compensation must be affirmed by the court. *Chicago Packing Co. v. Industrial Bd.* (1918) 282 Ill. 497, 118 N. E. 727; *Wood Street Planing Mill Co. v. Industrial Commission* (1916) 203 Ill. App. 431; *Murphy's Case* (1918) — *Mass.* —, 119 N. E. 657; *Walsh v. F. W. Woolworth Co.* (1917) 180 App. Div. 120, 167 N. Y. Supp. 394.

The finding of the industrial accident board that the death of an employee resulted from an injury arising out of and in the course of his employment is analogous to the verdict of the jury, and the finding is conclusive if it has a substantial support in the evidence. *Re Uzzio* (1917) 228 Mass. 331, 117 N. E. 349.

Although the inference that the accident was the result of a risk reasonably incident to the employment, and therefore arose out of it, was not the only inference which might be drawn from the evidence, the court will uphold the award based on such inference, where it was a very reasonable one and had been adopted by the industrial board. *Poler Ice & Fuel Co. v. Mulray* (1918) — *Ind. App.* —, 119 N. E. 149.

The finding by the commission that the accident arose out of the employment should be sustained, where there is some evidence to sustain it, and there was no substantial evidence offered to overcome the presumption that the death was the result of an accident. *Fogarty v. National Biscuit Co.* (1917) 221 N. Y. 20, 116 N. E. 346.

But whether there is any evidence in the record which fairly tends to establish the fact that the accident arose out of and in the course of the employment is a question of law, for the determination of the court. *Northern Illinois Light & Traction Co. v. Industrial Bd.* (1917) 279 Ill. 565, 117 N. E. 95.

And in *Elk Grove Union High School Dist. v. Industrial Acci. Commission* (1917) 34 Cal. App. 589, 168 Pac. 392, the court said that the question whether the accident causing the injury complained of arose out of and in the course of the employment involved jurisdictional facts, reviewable by the court.

The burden of proving that the injury for which compensation is asked was suffered in the course of the employment and grows out of it is upon the claimant. *John A. Roebling's Sons Co. v. Industrial Acci. Commission* (1918) — Cal. App. —, 171 Pac. 987; *Ohio Bldg. Safety Vault Co. v. Industrial Bd.* (1917) 277 Ill. 96, 115 N. E. 149; *Albaugh-Dover Co. v. Industrial Bd.* (1917) 278 Ill. 179, 115 N. E. 834; *Peoria R. Terminal Co. v. Industrial Bd.* (1917) 279 Ill. 352, 116 N. E. 651; *Northern Illinois Light & Traction Co. v. Industrial Bd.* (1917) 279 Ill. 565, 117 N. E. 95; *Griffith v. Cole* (Iowa) post, 923; *Hallett's Case* (1918) 230 Mass. 326, 119 N. E. 673; *Draper v. University of Michigan* (1917) 195 Mich. 449, 161 N. W. 956.

The burden is upon the claimant to furnish the evidence from which the inference can be reasonably drawn that the injuries arose out of and in the course of the employment. *Sugar Valley Coal Co. v. Drake* (1917) — Ind. App. —, 117 N. E. 937; *Union Sanitary Mfg. Co. v. Davis* (1917) — Ind. App. —, 115 N. E. 676; *Inland Steel Co. v. Lambert* (1917) — Ind. App. —, 118 N. E. 162.

The burden of proof on the employee, to show that the injury arose out of the employment, is not discharged by creating an equipoise; there must be a preponderance. *Griffith v. Cole* (Iowa), post, 923.

Proof that the injury arose out of and in the course of the employment must be based upon something more than a mere

guess, conjecture, or surmise. *Peoria R. Terminal Co. v. Industrial Bd.* (1917) 279 Ill. 352, 116 N. E. 651.

So, a finding of the industrial accident board, to the effect that the accident arose out of the employment, must be reversed, where it is entirely unwarranted by any testimony and unsupported by any rational inference. *Re Dube* (1917) 226 Mass. 234, 116 N. E. 234.

And the industrial accident board cannot infer, in the absence of any testimony, that a belt suddenly left the pulley and lashed against the employee as he passed in the course of his employment. *Ibid.*

But it is not essential that the employee prove the precise cause which produced the injury. *Bean's Case* (1917) 227 Mass. 558, 116 N. E. 826.

So, a workman who is injured by accident arising out of and in the course of the performance of his labor is entitled to compensation, although he cannot explain how the accident happened. *Stuart v. Kansas City* (1918) 102 Kan. 307, 171 Pac. 913.

The conclusion by the industrial accident board that the death of the employee was from an injury arising out of and in the course of the employment may be reached not only by direct evidence of fact, but by reasonable inferences therefrom. *Re Uzzio* (1917) 228 Mass. 331, 117 N. E. 349.

So, too, proof that the injury arose out of and in the course of the employment may be shown by circumstantial as well as direct evidence. *Peoria R. Terminal Co. v. Industrial Bd.* (1917) 279 Ill. 352, 116 N. E. 651; *Ohio Bldg. Safety Vault Co. v. Industrial Bd.* (1917) 277 Ill. 96, 115 N. E. 149; 14 N. C. C. A. 224; *Dixon v. Andrews* (1918) — N. J. L. —, 103 Atl. 410.

Where various theoretical conclusions may be drawn from the state of facts established, each being equally plausible, some indicating that the injury may have arisen out of the employment, and others that the misconduct of the person injured was the producing cause, then it may not be said that the evidence is sufficient to sustain the case of him upon whom the burden of proof rests. *John A. Roebling's Sons Co. v. Industrial Acci. Commission* (1918) — Cal. App. —, 171 Pac. 987.

A decree must be reversed where, upon the question whether the injury did or did not arise out of and in the course of the employment, the only evidence before the court is the testimony, in narra-

tive form, of the employee and the several physicians, from which different inferences might be drawn. Mathewson's Case (1917) 227 *Mass.* 470, 116 *N. E.* 831.

A number of cases in which the court has passed upon the sufficiency of the evidence, upon the question whether or not the accident arose out of and in the course of the employment, are set out below.

Where an employee in the park department of a city had a small scratch on his right hand, back of the middle knuckle, and complained on his return from work one night of the hand, and said that it had bothered him all day, and that it was done while he was at work, and, when examined at the hospital, he said that he had scratched it on something while he was working around plants, and did not remember whether he stuck a thorn in it, but knew that he was injured in the course of his employment, and that the injury resulted from it, it may be found that he was injured by accident arising out of and in the course of the employment. *Bean's Case* (*Mass.*) *supra*.

The inference that the workman received the scratch from which blood poisoning developed, causing his death, in the course of his employment, may be drawn from evidence showing that he had no scratch when he left home in the morning, that he had one when he came home from work at night, that he must have come home immediately from his work, that the scratch had blood upon it which had hardened, indicating that the scratch had been received earlier than the time he quit work, that it was such a scratch as he was not likely to receive on a trip from his work to his home, and was such a scratch as he might well have received while at his work. *State ex rel. Albert Dickinson Co. v. District Ct.* (1917) — *Minn.* —, 165 *N. W.* 478.

Where there was evidence showing that the deceased employee sustained an injury to his hand on the 9th day of March, that on the 19th day of March the hand was swollen and his condition indicated an infection, from which he subsequently died, and the evidence was conflicting as to whether or not germs might have found their way into his system through such injury, a finding to the effect that the death was due to an injury received in the course of the employment must be sustained. *William Rahr Sons Co. v. Industrial Commission* (1917) 166 *Wis.* 28, 163 *N. W.* 169.

Where the deceased had last been engaged in his usual work of running an elevator, and it was found stopped between floors under such circumstances that he must have been in it at the time, and did not pass out through the door, and there was an opening at the side of the elevator through which he might fall, and his body was subsequently found in the pit of the elevator, it may be found that he suffered injury arising out of and in the course of the employment. *Wishcaless v. Hammond, S. & Co.* (1918) — *Mich.* —, 166 *N. W.* 993.

The death of an employee by accident arising out of and in the course of the employment may be found, where a farmhand, whose particular employment on the day of the injury was to make a trip with a truck wagon drawn by a team of mules, left the farm between 5 and 6 o'clock in the morning and at 2 o'clock the next morning was found dead, sitting on the seat of the truck, with his body crushed between the seat and the overhanging roof of a shed under which the mules were standing. *Dixon v. Andrews* (1918) — *N. J. L.* —, 103 *Atl.* 410.

Where a claimant stated that he was sawing timber at the time of the accident, and the wind was blowing strongly, and that sawdust blew into the eye and injured it, it may be fairly inferred that the dust caused by the sawing blew into the eye, so that the accident arose out of the employment. *Dickinson v. Industrial Bd.* (1917) 280 *Ill.* 342, 117 *N. E.* 438.

In *Re Stein* (1918) — *App. Div.* —, 169 *N. Y. Supp.* 1115, the appellate division affirmed, without opinion, an award of compensation in the case of an employee who was injured in the eye, the finding of the commission that the accident arose out of the employment being sustained by the testimony of the claimant, supported by two other witnesses of the accident, that something flew in his eye while he was nailing up a box, that thereafter there was discomfort and redness of the eye, growing progressively worse, and later an X-ray examination showed a small piece of steel in the eye, which was removed.

It may be found that the death of an employee arose out of and in the course of his employment, where he was employed by the proprietor of an amusement park, and kept the boats in operation, when needed, and, in attempting to secure a boat which had slipped away from the dock, he leaped from the dock toward the boat and landed in the water,

caught hold of the bow, and, dropping from the boat, began to swim upon his back towards the stern of the boat, and sank, and was drowned when about 20 feet from the stern. *Boyle v. Mahoney* (1918) 92 Conn. 404, 103 Atl. 127.

In the absence of all evidence, the industrial board cannot find, merely from its knowledge of the location of the machinery and shafting where the injury took place, that the injured employee, when he left his machine, did so "temporarily, to go to the toilet, or for some other purpose incidental to his employment," from the single and mere fact that the location of the toilet and water tank was in the direction of the place where the injury took place. *Dube Case* (1917). 226 Mass. 591, 116 N. E. 234.

A rupture cannot be held to have been caused by injury arising out of and in the course of the employment, in the absence of any finding that there was strain upon the part injured and that the work of the employee caused the rupture. *Alpert v. Powers* (1918) 223 N. Y. 97, 119 N. E. 229.

An employee who had been vaccinated

in accordance with the request of the public authorities is not entitled to compensation for injuries caused by the vaccination sore becoming infected, where there was no evidence that the employment in which she was engaged made her more susceptible to the reception of the germ infection than if she were walking upon the street. *Krout v. J. L. Hudson Co.* (Mich.) ante. 860.

A widow's petition for damages for the death of her husband in service, which did not allege that the death was by accident arising out of and in the course of the employment, shows no cause of action, under the Louisiana act. *Dupre v. Coleman* (1918) — La. —, 78 So. 241.

An award of compensation cannot be sustained, in a case wherein a porter in a hotel was found dead in the freight elevator of the building at a time when his duties at the hotel for the day were supposed to be at an end, and there was nothing to show how his body came to be in that place. *Savoy Hotel Co. v. Industrial Bd.* (1917) 279 Ill. 329, 116 N. E. 712. W. M. G.

#### MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL. LENA RAU

v.

DISTRICT COURT OF RAMSEY COUNTY et al.

(138 Minn. 250, 164 N. W. 916.)

#### Workmen's compensation — "sunstroke."

1. "Sunstroke" is a personal injury caused by "accident," within the meaning of the Workmen's Compensation Act.

For other cases, see *Master and Servant*, II. a, 1, in Dig. 1-52 N. S.

#### Same — special risk.

2. Where the work and the condition of the place where it is carried on expose the employee to the happening of an event causing the accident, there is no longer a risk to which all are exposed, and the re-

sult is an "accident arising out of the employment."

For other cases, see *Master and Servant*, II. a, 1, in Dig. 1-52 N. S.

(November 2, 1917.)

**P**ETITION for a writ of certiorari to review a judgment of the District Court of Ramsey County denying compensation to relator under the Workmen's Compensation Act for the death of her husband. Reversed.

The facts are stated in the opinion.

Messrs. Kueffner & Marks, for relator.

The Compensation Act provides for payment of compensation, where death is caused by sunstroke, occurring while the employee is in the performance of his duties for his master.

State ex rel. People's Coal & Ice Co. v. District Ct. 129 Minn. 502, L.R.A.1916A, 344, 153 N. W. 119, 9 N. C. C. A. 129; State ex rel. Duluth Brewing & Malting Co. v. District Ct. 129 Minn. 176, 151 N. W. 912; Mahowald v. Thompson-Starrett Co. 134 Minn. 113, 158 N. W. 913, 159 N. W. 565; Days v. S. Trimmer & Sons, 176 App. Div. 124, 162 N. Y. Supp. 693; Heitz v. Ruppert, 218 N. Y. 148, L.R.A.1917A, 344, 112 N. E. 760; Moore v. Lehigh Valley R. Co. 169 App. Div. 177, 154 N. Y. Supp. 620; Larke v. John Hancock Mut.

Headnotes by QUINN, J.

**Note.**—As to recovery of compensation for injuries caused by weather conditions such as lightning, sunstroke, freezing, etc., see the annotation following *Wiggins v. Industrial Acci. Bd.* post, 936. Also see that annotation for references to other annotations on various questions arising under the Workmen's Compensation Acts.

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L. Ins. Co. 90 Conn. 303, L.R.A.1916E, 584, 97 Atl. 320, 12 N. C. C. A. 308; Schroetke v. Jackson-Church Co. 193 Mich. 616, L.R.A. 1917D, 64, 160 N. W. 383; La Veck v. Parke, D. & Co. 190 Mich. 604, L.R.A. 1916D, 1277, 157 N. W. 72; Vennen v. New Dells Lumber Co. 161 Wis. 370, L.R.A. 1916A, 273, 154 N. W. 640, Ann. Cas. 1918B, 293, 10 N. C. C. A. 729; Alloa Coal Co. v. Drylie, 1 Scot. L. T. 167, [1913] S. C. 549, 50 Scot. L. R. 350, 6 B. W. C. C. 398, 4 N. C. C. A. 899; Hurle's Case, 217 Mass. 223, L.R.A.1916A, 279, 104 N. E. 336, Ann. Cas. 1915C, 919, 4 N. C. C. A. 527; Johnson's Case, 217 Mass. 388, 104 N. E. 735, 4 N. C. C. A. 843; Madden's Case, 222 Mass. 487, L.R.A.1916D, 1000, 111 N. E. 379; Plass v. Central New England R. Co. 169 App. Div. 826, 155 N. Y. Supp. 854; Naud v. King Sewing Mach. Co. 95 Misc. 676, 150 N. Y. Supp. 910.

Messrs. O. H. O'Neill and W. J. Giberson, for respondents:

Sunstroke is not an accident within the meaning of the Compensation Law.

Sinclair v. Maritime Pass. Assur. Co. 3 El. & El. 478, 121 Eng. Reprint, 521, 30 L. J. Q. B. N. S. 77, 7 Jur. N. S. 367, 4 L. T. N. S. 15, 9 Week. Rep. 342; Dozier v. Fidelity & C. Co. 13 L.R.A. 114, 46 Fed. 446; Herdic v. Maryland Casualty Co. 146 Fed. 396, 79 C. C. A. 156, 149 Fed. 198; Continental Casualty Co. v. Johnson, 74 Kan. 129, 6 L.R.A.(N.S.) 609, 118 Am. St. Rep. 308, 85 Pac. 545, 10 Ann. Cas. 851; Bryant v. Continental Casualty Co. — Tex. Civ. App. —, 145 S. W. 636; Elsey v. Fidelity & C. Co. — Ind. App. —, 109 N. E. 413; Semancik v. Continental Casualty Co. 56 Pa. Super. Ct. 392; Gallagher v. Fidelity & C. Co. 163 App. Div. 556, 148 N. Y. Supp. 1016; Continental Casualty Co. v. Pittman, 145 Ga. 641, 89 S. E. 716; Benjamin v. Metropolitan Street R. Co. 245 Mo. 598, 151 S. W. 91; Johnson v. State, 1 Ga. App. 729, 57 S. E. 1056; Robinson v. State, 67 Tex. Crim. Rep. 79, 149 S. W. 186; State v. Rohn, 140 Iowa, 640, 119 N. W. 88; Yazoo & M. Valley R. Co. v. Williams, 87 Miss. 344, 39 So. 489; State v. Wells, 31 Conn. 212; Rayner v. Sligh Furniture Co. L.R.A.1916A, 220, note.

If George Rau did die of a sunstroke, it did not arise out of his employment.

Hopkins v. Michigan Sugar Co. L.R.A. 1916A, 310, and note, 184 Mich. 87, 150 N. W. 325; State ex rel. People's Coal & Ice Co. v. District Ct. 129 Minn. 502, L.R.A. 1916A, 344, 153 N. W. 119, 9 N. C. C. A. 129; Worden v. Commonwealth Power Co. 20 Det. L. N. 39; Sheldon v. Needham, 30 Times L. R. 590, 58 Sol. Jo. 652, 137 L. T. Jo. 212, [1914] W. C. & Ins. Rep. 274, 111 L. T. N. S. 729, 7 B. W. C. C.

471; Blakey v. Robson, E. & Co. 40 Scot. L. R. 259, [1912]S. C. 334, 5 B. W. C. C. 536; Roger v. Paisley School Bd. 49 Scot. L. R. 413, 5 B. W. C. C. 547; Tank v. Milwaukee (Wis.) cited in 6 N. C. C. A. 711, note.

Quinn, J., delivered the opinion of the court:

Certiorari to review a judgment of the district court of Ramsey county, denying compensation, under the Workmen's Compensation Act, to the relator Lena Rau, widow of the decedent George Rau, who was an employee of the respondent city.

For a number of years George Rau had been employed by the city of St. Paul, doing manual labor on its streets at \$2 a day, under the direction of a foreman, during which time he and the defendant were bound by and subject to the provisions of part 2 of chapter 467, p. 677, Laws of Minnesota for 1913, and amendments thereto. On July 1, 1916, while so employed, he was working on East Robie street. The day was hot. He was working in the open, with no protection from the rays of the sun. The street was sandy. It had rained the night before, and the sand was moist. During the early part of the afternoon decedent and his fellow workmen rested for a time in the shade near by. They resumed work at about 3 o'clock. Shortly thereafter Rau was at work near the middle of the street. A workman saw him stagger and went to his assistance. The foreman gave him a drink of water and then took him to the hospital, arriving there at about 4:30. Rau was in an unconscious condition; temperature 110; pulse 110. He regained consciousness at about 11 o'clock that evening. The doctor in charge stated that Rau was suffering from sunstroke. On the following day he was conscious and took liquid diet. He left the hospital on the afternoon of the 3d; on the 4th Dr. Endress was called to the Rau home, and found Rau's temperature 102 and pulse 100. On the 5th he was improved, but died on the morning of the 7th. The trial court found that the cause of death was sunstroke.

The record contains none of the testimony offered upon the trial, and the case must be considered solely upon the findings of the trial court, and determined upon deductions therefrom.

The question here for determination is: Did Rau come to his death by accident arising out of and in the course of his employment, within the meaning of the Compensation Act? If he did, then the relator is entitled to recover compensation,

and the judgment of the district court should be reversed; otherwise, affirmed.

The term "accident," as used in the Compensation Act and as therein defined, shall "be construed to mean an unexpected or unforeseen event, happening suddenly and violently, with or without human fault, and producing, at the time, injury to the physical structure of the body." Gen. Stat. 1913, § 8230.

The first inquiry is: What is sunstroke? It is stated, in effect, in Hare's Practice of Medicine, 1915, that sunstroke, more properly called heat stroke, is a condition of the body produced by great heat; that the chief factor is the presence of great heat, associated, as a rule, with marked humidity and physical exertion; and that heat stroke may occur at night as well as day, provided the atmosphere is hot and moist. Webster's New International Dictionary defines sunstroke as: "an affection, often fatal, due to exposure to the sun or excessive heat, and marked by sudden prostration, with symptoms like those of apoplexy."

The Encyclopedia Americana article on the subject begins: "Sunstroke; prostration due to exposure to intense external heat. Such exposure may be due to the direct or indirect rays of a tropical sun or to the excessive heat of an engine room. In either case heat and physical exertion combine to bring about the results. A high degree of humidity of the atmosphere is one of the most important features, since this hinders free evaporation from the body."

The conditions surrounding decedent at the time of his injury exposed him to an unusual danger, different from that to which the masses engaged in like employment were subjected. It had rained the night before; the sand was wet, the sun's rays direct, thereby enhancing liability to sunstroke. Decedent was exposed to the direct rays of the sun, in addition to the humid atmosphere emanating from the wet street.

That the injury was sustained in the course of the employment is not denied; that it was an "unexpected and unforeseen event" is not questioned; and we have no difficulty in arriving at the conclusion that it was an event "producing, at the time, injury to the physical structure of the body, happening suddenly and violently." It is undisputed that the day was extremely hot. The men had rested for three quarters of an hour in the shade and had returned to their labor. Decedent was at work near the middle of the street, when, all at once, he was seen to stagger. He had been overcome; had suffered a sunstroke.

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This was a violent injury produced by an external power, not natural. The foreman came to his assistance, gave him a drink of water, and immediately removed him to a hospital, where his temperature was found to be 110 and pulse 110. He was unconscious, and remained in that state until 11 o'clock that evening. The intense heat of the sun, associated with the humidity of the atmosphere emanating from the wet sand, as an external cause, was a violent agency, in the sense that it worked upon decedent so as to cause his injury and death. The conclusion that his death was caused by violent and external means is inevitable. That a death is unnatural imports a violent agency as the cause. *Paul v. Travelers' Ins. Co.* 112 N. Y. 472, 3 L.R.A. 443, 8 Am. St. Rep. 758, 20 N. E. 347; *Pickett v. Pacific Mut. L. Ins. Co.* 144 Pa. 79, 13 L.R.A. 661, 27 Am. St. Rep. 618, 22 Atl. 871.

In the cases of *Ismay v. Williamson* [1908] A. C. 437, 77 L. J. P. C. N. S. 107, 99 L. T. N. S. 595, 24 Times L. R. 881, 52 Sol. Jo. 713; *Morgan v. The Zenaida*, 25 Times L. R. 446, 2 B. W. C. C. 19, and *Davies v. Gillespie*, 105 L. T. N. S. 494, 28 Times L. R. 6, 56 Sol. Jo. 11, 5 B. W. C. C. 64, death by heat stroke was held to be an accident within the meaning of the Workmen's Compensation Act. In the *Ismay Case* a workman in a weak and emaciated condition, while raking ashes from under the boiler in a stokehole of a steamship, received a heat stroke from the effect of which he died. In affirming a recovery in that case, Lord Loreburn stated: "To my mind the weakness of the deceased which predisposed him to this form of attack is immaterial. The fact that a man who has died from a heat stroke was, by physical debility, more likely than others so to suffer can have nothing to do with the question whether what befell him is to be regarded as an accident or not. . . . In my view this man died from an accident. What killed him was a heat stroke, coming suddenly and unexpectedly upon him while at work. Such a stroke is an unusual effect of a known cause, often, no doubt, threatened, but generally averted by precautions which experience in this instance had not taught. It was an unlooked-for mishap in the course of his employment. In common language, it was a case of accidental death."

Concurring in this opinion, Lord Ashbourne remarked: "Was this an accident arising out of and in the course of his employment? With great deference to those who hold a contrary opinion, I can myself see no room for serious doubt on the subject. Everything was in the course of



his employment and arising out of it. But for the boiler and the heat stroke, and the speedy exhaustion it caused, there would have been no accident. . . . Although a heat stroke may be called a disease, it is in this case, in my opinion, a disease directly caused by an accident arising out of or in the course of an employment, particularly dangerous to Williamson, in consequence of his weak state of health."

In the Morgan Case the workman was engaged as an ordinary seaman on board the steamship Zenaida, while the ship was at port off the Mexican coast. He was ordered to go over the side to paint the vessel. The heat was excessive, he was seized with sunstroke, and his health was impaired. The trial court was of the opinion that he was suffering from an accident which arose out of and in the course of his employment, and awarded compensation. Upon review the award was sustained, it being held that the case was governed by the decision in the Ismay Case.

There is a marked contrast between the sudden and violent effect of a sunstroke and the drinking of water infected with typhoid germs, as it requires days of time after the infection for the disease to develop, as held in State ex rel. Faribault

Woolen Mills Co. v. District Ct. 138 Minn. 210, ante, 855, 164 N. W. 810.

Where the work and the conditions of the place where it is carried on expose the employee to the happening of an event causing the accident, there is no longer a risk to which all are exposed, and the result is an accident arising out of the employment. *Andrews v. Failsworth Soc.* 20 Times L. R. 429, [1904] 2 K. B. 32, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 Week. Rep. 451, 90 L. T. N. S. 611; *State ex rel. Virginia & R. L. Co. v. District Ct.* 138 Minn. 131, L.R.A.1918C, 116, 164 N. W. 585, and cases cited. Was decedent exposed to something more than the normal risk to which men, in general, engaged in manual labor upon the streets, are subjected in hot weather? If he was, then he was exposed to an extra danger arising out of his employment; and if that contributed to the accident, then the accident arose out of the employment. We are of the opinion that there was a substantial abnormally increased risk, owing to the character of the street, coupled with its moist condition, which contributed to the cause of the accident.

Reversed and remanded for further proceedings in accordance with the views herein expressed.

#### MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL. C. N. NELSON

v.

DISTRICT COURT OF RAMSEY COUNTY et al.

(138 Minn. 260, 164 N. W. 917.)

#### Workmen's compensation — freezing.

The evidence is held to sustain a finding that the injury to the relator, a janitor, who was frozen in severely cold weather while shoveling snow from the sidewalks about a building, was an accidental injury "arising out of his employment" within the Workmen's Compensation Act.

For other cases, see *Master and Servant, II. a, 1*, in *Dig. 1-52 N. S.*

(November 2, 1917.)

Headnote by DIBELL, C.

**Note.** — As to recovery of compensation for injuries caused by weather conditions such as lightning, sunstroke, freezing, etc., see the annotation following *Wiggins v. Industrial Acci. Bd.* post, 936. Also see that annotation for references to other annotations on various questions arising under the Workmen's Compensation Acts.

L.R.A.1918F.

CERTIORARI to the District Court for Ramsey County to review a judgment denying compensation to relator under the Workmen's Compensation Act. Reversed.

The facts are stated in the Commissioner's opinion.

Mr. John I. Levin, for relator.

Mr. E. A. Prendergast, for respondents:

The accident did not arise out of the employment within the meaning of the Workmen's Compensation Act.

*Hansman v. Western U. Teleg. Co.* 136 Minn. 212, 161 N. W. 512; *State ex rel. Virginia & R. L. Co. v. District Ct.* 138 Minn. 131, L.R.A.1918C, 116, 164 N. W. 585.

Dibell, C., filed the following opinion:

Certiorari to the Ramsey county district court to review a judgment denying the relator compensation under the Workmen's Compensation Act.

The relator was employed by the Northwestern Telephone Exchange Company. While so employed he froze his big toe, and the freezing resulted in the amputation of his leg. The injury was sustained in the course of his employment. The court found that the freezing was not an accident. It found that it arose out of his employment.

Since the trial we have held that freezing is an accident. *State ex rel. Virginia & R. L. Co. v. District Ct.* 138 Minn. 131, L.R.A. 1918C, 116, 164 N. W. 585. If the finding that the freezing arose out of his employment within the meaning of the Compensation Act (Gen. Stat. 1913, § 8195) is sustained, the relator should have compensation and the judgment should be reversed; otherwise, he should not, and there should be an affirmance.

The relator was a janitor employed by the telephone company at its Midway exchange, in Merriam Park. His duties were the usual ones of a janitor. Using his language, he was "required to keep the building clean, keep the fire going, shovel the snow off the sidewalk whatever time it was necessary,—all such things that belong to a janitor to do." On February 22, 1916, he went to the building about 5 o'clock in the morning, attended to the fires, did some other little things about the building, and then started to shovel the snow from the sidewalks. There had been a heavy fall the night before. He had to shovel a 50-foot front and 140 feet back to the alley. The snow was 2 or 2½ feet deep. The weather was very cold. The work of shoveling required perhaps one and one-half hours. While doing this work he went from time to time into the building to see to the fires, and could go at any time he chose. These are the important facts.

In *State ex rel. Virginia & R. L. Co. v. District Ct. supra*, we held that the finding of the court that the freezing there involved arose out of the employment was sustained by the evidence. The workman was employed in the northern woods swamping, was several miles from camp, had no facilities for warming or protecting himself, and was peculiarly exposed to severely cold weather. The question whether the trial court's finding was sustained was not difficult. The one presented by the record before us is. The direct authorities upholding findings in freezing cases are few. We cite those called to our attention. *McManan's Case*, 224 Mass. 554, 113 N. E. 287 (stevedore unloading a steamer, exposed to greater cold than that to which one working in the open is ordinarily exposed; not at liberty to stop work to protect himself); *Days v. S. Trimmer & Sons*, 176 App. Div. 124, 162 N. Y. Supp. 603 (workman unloading coal from delivery wagon and carrying into houses of customers; coal wet and weather severely cold); *Larke v. John Hancock Mut. L. Ins. Co.* 90 Conn. 303, L.R.A.1916E, 584, 97 Atl. 320, 12 N. C. C. A. 308 (insurance solicitor and collector required to travel in the open weath-

er 15 or 20 miles in very cold weather; made numerous calls; went in and out of heated houses); *Canada Cement Co. v. Pazuk*, Rap. Jud. Quebec 22 B. R. 432, 12 D. L. R. 303, 7 N. C. C. A. 982 (employee working at the bottom of a quarry pit in intense cold for long hours). In the Massachusetts case the court concluded that the finding that the workman was exposed to "materially greater danger and likelihood of getting frozen than the ordinary person or outdoor worker" was sustained. In the New York case the court said that the Industrial Commission "was fully justified in finding from the evidence that the claimant, by reason of his employment in handling wet coal in the storm, was specially affected by the severity of the weather." The Connecticut case was, in the view of the court, "a clear case of an employee injured as a result of a greater exposure to the elements than persons in that locality are ordinarily subjected." In the Quebec case the court in the course of an extended discussion said: "Thus, as a general principle, the employer is not responsible for damages caused to his workmen by lightning, storms, sunstroke, freezing, earthquake, floods, etc. These are considered as 'force majeure,' which human vigilance and industry can neither foresee nor prevent. The victim must bear alone such burden, inasmuch as human industry has nothing to do with it and inasmuch as the employee is no more subject thereto than any other person. . . . Every human being is liable to suffer from events in which he has no share of responsibility. There is here between the accident and the employment no relationship of cause and effect. Hence it cannot be said of such an accident that it arises out of or in the course of employment. But where the work, or where the conditions under which it is carried on, expose the employees to the happening of a force majeure event, or contribute to bring it into play or to aggravate its effects, then we are no longer face to face with the sole forces of nature. This is no longer a risk to which everybody is exposed; this is a danger which threatens more particularly the employees who work under special conditions. Hence the occurring of a force majeure event under such circumstances is an accident arising out of the employment."

There are two cases in which findings that the freezing did not arise out of the employment were sustained. *Warner v. Couchman* [1912] A. C. 85, 81 L. J. K. B. N. S. 45, 105 L. T. N. S. 676, 28 Times L. R. 58, 56 Sol. Jo. 70, 49 Scot. L. R. 681, 5 B. W. C. C. 177, affirming [1911] 1 K. B. 351, 80 L. J. K. B. N. S. 526, 103 L. T. N. S.

693, 27 Times L. R. 121, 55 Sol. Jo. 107, 4 B. W. C. C. 32 (journeyman baker delivering bread from his cart; weather cold and stormy; hands exposed to weather); *Karemaker v. The Corsican*, 4 B. W. C. C. 295 (seaman at work on his ship in harbor; handling frozen ropes; weather very cold, but not abnormally so.) In the first the finding of the county court that the workman was not exposed to more than the ordinary risk of those working in the open was sustained; and the court of appeal was unable to see that there was any peculiar danger to which the applicant was exposed, beyond that to which that large section of population who are drivers of vehicles, or who are otherwise engaged as out-of-door laborers, are exposed." Emphasis was placed upon the thought that the question was one of fact. In the other the finding of the county court was sustained with the suggestion that "the liability to frost bite is one of the normal incidents to which everybody is subjected by reason of the severity of the climate."

We find no other freezing cases. Cases

Involving sunstrokes or heat strokes present a similar question. They are the subject of review in *State ex rel. Rau v. District Ct.* 138 Minn. 250, ante, 918, 164 N. W. 916, a heat stroke case, where the evidence is held such as to authorize a finding that the injury arose out of the employment. And we have held that the character of an employee's work may so expose him to the risk of injury by lightning that a finding of a causal connection is sustained. *State ex rel. People's Coal & Ice Co. v. District Ct.* 129 Minn. 502, L.R.A.1916A, 344, 153 N. W. 119, 9 N. C. C. A. 129.

The trial court was justified in finding that to an appreciable extent the relator was more exposed to the risk of injury from freezing than the generality of workers, and that the added risk was because of the character of his employment. The causal test of the law is satisfied; and without prolonging the discussion we hold that the relator's work so exposed him to freezing that the finding that it arose out of his employment is sustained.

Judgment reversed.

## IOWA SUPREME COURT.

MARY E. GRIFFITH  
v.

B. J. COLE et al., Appts.

(— Iowa, —, 165 N. W. 577.)

### Workmen's compensation — review by court — extent of authority.

1. The provision of the Workmen's Compensation Act that any party may present a certified copy of the order of the commissioner and all papers in connection with same, to the court, whereupon the court shall render decree in accordance therewith, does not prevent the court from considering the transcript in rendering its decree, and it is not limited merely to ratify the order of the commissioner.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

### Same — course of employment — lightning stroke.

2. An injury to a member of a gang of bridge builders by a stroke of lightning, while he was sitting in the boarding tent after work hours, awaiting the time to go to bed, is within the course of his employ-

ment within the meaning of the Workmen's Compensation Act.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

### Same — arising out of employment.

3. An injury to a member of a bridge construction gang by a stroke of lightning, resulting in death, while he is sitting in the boarding tent awaiting time to go to bed after his day's work is done, does not arise out of his employment within the meaning of the Workmen's Compensation Act.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

### Master and servant — vis major as defense to injury.

4. An employer is not deprived of the defense of vis major when an employee in his boarding tent is killed by lightning, by the fact that the tent was placed on wet ground, that it had no lightning conductor and was near a wire fence and pile of steel rails; at least, he is not, where it is not shown that either of these circumstances caused the accident, rather than a direct bolt from the clouds.

*For other cases, see Master and Servant, II. a, 4, a, in Dig. 1-52 N. S.*

(December 18, 1917.)

**Note.** — As to recovery of compensation for injuries caused by weather conditions, such as lightning, sunstroke, freezing, etc., see the annotation following *Wiggins v. Industrial Acci. Bd.* post, 936. Also see that notation for references to other annotations on various questions arising under the Workmen's Compensation Acts.

**A** PPEAL by defendants from a judgment of the District Court for Story County in favor of claimant in a proceeding under the Workmen's Compensation Act to recover compensation for the death of her husband, caused by a stroke of lightning. Reversed.

Statement by Salinger, J.

The Workmen's Compensation Act provides that when the action of the tribunals created by the act are certified to the district court, it "shall render decree in accordance therewith." The order certified in this case found that the employer was under no liability for the death of the employee caused by a stroke of lightning. The district court took a contrary view, and gave the claimant a judgment for \$3,000. The employer appeals.

Messrs. Miller & Wallingford for appellants.

Messrs. C. G. Lee, I. R. Meltzer, T. G. Garfield, and C. W. Garfield, for appellee:

A finding of fact of the industrial board or commission is not to be set aside if there is any evidence to support it, but the conclusion as to whether or not the injury arose out of the employment, or whether or not compensation should be allowed upon the facts as found, may be reviewed by the court, on appeal. Whether or not the facts as found warrant an award of compensation is a question of law for the court, and, on appeal, the court may reverse upon question of law thus presented.

Heitz v. Ruppert, 218 N. Y. 148, L.R.A. 1917A, 344, 112 N. E. 750; Glatzl v. Stumpp, 220 N. Y. 71, 114 N. E. 1053; Von Ette's Case, 223 Mass. 56, L.R.A.1916D, 641, 111 N. E. 696, 12 N. C. C. A. 551; Buckley's Case, 218 Mass. 354, 105 N. E. 979, Ann. Cas. 1916B, 474, 5 N. C. C. A. 613; Fisher's Case, 220 Mass. 581, 108 N. E. 361; McLean's Case, 223 Mass. 342, 111 N. E. 783; Madden's Case, 222 Mass. 487, L.R.A.1916D, 1000, 111 N. E. 379; Moore's Case, 225 Mass. 258, 114 N. E. 204; Munn v. Industrial Bd. 274 Ill. 70, 113 N. E. 110, 12 N. C. C. A. 652; Victor Chemical Works v. Industrial Bd. 274 Ill. 1, 113 N. E. 173, Ann. Cas. 1918B, 627; McNicol's Case, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522.

The injury occurred within the course of the employment.

Heitz v. Ruppert, 218 N. Y. 148, L.R.A. 1917A, 344, 112 N. E. 750; Kiel v. Industrial Commission, 163 Wis. 441, 158 N. W. 68; Sponatski's Case, 220 Mass. 526, L.R.A. 1916A, 333, 108 N. E. 466, 8 N. C. C. A. 1025; Reithel's Case, 222 Mass. 163, L.R.A. 1916A, 304, 109 N. E. 951, 11 N. C. C. A. 235; Stacy's Case, 225 Mass. 174, 114 N. E. 206; Sundine's Case, 218 Mass. 1, L.R.A.1916A, 318, 105 N. E. 433, 5 N. C. C. A. 616; Von Ette's Case, 223 Mass. 56, L.R.A.1916D, 641, 111 N. E. 696, 12 N. C. C. A. 551; Boyd, Workmen's

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Compensation, § 481; Parker v. Hambrook, 107 L. T. N. S. 249; Ann. Cas. 1913C, 9; Plumb v. Cobden Flour Mills Co. Ann. Cas. 1914B, 502, note; Re Fahey, 155 Ops. Solicitor, Dept. Commerce & Labor, 218; Hills v. Blair, 182 Mich. 20, 148 N. W. 243, 7 N. C. C. A. 914; Taylor v. George W. Bush & Sons Co. 5 Penn. (Del.) 378, 61 Atl. 236; Riley v. Cudahy Packing Co. 82 Neb. 319, 117 N. W. 765; Milwaukee v. Althoff, 4 N. C. C. A. 120, note; Terlecki v. Strauss, 85 N. J. L. 454, 89 Atl. 1023. 4 N. C. C. A. 584; Martin v. John Lovibond & Sons [1914] 2 K. B. 227, 6 B. R. C. 466, 83 L. J. K. B. N. S. 806, 110 L. T. N. S. 455, [1914] W. C. & Ins. Rep. 778, 5 N. C. C. A. 988, 7 B. W. C. C. A. 243; Nisbet v. Rayne [1910] 2 K. B. 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times L. R. 632, 54 Sol. Jo. 719, 3 B. W. C. C. 507, 3 N. C. C. A. 268; Morris v. Lambeth. 22 Times L. R. 22, 8 W. C. C. 1; Rowland v. Wright, 77 L. J. K. B. N. S. 1071, 24 Times L. R. 852, 1 B. W. C. C. 192; Blovelt v. Sawyer [1904] 1 K. B. 271, 73 L. J. K. B. N. S. 155, 68 J. P. 110, 52 Week. Rep. 503, 89 L. T. N. S. 658, 20 Times L. R. 105. 6 W. C. C. 16; Chitty v. Nelson, 126 L. T. Jo. 172, 2 B. W. C. C. 496; Gane v. Norton Hill Colliery Co. [1909] 2 K. B. 539, 78 L. J. K. B. N. S. 921, 100 L. T. N. S. 979, 25 Times L. R. 640, 2 B. W. C. C. 42; Mann v. Industrial Bd. 274 Ill. 70, 113 N. E. 110, 12 N. C. C. A. 652.

Deceased's injury grew out of his employment.

Parker v. Hambrook, 107 L. T. N. S. 249, Ann. Cas. 1913C, 1; State ex rel. People's Coal & Ice Co. v. District Ct. 129 Minn. 502, L.R.A. 1916A, 344, 153 N. W. 119, 9 N. C. C. A. 129.

The stroke of lightning was not an act of God.

McCook v. McAdams, 76 Neb. 1, 106 N. W. 988, 110 N. W. 1005, 114 N. W. 596; Colt v. M'Mechen, 6 Johns. 160, 5 Am. Dec. 200; Michaels v. New York C. R. Co. 30 N. Y. 564, 86 Am. Dec. 415; Garrett v. Beers, 97 Kan. 255, L.R.A.1916F, 1289, 155 Pac. 2; Jackson v. Wisconsin Teleph. Co. 88 Wis. 243, 26 L.R.A. 101. 60 N. W. 430; Brown v. West Riverside Coal Co. 143 Iowa, 671, 28 L.R.A.(N.S.) 1260, 120 N. W. 732, 21 Am. Neg. Rep. 646; Amend v. Lincoln & N. W. R. Co. 91 Neb. 1, 135 N. W. 236.

In dealing with instrumentalities that are dangerous, ordinary care exacts the use of such appliances and devices as are reasonably available.

Melcher v. Freehold Invest. Co. 189 Mo. App. 170, 174 S. W. 455, 9 N. C. C. A. 65;

*Atlantic Coast Line R. Co. v. Newton*, 118 Va. 222, 87 S. E. 618, 12 N. C. C. A. 328.

A wet floor is conducive to the passage of an electric current.

*State ex rel. Ernest Fleckenstein Brewing Co. v. District Ct.* 134 Minn. 324, 159 N. W. 755.

Courts will take judicial knowledge of the fact that wires attached to buildings, without proper lightning arresters, are dangerous.

*Jackson v. Wisconsin Teleph. Co.* 88 Wis. 243, 26 L.R.A. 101, 60 N. W. 431.

Salinger, J., delivered the opinion of the court:

I. The statute (§ 34 of Compensation Act [Acts 35th Gen. Assem. chap. 147]) provides that: Any party in interest may present certified copy of an order . . . of the commissioner or a decision of the committee, as to which no claim for review is made . . . or present a memorandum of agreement approved by the commissioner, and all papers in connection with same, to the district court, whereupon said court shall render decree in accordance therewith.

The position of appellants is that the district court had no power to do what it did, because the words "in accordance therewith" refer to the order or decision and nothing else, and that the formulation of decree cannot be affected by the words "all papers in connection with same." In fewer words, that the district court is bound by the final conclusion reached, and cannot consider the record upon which the conclusion certified up rests. Appellants insist this contention is sustained, because it was said in *Fischer v. Priebe*, 178 Iowa, 512, 160 N. W. at 50: "It was not within the authority of the court to review or reverse or modify the award. Its function in the matter was simply to receive the award certified to it, and 'render a decree in accordance therewith.' . . . This is what seems to have been done and we find no error therein."

That this is purely arguendo, is not necessary to decision, and does not decide what appellant claims, is made manifest by consideration of the situation to which these words were addressed. The complaint was that the district court had made an allowance which the commission had not made. We held that the commissioner did make such allowance, that it is not objected to, and, in effect, that insufficient objection is made to whatever the district court did do. It is manifest that, when he found the court had made no original allowance, it became utterly unnecessary to determine whether it had power to make one.

The *Fischer Case* makes no reference to *Hunter v. Colfax Consol. Coal Co.* 175 Iowa, 245, L.R.A.1917D, 15, 154 N. W. 1037, 157 N. W. 145, Ann. Cas. 1917E, 803, 11 N. C. C. A. 886, and, indeed, refers to no decision. In the *Hunter Case*, 175 Iowa, at 308, we deal with an express objection that the act works "an improper delegation of judicial power, and a denial of judicial hearing; that the courts are compelled to enter judgment upon the award without further hearing; that there is no provision for appeal from the judgment on the award, except the limited one permitted by the act; that the judgment must be modified by the court, if modified by the commissioner, and that this works a denial of . . . and taking property without due process of law."

It is self-evident that to pass upon this objection made it necessary to determine whether the powers given, or the limitations put upon, the district court made the statute vulnerable to these objections. Of course, this could not be determined without bindingly passing upon what these powers and limitations are. We found them to be of such character as that the objections were not well taken.

We hold first there is no ouster of the courts where the act is rejected, and then proceed to say: "A somewhat more difficult question arises when the provisions of the act are accepted. In that case, if the parties cannot come to an agreement, compensation fixed by statute schedule is awarded by arbitration provided for in the act. In a sense, then, the acceptance of the statute operates to take from the court so much of the controversy as is determined by the applying of the statute schedules through the agency of the statute arbitrators. Before we reach the question whether, if this constitute a total ouster of the jurisdiction of the courts, it would invalidate the act, we, of course, have to determine whether such total ouster is so effected. We are forced to deal with this question as one of first impression, because no decision that sustains the Compensation Act of other states is applicable. The Washington act and that of Massachusetts reserve recourse to the courts and full judicial review. In *Sabre's Case*, 86 Vt. 347, 85 Atl. 694, Ann. Cas. 1915C, 1269, a delegation is sustained because, in the end, the matter may get to the supreme court and have full review. *Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649, sustains the Wisconsin act with a holding that there is review if the act be without power, or fraudulent; that, if the board act without or in excess of its jurisdiction,

there may be action in court to set aside the award, and that this may also be done if its findings of fact are not supported by the evidence. Our act has no such reservations, in terms, and therefore these decisions afford us no light." 175 Iowa, 314, 315.

In determining that there is not a total ouster of the courts and that therefore the act is valid, we group certain things as being jurisdictional—things upon which the power of the statute tribunals to act at all hinges. On this head we said: "The very basis of power to award compensation under the act is that its provisions must first be accepted; that the claimant must be an employee; that he must have sustained personal injuries; that they must have arisen out of and in course of the employment; and that the compensation shall be at rates fixed by the statute." 175 Iowa, 317.

We point out that *Sabre's Case*, supra, holds that as the Constitution provides courts shall be open for trial of all cases proper and cognizable, therefore the courts, regardless of statute, may determine whether the board created has gone beyond the powers granted it. And we add: "We are in no doubt that the very structure of the law of the land, and the inherent power of the courts would enable them to interfere, if what we have defined to be the jurisdiction conferred upon the arbitration committee were by it exceeded; that they could inquire whether the act was being enforced against one who had rejected it, whether the claiming employee was an employee, whether he was injured at all, whether his injury was one arising out of such employment . . . or acceptance [of the act] being conceded, . . . into whether that body attempted judicial functions, in violation of or not granted by the act."

We sustain the act for being in analogy with the rule that makes contracts lawful, which provide that the value of certain property and other like matters shall be determined by a certain person therein named and that his decision shall be final, and say that such contracts are usually upheld as lawful, because "they do not oust the courts of their jurisdiction over the subject-matter, but only provide a safe and speedy manner of fixing definitely some fact which is usually of a complex and difficult nature," and because, when such fact is determined in the manner provided by the contract, "the parties are at liberty, after so fixing such fact to go into court and litigate such differences as may still exist between them." 175 Iowa, 315, 316, L.R.A.1915D, 15, 154 N. W. 1063. We say

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that "so far as specific delegation goes, the arbitration committee can do no more than to find that the employee should have compensation under some item of the statute schedule, and the commissioner may, on investigation, make a finding than an award thus made shall be modified or terminated. It is manifest that this does not, in terms, deprive the courts of all jurisdiction in the premises;" that there are "provisions that indicate that it is not intended, literally at least, to give the statutory arbitrators all the powers that courts have." 175 Iowa, 317. And, in commenting upon the appeal allowed, we hold that "though the act does not, in terms, provide for judicial review, except by said appeal, the statute does not take from the courts all jurisdiction in the premises." We conclude thus: "All of which establishes that the statute works no complete ouster of jurisdiction. . . . The utmost it does is to provide administrative machinery for applying rates of compensation fixed by the legislature, as between parties who have agreed to have the amount of compensation, merely, thus determined. The effect of statutes, never challenged so far as we are advised, which limit recovery for negligence causing death, is to compel the courts to do what here is done by the arbitrators." 175 Iowa, 318, 319.

In *Des Moines Union R. Co. v. Funk*, — Iowa, —, 164 N. W. 648, it is recognized that certiorari will lie, "where the objection made is clearly one of jurisdictional nature, and it satisfactorily appears that the proceeding sought to be reviewed is wholly unauthorized;" as a mere right of appeal in such case would not be a speedy or adequate remedy within the meaning of the statute.

The Massachusetts act (Laws 1911, chap. 751, p. 3, § 11, as amended by Laws 1912, chap. 571, § 14) is, on this point, quite similar to our own. It provides that when copies of "the decision of the board . . . and all papers in connection therewith" have been transmitted to the superior court, "said court shall render a decree in accordance therewith." Construing this act, it was, in effect, held in *McNicol's Case*, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697. 4 N. C. C. A. 522, that this means such decree as the law requires, upon the facts found by the board, and does not reduce the action of the superior court to a mere perfunctory registration of approval of the conclusion of law reached by the board or commissioner; and that "the obligation placed upon the superior court, by the requirement to enter a decree in accordance with the decision, is to exercise its judicial function by entering such decree as

will enforce the legal rights of the parties, as disclosed by the facts appearing on the record."

One may not read the Hunter Case without being fully persuaded that we gravely doubted the constitutionality of the act, if it were open to the construction of appellant, and say that: "Contracts by which the parties undertake to deprive themselves in toto of the right to resort to the courts to settle controversies between them, in which are stipulated away all the rights of each or either to resort to the tribunals created by law, have been universally condemned. See *Wood v. Humphrey*, 114 Mass. 185; *Pearl v. Harris*, 121 Mass. 390; *Barron v. Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931." 175 Iowa, 313, 314.

Should we now hold that "in accordance therewith" means simply a formal approval of the conclusions of the commissioner, we would not only overrule the Hunter Case, but go counter to the rule which requires that construction, of the two, which will the least imperil the validity of a statute. We would subject the statute to danger which the Hunter decision sought to avert. We should not construe the statute as appellant desires, unless no other construction is, in reason, permissible. Our construction may interfere with the legislative purpose to provide a speedy method of obtaining compensation, rather than add to existing remedies. But if that be the result, it is still our duty to avoid any holding which will even gravely imperil the constitutionality of the statute. Some benefits may be lost by inability to effectuate the full purpose of the legislature. But better than that to lose all of the benefits of the statute. All possibility of this may be avoided by a perfectly permissible construction, to wit: The court may not go into general fact controversy. It is limited to determining, upon the transcript and findings which the statute requires to be sent up, whether the committee or the commissioner had jurisdiction, and to effectuating what it finds upon that point. This is in analogy to cases like *Hatch v. Board of Supervisors*, 170 Iowa, 82, 152 N. W. 28, which limit an inquiry of fact on certiorari to evidence addressed to whether the tribunal in review had jurisdiction, or, having it, exceeded it. Concretely, the court may investigate whether the commissioner has exceeded his jurisdiction. If that be found, it may set his award aside. If it finds the commissioner had jurisdiction because an injury arose in course of and out of the employment, and the commissioner has refused to

make an award, the court may remand, with direction that he allow what the statute provides; or, to avoid circuity of action, the court may effectuate its finding that the injury did so arise by itself allowing the statute compensation, if it appear as matter of law what that compensation should be. It follows that the district court did not err in entering upon an inquiry whether the injury complained of arose as aforesaid, nor because it proceeded to fix the amount of compensation due, there being no complaint that it erred in determining the amount.

This leaves for our determination whether, on the merits, any recovery on part of the plaintiff is warranted.

II. One is in the "course of his employment," though he has not yet actually entered upon his task (note in 3 N. C. C. A. at 270); while returning to work (*Re Heitz*, 218 N. Y. 148, L.R.A.1917A, 344, 112 N. E. 750), while going to meals (*Martin v. John Lovibond & Sons*, [1914] 2 K. B. 227, 6 B. R. C. 466, 83 L. J. K. B. N. S. 806, 110 L. T. N. S. 455 [1914] W. C. & Ins. Rep. 78, 7 B. W. C. C. 243; 5 N. C. C. A. 988; *Re Sundine's Case*, 218 Mass. 1, L.R.A.1916A, 318, 105 N. E. 433, 5 N. C. C. A. 616; *Rowland v. Wright*, 77 L. J. K. B. N. S. 1071, 24 Times L. R. 852, 1 B. W. C. C. 192); while on his way to cook his meals (*Morris v. Lambeth*, 22 T. L. R. 22, 8 W. C. C. 1; note in Ann. Cas. 1913C, p. 20); while eating his meals (*Brice v. Lloyd* [1909] 2 K. B. 804, 101 L. T. N. S. 472, 25 Times L. R. 759, 53 Sol. Jo. 744, 2 B. W. C. C. 26; *Blovelt v. Sawyer* [1904] 1 K. B. 271, 73 L. J. K. B. N. S. 155, 68 J. P. 110, 52 Week. Rep. 503, 89 L. T. N. S. 658; 20 Times L. R. 105, 6 W. C. C. 16); where he leaves his work and is on the roof for the purpose of taking fresh air (*Von Ette's Case*, 223 Mass. 56, L.R.A.1916D, 641, 111 N. E. 696, 12 N. C. C. A. 551); where, while delivering ice, he leaves his team while going toward a house for shelter (*State ex rel. People's Coal & Ice Co. v. District Ct.* 129 Minn. 502, L.R.A.1916A, 344, 153 N. W. 119, 9 N. C. C. A. 129); while he is going for his dinner pail after working hours (*Taylor v. George W. Bush & Sons Co.* 5 Penn. (Del.) 378, 61 Atl. 236); while he is putting on his coat after his day's work (*Helmke v. Thilmany*, 107 Wis. 216, 83 N. W. 360, 8 Am. Neg. Rep. 172); while on his way home from work (*Gane v. Norton Hill Colliery Co.* [1909] 2 K. B. 539, 78 L. J. K. B. N. S. 921, 100 L. T. N. S. 079, 25 Times L. R. 640, 2 B. W. C. C. 42; *Terlecki v. Strauss*, 85 N. J. L. 454; 89 Atl. 1023, 4 N. C. C. A. 584; *Re Sroeb*, Ohio Ind. Com. No. 36817; *Re Fahrey*, 155

Ops. Solicitor Dept. Commerce & Labor, 218; Stacy's Case, 225 Mass. 174, 114 N. E. 206); where he is returning, after working hours are done, to a sleeping room furnished by the employer (*Dougherty v. Liability Corp.* 1 Mass. W. C. C. 450). If the employment is continuous, injury has been held to arise out of the employment, where the servant, after a day's work, was sitting writing a letter in a car furnished him by the employer to sleep in. *International & G. N. R. Co. v. Ryan*, 82 Tex. 565, 18 S. W. 219. And so, where a servant girl residing in her employer's home was suffocated while asleep in her bed, through a fire which broke out in the house. *Chitty v. Nelson*, 126 L. T. Jo. 172, 2 B. W. C. C. 496.

"The general rule in construing compensation laws is that the responsibility of the employer begins when his employee enters his premises to perform the services required of him, and terminates when the employer leaves such premises, providing that he does not loiter needlessly or arrive at an unreasonable hour in advance of the beginning of his duties. *Gordon v. Eby*, 1 Cal. Ind. Acc. Comm. Decisions, No. 1."

The test seems to be whether deceased, "though actually through his work, was still within the sphere of the work" (note to *Hills v. Blair*, 7 N. C. C. A. 422); was doing what "a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time" (*Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585).

There are some holdings that run counter to these, say, for instance, *Mahoney v. Sterling Borax Co.* 2 Cal. Ind. Comm. 700. But, on the whole, we incline to think that this employee was injured while in the course of his employment. He was where he was hurt because he had been employed. While his day's work was done, yet he remained where it was his duty to be in order to begin the next day's work. He remained all the time within the sphere that his employment had fixed. Thus far, we sustain the decision of the trial court.

II. (a) But it does not suffice that he was injured while in the course of his employment. It must further appear that his injury arose out of such employment. The defendants were bridge builders, who had charge of construction of county bridges in Story county. Deceased was employed by them. Decedent and others in such employment were by defendants lodged and boarded on the ground where the work was done. On the night of the accident the day's work had been finished, but the em-

ployees were in the boarding tent. They had got through washing the dishes and were sitting there until it was time to go to bed. While thus engaged the decedent came to his death from a stroke of lightning. Concede that he was in the course of his employment while thus in the tent awaiting his bedtime, or supervising other employees in getting ready for bed, and still there must be proof that the injury arose out of such employment. The burden is on the claimant. It is not discharged by creating an equipose. It requires a preponderance. See *Eisentrager v. Great Northern R. Co.* 178 Iowa, 113, L.R.A. 1917B, 1245, 160 N. W. 311; *Savage's Case*, 222 Mass. 205, 110 N. E. 283. "The burden of furnishing evidence from which the inference can be legitimately drawn that the death of an employee was caused by an accident arising out of and in the course of his employment rests upon the claimant. *Barnabus v. Bersham Colliery Co.* 103 L. T. N. S. 513, 55 Sol. Jo. 63, 4 B. W. C. C. 119. It must appear by a preponderance that there is some causative connection between the injury and something peculiar to the employment (*Jones v. United States Mut. Acci. Asso.* 92 Iowa, 652, 61 N. W. 485); that it resulted from some risk reasonably incident to the employment, because 'out of' involves the idea that the injury is, in some sense, due to the employment (*Fitzgerald v. W. G. Clarke & Son* [1908] 2 K. B. 796, 77 L. J. K. B. N. S. 1018, 99 L. T. N. S. 101, 1 B. W. C. C. 197); a causative danger peculiar to the work, and not common to the neighborhood," an injury fairly traceable to the employment as a contributing cause, to some hazard other than one to which the workman would have been equally exposed though in a different employment (*McNicol's Case*, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522); a hazard peculiar to the business which is "the immediate cause" of the injury (*Roger v. School Bd.* 1 Scot. L. T. 271; and see *Robson E. & Co. v. Blakey*, 5 B. W. C. C. 536; [1912] S. C. 334, 49 Scot. L. R. 254); an injury due to something more than the normal risk to which all are subject, which, at the least, means that the employment necessarily accentuates the natural hazard attendant upon work done in the course of the employment (*State ex rel. People's Coal & Ice Co. v. District Ct.* 12 Minn. 502, L.R.A.1916A, 344, 153 N. W. 119, 9 N. C. C. A. 129).

The words "out of" involve the idea that the accident is, in some sense, due to the employment. *Barnabus v. Bersham Colliery Co.* and *Fitzgerald v. W. G. Clarke & Son*, supra. It is said in *Hopkins v.*



Michigan Sugar Co. 184 Mich. 87, L.R.A. 1916A, 310, 150 N. W. 325: "An employee may suffer an accident while engaged at his work, or in the course of his employment, which in no sense is attributable to the nature of or risks involved in such employment, and therefore cannot be said to arise out of it."

In McNicol's Case, *supra*, wherein recovery for injury by lightning is denied, it is done because no causal relation or peculiar exposure appears, and it is said that while the injury need not have been foreseen or expected, yet "after the event, it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence;" and that there can be a recovery only when it "is apparent to the rational mind, upon consideration of all the circumstances," that there exists "a causal connection between the conditions under which the work is required to be performed and the resulting injury. . . . The causative danger . . . peculiar to the work . . . incidental to the character of the business." While an accident arising out of an employment almost necessarily occurs in the course of it, the converse does not follow. *Hopkins v. Michigan Sugar Co. supra*. To be sure, the nature of the occupation may supply causative relation. In *State ex rel. Ernest Fleckenstein Brewing Co. v. District Ct. 134 Minn. 324, 159 N. W. 756*, such relation was held to exist where an employee was handling instrumentalities charged with electricity, and there were present certain conditions as, for example, a wet cement floor, which were quite conducive to the passage of the electric current, it further appearing that deceased must have been struck at the moment he came in contact with an electric wire or socket. But it is only as to some employments that this is so, and, as said in *Andrew v. Failsworth Industrial Soc. [1904] 2 K. B. 32, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 Week. Rep. 451, 90 L. T. N. S. 611, 20 Times L. R. 429*, speaking generally, being struck by lightning does not arise out of an employment, because, *prima facie*, it is something which arises altogether outside of such employment, and is a risk incidental to a small class of employments only. Because this is so, it is held in *Klawinski v. Lake Shore & M. S. R. Co. 185 Mich. 643, L.R.A.1916A, 342, 152 N. W. 213*, that there may be no recovery where a railroad section man was killed by a stroke of lightning while in a barn in which he had taken refuge from a storm, at the direction of his foreman. In *Kelly v. Kerry County Council. 1 B. W. C. C. 194,*

deceased was, during a heavy rainstorm, working at a water table in the road with a shovel, freeing outlets and gullets from matter that tended to choke them, and while so engaged was killed by lightning. It was held this employment created no special or peculiar risk from lightning, though deceased was obliged to do this work while a thunder-storm was raging; that he was exposed to no greater risk of being struck by lightning than if he had been working in a field or garden, and that "the antecedent probability that they would be struck by lightning seemed to me to be no greater in their case than in the case of any other person who went to work that day within the area of the thunderstorm." To the same effect is *Hoenig v. Industrial Commission, 159 Wis. 646, L.R.A.1916A, 339, 150 N. W. 996, 8 N. C. C. A. 192*, where an employee was killed by lightning while working at the water's edge.

In *Karemaker v. The Corsican, 4 B. W. C. C. 295*, a seaman, while at work on his ship, had his hands frozen from handling frozen ropes. It was held the injury did not arise out of the employment, because the frost-bites were caused by the elements. *Warner v. Couchman [1911] 1 K. B. 351, 80 L. J. K. B. N. S. 526, 103 L. T. N. S. 693, 27 Times L. R. 121, 55 Sol. Jo. 107, 4 B. W. C. C. 32, 1 N. C. C. A. 51*, is to the same general effect. It has frequently been held that many accidents may happen to a workman in the course of his employment, for which his employer would be under no liability. For illustration, a servant engaged in a foundry yard in the course of his employment, if struck by lightning and seriously maimed, would have no claim under Workmen's Compensation Acts. *Falconer v. London & G. Engineering & Ship Bldg. Co. 3 Sc. Sess. Cas. 5th Series, 564*. It is said in that case: "It must, I think, have arisen 'out of his employment' and, in a more exact sense than that, it occurred to him when at or going about his own employment in or about the factory."

The most that may be said where, as here, an employee is injured while sitting in his boarding tent preparatory to going to bed, is that if he had not been employed he would not have been present in the tent, and would not have been struck at the time he was. In the same sense, the fact that he was born establishes a causative connection. If he had never come into being he could not have been struck by lightning. The same argument might be made for a claim against one who sold a carriage to one who was struck by lightning while riding in it. What was said in *Craske v. Wigan, 2 B. W. C. C. 35*, covers the situation: "It

is not enough for the applicant to say 'the accident would not have happened if I had not been engaged in this employment, or if I had not been in that particular place.' The applicant must go further and must say 'the accident arose because of something I was doing in the course of my employment, or because I was exposed by the nature of my employment to some peculiar danger.'"

In our opinion, the injury claimed for did not arise "out of" decedent's employment.

II. (b) It is not intended to hold that injuries from lightning can in no case be due to an industrial employment. It has been rightly said that they can be. See *State ex rel. People's Coal & Ice Co. v. District Ct. supra*. The vice in this decision seems to us to be that while it recognizes there must be more than the normal risk from lightning, to which all are subject, and that the employment must necessarily accentuate the natural hazard from lightning, this is not followed to its logical end, and a recovery for injury by lightning is allowed, where there was no such accentuation or abnormal risk. All that is requisite is that the employment be of such nature as that, in reason, the employee is more exposed to hazards from lightning than is one in some other employment. Cases that hold a given accident from lightning did not arise out of the course of the employment recognize such injury may be related to the employment. See *Hoening v. Industrial Commission, supra*. And so of *Roger v. School Bd. 1 Scot. L. T. 271*, wherein it is said that "To be struck by lightning is a risk known to all and independent of employment, yet the circumstances of a particular employment might make the risk not a general risk, but a risk sufficiently exceptional to justify its being held that the accident from such risk was an accident arising out of the employment."

And it has been rightly held that injury from lightning did arise out of the employment, where a telephone or telegraph operator was hurt by an electric shock received in the course of his work. *Atlantic Coast Line R. Co. v. Newton*, 118 Va. 222, 87 S. E. 618, 12 N. C. C. A. 328. And so where a workman on a high scaffolding was kept at work during a storm. *Andrew v. Failsworth Industrial Soc. supra*. But where the servant is riding a corn cultivator and plowing corn, being struck by lightning is suffering from what is not peculiarly invited by the employment. A lineman who, while at his work, is bitten by a snake, will not be allowed to trace his injury to his employment, even though he would not have been bitten had he been elsewhere

than where his employment called him. On the other hand, if he touch a live wire or is struck by lightning while repairing or putting up a wire, he may well claim that his injury is peculiarly due to his employment.

As was said in *Kelly v. Kerry County Council, supra*, there must be evidence that the servant was exposed to a greater risk of being struck by lightning than if he had been working in a field or garden. In *Robson E. & Co. v. Blakey*, 5 B. W. C. C. 536, it is well indicated what the natural range of inquiry is, and said: "To what class of dangers does this man's employment expose him? . . . Suppose he is a collier. I may say his employment exposes him to the risk of having things falling upon him from the roof, to the danger of tumbling down a shaft, and so on. In short, there is a peculiar class of dangers which exists only for people who go down into mines."

It is further illustrated by employments which compel walking in the street, and remaining off the sidewalk, as to which it has been said that there is a peculiar exposure to hazard from moving vehicles. In one word, it all turns upon whether it may in reason be said that, as distinguished from being hurt while employed, the injury is due to the nature of the employment. As said, we do not deny that being struck by lightning may be reasonably traceable to the nature of the work done, but decide that it may not be done in this case.

II. (c) And it might well happen, too, that no recovery could be had under the compensation statute, even though injury was due to the negligence of the master. The negligence that sets the statute in motion is one that involves a failure to discharge a duty which the employer, as such, owes to the employee as such. If the master furnish a defective scaffold for those who are erecting his building, the statute will give compensation, but if he ride a vicious horse to the premises where his bricklayer is at work, and the horse escape and strike the employee while he is preparing to ascend with brick, the one who caused the injury will be held responsible, but not under the provisions of the statute.

It does not necessarily follow, from the fact that one struck by lightning might recover upon an accident insurance policy, or otherwise recover for such injury, that therefore recovery may be had under the Compensation Act. The statute (Code Supp. 1913) § 2477m16, seems to contemplate injuries arising out of an industrial employment—industrial accidents. It is a fair analysis of *Hills v. Blair*, 182 Mich. 20,

148 N. W. 243, 7 N. C. C. A. 409, and *Rayner v. Sligh Furniture Co.* 180 Mich. 168, L.R.A.1916A, 22, 146 N. W. 665, Ann. Cas. 1916A, 386, 4 N. C. C. A. 851, that recovery under compensation acts can only be had for what is, in its nature, an accident growing out of an industrial employment. And in a concurring opinion in *Falconer v. London & G. Engineering & Ship Bldg. Co.* 3 Sc. Sess. Cas. 5th series, 564, Lord Trayner said that many accidents may happen to a workman in the course of the employment, for which the employer would incur no liability; "for example, a servant engaged in a foundry yard in the course of his employment, if struck by lightning and seriously maimed, would have no claim for compensation under the act." It is said in *Klawinski v. Lake Shore & M. S. R. Co.* 185 Mich. 643, L.R.A.1916A, 342, 152 N. W. 213: "There is no doubt that it was the legislative intent to compensate workmen for injuries resulting from industrial accidents, and that such compensation is charged against the industry because it is responsible for the injury."

And in *Hoenig v. Industrial Commission*, 159 Wis. 646, L.R.A.1916A, 330, 150 N. W. 996, 8 N. C. C. A. 192, that the law assumes to provide compensation for industrial accidents only—those growing out of the employment and caused by the industry. Those caused by the industry and chargeable to the industry. And it does not apply to injury resulting from those forces of nature described in the common law as acts of God; such forces as are wholly uncontrollable by men.

II. (d) The evidence shows that the tent was placed in a river bottom; that on the afternoon of the day on which decedent was injured the ground about the tent was saturated with water; that the tent had no floor and was wet and muddy that afternoon; that it had no lightning rods nor lightning arresters of any sort; that it was higher than the surrounding objects; that wire fences which were part of the highway fence were about the tent; that just north of it, in close proximity to its guide ropes, there was a pile of steel rods for use in reinforcing concrete, and that the tent poles, besides being connected by the canvas comb or ridge of the tent, were further connected by a No. 12 wire used for hanging dishcloths and other articles to dry, and which wire stretched above the top of the table in the tent. It is further proved that the phenomena of lightning and danger therefrom may, in a certain degree, be guarded against; that occupants of steel or metal structures are immune from danger from lightning; that metal is a good conductor of electricity; that a wire fence

increase lightning hazards in its immediate vicinity, and that wet earth is a conductor of electricity. Appellant uses these facts for the proposition that defendants may not defend with *vis major*, because that defense is available only where the act of the elements is the sole cause of injury, and is not available where the "act of God" is coupled with human negligence. And it is true there is a general rule that "act of God" is no defense, unless what happens is due to natural causes which can neither be anticipated, guarded against nor resisted, and which could not have been prevented by any human prudence. *McCook v. McAdams*, 76 Neb. 1, 106 N. W. 988, 110 N. W. 1005, 114 N. W. 596; *Colt v. M'Meehan*, 6 Johns. 160, 5 Am. Dec. 200; *Garrett v. Beers*, 97 Kan. 255, L.R.A.1916F, 1289, 155 Pac. 2. He contends that in this case this negligence is furnished by the fact that the defendants did not equip this tent with appliances which are accepted as preventatives of lightning, or as reducing the hazard therefrom. Before considering this position, it is first to be said that, throughout, the claimant had the burden of showing that the alleged negligence was the proximate cause of his injury. It will not suffice that it is equally probable or possible that such negligence caused the injury, and that it did not. There is no evidence that the wire fence, the failure to have the lightning arresters, and the like caused the injury, rather than a bolt of lightning that came directly from the clouds, and which would have struck where it did though the things complained of had not been present. Let us assume for the sake of argument that abstractly speaking, it may be no defense to a claim under our Compensation Act that the employer used every care that a reasonable man would, and was not obliged to use super care. Be that as it may, when even as to such a claim it becomes necessary to assert that *vis major* is no defense, because of the concurring negligence of the master, there may be an inquiry into whether the master was as careful as reasonably prudent men are in like circumstances. We think that failure to rod this tent, and the like, not to anticipate possibilities of lightning therewith, and the existence of the wire fence and the like, constituted no such negligence as deprives defendants of the defense of *vis major*. They were bridge contractors constructing and equipping a boarding tent and not an electrical telegraph or telephone system, or the like, as to which ordinary and reasonable prudence demands precautions against lightning. See *Atlantic Coast Line R. Co. v. Newton*, 118 Va. 222, 87 S. E. 618. They are not within

the rule of *Sloan v. J. G. White Engineering Co.* 105 S. C. 226, 89 S. E. 564, 12 N. C. C. A. 708, wherein the supreme court of South Carolina by a divided vote, held that, where a servant was struck by lightning which came into a power house wherein he was working, and over a negligently grounded wire, and the proper grounding was a matter peculiarly within the knowledge of the master, that if the latter plead vis major he has the burden of showing that the injury arose from an act of God, without contribution thereto by the negligence of the employer. To the same effect are *Brown v. West Riverside Coal Co.* 143 Iowa, 671, 28 L.R.A.(N.S.) 1260, 120 N. W. 732, 21 Am. Neg. Rep. 646; *Jackson v. Wisconsin Teleph. Co.* 88 Wis. 243, 26 L. R. A. 101, 60 N. W. 430; *Michaels v. New York C. R. Co.* 30 N. Y. 564, 86 Am. Dec. 418; *Amend v. Lincoln & N. W. R. Co.* 91 Neb. 1, 135 N. W. 236. In *Hoenig v. Industrial Commission*, 159 Wis. 646, L.R.A. 1916A, 339, 150 N. W. 996, 8 N. C. C. A. 192; there was testimony tending to prove that the surroundings created a peculiar

exposure to lightning. But it was held upon the physical facts that there was no special hazard, and that the claimant might not recover. The vast majority would never think of lightning and appliances to insure safety from it in putting up such a tent. As well hold that a livery man is liable because he permits a team and buggy to go out in a rainstorm without putting lightning rods or some other device on the buggy. On the theory of appellant, why would not a farmer be liable because his hired man was killed by lightning while sleeping in the bedroom provided for him, because the farmer's house had not been rodged?

In our opinion it was error to hold that here was an injury arising out of the employment. Wherefore we are constrained to reverse.

Gaynor, Ch. J., and Ladd, Weaver, Evans, Preston, and Stevens, JJ., concur.

Petition for rehearing denied.

#### MONTANA SUPREME COURT.

KATE L. WIGGINS, Resp.,  
v.

INDUSTRIAL ACCIDENT BOARD, Appt.

(54 Mont. 335, 170 Pac. 9.)

**Workmen's compensation — death from lightning — industrial accident.**

1. Death by lightning of one struck while at work on a road grader is an industrial accident within the meaning of the Workmen's Compensation Act.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

**Same — Increase of hazard — character of employment.**

2. The death from lightning of one at work on a metal road grader does not arise out of his employment, where there is nothing to show that his hazard was increased by the fact that he was employed on such machine.

*For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.*

**Evidence — Judicial notice — attraction for lightning.**

3. The court cannot take judicial notice of an alleged natural attractiveness of metal for lightning.

*For other cases, see Evidence, I. e, in Dig. 1-52 N. S.*

(January 11, 1918.)

**Note.** — As to recovery of compensation for injuries caused by weather conditions, such as lightning, sunstroke, freezing, etc., see the annotation following this case, post,

L.R.A.1918F.

**A**PPEAL by the Industrial Accident Board from a judgment of the District Court for Big Horn County in favor of claimant in a proceeding to recover compensation for the death of her son by lightning. Reversed.

The facts are stated in the opinion.

Messrs. S. C. Ford, Attorney General, and R. L. Mitchell, Assistant Attorney General, for appellant.

The death of the son of the plaintiff by lightning was not an injury arising out of and in the course of his employment, within the meaning of § 16 of the Workmen's Compensation Act, chap. 96, of the 1915 Sessions Laws.

*Fitzgerald v. W. G. Clarke & Son* [1908] 2 K. B. 796, 77 L. J. K. B. N. S. 1018, 99 L. T. N. S. 101, 1 B. W. C. C. 197; *Craske v. Wigan* [1909] 2 K. B. 635, 78 L. J. K. B. N. S. 994, 101 L. T. N. S. 6. 25 Times L. R. 632, 53 Sol. Jo. 560; *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 459, 3 N. C. C. A. 585; *Hoenig v. Industrial Commission*, 159 Wis. 646. L.R.A.1916A, 339, 150 N. W. 996, 8 N. C. C. A. 192; *Klawinski v. Lake Shore & M. S. R. Co.* 185 Mich. 643, L.R.A.1916A, 342, 152 N. W. 213; *State ex rel. People's Coal & Ice Co. v. District Ct.* 129 Minn. 502. L.R.A.1916A, 344, 153 N. W. 119, 9 N. C. C.

936. Also see that annotation for references to other annotations on various questions arising under the Workmen's Compensation Acts.

A. 129; *Andrew v. Failsworth Industrial Soc.* [1904] 2 K. B. 32, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 90 L. T. N. S. 611, 52 Week Rep. 451, 20 Times L. R. 429; *Kelly v. Kerry County Council*, 42 Ir. L. T. 23, 1 B. W. C. C. 194; *Warner v. Couchman* [1910] 1 K. B. 351, 80 L. J. K. B. N. S. 526, 103 L. T. N. S. 693, 27 Times L. R. 121, 4 B. W. C. C. 32; *Karemaker v. The Corsican*, 4 B. W. C. C. 295; *Newman v. Newman*, 169 App. Div. 745, 155 N. Y. Supp. 665, 218 N. Y. 325, 113 N. E. 332; *McNicol's Case*, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522; *Milliken's Case*, 216 Mass. 293, L.R.A.1916A, 337, 103 N. E. 898, 4 N. C. C. A. 512; *Federal Rubber Mfg. Co. v. Harvolie*, 162 Wis. 343, L.R.A.1916D, 968, 156 N. W. 143; *Hopkins v. Michigan Sugar Co.* 184 Mich. 87, L.R.A.1916A, 310, 150 N. W. 325.

Matters which are not fairly well settled, and are seriously controverted, cannot be judicially known.

7 Enc. Ev. 903; 15 R. C. L. 1129; *St. Louis Gaslight Co. v. American F. Ins. Co.* 33 Mo. App. 368; *Dixon v. Niccolls*, 39 Ill. 385, 89 Am. Dec. 312; *Jones*, Ev. 2d ed. § 129; *Dunphy v. St. Joseph Stock Yards Co.* 118 Mo. App. 506, 95 S. W. 301.

**Mr. C. C. Guinn**, for respondent:

The death of the son of the plaintiff by lightning was "an injury arising out of or in the course of his employment," within the meaning of the Workmen's Compensation Act.

*McNicol's Case*, 215 Mass. 497, L.R.A. 1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522; *State ex rel. People's Coal & Ice Co. v. District Ct.* 129 Minn. 502, L.R.A.1916A, 344, 153 N. W. 119, 9 N. C. C. A. 129; *Parker v. The Black Rock*, Ann. Cas. 1916B, 1300, note; *Melcher v. Freehold Invest. Co.* 189 Mo. App. 170, 174 S. W. 455, 9 N. C. C. A. 65; *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 596; *Scott v. Payne Bros.* 85 N. J. L. 446, 89 Atl. 927, 4 N. C. C. A. 682; *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, L.R.A.1916F, 1164, 158 Pac. 212, 12 N. C. C. A. 789; *Larke v. John Hancock Mut. L. Ins. Co.* 90 Conn. 303, L.R.A.1916E, 584, 97 Atl. 320, 12 N. C. C. A. 308; *Hopkins v. Michigan Sugar Co.* 184 Mich. 87, L.R.A. 1916A, 310, 150 N. W. 325; *Rayner v. Sligh Furniture Co.* 180 Mich. 168, L.R.A. 1916A, 22, 146 N. W. 665, Ann. Cas. 1916A, 386, 4 N. C. C. A. 851; *Hoenig v. Industrial Commission*, 159 Wis. 646, L.R.A. 1916A, 339, 150 N. W. 996, 8 N. C. C. A. 192; *Klawinski v. Lake Shore & M. S. R. Co.* 185 Mich. 643, L.R.A.1916A, 342, 152 N. W. 213; *Stertz v. Industrial Ins. Com-*

*mission*, 91 Wash. 588, 158 Pac. 256, Ann. Cas. 1918B, 354.

Judicial notice may be taken of electricity and its manifold uses, and of scientific facts of such universal notoriety and so generally understood, that they may be regarded as forming part of the common knowledge of every person.

15 R. C. L. 1128; 1 Greenl. Ev. § 6; *Brumagin v. Bradshaw*, 39 Cal. 40; *McKinnon v. Bliss*, 21 N. Y. 206; *Lanfear v. Mestier*, 89 Am. Dec. 682, note.

**Holloway, J.**, delivered the opinion of the court:

On June 28, 1916, Herbert L. Wiggins, in the employ of Big Horn county, engaged in work upon the public roads, was killed by lightning. His dependent mother presented to the Industrial Accident Board a claim for compensation, but the claim was rejected, and this action resulted. The trial court rendered and entered judgment in favor of the claimant, and the board appealed.

Section 16 of the Workmen's Compensation Act (Laws 1915, chap. 96) provides that the industrial accident fund is liable for the payment of compensation to an employee, or in case of his death to his dependents, for "injury arising out of and in the course of his employment." The phrase quoted was incorporated in the English Compensation Act of an early date, and has been copied into the act adopted by practically everyone of the states of the Union which has a statute dealing with the subject. It has been construed frequently by the British and American courts, and the authorities agree that, to warrant payment of compensation, the facts must disclose that the injury or death, as the case may be, resulted from (a) an industrial accident, (b) arising out of and (c) in the course of the employment. In other words, it is held that these terms are employed conjunctively, and not disjunctively, and that the burden of proof is upon the claimant to establish, by a preponderance of the evidence, that all three of these conditions are met. The authorities are too numerous to be cited. They will be found collected and reviewed in Ann. Cas. 1913C, 1, Ann. Cas. 1914B, 498; Ann. Cas. 1916B, 1293, and Ann. Cas. 1917C, 760.

It is conceded by the appellant board that the death of Wiggins resulted from injury received by him while in the due course of his employment. Our inquiry is thus limited to the principal question, and to questions subsidiary to one of them:

1. Can it be said that the death of Wiggins resulted from an industrial accident?

We have heretofore indicated that the terms of our act are sufficiently comprehensive to include injury resulting from an act of God, and we adhere to that doctrine, and answer the first inquiry in the affirmative. *Lewis & Clark County v. Industrial Acci. Bd.* 52 Mont. 6, L.R.A.1916D, 268, 155 Pac. 268.

2. Did the death of Wiggins result from injury arising "out of" his employment? The words "out of" point to the origin or cause of the accident, and are descriptive of the relation which the injury bears to the employment. Without attempting to formulate a rule which will include every injury within the meaning of this phrase, it is sufficient for the purposes of this appeal to say that if, by reason of the nature of the employment itself or the particular conditions under which the employment is pursued, the workman is exposed to a hazard peculiar to the employment under the circumstances, and injury results by reason of such exposure, then it may be said fairly that the injury arises out of the employment, or, stated in different terms, the workman must have been exposed by his employment to more than the normal risk to which the people of the community generally are subject, in order that his injury can be said to arise out of his employment. *Workmen's Compensation Acts; A Corpus Juris Treatise*, p. 77.

It is not contended that there was anything in the nature of the particular work upon which Wiggins was engaged that exposed him to extra hazard, but it is insisted that the conditions under which he was required to do his work at the time of the accident exposed him to more than the natural risk of being struck by lightning. He was required to work with a metal road grader at a time a thunderstorm was threatening. These facts appeared from an agreed statement. The trial court reached the conclusion that the deceased had been exposed to an abnormal risk, by a process indicated in an opinion expressed at the time judgment was rendered, as follows: "In this case we are of the opinion that we are justified in taking judicial notice of the principle of the lightning rod, the natural attractiveness of metal, and especially of steel, for lightning, and we hold that under the facts in this case the deceased was exposed by reason of his employment about an iron and steel road grader to unusual hazard from lightning; that such employment increased the natural hazard from lightning to which all living creatures are exposed."

Assuming, without deciding, that, in disposing of a case submitted upon an agreed statement of facts, the court may supple-

ment the record by matters of which it may properly take judicial notice, the question resolves itself into this: Was the court justified in taking judicial notice of the natural attractiveness of metals for lightning? Section 7888, Revised Codes, enumerates the matters and things of which the courts of this state may take judicial notice. The only provision of the statute which could possibly be invoked here is: "Courts take judicial notice of . . . the laws of nature."

In 15 R. C. L. 1127, it is said: "Judicial notice will be taken of scientific facts which are universally known, and which may be found in encyclopedias, dictionaries, or other publications, as well as of scientific methods and instruments, but they must be of such universal notoriety and so generally understood that they may be regarded as forming part of the common knowledge of every person. Here, as elsewhere, a judge may refresh his memory, if it is at fault, by resorting to any means for that purpose which he deems safe and proper. Examples of scientific matters of judicial cognizance are the laws of gravitation, the revolution of the earth, the change of the seasons, and the expansion of metals when heated and their contraction when cooled. The general nature and qualities of electricity and its manifold uses, the telephone, its nature, operation, and use, are likewise entitled to recognition under the same theory. . . . However, cognizance may not be taken of scientific matters of uncertainty or dispute, or of insufficient notoriety, even though learnedly discussed in scientific publications."

Is it a known law of nature that metals such as iron or steel, possess properties which perceptibly attract lightning and enhance the danger from lightning within the sphere of their influence, and, if so, to what source of information may one resort to refresh his recollection and confirm him in his knowledge of the existence of the law? The trial court apparently treated the attractiveness of metals for lightning as the principle which underlies the use of the lightning rod, or, stated differently, upon the assumption that the lightning rod attracts the lightning, the iron and steel composing the road grader possessed the same property, and, because of their attractiveness for the lightning, their enforced use by the deceased increased his risk beyond the normal limit.

As a result of scientific research covering a period of 150 years or more, certain fairly well-defined theories concerning the action of lightning have been evolved. The discussion of them by scientists is elab-

orate and necessarily of a technical character. It would be impossible for us to reduce them to form available for presentation here, but an excellent summary of them is to be found in a brochure by H. H. Cochrane, a leading electrical engineer of this country, from which we quote the following:

"I may say that such laws [the laws governing the action of lightning] as exist are the same as those applying to other electric currents or discharges. Such laws, however, are exceedingly difficult to apply in the case of lightning, on account of the great number of unknown and unknowable variables which exist in any particular case. Certain atmospheric conditions cause the mist or vapor which forms clouds, to become charged with electricity. The potential of this charge tends to increase as the particles of moisture increase in size and decrease in number. When the potential becomes sufficiently high, the charged cloud will relieve itself by discharging either to another cloud of lower potential, or to the earth. It is the latter kind of lightning only in which we are interested.

"The character of such a discharge to earth depends upon the size of the cloud, its distance from the earth, the potential to which it is charged, the quantity of the charge, and the character of the path through the atmosphere in which the discharge takes place. The discharge may be oscillatory, with a frequency varying from a few thousand cycles per second up to several million cycles per second, or it may be a single direct stroke, with a current flowing in one direction only. In the latter case the impulse or wave of current will ordinarily have such a steep wave front that its characteristics will largely resemble those of the high frequency oscillatory discharge.

"When the atmosphere in the path of the discharge is variable in its characteristics, in other words, if the stroke passes successively through atmospheric strata of high and low temperature, and of varying degrees of moisture, the potential gradient will be correspondingly variable, so that the breakdown of the atmosphere will occur by a step by step process. The potential gradient in the atmosphere in close proximity to the cloud may be sufficiently high to cause this part of the atmosphere to break down as a preliminary step. The potential of the cloud, having now advanced to a new point, will stress the atmosphere adjacent to the new point sufficient to cause another advance in the breakdown, and so the stroke will progress from point to point, until it finally reaches

the earth, the action being similar to that of a quantity of water released on the top of a hill, which starts a small stream downward in the most available path, which stream turns from side to side in its course down the hill, always taking the easiest path, until it reaches the bottom.

"This, I believe, is the most usual form of lightning stroke. A rarer form occurs when the atmosphere is practically uniform in character between a broad, flat cloud and the earth. In this case the potential gradient between the cloud and the earth will be more nearly uniform, and no discharge will occur until the atmosphere throughout the entire course of the stroke is stressed to the breakdown point. The voltage required for this kind of a stroke is very much higher than that required for the class of stroke first described, and the severity of the stroke is correspondingly greater.

"If the earth were perfectly flat and uniform, the points at which lightning would strike would be determined entirely by the location of the charged clouds and the characteristics of the atmosphere intervening between the clouds and the earth. In general, the lightning would start from the lowest point on the charged cloud, and would follow the path of least resistance through the atmosphere to the earth. Where the earth is not uniform, due to either variable contour, or the existence of buildings, trees, poles, or other projections from the surface, or due to regions of good conductivity, caused by moisture, as compared with regions of poor conductivity, caused by dry sand or rock, the course of the lightning to the earth will be somewhat modified by these irregularities. This follows from the fact that the lightning always tends to take the path of least resistance.

"In all ordinary cases, however, the location and configuration of the storm clouds, and the more or less variable conductivity of the atmosphere, are by all means the predominating factors in determining where the lightning will strike, and all ordinary, natural, or artificial projections from the earth's surface are of comparatively small importance."

We may assume for present purposes that a lightning rod properly adjusted to a building furnishes some protection against damage from lightning; but, so far as our research has gone, there appears to be no difference of opinion among the authorities that the lightning rod is not employed because it attracts the lightning. From the articles in the standard encyclopedias and from the work of Sir Oliver Lodge, entitled "Lightning Conductors and

Lightning Guards," we deduce the following: The lightning rod projecting above the building which it is intended to protect may be the object upon which the atmospheric breakdown occurs, and, being a good conductor of electricity, it will ordinarily conduct the discharge safely into the ground and relieve the building itself from danger. When electricity passes through a poor conductor, it generates intense heat. If there is no lightning rod attached to a building, and the breakdown occurs at some projecting portion of the building, the heat generated by the passage of the electricity through the building, a poor conductor, may and usually does cause damage. The atmospheric breakdown occurs at the weakest point—the place of maximum tension. If there are numerous projecting objects, such as lightning rods, trees, etc., the brushes and glows become so numerous that the tension may be relieved and the entire discharge dissipated without violence or damage, and primarily this is the purpose which the lightning rod is to subserve. But if the charged cloud descends too quickly or has too great a store of energy, the crash occurs notwithstanding the projecting points, and the service of the lightning rod is then employed to conduct the discharge into the ground. Because projecting objects may occasion the atmospheric breakdown, trees, tall buildings, and other projecting objects are more likely to be struck by lightning than other less prominent objects, and it is upon this theory, we think, that compensation for injury from lightning was allowed in *State ex rel. People's Coal & Ice Co. v. District Ct.* 129 Minn. 502, L.R.A.

1916A, 344, 153 N. W. 119, 9 N. C. C. A. 129, and in *Andrew v. Failsworth Industrial Soc.* [1904] 2 K. B. 32, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 Week. Rep. 451, 20 Times L. R. 429, and denied in *Klawinski v. Lake Shore & M. S. R. Co.* 185 Mich. 643, L.R.A.1916A, 342, 152 N. W. 213, in *Hoenig v. Industrial Commission*, 159 Wis. 646, L.R.A.1916A, 339, 159 N. W. 996, 8 N. C. C. A. 192, and in *Kelly v. Kerry County Council*, 42 Ir. L. T. 23, 1 B. W. C. C. 194. The decisions are harmonious. The difference in the facts alone accounts for the contrary results.

The most diligent research on our part has failed to disclose any authority which supports the theory upon which this cause was decided by the court below: on the contrary, so far as they point to any conclusion respecting the subject, the authorities indicate quite clearly that the presence of the metal road grader could not have had any perceptible influence upon the lightning, and did not tend to increase the natural hazard of the deceased's employment. For this reason it cannot be said from this record that his death resulted from an accident arising out of his employment, as the term is used in our Workmen's Compensation Act.

The judgment is reversed, and the cause is remanded to the district court, with directions to enter judgment for the defendant board.

**Sanner, J.**, concurs. **Brantly, Ch. J.**, being absent, takes no part in the foregoing decision.

Petition for rehearing denied.

### **Annotation—Workmen's Compensation: compensation for injuries caused by weather conditions, such as lightning, sunstroke, freezing, etc.**

The general subject of Workmen's Compensation Acts is treated in annotations in L.R.A.1916A, 23, and L.R.A.1917D, 80. For later cases and annotations on Workmen's Compensation Statutes, consult the L.R.A. Indexes for volumes subsequent to L.R.A.1917D, under the title, "Workmen's Compensation."

As to what constitutes an "accident" or "personal injury," within the meaning of the Compensation Act, see annotation following *Re Maggelet*, ante, 864. As to injuries arising out of and in the course of the employment, within the meaning of the Compensation Acts, see annotation to *Mueller Constr. Co. v. Industrial Bd.* ante, 891.

The earlier cases upon recovery of compensation for injuries caused by

weather conditions, such as lightning, heat stroke, freezing, etc., will be found in the annotation in L.R.A.1916A, at page 38, notes 49, 50, page 43, notes 74 et seq., and page 241, notes 18 et seq., and in the annotation in L.R.A.1917D, at page 108, note 44, and page 129, note 67. The present annotation deals only with cases handed down since the preparation of the earlier annotations.

In passing upon the question whether or not compensation is recoverable for injuries caused by weather conditions, such as lightning, etc., the question is twofold: First, it must be decided whether or not the injury was an accident or the result of an accident; and second, whether the injury arose out of the employment. In a number of cases



passing upon the general question, it is apparently assumed that the injury was accidental within the meaning of the Compensation Act, and the question to decide was whether or not it arose out of the employment; while, in other cases, it was apparently assumed that the injury arose out of the employment, so that compensation was recoverable, if the injury could be considered accidental in character.

Injuries resulting from exposure to weather conditions, such as heat, cold, ice, snow, or lightning, are generally classed as risks to which the general public is exposed, and as not coming within the purview of Compensation Acts, though the injured person, at the time he received his injury, may have been discharging duties incident to and in the course of his employment. But where the employment of the injured person required him to be at the place where his injuries were received, and he was, in fact, at such place, in pursuance of the discharge of the duties of his employment, the risk thereby encountered is held to be incident to such employment, though the injury may have resulted from conditions produced by the weather, to which persons generally, in that locality, were exposed. *Re Harraden* (1917) — *Ind. App.* —, 118 N. E. 142.

#### **Lightning.**

An employee of a county, who was killed by lightning while at work upon the public road, suffers an industrial accident within the meaning of the Montana statute. But such death does not arise out of his employment, where there is nothing to show that his hazard was increased by the fact that he was employed on such machine. *Wiggins v. Industrial Acci. Bd.*, ante, 932.

In a case in which a bridge builder, while sitting in a boarding tent, was struck by lightning, the court said that the fact that the tent was placed in a river bottom, that the ground about the tent was saturated with water, that it had no floor and was wet, that it had no lightning rods or lightning arresters of any sort, that it was higher than the surrounding objects, that wire fences which were a part of the highway fence were about the tent, that in close proximity to its guide ropes there was a pile of steel rods for use in reinforcing concrete, and that the tent poles were connected by a metal wire, were not sufficient to show that the injury to the workman arose out of the employment. *GRIFFITH v. COLE*, ante, 923. This decision

was based upon the fact that the injury was an act of God, or rather that it was not due to the negligence of the employer. It is submitted that, regardless of the correctness of the ultimate holding, the reasoning of the court is erroneous. The question is not whether or not there was evidence to show negligence on the part of the employer, but whether, because of the employment, the employee in question was subjected to a danger from lightning greater than were the other people in the neighborhood; that is. Was the danger to which he was subjected one which was incident to the employment, or was it one to which other people, the public generally, in that neighborhood, were subjected? If the conditions surrounding the tent were such that it was more likely to be struck by lightning than were the other places thereabout, it would seem to be clear that he would be entitled to compensation. Whether or not the tent was of this character is a question of fact; but it is submitted that the decision should have rested upon the points suggested, rather than upon the question of negligence vel non of the employer.

#### **Heat stroke or sunstroke.**

Injury from heat stroke or sunstroke is generally considered to be an injury by accident. *STATE EX REL. RAU v. DISTRICT Ct.* ante, 918; *Kanscheit v. Garrett Laundry Co.* (1917) 101 *Neb.* 702, 164 N. W. 708; *Young v. Western Furniture & Mfg. Co.* (1917) 101 *Neb.* 696, L.R.A.1918B, 1001, 164 N. W. 712; *Hernon v. Holahan* (1918) 182 *App. Div.* 26, 169 N. Y. Supp. 705.

Whether or not the injury from heat-stroke or sunstroke may be held to arise out of the employment depends upon the circumstances of the individual case.

Thus, death from a heat stroke may be found to have grown out of the employment, where the employee was required to work in a corrugated steel building covered with tarred roofing, on a hot day, when the building was heated. *Young v. Western Furniture & Mfg. Co.* (1917) 101 *Neb.* 696, L.R.A.1918B, 1001, 164 N. W. 712.

So, it may be found that an employee of a city suffers injury by accident arising out of the employment, where he suffered a sunstroke while at work on a street on a very hot day, in the open, with no protection from the rays of the sun, and the street was sandy, and the sand was moist because it had rained the night before. *STATE EX REL.*

**RAU v. DISTRICT Ct. ante, 918.** The court said: "The conditions surrounding decedent at the time of his injury exposed him to an unusual danger, different from that to which the masses engaged in like employment were subjected. It had rained the night before; the sand was wet; the sun's rays direct, thereby enhancing liability to sunstroke. The decedent was exposed to the direct rays of the sun in addition to the humid atmosphere emanating from the wet street."

In **Kanscheit v. Garrett Laundry Co. (1917) 101 Neb. 702, 164 N. W. 708,** and **Hernon v. Holahan (1918) 182 App. Div. 261, 169 N. Y. Supp. 705,** it was apparently taken for granted that injury from sunstroke, while the employee was engaged at his work, arose out of and in the course of the employment.

But in **McCarthy's Case (1918) 230 Mass. 429, 119 N. E. 697,** it was held that, in order to sustain an award of compensation in favor of a workman who was injured by sunstroke while at work in a gravel pit, it must appear that the employee was required to remain in the pit, and could not leave the work if he felt that he was affected by the heat.

And in **Roach v. Kelsey Wheel Co. (1918) — Mich. —, 167 N. W. 33,** it was held that there could be no recovery of compensation for injuries caused by heat stroke, where the employee was doing the work which he and his associates were employed to do, exactly in the manner they expected to do it, and there was no evidence that anything untoward or unusual happened during the time when he was subjected to the heat. The court said: "To permit recovery in this case would make it impossible to deny recovery in any case where a fireman of a stationary or marine boiler, in the performance of his ordinary and accustomed labor, succumbs to heat prostration."

The Michigan court has declared that, as the Compensation Statutes is in derogation of the common law, it must be construed strictly, and the decision in this case is an illustration of the effect of the strict construction which is given to the statute by the Michigan court. The great majority of courts have held that the statutes are to be construed liberally, to accomplish the humane purpose for which they were passed, and it would seem that one class of workmen who are especially in need of the protection of the Compensation Acts are the men whose employment

subjects them to great heat, and who sometimes succumb to such heat; but this entire class of employees is placed outside of the operation of the act by the strict construction given thereto by the Michigan court, provided they are working in their accustomed manner.

#### **Freezing.**

Freezing may be a personal injury caused by accident within the meaning of the Workmen's Compensation Act. **State ex rel. Virginia & R. L. Co. v. District Ct. (1917) 138 Minn. 131. L.R.A.1918C, 116, 164 N. W. 585; STATE EX REL. NELSON v. DISTRICT Ct. ante, 921.**

A janitor of a building, whose duty it was, among other things, to shovel the snow from the sidewalk, may be found to suffer injury arising out of his employment, where he was engaged in the shoveling of snow from a sidewalk about 190 feet long, the snow was 2 or 2½ feet deep, and the weather was very cold, and he froze his big toe, the freezing resulting in the amputation of his leg. *Ibid.*

And an employee whose work required him to cut and handle timber, and his hands to come in contact with the snow, and who froze his thumb while at work several miles from camp, where there were no facilities for warming, and in severely cold weather, may be found to suffer injury arising out of the employment. **State ex rel. Virginia & R. L. Co. v. District Ct. (Minn.) supra.**

But in **Davis v. Fowler Packing Co. (1917) 101 Kan. 769, 168 Pac. 1111,** a judgment in favor of an employee was reversed, where the injury complained of was caused by frozen feet, and there was no evidence to show that it occurred at the plant of the employer.

W. M. G.

#### **ARKANSAS SUPREME COURT.**

**CLIFFORD HOLMES et al., Appts.,**  
v.

**STATE OF ARKANSAS.**

(— Ark. —, 204 S. W. 846.)

#### **Breach of peace — calling names.**

Applying to a huckster as a nickname.

**Note.** — As to breach of the peace by the use of insulting or disorderly language, see annotation following this case, post, 941: and references therein to annotations on related questions.

a word which he uses in crying his wares, is not, although it incites him to anger, within a statute making the use of profane, violent, abusive, or insulting language which in its common acceptation is calculated to arouse to anger the person to whom it is addressed, a breach of the peace.

*For other cases, see Breach of the Peace, in Dig. 1-52 N. B.*

(Smith, J., dissents.)

(July 8, 1918.)

**A**PPPEAL by defendants from a judgment of the Circuit Court for Craighead County convicting them of using profane or insulting language in violation of statute. Reversed.

The facts are stated in the opinion.

Mr. J. F. Gautney for appellants.

Messrs. John D. Arbuckle, Attorney General, and T. W. Campbell, Assistant Attorney General, for the State:

Whether the language used is calculated to arouse to anger is a question to be left to the jury.

State v. Moser, 33 Ark. 140.

McCulloch, Ch. J., delivered the opinion of the court:

Appellants, Clifford and Louis Holmes, are lads thirteen or fourteen years of age, and were arrested and convicted before a justice of the peace of Craighead county for violation of the statute which provides that if any person "shall make use of any profane, violent, abusive or insulting language toward or about another person, in his presence or hearing; which language in its common acceptation is calculated to arouse to anger the person about or to whom it is spoken or addressed, or to cause a breach of the peace or an assault, every such person shall be deemed guilty of a breach of the peace," etc. Kirby's Dig. § 1648.

The case was tried in the circuit court on appeal, and the trial resulted in the conviction of appellants. It appears from the evidence that Fred Hatch, the prosecuting witness, was a street vender of potatoes at the town of Bay, Craighead county, and in crying his wares was accustomed to announce the sale of potatoes by calling out "taters" in a tone of voice which excited merriment on the part of those who heard him, and the boys in the neighborhood gave him the nickname of "Taters," to which Hatch took serious offense. This had been going on for nearly two years according to the testimony, and Hatch had frequently shown irritation at the use of the nickname in connection with himself, and had indicated to the boys that its use was offensive to him. The evidence shows

that the boys sometimes applied other nicknames to him, among other things calling him "Flashlight" and "Sixshooter," and also "Chicken" and "Pumpkin." The judgment of conviction is, however, sought to be upheld upon the use of the nickname "Taters," which seems to have been especially offensive to Hatch.

It is contended that the evidence wholly fails to connect one of the appellants, Louis Holmes, with the use of the alleged offensive language towards Hatch, and the attorney general concedes that the evidence is insufficient to connect him with the offense. There was sufficient evidence, however, to warrant the conclusion that Clifford Holmes used the nickname towards Hatch, together with other boys about his own age, and that Hatch was very much offended at the conduct of the boys in frequently calling him by the nickname "Taters."

The court, among other instructions, gave one to the jury, submitting to them for determination the question whether or not the language used was such as, in its common acceptation, was calculated to arouse a person to anger and cause a breach of the peace. Counsel for appellants insist that that instruction should not have been given, and that the evidence was not sufficient to warrant a conviction, in that the language used by the boys does not come within the statute. It will be observed that the statute defines the character of language constituting the offense as "profane, violent, abusive or insulting language, . . . which language in its common acceptation is calculated to arouse to anger the person about or to whom it is spoken or addressed, or to cause a breach of the peace," etc. The language used must be in its nature "profane, violent, abusive, or insulting," and it must be of that character which "in its common acceptation is calculated to arouse to anger the person about or to whom it is spoken or addressed, or to cause a breach of the peace or an assault." It is not sufficient that the language used gives offense to the person to whom or about whom it is addressed, but it must be that which, in its ordinary acceptation, is calculated to give offense and to arouse to anger.

In State v. Moser, 33 Ark. 140, the defendant was accused of directing toward another person the language, "Go to hell, God damn you," and in passing upon the question of the guilt of the defendant this court said that the language used was certainly profane, but that it was a question for the jury to determine whether the words were used under such circumstances as were calculated to arouse to anger the person to whom the words were addressed.

In the present case the word used towards Hatch was neither profane, violent, abusive, nor insulting, and was not, in its common acceptation, calculated to arouse a person to anger. The fact that Hatch became offended at the application to him of the nickname does not make the language such as is insulting according to its common acceptation. The nickname was used by the boys in a spirit of fun, doubtless because they ascertained that it irritated Hatch. It did not carry the implication of unlawful conduct or moral turpitude on the part of the person toward whom it was used. It was undoubtedly offensive to him, and he showed his irritation repeatedly; but the statute was not intended to reach cases where persons, by the use of harmless nicknames or in a spirit of fun, make use of nicknames or expressions which, although they are not calculated in their common acceptation to arouse anger, do in fact give offense because of the peculiar sensibilities of the person to whom or about whom the words are used. It may be considered bad taste for men or boys to indulge in such practice, but the law was not intended to reach such cases. We know that even innocent amusement at the expense of others sometimes brings about a breach of the peace, but those are not the things which the law meant to reach by this statute. It is only the language of the kind referred to, which is calculated in its ordinary acceptation to arouse to anger or cause a breach of the peace, that the statute denounces.

Our conclusion is, therefore, that the testimony in the case, given its strongest force, does not establish an offense under the statute. The judgment of the Circuit Court is reversed, and the charge against each of the defendants is dismissed.

**Smith, J., dissenting:**

If the only effect of the opinion in this case was to relieve the three boys of the \$5 fine imposed by the judgment of the court below, I would be constrained to pass it by without recording my dissent. But such is not its effect. The law as here announced applies to "grown-ups" as well as to boys, and it requires no stretch of the imagination to forecast some of the results which may flow from this decision, if the doctrine here announced is applied to a real, sure-enough lawsuit. The statute quoted from in the majority opinion has long been known as the "Peace and Tranquility Statute," and possibly no law in the books has been more wholesome. One can easily conjecture the quarrels and feuds and murders which the existence of this

law, and its enforcement, have prevented; and its wholesome provisions should not be impaired.

Here the testimony was to the effect that Hatch discovered appellants and some other fifteen-year-old boys in the act of cutting the stay ropes of the tent of a little show which was being exhibited in the village of Bay, and he reported their conduct to the constable, who caused the boys to desist. Hatch testified that thereafter these boys "picked" on him. The boys say he called them Bohemians, but this Hatch denied. That, if true, however, would not have excused their conduct, because, as this court said in the case of *Moore v. State*, 50 Ark. 27, 28, 6 S. W. 18, "violent words cannot excuse like violent words." Hatch testified that this conduct continued for nearly two years, until it became intolerable, and that he went to the boys and told them that he did not want to slap them, and did not want to compel their parents to pay fines, but that he would have them arrested if they did not stop their practice. The boys continued to apply these various nicknames to him, and he caused their arrest, and they were convicted in both the justice of the peace court and in the circuit court on appeal. Hatch testified that the boys would halloo at him at various times and places, and would follow him to the post office, and poke their heads in at the door, and call him the various nicknames they had given him. A Mr. Davis testified that the conduct of the boys finally "got onto Mr. Hatch," and Hatch himself testified that the conduct of the boys became unendurable.

In the case of *Moore v. State*, supra, in a discussion of the kind of language against the use of which the penalty of the statute was denounced, this court said: "Whether language was in its nature calculated to arouse to anger or to provoke a breach of the peace must be left to the jury, depending, as it does, upon the manner of the speaker, the relations of the parties, and the circumstances under which it was spoken."

These questions were submitted to the jury, and the jury was told that a conviction could not be had unless they found the language used was, in its common acceptation, calculated to arouse Hatch to anger or to cause a breach of the peace, and the verdict of the jury should be conclusive of that fact. Webster's New International Dictionary defines the verb "insult" as follows: "To treat with insolence, indignity, or contempt, by word or action; to affront wantonly."

The noun is defined as: "Gross indigni-

ty offered to another, either by word or act; an act or speech of insolence or contempt; an affront."

And the adjective "insulting" is defined as: "Containing, or characterized by, insult or indignity; tending to insult or affront; as, insulting language, treatment, etc."

And the words, "insolent," "impertinent," "impudent," "abusive," and "offensive" are given as synonyms of the word "insulting." In view of these definitions, it occurs to me that it was at least a question for the jury to say whether the language used under the circumstances was insulting.

There is in the life of most men something of which they are ashamed and would like to forget. It may be only some folly

or indiscretion, or a personal peculiarity, or a physical defect. One might be reminded of this thing, and know that others were also reminded, by the use of some simple word or phrase or nickname which, standing by itself, would be innocuous, but which was used to insult, and accomplished the effect of producing great mental distress. I am of the opinion that a wiser, sounder policy would be to permit the jury to say in a particular case, in accordance with the rule announced in *Moore v. State*, *supra*, whether the language used, under the circumstances under which it was used, was calculated, in its common acceptation, to insult the person to whom it was spoken; and I therefore dissent from the opinion of the majority in this case.

### Annotation—Breach of peace by use of insulting or disorderly language.

For disorderly language as disturbance of public peace, see the note to *Stewart v. State*, 32 L.R.A.(N.S.) 505.

For use of profane or offensive language while upon one's own premises as an offense, see the note to *St. Louis v. Slupsky*, 49 L.R.A.(N.S.) 919.

For good motive as affecting criminal charge involving obscene, indecent, or profane language or literature, see the note to *Delk v. Com.* (1915) L.R.A. 1916B, 1121.

At common law the use of insulting or disorderly language was not per se an offense. It seems that such use might be punishable if tending to a breach of the peace, but the authorities are not very clear on what is meant by the expression "tending to a breach of the peace."

There may be words of heat and intemperance and evil words which do not tend to the terror of anyone or to a breach of the peace. *Rex v. Heywood* (1638) Cro. Car. 498, 79 Eng. Reprint, 1030. In *Reg. v. Langley* (1704) Holt, K. B. 654, 90 Eng. Reprint, 1261, Holt, Ch. J., said: "Where words directly tend to the breach of the peace, as if one man challenge another, etc., it is indictable; but for these petty offenses, that are contra bonos mores, the law has another provision, by requiring surety for the peace and good behavior."

Abusing a person who was a magistrate, in the presence of others, is not an indictable offense, where it is not alleged that there was an intent to provoke a breach of the peace. *Ex parte Chapman* (1836) 4 Ad. & El. 773, 111 Eng. Reprint, 974.

In *Ex parte Marlborough* (1844) 5 Q. L.R.A.1918F.

*B. 955, 114 Eng. Reprint, 1508*, where it was held that the court would not grant any criminal information for unwritten words out of court in charging a magistrate with corruption or wrong, *Lord Denman, Ch. J.*, said: "It is clear upon all the authorities that words merely spoken are not the subject of a criminal information. The exception is in those cases where the words amount to a provocation to break the peace, by their inciting either to personal violence or to a challenge."

In *Johnson v. Clem* (1884) 82 Ky. 84, it was held that "when one is in the possession of his own land, and another, with himself and hands, enters thereon, against the will of the owner, and when requested to leave, by violent and abusive language announces his purpose to hold the possession, the entry and holding is forcible, and constitutes a breach of the peace."

"The threat to burn the dwelling of another is a threatened breach of the public peace, as it tends to provoke to acts of violence and a disturbance of the public order." *State ex rel. Gestner v. Murphy* (1888) 40 La. Ann. 855, 6 So. 107, holding that a magistrate had power to require the person making the threat to give a peace bond.

In *Ware v. Loveridge* (1889) 75 Mich. 488, 42 N. W. 997, it seems to have been the opinion of the majority of the court that it was not a breach of the peace at common law for the defendant to enter the house of the prosecutor and there utter obscene language. Some of the discussion in this case approaches the real gist of the matter, and it is to be regretted that one of the judges reports

the facts in one way while another reports them in another way, and that the language of the opinions is obscure.

In *Cohen v. Huskisson* (1837) 2 Mees. & W. 477, 150 Eng. Reprint, 845, Murph. & H. 150, 6 L. J. Mag. Cas. N. S. 133, where the plaintiff went into a shop of the defendant and abused him, and afterwards went out in the street and continued to abuse him, in the presence of many people, the court held that a breach of the peace was committed.

It was held, however, in *State v. Taylor* (1856) 3 Sneed (Tenn.) 662, that it was not an indictable offense for a person armed with dangerous weapons to use at a public election, in the presence of divers citizens, with reference to a person addressed, violent and opprobrious language calculated to produce a breach of the peace, the court stating that mere quarrelsome words are not a punishable offense.

Profane swearing was an offense at common law, but the earlier cases do not seem to put it on the ground of a disturbance of the peace. Chancellor Kent, however, in *People v. Ruggles* (1811) 8 Johns. (N. Y.) 229, 5 Am. Dec. 335, puts it to some extent on this ground in sustaining an indictment for speaking blasphemous words in a loud voice in the presence of divers Christian people. And following his authority it is stated in effect in *State v. Chandler* (1839) 2 Harr. (Del.) 553, that blasphemy was indictable at common law as having a tendency to disturb the peace, and in *Updegraph v. Com.* (1824) 11 Serg. & R. (Pa.) 394, that blasphemy is an offense at common law, as it tends to provoke and excite others to such breach.

In *Goree v. State* (1881) 71 Ala. 7, the court said: "It is too well settled for either disputation or discussion that public profane swearing as well as blasphemy was an indictable offense at the common law, owing, no doubt, as well to the fact of its tendency to disturb the peace and corrupt the morals of the community, as to undermine the foundations of Christianity, which is justly regarded, in a certain sense, as a part of the common law of the land." But it was held that the offense, to be indictable, should be committed under such circumstances as to constitute a public nuisance.

(And the same was held in *Ex parte Delaney* (1872) 43 Cal. 473; *State v. Brewington* (1881) 84 N. C. 783; *State v. Chrisp* (1881) 85 N. C. 528, 39 Am. Rep. 713; *State v. Graham* (1855) 3 Sneed (Tenn.) 145.)

#### Offenses of disturbing peace of family, person, etc.

The offense of disturbing the peace and quiet of any family by abusive, violent, obscene, or profane language is not committed in general by disturbing the peace of an individual. *Miles v. United States* (1907) 7 Ind. Terr. 11, 103 S. W. 598.

It is no offense to disturb the peace of an individual by the use of loud and abusive language, as such is not within the statute against disturbing the peace of families or neighborhoods. *State v. Schlottman* (1873) 52 Mo. 164.

In *Brooks v. State* (1890) 67 Miss. 577, 7 So. 494, the statute provided: "§ 2769. Any person who wilfully disturbs the peace of a family or person . . . by any tumultuous or offensive conduct, shall be punished," etc. "§ 2770. Any person who enters the dwelling house of another . . . or upon the public highway or any other place, near such premises and in the presence or hearing of the family of the possessor or occupant thereof, or of any member thereof, or of any female, makes use of abusive, profane, vulgar, or indecent language, . . . shall be punished, etc." It was held that these statutes related to the peace of the family, and not to the peace of the individual, and consequently no offense was charged by an affidavit alleging that the defendant did wilfully disturb the peace of a certain person by offensive conduct, to wit, by saying to him the language complained of.

In *State v. Burns* (1886) 35 Kan. 387, 11 Pac. 161, Blodgett and his family kept a boarding house where the former husband of the defendant boarded, and she was charged with disturbing the peace and quiet of Blodgett and his family by making loud and boisterous noises, by uttering profane and vulgar oaths, and by rude and indecent behavior, under the statute providing that every person who shall wilfully disturb the peace and quiet of any person, family, or neighborhood shall, etc., be punished. It was held that the court properly charged the jury that "although the words and acts of the defendant may have been primarily directed against some person other than Blodgett or his family, yet if the defendant's words and acts were wrongful and wilful, and the natural and necessary consequences of them were the disturbance of Blodgett and his family, the defendant is equally guilty as though she had no other inten-

tion than the disturbance of Blodgett and his family."

In the somewhat indistinct report of *Watson v. State* (1899) — **Tex. Crim. Rep.** —, 50 S. W. 340, it seems probable that the charge was the disturbing of the peace by using profane language near a private house; and it was held that the statute did not require that the act complained of be wilfully done, and that it was not necessary for the court to charge that it must be wilfully done.

A conviction for disturbing the peace by cursing, etc., in a private house, will not be disturbed on the ground that the private character of the house was changed by the fact that a wedding was going on at the time, and the residence was thrown open to invited guests. *Terry v. State* (1887) 22 **Tex. App.** 679, 3 S. W. 477, where, however, the conviction was reversed on other grounds.

A conviction for using obscene and vulgar language near a private house, in a manner calculated to disturb the inhabitants thereof, will not be sustained where the evidence does not show with reasonable certainty that the language was used in a manner calculated to disturb the persons living in the house. *Wallace v. State* (1894) 33 **Tex. Crim. Rep.** 178, 26 S. W. 68.

In *Mercer v. State* (1907) 52 **Tex. Crim. Rep.** 321, 106 S. W. 365, an information charging that the defendant did go near the private house of a person and did then and there curse and swear and yell and shriek and use loud, abusive, vulgar, obscene, and indecent language in a manner calculated to disturb the inhabitants of said private house, is sustained by evidence that defendant came to the owner of a house, who was working in his yard and engaged in conversation, and used profane language, and alluded to the prosecutor as a damned liar.

The conversation must be loud under the statute making it an offense if any person or persons shall wilfully disturb the peace of any neighborhood, or of any family, or of any person, by loud and offensive and indecent conversation. *State v. Maggard* (1889) 80 **Mo. App.** 286.

In *State v. Sturges* (1892) 48 **Mo. App.** 263, it was held that the evidence was sufficient to sustain a conviction under the same statute, but the judgment was reversed on account of misdirection.

**Offense of words calculated to cause or provoke a breach of the peace.**

It will be seen that in *HOLMES v. STATE*, ante, 938, it is held that calling a potato peddler "Taters" is not within the statute, as not calculated in its ordinary acceptation to arouse to anger or cause a breach of the peace.

In *State v. Moser* (1878) 33 **Ark.** 140, discussed in *HOLMES v. STATE*, it was held that the question was for the jury where the words were, "Go to hell, God damn you."

It is a breach of the peace to approach a man in front of his place of business in a town and curse and abuse him and make demonstrations as if to strike him. *Laur v. State* (1910) 94 **Ark.** 178, 126 S. W. 840.

Where the defendant, with his pistol in his pocket, which was partly drawn during a part of the altercation, approached one of a number of men, who had a spade in his hand during the greater part of the time, and said: "Don't you owe me \$2.50?" And the person addressed replied: "Yes: I owe you for marrying me, and I will pay you in corn;" and the defendant responded: "Damn you, and your corn, too;" and then, turning to the crowd, said: "Any man that made fun of my dinner is a damned son-of-a-bitch, and his mother is a bastard,"—it was held that the court properly instructed the jury that the language was, in its common acceptation, calculated to cause a breach of the peace. *Hearn v. State* (1879) 34 **Ark.** 550.

But an ordinance prohibiting disorderly conduct "calculated to disturb the peace of the citizen" is not violated by the use, in the presence of a man, of an obscene word, in an ordinary tone, without anger, and under circumstances not calculated to offend the hearer or cause a breach of the peace. *Daniel v. Athens* (1900) 110 **Ga.** 289, 34 S. E. 1016.

Under a conviction for using violent, abusive language to and concerning a person, under circumstances reasonably calculated to provoke a breach of the peace, the relative size of the parties does not affect the issue. *Deaton v. State* (1908) 53 **Tex. Crim. Rep.** 393, 110 S. W. 69, arising under the statute providing: "If any person shall, in the presence or hearing of another, curse or abuse such person, or use any violently abusive language to such person concerning him or any of his female relatives, under circumstances reasonably

calculated to provoke a breach of the peace, he shall be deemed guilty, etc.”

A conviction of using abusive language calculated to bring about a breach of the peace is sustained by evidence that the defendant said to another man, “If you say that I did not pay your brother for the seed he let me have, you are a liar.” *Easter v. State* (1913) 71 *Tex. Crim. Rep.* 370, 160 S. W. 74.

An information charging that the defendant did then and there unlawfully, in the presence and hearing of A. B., curse and abuse said A. B. in a manner reasonably calculated to provoke a breach of the peace, when the language of the statute is “under circumstances reasonably calculated,” etc., is sufficient, though the language is not exactly synonymous. *Trezevant v. State* (1905) 47 *Tex. Crim. Rep.* 502, 84 S. W. 828.

Violent words cannot excuse like violent words, but the jury may consider the provocation in mitigation of the punishment. *Moore v. State* (1887) 50 *Ark.* 25, 6 S. W. 17.

And the offense of cursing a prosecutor under circumstances calculated to provoke a breach of the peace is not excused by the fact that the prosecutor cursed the defendant first. *Christmas v. State* (1898) — *Tex. Crim. Rep.* —, 44 S. W. 175, where the appellate court so observed in commenting with approval on an instruction permitting the jury to take in mitigation the fact, if it was a fact, that the prosecutor used threatening, abusive, or discourteous language to the defendant, etc. A similar charge was approved in *Watkins v. State* (1898) — *Tex. Crim. Rep.* —, 44 S. W. 507.

**Offense of words tending to create a breach of the peace.**

Where a person and a constable demanded that a third person go about his business and leave them alone, and the person addressed contended with both of them and employed profane and angry words in doing so, it was held that the words employed by him tended to a breach of the peace,—that they incited to immediate violence. *State v. Clark* (1908) 64 *W. Va.* 625, 63 S. E. 402 (where the question arose in relation to the charge of the court, the person who used the words being accused of murdering the constable).

Where an ordinance made it an offense to “address to another, or utter in the presence of another, any words, language, or expression, having a tendency to create a breach of the peace,” it was

held that to constitute the offense the words must either be addressed to or spoken of the person whom they have a tendency to incite to a breach of the peace. *Ex parte Kearny* (1880) 55 *Cal.* 212.

Where the defendant was charged with having used certain abusive language toward and in the presence of the complainant, intending thereby and which naturally tended to cause a breach of the peace, the court considered that some of the words did not justify a conviction in the absence of evil intent, but other words would warrant a conviction without reference to the intent; and as the complaint charged intent, it was error to take the intent from the jury. *State v. Shelby* (1905) 95 *Minn.* 65, 103 N. W. 725.

The offense of using without provocation opprobrious words or abusive language to or of another, in his presence, tending to cause a breach of the peace, was committed where the defendant's cattle, having been running at large on the prosecutor's premises, were taken up and impounded under the stock law, and the defendant invaded the premises and endeavored to release the cattle from the pound, which attempt was resisted by the prosecutor's wife, to whom the defendant said, “Go to hell, God damn you.” *Ratteree v. State* (1886) 78 *Ga.* 335.

Whether there is sufficient provocation is for the jury. *Meaders v. State* (1895) 96 *Ga.* 299, 22 S. E. 527; *Williams v. State* (1898) 105 *Ga.* 608, 31 S. E. 38; *Echols v. State* (1899) 110 *Ga.* 257, 34 S. E. 389; *Hanson v. State* (1901) 114 *Ga.* 104, 39 S. E. 942; *Fish v. State* (1905) 124 *Ga.* 416, 52 S. E. 727; *Jackson v. State* (1913) 14 *Ga. App.* 19, 80 S. E. 20.

Where there was a line fence between the premises of the defendant and those of the prosecutor's father, and, in the absence of the defendant, the prosecutor and his father, with others, tore down the fence and moved it to another place, and were thus engaged when the accused came upon the scene, and he then used the language for which he was indicted, it was for the jury to say whether there was a provocation, and if so, whether it was sufficient to justify the accused in the language attributed to him. *Meaders v. State* (1895) 96 *Ga.* 299, 22 S. E. 527.

Whether the words were of such a character that the use of them was calculated to cause a breach of the peace,



or whether there was provocation sufficient to excuse their use, are questions for the jury; and it is error for the judge to instruct the jury as a matter of law that the words alleged are opprobrious and abusive within the meaning of the statute, and that a given state of facts would not be provocation for their use. *Fish v. State* (1905) 124 Ga. 416, 52 S. E. 727. Followed in *Jackson v. State* (1913) 14 Ga. App. 19, 80 S. E. 20.

While the question of provocation is for the jury, it was held no error to refuse to instruct them that if the complainant swore to a lie in a case against the defendant, they could determine whether that was provocation for the defendant to say to him, "You swore a God damned infernal lie, God damn you." *Dyer v. State* (1896) 99 Ga. 20, 59 Am. St. Rep. 228, 25 S. E. 609.

#### Various other statutory offenses.

A conviction of breach of peace from using language calculated to bring on a difficulty was sustained by evidence that the defendant called the prosecutor a God damn liar. *Johnson v. State* (1902)—*Tex. Crim. Rep.* —, 66 S. W. 1097.

A charge that the defendant was guilty of using a profane epithet towards the complainant at her residence charges no offense under the statute providing a punishment for all persons who "shall make, aid, countenance or assist in making any improper noise, riot, disturbance or breach of the peace in the streets and highways or elsewhere within the city." *State, Anderson, Prosecutor, v. Camden* (1890) 52 N. J. L. 289, 19 Atl. 539, holding that the word "elsewhere" meant other public places, as the statute was intended to prohibit offenses of a public character. The court further said: "And the act itself set forth must appear to be such as, by reason of its noisy, riotous character, or its disturbing or indecent features, amounts to a breach of the peace."

In *People v. Pabon* (1909) 15 P. R. R. 198, it was held that the offense of disturbing the public peace was not charged where the complaint alleged that the defendant conducted himself in a disorderly and offensive manner towards the complainant, calling him "malcriado" (low-lived), and thus disturbed the public peace, as the word was not in its nature of such scope and force that it could disturb the peace or tranquillity of the complainant, it not being alleged that the word was said in a loud voice or in a threatening tone or in a

noisy or offensive manner, and the word itself not being rude or unseemly.

A statute providing a punishment for "every person who shall disturb or break the peace, or stir up or provoke contention and strife by following or mocking any person with scurrilous or abusive or indecent language, or gestures, or noise," is violated where, there having arisen a controversy between the defendant and K. on one day, the defendant became very much enraged against K., and on the following day went to the place where K. was and addressed to him abusive and insulting language, as the strife and contention mentioned may be evidenced by passionate words, looks, and gestures without blows; for example, exciting the bad passions of K. so that he replied with like violent and opprobrious language. *State v. Warner* (1867) 34 Conn. 276.

In *State v. Benedict* (1839) 11 Vt. 236, 34 Am. Dec. 688, the court sustained a conviction under a statute making it an offense that a person shall in any manner disturb or break the peace by threatening, and held that the court correctly instructed the jury "that if they believed the threats were made by the respondent, with intent to put Mrs. Benedict in fear of her life, or other bodily harm, and that they were so made as to be calculated to produce such effect upon a person of ordinary sagacity and forecast, and that they did produce this effect, they would be warranted in finding a verdict against the respondent, notwithstanding those threats were not made in the presence of Mrs. Benedict, or under such circumstances as to induce a belief of immediate personal violence." The court observed that whatever was once thought upon the subject, it is now well settled that mere threats in words not written is not an indictable offense at common law.

In *State v. Archibald* (1887) 59 Vt. 549, 59 Am. Rep. 755, 9 Atl. 362, the court sustained a conviction under the statute which provided a punishment for a person who disturbs or breaks the public peace by quarreling, etc., where the defendant was charged with quarreling with the prosecutor by cursing and swearing at him and by calling him opprobrious, indecent, and obscene names, and it was held that the statute did not require an allegation of an intent to break the public peace.

#### Where the words are addressed to an officer.

In *Heath v. Hagen* (1907) 135 Iowa,

495, 113 N. W. 342, in sustaining an instruction that any names the plaintiff may have called a police officer would not of themselves justify him in making an arrest, it was stated that abusive words addressed to an officer do not justify him in making an arrest unless they amount to a breach of the peace.

That a person while under arrest and being taken to the station house applied a vile name to the officer, there being no evidence that the remark was made in a loud voice or public manner, cannot be deemed disorderly conduct tending to or intended to promote a breach of the peace. *People v. Lukowsky* (1916) 94 Misc. 500, 159 N. Y. Supp. 599, where the court said: "The law does not contemplate that the officer would assault a person in his custody by reason of a remark addressed to him, yet in no other way could the remark tend to provoke a breach of the peace."

A conviction for disturbing the peace by cursing and swearing in a public place, to wit, the street, cannot be sustained when the evidence showed that the only cursing in the street done by the defendant, was when she was resisting arrest by the officer, and it seems probable from the report that the arrest was wrongful. *Williams v. State* (1886) 21 Tex. App. 256, 17 S. W. 624.

In *State v. Moore* (1914) 166 N. O. 371, 81 S. E. 693, where the defendant was charged with the violation of an ordinance "in that she did curse on the streets, loud enough to be heard by those passing by, in a disorderly manner, and on the streets of the town," the proof was that she had been arrested for violating an ordinance and had given a bond for her appearance, and that, as she stepped into her buggy, she was cautioned by the policeman who had arrested her not to drive through the town, and replied to him that she would drive "where she damned please." No one heard it except the policeman. It was held that her conviction must be reversed, but the terms of the ordinance do not appear.

An offense under an ordinance which was a substantial copy of the Missouri statute referred to in *State v. Maggard* (1899) 80 Mo. App. 286, supra, cannot be committed by one who disturbs the peace of the village marshal, as the village marshal is not a person within the meaning of the ordinance. *Salem v. Coffey* (1905) 113 Mo. App. 675, 88 S. W. 772, 93 S. W. 281.

But in *De Soto v. Hunter* (1909) 145

Mo. App. 430, 122 S. W. 1092, it was held that a police officer was a person whose peace might be disturbed under a city ordinance making it an offense wilfully to disturb "the peace of any person or persons by violent, offensive, tumultuous or obstreperous conduct or carriage, or by loud or unusual noises, or shall use toward another any indecent, profane, obscene or offensive language calculated to provoke a breach of the peace, . . . so that others are disturbed thereby;" the court not agreeing with the case of *Salem v. Coffey* (Mo.) supra.

And the offense of using without provocation opprobrious words or abusive language to or of another in his presence, tending to cause a breach of the peace, may be committed by the use of such words to or of an officer who has the user at the time in legal custody. *Elmore v. State* (1914) 15 Ga. App. 461, 83 S. E. 799.

It may be noted that it was held in *Davis v. Burgess* (1884) 54 Mich. 514, 52 Am. Rep. 828, 20 N. W. 540, that loud, boisterous, profane, and insulting language to a police officer in the public streets, continued and repeated where people were constantly passing, constitutes a breach of the peace.

See also *Com. v. Harris* (1869) 101 Mass. 29, relating to public peace, and referred to in the note in 32 L.R.A. (N.S.) 505.

For right of officer to arrest without a warrant one using abusive language toward him, see the note in 13 L.R.A. (N.S.) 881.

#### Miscellaneous.

In *Marcuchi v. Norfolk & W. R. Co.* (1918) — W. Va. —, 94 S. E. 979, it seems to have been held in effect that a person who attempts to force his way into the coach of a train and persists in the attempt when the conductor detains him on the steps, and who continues to use loud, vulgar, obscene, and profane language in the presence of the conductor and other persons, is guilty of a breach of the peace; but it seems doubtful whether this was necessary to the decision of the case.

Where the statute provided: "No person shall address any offensive, derisive, or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, or make any noise or exclamation in his presence and hearing, with intent to deride, offend, or annoy him, or to prevent him from pursu-

ing his lawful business or occupation," it was held that the presence of others than the offender and the person addressed was not necessary to complete the offense, and that it was no objection

that the place in the highway where the words were spoken was 40 rods distant from any dwelling house. *State v. McConnell* (1900) 70 N. H. 294, 47 Atl. 2671. B. B. B.

#### NORTH DAKOTA SUPREME COURT.

HOWARD MOODY, Exr., etc., of Martin A. Hagen, Deceased,  
v.

OTTO A. HAGEN et al., Respts.

NORTH DAKOTA TAX COMMISSION,  
Intervener, Appt.

(36 N. D. 471, 162 N. W. 704.)

#### Tax — succession — aliens — discrimination.

1. Section 8977 of the Compiled Laws of 1913, which imposes a tax of 25 per cent on the inheritance of nonresident aliens as opposed to a tax of 1½ per cent on the inheritances of citizens and *resident aliens* residing in the United States is not in violation of § 20 of article 1 of the Constitution of North Dakota, which provides that "no citizen or class of citizens shall be granted privileges or immunities which upon the same terms shall not be granted to all citizens." Nor is it in violation of § 11 of article 1, which provides that "laws of a general nature shall have a uniform operation." Nor, where the decedent was a citizen of the United States and residing therein, is it in violation of article 6 of the Treaty of Amity and Commerce between Norway and the United States, and which provides that "the subjects of the contracting parties in the respective states may freely dispose of their goods and effects either by testament, donation or otherwise, in favor of such persons as they think proper; and their heirs, in whatever place they shall reside, shall receive the succession . . . ab intestato, either in person or by their attorney, without having occasion to take out letters of naturalization. These inheri-

tances, as well as the capitals and effects, which the subjects of the two parties, in changing their dwelling, shall be desirous of removing from the place of their abode, shall be exempted from all duty called 'droit de detraction,' on the part of the governments of the two states respectively."

*For other cases, see Constitutional Law, II. a. 2. b; Taxes, V. b; Treaties, in Dig. 1-52 N. S.*

#### Constitutional law — right to inherit.

2. The right to inherit or to take by will and the right to devise and to bequeath are not natural and inalienable rights, nor are they guaranteed by the state or Federal Constitutions.

*For other cases, see Taxes, V. a, in Dig. 1-52 N. S.*

#### Alien — rights — descent.

3. The alien, in the absence of permissive legislation, has never been allowed, as against the sovereign state, to take by descent or even by will.

*For other cases, see Descent and Distribution, I. b, in Dig. 1-52 N. S.*

#### Descent — alien — statutory right.

4. Statutes which change the common law and which allow aliens to take by will or to inherit are not to be looked upon in the light of a recognition or extension of any previously existing right belonging to such aliens, but rather as a fresh grant or a right or a statute of grace which the state chooses to confer.

*For other cases, see Descent and Distribution I. b, in Dig. 1-52 N. S.*

#### Tax — export — inheritance.

5. There is a wide distinction between a tax on the right to export or to carry out of a state property after it has passed to an heir or legatee and has become his, and a tax on the property before it passes to him; or a tax upon his right to receive, or of the deceased to devise and bequeath.

*For other cases, see Taxes, V. a, in Dig. 1-52 N. S.*

#### Same — discrimination — right to complain.

6. A citizen of a foreign country, residing therein, has, in the absence of express treaty right, no reason to complain that his inheritance is taxed more than that of a fellow alien who resides in the United States, but not in the state where the deceased resided, or of the probate of the will.

*For other cases, see Taxes, V. b, in Dig. 1-52 N. S.*

#### Same — class legislation.

7. The wealth and prosperity of California or of any other state in the Union is of

#### Headnotes by BRUCE, Ch. J.

**Note.** — The constitutionality of succession taxes is treated in the notes to *Rodman v. Com.* 33 L.R.A.(N.S.) 592, and *State ex rel. Ise v. Cline*, 50 L.R.A.(N.S.) 991; and see later cases, *Carter v. Craig*, 52 L.R.A.(N.S.) 211; *State ex rel. Graff v. Probate Ct.* L.R.A.1916A, 901; *State v. Mollier*, L.R.A.1916C, 551; *Strauss v. State*, L.R.A.1917E, 909; and *Re McKelway*, L.R.A.1917E, 1143.

For validity of discrimination against aliens by Inheritance Tax Law as affected by treaties with foreign governments, see notes to *Re Stixrud*, 33 L.R.A.(N.S.) 632, and *Re Peterson*, L.R.A.1916A, 474, and later cases, *Re Moynihan* L.R.A.1916D, 1127, and *Strauss v. State*, L.R.A.1917E, 909.

vital importance to the people of North Dakota. A statute, therefore, which discriminates in the matter of the amount of an inheritance tax between a citizen and resident of Norway and a citizen of Norway residing in California, or any other state of the Union, is not, for that reason, void on the ground of class legislation.

*For other cases, see Constitutional Law, II. a, 4, in Dig. 1-52 N. S.*

#### **Treaty — inheritance — applicability.**

8. Article 8 of the Treaty of Amity and Commerce between the United States and the Kingdom of Norway is only applicable to the estates of decedents who were citizens of Norway leaving property in the United States, and citizens of the United States leaving property in Norway, and those inheriting from them, and is not applicable to the estates of decedents who were citizens of the United States.

*For other cases, see Treaties, in Dig. 1-52 N. S.*

#### **Definition — "droit de detraction."**

9. The term "droit de detraction" means a tax which is levied on the right of removal of property from one state to another, and does not include an inheritance tax, which is merely a tax upon the right to devise and to inherit.

*For other cases, see Taxes, V. a, in Dig. 1-52 N. S.*

#### **Treaty — construction — judicial legislation.**

10. The general rule that treaties should be liberally construed so as to carry out the apparent intention of the parties, to secure equality and reciprocity between them, does not justify a state court in judicially legislating as against the right of the state and its taxing power, and in adding words to a treaty so as to make it applicable to the estate of citizens of the United States in the United States, when by its terms it is only applicable to the estates of aliens, or to the estates of citizens of the United States who reside in a foreign country.

*For other cases, see Treaties, in Dig. 1-52 N. S.*

(Robinson, J., dissents.)

(April 4, 1917.)

**A** PPEAL by intervener from an order of the District Court for Cass County reversing an order of the County Court, fixing the amount of an inheritance tax to be paid on the legacy of respondent Skarderud. Reversed.

The facts are stated in the opinion.

Messrs. George E. Wallace and F. E. Packard for appellant.

Messrs. Fowler & Green, for respondent Skarderud:

Respondent Skarderud cannot be legally compelled to pay at any greater or other rate than is chargeable against her brother,

L.R.A.1918F.

Otto A. Hagen, as the law in question is unconstitutional.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 155, 41 L. ed. 608, 17 Sup. Ct. Rep. 255; Beale v. Northern P. R. Co. 15 N. D. 325, 108 N. W. 33, 11 Ann. Cas. 921, 20 Am. Neg. Rep. 453; Edmonds v. Herbrandson, 2 N. D. 273, 14 L.R.A. 725, 50 N. W. 970; State ex rel. Pell v. Newark, 40 N. J. L. 71; Ayars's Appeal, 122 Pa. 266, 2 L.R.A. 577, 10 Atl. 356; State ex rel. Richards v. Hammer, 42 N. J. L. 435; Chicago, M. & St. P. R. Co. v. Westby, 47 L.R.A.(N.S.) 97, 102 C. C. A. 65, 178 Fed. 619; Nunnemacher v. State, 120 Wis. 190, 9 L.R.A.(N.S.) 121, 108 N. W. 627, 9 Ann. Cas. 711; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; State v. Hamlin, 86 Me. 495, 25 L.R.A. 632, 41 Am. St. Rep. 569, 30 Atl. 76; Plummer v. Borsheim, 8 N. D. 565, 80 N. W. 690; Angell v. Cass County, 11 N. D. 265, 91 N. W. 72; State ex rel. Dorval v. Hamilton, 20 N. D. 592, 129 N. W. 916; Truax v. Raich, 239 U. S. 33, 60 L. ed. 131, L.R.A.1916D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917B, 283.

And even though it be held constitutional, it is not applicable to her because of the treaty existing between Norway and the United States.

Hauenstine v. Lynham, 100 U. S. 483, 25 L. ed. 628; Geofroy v. Riggs, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295; Re Stixrud, 58 Wash. 339, 33 L.R.A.(N.S.) 632, 109 Pac. 343, Ann. Cas. 1912A, 850; Adams v. Akerlund, 168 Ill. 632, 48 N. E. 454; Erickson v. Carlson, 95 Neb. 182, 145 N. W. 352; Den ex dem. University v. Miller, 14 N. C. (3 Dev. L.) 188; Re Peterson, 168 Iowa, 511, L.R.A.1916A, 469, 161 N. W. 66; Re White, 42 Wash. 360, 84 Pac. 831; Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

**Bruce, Ch. J.**, delivered the opinion of the court:

This is an appeal from an order and judgment of the district court of Cass county, reversing, an order of the county court, fixing the amount of the inheritance tax to be paid on the legacy of the respondent Elina A. Skarderud.

Elina A. Skarderud is a subject and resident of Norway. She has a sister and brother, one residing in Fargo, and the other in California, both of whom are citizens of the United States. These three are collateral heirs, and by will are given the entire property, real and personal, of Martin A. Hagen, deceased, who in his lifetime was a citizen of the United States, domiciled in Fargo, Cass County, North Dakota. This appeal involves the constitutionality

of the Inheritance Tax Law as applied to the respondent Elina A. Skarderud. As to the other heirs, it is conceded the tax is lawful and is payable on a basis of  $1\frac{1}{2}$  per cent up to \$25,000, and  $2\frac{1}{2}$  per cent on the excess. The tax computed against the share of Elina A. Skarderud was at the rate of 25 per cent, which is the amount required by the statute to be taxed in the case of aliens who are *not residents* of the United States.

The part of the act Comp. Laws 1913 § 8077, which is in dispute reads as follows: "Upon the transfer of property in any manner hereinbefore described to or for the use of collateral relations or strangers in blood who are *aliens not residing in the United States*, or to or for the use of any corporation which is not chartered by the authority of the government of the United States or of any state, a tax of twenty-five per centum shall be levied and collected."

It is contended that this clause violates § 11 of article 1 of the Constitution of the state of North Dakota, which provides that "laws of a general nature shall have a uniform operation."

Also § 20 of article 1, which provides that "no special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens."

It is also contended that the act violates the provision of article 6 of the Treaty of Amity and Commerce which was entered into between the United States and Norway and Sweden in 1783 (8 Stat. at L. 60), and revised by article 17 of the Treaty of Commerce and Navigation of 1827 (8 Stat. at L. 346), and later still, and after the separation of Norway and Sweden, reaffirmed between the several nations.

It is clear to us that § 20 of article 1 of the Constitution of North Dakota has no connection with the case at bar. The respondent Elina A. Skarderud is concededly not a citizen of North Dakota, nor of the United States. The constitutional provision, therefore, has no applicability to her. *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Mager v. Grima*, 8 How. 490, 12 L. ed. 1168. Even if the tax be looked upon as a limitation on the right of the decedent to devise and bequeath, the limitation applies to all citizens and all residents of North Dakota, and therefore does not discriminate as to any privilege or any immunity. Nor do we believe that the statute in any way violates § 11 of article 1,

which provides that "laws of a general nature shall have a uniform operation."

It is certainly uniform as to all decedents in North Dakota. It is certainly uniform as to all nonresident aliens. *Magoun v. Illinois Trust & Sav. Bank*, supra. The only criticism, then that can be made against it, is that it discriminates against these nonresident aliens as compared with citizens of the United States and with resident aliens.

It is, of course, well established that a reasonable classification does not subject a law to the taint of lack of uniformity, and that in passing upon the question the test is "a just and natural reason of necessity or propriety for the difference made by the law in the liabilities and rights" of the members of the several classes. *Chicago, M. & St. P. R. Co. v. Westby* (C. C. A. 8th C.) 47 L.R.A. (N.S.) 97, 102 C. C. A. 65, 178 Fed. 619; *Re McKennan*, 27 S. D. 136, 33 L.R.A. (N.S.) 620, 130 N. W. 33, Ann. Cas. 1913D, 745; *State ex rel. Foote v. Bazille*, 97 Minn. 11, 6 L.R.A. (N.S.) 732, 106 N. W. 93, 7 Ann. Cas. 1056; *Frederickson v. Louisiana*, 23 How. 445, 16 L. ed. 577. We believe that there is "a just and natural reason of necessity or propriety for the classification which is made."

We must start with the premise that the right to inherit or to take by will and the right to devise and bequeath are not natural and inalienable rights, nor are they guaranteed by the state or Federal Constitutions, but are entirely within the control of the sovereign state. *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

We must further recognize the historical and legal fact that, even when the right to devise and to bequeath and to take by will and to inherit has been recognized by statute, as it has been generally throughout the United States, the alien has never, in the absence of permissive legislation, been allowed, as against the sovereign state, to take by descent or even by will. 2 C. J. 1054, 1057; *Connolly v. Reed*, 22 Idaho. 29, 125 Pac. 213. We must also adopt the premise that statutes which change the common law and which allow aliens to take by will or to inherit are not to be looked upon in the light of a recognition or extension of any previously existing right belonging to such aliens, but rather as a fresh grant or a right or a statute of grace which the state chooses to confer. 2 C. J. 1062; *Connolly v. Reed*, supra.

We may also add that we seriously question the proposition that a nonresident alien can invoke the provisions of the state and

Federal Constitutions at all. He owes no allegiance to our flag or our government. He may, as far as we know, be plotting our destruction. Why should we be presumed to give when we receive nothing? The Constitution, no doubt, follows the flag. But the American flag does *not* wave over the continent of Europe. See *Wunderle v. Wunderle*, 144 Ill. 40, 19 L.R.A. 84, 33 N. E. 195. We merely suggest the point, however, and make no holding upon it. Be this as it may, however, we believe that there is a valid reason for the discrimination, and even though resident and non-resident aliens are not treated alike.

It must indeed be apparent to all that a sovereign state must have the right to impose a higher inheritance tax on nonresident aliens than upon its own residents and citizens. Residents and citizens together tend to make up the united strength of the state and of the nation; for it is of men and women that states are made. *Mager v. Grima*, 9 How. 493, 12 L. ed. 1170.

It is also clear that, although a state, without the consent of Congress, may only levy such taxes on exports as are necessary for executing its inspection laws (Fed. Const. § 10, art. 1), the right of the several states to control the disposition of their own property and the laws of descent and inheritance has not been taken away from them. *Magoun v. Illinois Trust Co.* and *Wunderle v. Wunderle*, *supra*. It is now generally conceded that the right to inherit or take by will is not a natural and inalienable right, nor is the right to bequeath and devise, and if this be true of the citizens of a state, much more must it be true of nonresident aliens.

There is nothing in the state or in the Federal Constitutions which prevents a state, if it will, from returning to the medieval theory and practice and of providing that upon the death of the owner, all of his property shall escheat to it. If, as has been held by the Supreme Court of the United States in the case of *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248, a state may reserve the use of its oyster beds to its own citizens, and if a state can take away the right or power to dispose by will or to inherit, it may place upon the right, if granted, whatever limitations it may please. 6 R. C. L. 428; *Mager v. Grima*, 8 How. 490, 12 L. ed. 1168; *Magoun v. Illinois Trust & Sav. Bank* and *Connolly v. Reed*, *supra*.

There is a wide difference between a tax on the right to export or to carry out of the state after the property has passed to the heir or legatee and has become his and a tax on the property before it passes

to such person, or on the right of the decedent to will and bequeath and the right of the legatee to accept. Re *Anderson*, 166 Iowa, 617, 52 L.R.A.(N.S.) 686, 141 N. W. 1098. In such a case the state is really dealing with its own property or with that which, if it chose, could be its own property. It is simply saying, "This property is of right and ancient usage ours, but we will give citizens of the United States, whether residing here or abroad, and alien citizens, providing they reside in the United States, 98½ per cent of that which the decedent desired that they should have, but to aliens who do not reside in the United States we will only give 75 per cent, and the remainder we will keep for ourselves." *Mager v. Grima and Connolly v. Reed*, *supra*.

If reason were necessary to be given for this discrimination between resident and nonresident aliens, it would be easy to be found, and even though the aliens do not reside within the state of North Dakota, but within some other state of the American Union. A resident of another state of the Union, even though an alien, learns of our institutions, and becomes imbued with our spirit. Especially if he has children who attend our public schools, he cannot help but become attached to us. If children are born to him within our borders, they, by that very fact, become citizens. In case of war he is usually an alien friend rather than an alien enemy. We are a nation, indeed, though composed of many states. Our state officers first swear to support the Constitution of the United States and then the Constitution of their own state. Every person born or naturalized in the United States and subject to the jurisdiction thereof is a citizen first of the United States and then of the state in which he resides. See 14th Amendment to the Federal Constitution. No state liveth unto itself or by itself. Surely it is for the interest of the state of North Dakota that the property of the United States shall, as far as possible, be kept within the confines of the country, even though not within our own borders. It is created under the protection of the same flag and the same national Constitution.

All private property within the United States is subject to Federal Taxation, and the wealth and prosperity of the United States as a whole is of vital importance to the citizens and residents of every state. The expenses of the national government must be met, and are every day becoming greater and greater. Not only this, but the Federal taxing power is every day encroaching upon the resources of the several states. The more, for instance, that is

taken from the citizens of North Dakota by the Federal income tax (Act Aug. 27, 1894, chap. 349, 28 Stat. at L. 509), the less money and property have our citizens and residents to meet our own local and state exactions and to pay our state income tax and our state taxes generally. We are vitally interested in the wealth of other states because they pay a proportionate share of the general Federal taxes which we all must pay. The nation is "the United States." The growth of every other state in opportunity and prosperity, and in all that opportunity and prosperity, when rightfully used, bring, is of moment to us. Their strength, both moral and material, helps to make up the sum of national greatness. Their people are our people; their flag is our flag; and their God is our God.

Nor do we believe that the act is in violation of article 6 of the Treaty of Amity and Commerce of 1783 between the United States and Norway and Sweden, as revived by article 17 of the Treaty of Commerce and Navigation of 1827, and which treaty reads as follows: "The subjects of the contracting parties in the respective states may freely dispose of their goods and effects either by testament, donation or otherwise, in favour of such persons as they think proper; and their heirs in whatever place they shall reside, shall receive the succession . . . ab intestato, either in person or by their attorney, without having occasion to take out letters of naturalization. These inheritances, as well as the capitals and effects, which the subjects of the two parties, in changing their dwelling, shall be desirous of removing from the place of their abode, shall be exempted from . . . duty, called 'droit de detraction,' on the part of the government of the two states respectively. But it is at the same time agreed, that nothing contained in this article shall in any manner derogate from the ordinances published in Sweden against emigrations, or which may hereafter be published, which shall remain in . . . force and vigour. The United States on their part, or any of them, shall be at liberty to make respecting this matter, such laws as they think proper."

We fail, indeed, to see how this treaty is in any way applicable. As we have before pointed out, the deceased was not a citizen of Norway, but of North Dakota, and of the United States. The treaty clearly relates only to the rights and privileges of the subjects of the United States in Norway and the subjects of Norway in the United States, and those who take or inherit from them. So, too, it is perfectly clear that the subject of taxation was not

attempted to be covered by the treaty, and much less the inheritance tax. The term "droit de detraction" has always had a well-defined meaning. It is a tax levied upon the removal from the one state or country to another of property acquired by succession of testamentary disposition, and it does not cover taxes upon the succession to or transfer of property. *Re Peterson*, 168 Iowa, 511, L.R.A.1916A, 460, 151 N. W. 66; *Frederickson v. Louisiana*, 23 How. 447, 16 L. ed. 579; *Re Strobel*, 5 App. Div. 621, 39 N. Y. Supp. 169.

The treaty in question was first concluded in the year 1783 (8 Stat. at L. 60), and afterwards revised in the year 1810 (8 Stat. at L. 232), and again in 1827 (8 Stat. at L. 346). In the year 1783 there was no such thing as an inheritance tax either in the United States as a whole or in any of the several states. The first Federal tax was enacted in 1864, chapter 173, 13 Stat. at L. 285. The first state tax, that of Pennsylvania, was not enacted until 1826, P. L. 227. The next in point of time were that of Virginia, which was enacted in 1844 (Laws 1844, chap. 1), then that of Maryland, which was enacted in 1864 (Laws 1864, chap. 200), and then that of Delaware, which was enacted in 1869 (13 Del. Laws, chap. 390). The same rule applies in construing treaties as is applied in construing contracts; and that is that things not in existence will hardly be deemed to have been contemplated. *Re Anderson*, 166 Iowa, 617, 52 L.R.A.(N.S.) 686, 147 N. W. 1008; *Geofroy v. Riggs*, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 298; *Re Peterson*, supra.

It is clear, therefore, from reading the treaty, that all that was contemplated thereby was that the citizens of Norway residing in North Dakota or in any of the United States should be allowed to freely dispose by will, gift, or otherwise of their property, and that their heirs might receive such property without taking out letters of naturalization. The treaty does not apply to citizens of the United States as far as the right of disposition is concerned, nor to the beneficiaries by will or otherwise of the estates of citizens of the United States. *Frederickson v. Louisiana*, 23 How. 445, 16 L. ed. 577. The "droit de detraction" also which is spoken of merely relates to taxes upon the right of withdrawal from the country after the property has passed to the beneficiary. It has no relation whatever to a tax which is levied on the right of disposition, or upon the right to receive property by will or descent, and which attaches and is levied before the property passes into possession of the beneficiary. *Re Peterson*, supra.

We realize that the case of *Re Stixrud*, 58 Wash. 339, 33 L.R.A.(N.S.) 632, 109 Pac. 343, Ann. Cas. 1912A, 850, holds to a doctrine contrary to that here announced and that announced in the case of *Re Peterson*, supra. The plain language of the treaty compels us, however, to dissent from this opinion, and to follow the holding of the supreme court of Iowa in the case of *Re Peterson*, supra, which appears to us to be much more sound and reasonable.

The case of *Geofroy v. Riggs*, 123 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295, cited by counsel for respondents, was a controversy purely between two citizens of France, and involved the inheritance of land in the District of Columbia. The District of Columbia does not seem to have asserted any right. No question of taxation was involved, and at any rate, if any sovereignty was involved, it was the sovereignty of the nation. The treaty, too, provided that "the citizens and inhabitants of the United States shall be at liberty to dispose," etc., and was not, like the treaty with Norway, confined merely to the rights of the citizens of the respective nations.

The case of *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. ed 628, involved the estate of a citizen of Switzerland who was a resident of Virginia, and the claimant was also a citizen of Switzerland. The provisions of the treaty, therefore, were clearly applicable to the parties, and though a liberal doctrine of construction was applied as to the express terms of the instrument, there was no attempt to add to the treaty other terms which were not included in it.

The opinion in the case of *Re Stixrud*, indeed, is much influenced by a recognition of the supposed rule of liberal construction which is presumed to apply in the case of treaties with foreign powers.

Though this rule may apply as between the United States and the citizens of the foreign nations, and as between the citizens of the United States and the foreign nations, we know of no such rule having been applied when the treaty violates to a greater or lesser extent the rights and prerogatives of the sovereign states, and much less to justify a construction which is not a construction, but an act of judicial legislation. It has with the sole exception of the case of *Re Stixrud* (and then only in a state court, and not in the Supreme Court of the United States), never been applied in a case where a sovereign state was represented and sought to assert the prerogatives of its taxing power. We are firmly convinced that the so-called liberality of construction and what appears to us to be judicial legislation should never be tolerated as against such rights.

The whole structure of the American government is built upon a foundation of state home rule; and, though there may be in some cases where the state was really not vitally interested and its taxing power not involved, a more or less tacit acquiescence in the doctrine, we do not believe that any student of history will for a moment contend that the treaty-making power was ever intended to have been conferred upon the national government to such an extent as to interfere with the legitimate functions of the sovereign states. It is to be remembered, indeed, that the treaty-making power is an extraordinary and undemocratic power. Unlike any other law, all that is necessary to the enactment of a treaty is the consent of the President and two thirds of the Senate. If, under this power, the right to the inheritance of land and property can be controlled at all (and it would seem from the case of *Hauenstein v. Lynham*, supra, that it may), the President and two thirds of the Senate can accomplish that which the people, represented in both branches of the national Congress, could not perform. Surely such an extraordinary power should not be added to by judicial legislation on the part of the courts of the several states. A treaty should, perhaps, "be . . . construed so as to carry out the apparent intention of the parties to secure equality and reciprocity between them." See *Geofroy v. Riggs*, supra. But "there are restraints which arise from the nature of the government itself and that of the states," and no new treaty should be made by the courts of the several states and no new provisions should be judicially written into the national contracts. Not only is this the case, but we believe the omission of the property of citizens of the United States when residing in the United States from the scope of the treaty was purposely made.

Home rule is certainly a cardinal principle of the American political system. It cannot be believed that the American Constitution would ever have been ratified by the several states if these states had ever believed that their taxing power could be taken away by the act of the President and two thirds of the Senate, and that the transmission of the property of their own citizens could be thus interfered with. The treaty-making power may apply to the rights of citizens of foreign nations in the United States and citizens of the United States in foreign states, but it surely does not apply, and the terms of the treaty in question do not make it apply, to the rights of citizens of the United States resident within the United States. If any such power had been intended at the time of



the adoption of the Constitution, "it," to use the language of Mr. Justice Cooley, but in another connection, "would be somewhat startling to our people and would be likely to lead hereafter to a more careful scrutiny of the charters of government framed by them, lest sometime, by an inadvertent use of words, they might be found to have conferred upon some agency of their own the legal authority to take away their liberties altogether." See *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103.

The judgment of the District Court is reversed, and the cause is remanded for further proceedings according to law.

**Birdzell, J.**, being disqualified, did not participate, and **Burr**, Judge of the Ninth Judicial District, sat in his place

**Robinson, J.**, dissenting:

In Fargo, North Dakota, there was an old resident named Hagen. He scorned delights and lived laborious days and when about to depart for the land of rest he transferred all his property by will to a brother in Wisconsin, a sister in California, and to a sister in Norway, whose transfer tax of 25 per cent was \$8,000. It is claimed that, in so far as the transfer tax discriminates against the estate of the defendant, it is void, for the reason of a treaty between the United States and Norway especially providing against any such discrimination by one state or country against the citizens of the other. And so it has been held by the supreme court of Washington in an exceedingly well-reasoned case, which is directly in point, on the same identical treaty. *Re Stixrud*, 58 Wash. 339, 33 L.R.A.(N.S.) 632, 109 Pac. 343, Ann. Cas. 1912A, 850. All treaties made pursuant to the Constitution of the United States becomes the supreme law of the land, and the judges of every state are bound thereby. While it seems clear that the claim made under the treaty is conclusive, it seems equally clear that our Constitution affords an ample remedy against such an unjust transfer tax.

In this case the majority decision is based on the laws of feudalism, and not on the Constitution of our state. The reasoning is based on the rules of law which resulted from the Norman Conquest, but the state does not stand in the place of William the Conqueror. It is no lord paramount. It has no kingly prerogatives. It does not exist by divine right. It is merely a corporate entity which we, the people, have devised for the purpose of protecting our natural rights, and it has no right to rob any person.

The Inheritance Tax Law shows on its face that it is a thief and a robber. It imposes a tax of from 1 to 25 per cent on inheritances, gifts, grants, and transfers made in contemplation of death. The act is void unless its purpose is to impose a tax. Its title is, "An Act to Provide for Taxation, and Fixing the Rate of Taxation." And by § 61 of the Constitution the subject of every act must be expressed in its title. By § 176 of the original Constitution all property must be taxed by uniform rule according to its value in money, and by this section, as amended, taxes must be uniform upon the same class of property. While property may be classified for taxation, the classing must depend upon the character of the property, and not on the character of its owner, the color of his hair or his relationship to any person. Unless the act pertains to taxation, it is in conflict with § 61 of the Constitution; and if it does relate to taxation it conflicts with § 176 of the Constitution as amended, because the various taxes which it imposes depend on the relationship of parties to one another, and not on any classification of property. If such an unjust system of taxation and confiscation has been sustained in any state under a similar Constitution, it is because the judges did not know any better and because they give to modern Constitutions and the natural rights of man less consideration than they do to the laws of feudalism.

According to our Bill of Rights:

Section 1: "All men are by nature . . . free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; and pursuing and obtaining safety and happiness."

Section 2: ". . . Government is instituted for the protection, security and benefit of the people."

This means that every man has a right to acquire property by gift, sale, or purchase, and the right to acquire and protect property is no greater than the right to dispose of it by sale or gift. According to the fundamental principles of this state, when by any just means a person acquires title to property, it belongs to him and his heirs; and when a man can no longer use his property it is his right and duty to devise and transfer it to his heirs, and the state has no right to rob either the living or the dead.

Affirmed by the Supreme Court of the United States, December 10, 1917, 245 U. S. 633, 62 L. ed. 522, 38 Sup. Ct. Rep. 133.

**COLORADO SUPREME COURT.**  
(Department No. 3.)

GEORGE W. SCHELL, Plff. in Err.,  
v.  
PEOPLE OF THE STATE OF COLORADO.

(— Colo. —, 173 Pac. 1141.)

**Bigamy — absence of spouse — construction of statute.**

1. The wife's remaining for more than five years at the old home when the husband leaves her is not within the exception of a statute for the punishment of bigamy, that nothing contained in the statute shall apply to any person whose wife is continuously absent from him for the space of five years prior to the second marriage. *For other cases, see Bigamy, in Dig. 1-52 N. S.*

**Witness — wife against husband — bigamy.**

2. Bigamy is a crime against the first wife within the operation of a statute making the wife a competent witness against the husband in a proceeding for a crime committed by him against her. *For other cases, see Witnesses, I. b, in Dig. 1-52 N. S.*

**Appeal — objection to form of verification of Information.**

3. Objection to the form of verification of an information cannot be made for the first time on appeal. *For other cases, see Appeal and Error, VII. j, 4, in Dig. 1-52 N. S.*

**Same — limiting time for argument.**

4. The discretion of the trial court as to time allowed for argument of counsel is not subject to review, in the absence of abuse. *For other cases, see Appeal and Error, VII. i, 6, in Dig. 1-52 N. S.*

**Indictment — bigamy — surplusage.**

5. An allegation in an information for bigamy that accused knew his first wife to be living when marrying the second time is surplusage.

*For other cases, see Indictment, etc., II. a, in Dig. 1-52 N. S.*

(June 3, 1918.)

**ERROR** to the District Court for the City and County of Denver to review a judgment convicting defendant of bigamy. Affirmed.

The facts are stated in the opinion.

**Note.** — The question whether a husband or wife is a competent witness against the other in criminal prosecutions is discussed in the notes to *State v. Woodrow*, 2 L.R.A. (N.S.) 862; *State v. Orth*, 22 L.R.A. (N.S.) 240; *Molyneux v. Willcockson*, 41 L.R.A. (N.S.) 1213; and *West v. State*, L.R.A. 1917E, 1133; and see later case, *Denning v. United States*, L.R.A. 1918E, 487.

L.R.A. 1918F.

Messrs. G. K. Andrus and Ralph R. Andrus, for plaintiff in error:

There was no evidence introduced to warrant the conviction of defendant.

*Clarke v. People*, 16 Colo. 511, 27 Pac. 724; *Notary v. People*, 52 Colo. 153, 120 Pac. 156; *Wright v. United States*, 142 C. C. A. 379, 227 Fed. 855; *Southern Exp. Co. v. Com.* 167 Ky. 480, 180 S. W. 839; *People v. Scharf*, 217 N. Y. 204, 111 N. E. 758, reversing 168 App. Div. 494, 153 N. Y. Supp. 1045; *Parnell v. State*, 126 Ga. 103, 54 S. E. 804; *Robinson v. State*, 6 Ga. App. 696, 65 S. E. 792; *People v. Dauchy*, 148 App. Div. 366, 131 N. Y. Supp. 993; *State v. Barrow*, 31 La. Ann. 691; *Barber v. State*, 50 Md. 161; *Poss v. State*, 47 Tex. Crim. Rep. 486, 83 S. W. 1109.

The information was not properly verified.

*Brown v. People*, 20 Colo. 161, 36 Pac. 1040.

Where the identity of a charge in an indictment is dependent upon an allegation which is unnecessary, or where an indispensable allegation is made needlessly specific, the unnecessary matter cannot be rejected as surplusage, but must be proved as averred or the prosecution must fail.

*Schayer v. People*, 5 Colo. App. 75, 37 Pac. 43; 22 Cyc. 347; *State v. Huxoll*, 191 Mo. App. 304, 178 S. W. 866; *Naftzger v. United States*, 118 C. C. A. 598, 200 Fed. 494; *Caswell v. State*, 5 Ga. App. 483, 63 S. E. 566; *Tucker v. State*, 59 Tex. Crim. Rep. 291, 128 S. W. 617.

The first wife is not a competent witness against her husband in a case of bigamy.

*Bassett v. United States*, 137 U. S. 496, 34 L. ed. 762, 11 Sup. Ct. Rep. 165; *People v. Quanstrom*, 93 Mich. 254, 17 L.R.A. 723, 53 N. W. 165; *Overton v. State*, 43 Tex. 616; *Hiler v. People*, 156 Ill. 511, 47 Am. St. Rep. 221, 41 N. E. 181; *State v. Hughes*, 58 Iowa, 165, 11 N. W. 706.

In a criminal case, when practically a man's life is at hazard, it is an abuse of discretion not to allow counsel sufficient time to present the matter properly to a jury.

*Rockwell Stock & Land Co. v. Castroni*, 6 Colo. App. 528, 42 Pac. 182.

Messrs. Leslie E. Hubbard, Attorney General, Charles Roach and Miss Clara Ruth Mozzor, Assistant Attorneys General, for the People:

The evidence was ample to support the conviction.

*State v. Goulden*, 134 N. C. 743, 47 S. E. 450; *Parker v. State*, 77 Ala. 47, 54 Am. Rep. 43; *Jones v. State*, 67 Ala. 84; *Rand v. State*, 129 Ala. 119, 29 So. 844; *Com. v. Mash*, 7 Metc. 472; *Com. v. Hayden*, 163

Mass. 453, 28 L.R.A. 318, 47 Am. St. Rep. 468, 40 N. E. 846, 9 Am. Crim. Rep. 408; *People v. Spoor*, 235 Ill. 230, 126 Am. St. Rep. 197, 85 N. E. 207, 14 Ann. Cas. 638; *State v. Ackerly*, 79 Vt. 69, 118 Am. St. Rep. 940, 64 Atl. 450, 8 Ann. Cas. 1103; *State v. Zichfield*, 23 Nev. 304, 34 L.R.A. 784, 62 Am. St. Rep. 800, 46 Pac. 802; *Baker v. State*, 27 L.R.A.(N.S.) 1102, note.

The first wife was not absent from the defendant for five years, within the meaning of the statute.

*Parker v. State*, 77 Ala. 47, 54 Am. Rep. 43; *State v. Goulden*, 134 N. C. 743, 47 S. E. 450; *Com. v. Thompson*, 93 Mass. 23, 87 Am. Dec. 685; *Williams v. Williams*, 63 Wis. 58, 53 Am. Rep. 253, 23 N. W. 110; 1 Taylor, Ev. § 157; 1 Elliott, Ev. § 114; *Lawson*, Presumptive Ev. p. 264; 2 Chamberlayne, Ev. § 1001; *Hammon*, Ev. p. 253; *Jones*, Ev. 2d ed. § 61; 4 Enc. Ev. 41; 13 Cyc. 300.

The information was properly verified.

*Laffey v. People*, 55 Colo. 575, 136 Pac. 1031; *Bergdahl v. People*, 27 Colo. 302, 61 Pac. 228; *Taylor v. People*, 21 Colo. 426, 42 Pac. 652.

There was no failure to prove substantive averments.

*Johnson v. People*, 33 Colo. 224, 108 Am. St. Rep. 85, 80 Pac. 133; *Wharton*, Crim. Ev. 10th ed. p. 366.

The testimony of the first wife was competent.

*Hills v. State*, 61 Neb. 589, 57 L.R.A. 155, 85 N. W. 836; *State v. Sloan*, 55 Iowa, 217, 7 N. W. 516; *State v. Hughes*, 58 Iowa, 105, 11 N. W. 706; *Dill v. People*, 19 Colo. 469, 41 Am. St. Rep. 254, 36 Pac. 229; *Stein v. Bowman*, 13 Pet. 209, 10 L. ed. 129; *United States v. Bassett*, 5 Utah, 131, 13 Pac. 237; *Mitsunaga v. People*, 54 Colo. 102, 129 Pac. 241; *Byram v. People*, 49 Colo. 533, 113 Pac. 528.

Messrs. **Fred Farrar** and **Frank C. West** also for the People.

**Allen, J.**, delivered the opinion of the court:

The plaintiff in error, hereinafter designated the defendant, was charged with and convicted of the crime of bigamy under § 1766, Rev. Stat. 1908 (§ 1894, Mills's Anno. Stat. 1912). Eliminating clauses of the section above cited which are not material to any question presented by the record, the section reads as follows: "Bigamy consists in the having of two wives or two husbands at one and the same time, knowing that the former husband or wife is still alive. If any person or persons within this state, being married, or who shall hereafter marry, do at any time marry any person or persons, the former husband or

wife being alive, the person so offending shall on conviction thereof be punished by a fine not exceeding \$1,000 and imprisoned in the penitentiary not exceeding two years.

Nothing herein contained shall extend to any person or persons whose husband or wife shall have been continually absent from such person or persons for the space of five years prior to the second marriage, and he or she not knowing such husband or wife to be living within that time.

The first contention made by the plaintiff in error is that there is a total failure of proof to convict the defendant. It is undisputed that the defendant married a second time while his former wife was living and not divorced from him. It is claimed, however, that the defendant is not guilty, according to the evidence, by reason of the exception contained in the statute. In other words, the defendant claims that his former wife, at the time of his second marriage, had been continually absent from him for the space of five years, and that he did not know her to be living within that time. The contention thus made requires both an examination of the evidence and an interpretation of the statute, especially since each side takes a different view with reference to what does or may constitute absence of the former spouse within the meaning of the exception contained in the bigamy statute.

The evidence shows the following facts: The defendant married his first wife, who is referred to in the record as Mrs. Frances Schell, in Nebraska, in the year 1891. He cohabited and resided with her in Nebraska until some time in the year 1903, at which time he left his family, then consisting of his wife and five children, and came to Denver, Colorado. The defendant's family was then, and had been for more than five years, living in Gothenburg, Nebraska. The wife and children continued to reside in Gothenburg until September 11, 1913, when the wife removed to North Platte, Nebraska, which is located 36 miles from Gothenburg. In 1904 Mrs. Frances Schell visited her husband in Denver, but did not establish a matrimonial domicile with him. She did not move to Denver, nor come prepared to stay, but on the occasion mentioned merely visited the defendant for the space of six days, and then went back to her home in Gothenburg, Nebraska. The defendant visited her at Gothenburg in 1906, which was the last time the parties saw each other until the time of the trial of this case in October, 1916. The defendant married Helen Baber in Denver on February 20, 1915, which was at a time less than two years from the date upon which

Mrs. Frances Schell removed from her home in Gothenburg, Nebraska.

The attorney general contends that, under the foregoing facts, the defendant's first wife was not absent from the defendant for the space of five years, within the meaning of the statute. This contention is opposed by the plaintiff in error in his reply brief. It is conceded that the defendant and his first wife lived separate and apart from each other, and each in a different state, for more than seven years prior to the time of the defendant's second marriage. The theory of the defendant is that the fact thus conceded shows the first wife's absence from him for the space of five years, and brings him within the exception in the statute so far as the same relates to the absence of a former spouse. It becomes necessary, therefore, to pass upon the attorney general's contention, and to determine the meaning of the word "absent" as the same is used in the bigamy statute.

In many reported cases the word "absent," as used in bigamy statutes, has been regarded as having such confined and technical meaning as it has in the rule regarding the presumption of death. We find no case in which the situation is otherwise. "Absent" therefore means being away from the home or place where one has established a residence. 1 C. J. 341; 13 Cyc. 300 (c).

Our statute uses the term in question as a part of the phrase "absent from such person." The word "absent," nevertheless, still has the meaning above mentioned. The bigamy statute in Alabama (Code 1907, § 6390) employs the expression "whose former husband or wife had remained absent from him or her for the last five years preceding such second marriage." This expression was under consideration by the supreme court of Alabama in the case of *Parker v. State*, 77 Ala. 47, 54 Am. Rep. 43, and the absence referred to in the statute was regarded as the "absence from which death is presumed," and as "absence from the former place of abode."

In *Parker v. State*, supra, the court said: "If the defendant left his wife in North Carolina, where they formerly resided, and absented himself from that state, the presumption of her death cannot arise by reason of his absence or of his having heard nothing from her. . . . A husband cannot create absence by abandoning his family, and then invoke the presumption of innocence to destroy the presumptive proof of continuing life."

In *Hyde Park v. Canton*, 130 Mass. 505, 507, it is said: "If a man leaves his home and goes into parts unknown, and remains unheard from for the space of seven years, the law authorizes to those that remain,

the presumption of fact that he is dead: but it does not authorize him to presume therefore that any one of those remaining in the place which he left has died."

In the case at bar the evidence shows clearly that the first wife never left the last matrimonial domicile of herself and defendant, or her domicile at Gothenburg, Nebraska, until within two years of the time of defendant's second marriage. While she remained in Gothenburg, she was not absent from him, within the meaning of the statute. It does not matter whether the defendant intended to desert her when he came to Denver or not. In the case of *Parker v. State*, supra, it was not the defendant's desertion that prevented the wife from being absent within the meaning of the statute, but it was the fact that on her part there was no "absence from the former place of abode." The presumption of death arises in the case of a person "who has been absent from his last or usual place of residence." 13 Cyc. 297. At the time the defendant married the second wife the last or usual place of residence of Frances Schell was at Gothenburg, and she had been absent from that place for a period of less than two years. It is true that she came to Denver, according to the evidence, in 1904, but she never established a settled residence in Denver. She came as a visitor, and remained in Denver only six days. She then went back to Gothenburg, Nebraska, where her home was. The defendant knew this fact, and thereafter knew that Gothenburg continued to be her place of abode. He visited her there in 1906, and corresponded with her at that place as late as 1908. Frances Schell remained in Gothenburg until September, 1913. If any presumption of her death would arise, due to her absence, it would be her absence from Gothenburg, and not her being away from the place where her husband happened to reside. Under the facts in this case, Frances Schell would naturally be expected to be found, by the defendant as well as by others, at Gothenburg, at the time of defendant's second marriage. In *Robinson v. State*, 6 Ga. App. 696, 65 S. E. 795, the court said that "absence" means absence from the places where she, the first wife, would naturally be expected to be found.

We are of the opinion, therefore, that under the facts of this case the first wife had not been absent from the defendant for the space of five years prior to his second marriage. The defendant did not bring himself within the exception contained in the statute, and it is immaterial to what extent he proved, or the state failed to disprove, that he did not know that his first wife was alive, or that he had good

grounds for supposing her to be dead, at the time of his marriage to Helen Baber.

The prevailing view of the United States is that it is the clear intent of the statutes that one who marries within the period designated by the statute shall do so at his peril. 7 C. J. 1164; 3 R. C. L. 801, § 9; *State v. Ackerly*, 79 Vt. 69, 118 Am. St. Rep. 942, 64 Atl. 450, 8 Ann. Cas. 1103; *Com. v. Hayden*, 163 Mass. 453, 28 L.R.A. 318, 47 Am. St. Rep. 468, 40 N. E. 846, 9 Am. Crim. Rep. 408; *Cornett v. Com.* 134 Ky. 613, 121 S. W. 424, 21 Ann. Cas. 309.

The view above taken by us dispenses with the necessity for any discussion of the instructions requested or given. In that matter there was no error prejudicial to the defendant committed by the trial court.

It is urged that the court erred in permitting the defendant's first wife to testify as a witness against him. Upon this point the plaintiff in error relies upon § 7274, Rev. Stat. 1908 (§ 8072, *Mills's Anno. Stat.* 1912), which provides, among other things, that a wife shall not be examined for or against her husband without his consent, except it be in "a criminal action or proceeding for a crime committed by one against the other." It is claimed that the alleged bigamy of the defendant cannot be a crime committed against the wife, within the meaning of the statute above cited. There is a conflict of authority on the question whether or not bigamy is a crime committed by one spouse against the other. 3 R. C. L. 812, § 26; 40 Cyc. 2221. The statute above mentioned was under consideration by this court in *Dill v. People*, 19 Colo. 469, 481, 41 Am. St. Rep. 254, 36 Pac. 232. It was there said:

"All crimes are crimes against the public. . . . But crimes directly affecting particular persons or individuals are uniformly considered crimes against such persons or individuals. . . .

"Our statute does not limit the right of the husband or wife to testify to criminal prosecutions for crimes involving personal violence, either actual or constructive; the language is unqualified that the husband or wife may testify against the 'other in a criminal action or proceeding for a crime committed by one against the other.' This language is broad enough to include any crime, whether of violence to the person, or other crime committed by the husband or wife directly affecting the other."

It was held in *Dill v. People*, supra, that the making of a false affidavit by the husband in a divorce suit against his wife, for the purpose of procuring a constructive service of summons, was a crime committed against the wife, within the meaning of the statute in question. In arriving at its con-

clusion the court used language and reasoning which is applicable to the crime of bigamy as well as that of perjury, and, among other things, said: "Since some private wrong or injury is included in every crime, it is evident that the word 'crime' in that clause of the statute which permits the husband or wife to testify against the other in a 'criminal action or proceeding for a crime committed by one against the other' means the private wrong or injury included in such public crime. The word must have such meaning, or the statute is meaningless. It follows that a wife is competent to testify against her husband in a criminal action or proceeding whenever she is the individual particularly and directly injured or affected by the crime for which he is being prosecuted."

We are of the opinion that the statute in question was correctly interpreted in the opinion in the *Dill* Case, and it would be contrary to such interpretation now to hold that bigamy is not a crime against the wife within the meaning of the statute. We therefore adopt the rule laid down in *State v. Sloan*, 55 Iowa, 219, 7 N. W. 516, where the court said: "In our opinion, if the defendant is guilty of bigamy, he committed a crime against his wife. We think she is a competent witness."

The decision in that case was followed in *State v. Hughes*, 58 Iowa, 165, 11 N. W. 706. These Iowa decisions were followed in *Nebraska*. *Hills v. State*, 61 Neb. 539, 57 L.R.A. 155, 85 N. W. 836.

For the reasons above named, we hold that the defendant's first wife was a competent witness against him, and that the trial court did not err in allowing the wife to testify in behalf of the state in this case.

In one of the assignments of error it is claimed that the information was not properly verified. No objection to the information, or to the form of its verification, or to the alleged absence of a proper verification, was made at any stage of the proceedings in the trial court. Such objection cannot, therefore, be considered at this time. *Bergdahl v. People*, 27 Colo. 302, 307, 61 Pac. 228; *Laffey v. People*, 55 Colo. 575, 136 Pac. 1031.

The plaintiff in error contends that "the court erred in limiting the defendant's counsel to forty minutes to argue his case to the jury." The general rule is that the limitation of the time for argument by the counsel for either side is in the discretion of the trial court. 12 Cyc. 568. Considering the amount and character of the testimony taken, the number of witnesses, and other circumstances of the case, we cannot say that the trial court abused its discretion in this matter.

The plaintiff in error calls attention to the fact that the information alleged that the defendant, at the time of his second marriage, knew that his first wife was living. Such an allegation could have been omitted without affecting the charge against the accused. 7 C. J. 1166, § 29. It was surplusage. 22 Cyc. 370, c. It was not neces-

sary for the state to prove such allegation. 22 Cyc. 448. The record shows no error based on the allegation or proof in question.

The record shows no reversible error, and the judgment is therefore affirmed.

Hill, Ch. J., and Bailey, J., concur.

#### OKLAHOMA SUPREME COURT.

FIRST NATIONAL BANK OF CUSHING,  
Plff. in Err.,  
v.

H. R. KETCHUM.

(— Okla. —, 172 Pac. 81.)

#### Evidence — alteration in check.

1. Where plaintiff brought an action against a bank to recover moneys deposited, and the bank pleaded payment of said sum upon checks drawn by plaintiff and alleged that after same had been charged to plaintiff's account he claimed that a certain check had been forged by raising the amount thereof, whereupon the bank credited his account with the amount thereof and brought suit against the person who presented said check to recover the amount paid thereon, and alleged further that, if said check had been altered, said alteration was made possible by the negligent manner in which plaintiff had executed said check,— held, that it was not error to permit plaintiff to testify as to the alteration made in said check.

*For other cases, see Evidence, XIII. a, in Dig. 1-52 N. S.*

#### Same — burden to show payment.

2. In an action by a depositor against a bank to recover a balance due, where the bank pleads payment, the burden is on the bank to show that the money deposited by plaintiff had been paid out on checks drawn by him.

*For other cases, see Evidence, II. c, in Dig. 1-52 N. S.*

Headnotes by HARDY, J.

**Note.** — The liability of bank to depositor for paying altered check where the alteration was facilitated by the form in which it was drawn is discussed in the note to *Commercial Bank v. Arden*, L.R.A.1918B, 327.

Since the date of the preparation of that note the decision of the English court of King's bench in *MacMillan v. London Joint Stock Bank* [1917] 2 K. B. 439, W. N. 181, 33 Times L. R. 398, 61 Sol. Jo. 523, 86 L. J. K. B. N. S. 1499, 22 Com. Cas. 364, discussed therein, was reversed by the House of Lords (1918) 145 L. T. Jo. 163. Under the facts of that case, as set forth in the note in L.R.A.1918B, 327, the House of Lords holds that the bank is protected in paying out the amount to which the check

#### Bills and notes — alteration — effect.

3. Where an instrument when executed is complete on its face, and after delivery thereof by the maker is materially altered, it is annulled except as against a party who made, authorized, or assented to the alteration.

*For other cases, see Alteration of Instruments, I. in Dig. 1-52 N. S.*

(April 9, 1918.)

**E**RROR to the District Court for Payne County to review a judgment in favor of plaintiff in an action brought to recover a balance alleged to be due on certain deposits made by him and to recover damages for the wrongful protest of two checks drawn on the bank by him. Affirmed.

The facts are stated in the opinion.

Messrs. John R. Hadley and Walter Mathews, for plaintiff in error:

Evidence of the alteration of the check was foreign to the issues raised by the pleadings, and should not have been admitted.

*Lockwood Bros. v. Frisco Lumber Co.* 22 Okla. 38, 97 Pac. 562.

The party asserting that an instrument has been unlawfully altered has the burden of proving such alteration.

*Cavitt v. Robertson*, 42 Okla. 619, 142 Pac. 299.

If the injury resulted from the act of the forger, the maker is not liable for that injury, though the carelessness of the maker contributed to and aided the forger

had been raised. The early case of *Young v. Grote*, 4 Bing. 253, 130 Eng. Reprint, 764, 12 J. B. Moore, 484, 5 L. J. C. P. 165, 29 Revised Rep. 552, 5 Eng. Rul. Cas. 140, is approved. There is a direct conflict between this decision of the House of Lords and the decision of the Privy Council in *Colonial Bank v. Marshall* [1906] A. C. 559, 5 B. R. C. 283, 75 L. J. P. C. N. S. 76, 22 Times L. R. 746, 5 Ann. Cas. 771, discussed in the note to which reference is above made. As shown in this note, there is little American authority on this exact point. Attention is called to the decision in *Commercial Bank v. Arden*, 177 Ky. 520, L.R.A.1918B, 320, 197 S. W. 951, and *FIRST NAT. BANK v. KETCHUM*.

in bringing about the injury; but if the injury resulted from the act of the maker, he is liable.

*Fordyce v. Kosminski*, 49 Ark. 40, 4 Am. St. Rep. 18, 3 S. W. 892; *Exchange Nat. Bank v. Bank of Little Rock*, 22 L.R.A. 686, 7 C. C. A. 111, 19 U. S. App. 152, 58 Fed. 140; *National Bank v. Fish*, — Okla. —, ante, 278, 169 Pac. 1105.

*Messrs. Thomas A. Higgins and Sylvester J. Berton*, for defendant in error:

After the plaintiff made *prima facie* case as to the alteration, the burden of showing the alteration was upon the bank to show that the check was written for \$80, or that the same was altered by and with the consent of the plaintiff and that the \$80 was paid by his direction.

*Chicago Sav. Bank v. Block*, 126 Ill. App. 128; *Cushman v. Illinois Starch Co.* 79 Ill. 281; *Harris v. Bank of Jacksonville*, 22 Fla. 501, 1 Am. St. Rep. 201, 1 So. 140; *Standard Fashion Co. v. Joels*, — Okla. —, 159 Pac. 846; *Edwards v. Johnston-Larimer Dry Goods Co.* — Okla. —, 158 Pac. 446.

After a check is written, signed, and delivered it is a complete contract, and any change or alteration made without the consent of the maker makes the check or negotiable paper null and void even in the hands of a bona fide holder.

1 R. C. L. §§ 70, 1036; *Exchange Nat. Bank v. Bank of Little Rock*, 22 L.R.A. 686, 7 C. C. A. 111, 19 U. S. App. 152, 58 Fed. 140; *Fordyce v. Kosminski*, 49 Ark. 40, 4 Am. St. Rep. 18, 3 S. W. 892; *Walsh v. Hunt*, 120 Cal. 46, 39 L.R.A. 697, 52 Pac. 115; *Coburn v. Webb*, 56 Ind. 96, 26 Am. Rep. 15; *Knoxville Nat. Bank v. Clark*, 51 Iowa, 264, 33 Am. Rep. 129, 1 N. W. 491; *Bank of Herington v. Wangerin*, 65 Kan. 423, 50 L.R.A. 717, 70 Pac. 330; *Burrows v. Klunk*, 70 Md. 431, 3 L.R.A. 576, 14 Am. St. Rep. 371, 17 Atl. 378; *Draper v. Wood*, 112 Mass. 315, 17 Am. Rep. 92; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 198, 25 Am. Rep. 67; *Wait v. Pomeroy*, 20 Mich. 425, 4 Am. Rep. 395; *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661; *Simmons v. Atkinson & L. Co.* 69 Miss. 862, 23 L.R.A. 599, 12 So. 263; *National Exch. Bank v. Lester*, 21 L.R.A. (N.S.) 402, and note, 194 N. Y. 461, 87 N. E. 779, 16 Ann. Cas. 770; *Conger v. Crabtree*, 45 Am. St. Rep. 251, and note, 88 Iowa, 536, 55 N. W. 335; *Burgess v. Blake*, 86 Am. St. Rep. 121, note; *Citizens' Nat. Bank v. Williams*, 35 L.R.A. 469, and note, 174 Pa. 66, 34 Atl. 303; *Garrard v. Haddan*, 67 Pa. 82, 5 Am. Rep. 412; *Crawford v. West Side Bank*, 100 N. Y. 50, 53 Am. Rep. 162, 2 N. E. 881; *Cronk-hite v. Nebeker*, 42 Am. Rep. 136, and note, 81 Ind. 319.

L.R.A.1918F.

*Hardy, J.*, delivered the opinion of the court:

*H. R. Ketchum* commenced an action against First National Bank of Cushing to recover a balance due on certain deposits made by him, and for damages for wrongfully protesting two checks which had been drawn by him against his account when sufficient funds were on deposit to pay said checks. The bank answered pleading payment of the deposit, and set out in detail the checks paid by it which had been drawn by plaintiff against his account, among which was one check for the sum of \$80, about which last-mentioned check this controversy hinges. Verdict and judgment were for Ketchum, and the bank appeals. The parties will be referred to as they appeared in the trial court.

The court permitted plaintiff, over objections by defendant, to testify that a certain check purporting to be for the sum of \$80 which had been charged to his account by defendant had been altered after its execution and delivery by him, in that the amount thereof had been raised from 80 cents to 80 dollars, and this action of the court is urged as error for the reason, as counsel claims, there was no allegation in any of the pleadings tendering an issue as to the amount of said check. Defendant alleged in its answer that, after this check had been paid by defendant and charged against the deposit of plaintiff in the sum of \$80, plaintiff objected to the charge and claimed the check had been raised from 80 cents to 80 dollars, and that defendant thereupon credited plaintiff's account with the sum of \$79.20, and entered into an agreement whereby an action was to be commenced against the person presenting said check for payment to recover said sum; and further alleged that if said check had been altered as claimed the alteration thereof was made possible through the negligence of plaintiff because of the manner in which said check was executed. Under these allegations the evidence was properly admitted.

The court instructed the jury that the burden was on defendant to prove that the check as paid by it was in the same condition as when drawn by defendant, and refused to instruct upon defendant's request that the burden was on plaintiff to prove an alteration in the check.

The relation between plaintiff and defendant was that of debtor and creditor, and there being no controversy over the fact that plaintiff had deposited certain funds to his credit with defendant, defendant, seeking to avoid a recovery by plaintiff upon the plea of payment, was charged

with the burden of sustaining that plea by a preponderance of the evidence. *Winton v. Myers*, 8 Okla. 421, 58 Pac. 634; *Edwards v. Johnston-Larimer Dry Goods Co.* — Okla. —, 158 Pac. 446; *Standard Fashion Co. v. Joels*, — Okla. —, 159 Pac. 846; *Zane, Banks & Bkg.* 291; 7 C. J. 668.

The defendant could not lawfully pay out moneys on deposit with it to plaintiff's credit except as directed by him, and in maintaining its defense of payment it was incumbent upon defendant to show that the checks upon which said moneys were disbursed were drawn by plaintiff; and this it sought to do by showing a credit of \$80 which had been paid out on a check which defendant claimed had been executed by plaintiff. It was not enough to show that the moneys had in fact been paid out, but it was necessary to go further and show that same had been paid out according to the directions of plaintiff, and that the checks for the payment of which credit was claimed were the checks of plaintiff. *Cushman v. Illinois Starch Co.* 79 Ill. 281; *Harris v. Bank of Jacksonville*, 22 Fla. 501, 1 Am. St. Rep. 201, 1 So. 140; *Zane, Banks & Bkg.* 291.

Irrespective of the question as to where lay the burden of proof, the evidence conclusively establishes the alteration of the check in controversy. The original instrument is before us, and an examination thereof establishes beyond any reasonable doubt that it has been altered as claimed. It was originally written in ink, and at the end of the line opposite the name of the payee, where the amount of the check is usually designated in figures, the maker had, according to his testimony, written the amount thus, "X<sup>80</sup>/<sub>100</sub>," and in the line where the amount was written out, stated the amount thus "only eighty cents." The check as it now is, and was at the time of its payment, shows the original writing to have been retraced with an indelible pencil, and opposite the name of the payee, where the amount was designated as above stated, same has been changed to read "\$80.00," and on the line where the words "only eighty cents" were written the words "only" and "cents" have been erased, leaving the word "eighty" in writing, and at the right end of the line appears the word "dollars," which is a part of the blank printed form on which the check was written. Where the word "only" was erased, a hole plainly appears in the paper, and where the word "cents" was erased the paper is much thinner, and upon being held up to the light shows plainly that an erasure has been made, and where the figures "\$80.00" now appear an erasure also is plainly shown to

have been made. There cannot be any reasonable doubt that the check has been materially altered, and the testimony of plaintiff that the alteration was made after its execution and delivery by him is uncontradicted, and, even if the court committed error in its instructions as to the burden of proof, we would not reverse the case for that reason.

Defendant claims that plaintiff was negligent in drawing the check and thereby made it possible for the alteration to be made, and for that reason is not entitled to recover, and that the court committed error in instructing the jury that the fact whether or not the check was negligently drawn was not to be considered by them. The negligence alleged is said to consist in the failure of plaintiff to draw a line through, or erase, the dollar mark at the end of the line where the amount of the check was designated in figures, and in failing to erase the printed word "dollars" at the end of the line where the amount of the check was written in words, and because of his failure to do this it was made possible for the person altering the check to make the erasures hereinbefore described and leave the check in its present condition. The rule urged has frequently been applied where an instrument was executed leaving certain blanks therein which were afterwards filled out in such a manner as to leave no mark or indication of an alteration therein; but the distinction between an instrument executed in blank as to the date, the name of the payee, or the amount when signed and delivered to another for use, and with authority to fill in blanks thus left, and an instrument complete on its face when signed and delivered in which material alterations have been made is emphasized in many of the cases. In the latter case there is no implied authority to change the instrument as delivered, and the negligence of the maker under such circumstances cannot be said to cause the loss which required the commission of a crime by another to effect. Where the maker of an instrument carelessly leaves blank spaces therein which he intrusts to another to fill, and that other person disobeys instructions and fills up the space for a larger amount the rule may well be invoked, for the loss occasioned thereby is the natural and probable result of his negligence and should have been foreseen by him; but, on the other hand, when a person executes an instrument complete in itself, though unskillfully drawn, he should be protected from its alteration by forgery in any manner, for he has as much right to presume that the holder thereof will not commit the crime of



forgery by its alteration as there is for others to presume that it has not been so altered. This rule has been declared in this state by statute. Section 4174, Rev. Laws 1910, provides as follows: "Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course not a party to the alteration, he may enforce payment thereof according to its original tenor."

The alteration is palpable, and the most ordinary examination of the check upon the part of the bank would have revealed it. It was discredited on its face by its very appearance at the time the bank took it, and, instead of the plaintiff being negligent, the evidence convinces us that the bank was extremely careless in paying this check in the condition it was when it was presented, and is not in a position to say that its loss was occasioned by any negligence of plaintiff.

The holding a maker bound by an altered instrument, when he was not negligent in its execution, is in effect to say that the crime of forgery was committed under implied authority from him, and renders him

liable upon a contract which he never executed, authorized, nor ratified, and places upon him the burden of anticipating and guarding against the many and devious ways by which the crime of forgery is committed. The great weight of authority rejects this view, and holds, in line with our statute above quoted, that a material alteration in a negotiable instrument after its execution and delivery as a complete contract avoids it except as against parties consenting to the alteration. This doctrine rests upon the sound principle that parties are only liable on their contracts as made and entered into by them in the absence of ratification or estoppel. *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661; *Knoxville Nat. Bank v. Clark*, 51 Iowa, 264, 33 Am. Rep. 129, 1 N. W. 491; *Fordyce v. Kosminski*, 49 Ark. 40, 4 Am. St. Rep. 18, 3 S. W. 892; *Burrows v. Klunk*, 70 Md. 451, 3 L.R.A. 576, 14 Am. St. Rep. 371, 17 Atl. 378; *Goodman v. Eastman*, 4 N. H. 455; *Exchange Nat. Bank v. Bank of Little Rock*, 22 L.R.A. 686, 7 C. C. A. 111, 19 U. S. App. 152, 58 Fed. 140.

The judgment is affirmed.

All the Justices concur.

#### FLORIDA SUPREME COURT.

STATE OF FLORIDA EX REL. VAN C. SWEARINGEN, Attorney General,  
v.

W. S. BULLOCK, Judge of the Fifth Judicial Circuit of Florida.

(— Fla. —, 79 So. 337.)

Common law — change.

1. Any principle of the common law may be changed by statute, when the Constitution is not thereby violated.

*For other cases, see Common Law, in Dig. 1-52 N. S.*

Venue — finding of indictment.

2. Assuming that the common law required indictments to be found by a grand jury of the county where the crime was committed, a change of this common-law rule by statute, in the public interest, so as to authorize indictments under certain adjudged conditions to be found by a grand

jury in a county of the circuit other than the one in which the crime was committed, is not expressly or impliedly forbidden by the Constitution.

*For other cases, see Venue, I. in Dig. 1-52 N. S.*

(Browne, Ch. J., and Taylor, J., dissent.)

(July 10, 1918.)

ON DEMURRER to an alternative writ of mandamus to compel the respondent judge to cause the redocketing of certain cases and exercise jurisdiction thereof and proceed to the trial and determination of the cases or show cause for not doing so. Demurrer overruled.

The facts are stated in the opinion.

Mr. Richard McConathy, for respondent:

All common-law indictments are required to be found by the grand jury of the county in which the offenses are committed.

10 Am. & Eng. Enc. Law, 530; *Ex parte Slater*, 72 Mo. 102; *Weyrich v. People*, 80 Ill. 90; *Cooley*, Const. Lim. 5th ed. note 1, p. 376; 22 Cyc. 190, 191; *United States v. Hill*, 1 Brock. 156, Fed. Cas. No. 15,364;

Headnotes by WHITFIELD, J.

Note. — As to power of legislature to provide for indictment in county or district other than that in which crime is alleged to have been committed, see annotation following this case, post, 965.

Bishop, *Crim. Proc.* 3d. ed. § 49; *English v. State*, 31 Fla. 340, 12 So. 680.

A statute giving jurisdiction of a prosecution to the courts of a county other than that in which the offense has been committed is void as denying to the offender the constitutional right of a trial in his county or vicinage.

*State v. Lewis*, 9 Ann. Cas. 615, note; *State v. Carroll*, 55 Wash. 588, 133 Am. St. Rep. 1047, 104 Pac. 814, 19 Ann. Cas. 1234; *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635.

The indictment on its face should show the authority of the grand jury.

Bishop, *Crim. Proc.* 3d ed. § 385; *United States v. Wood*, 2 Wheeler, C. C. 325, Fed. Cas. No. 16,757.

**Mr. H. M. Hampton** also for respondent.

Messrs. **Van C. Swearingen**, Attorney General, and **C. O. Andrews**, Assistant Attorney General, for relator:

Statutes authorizing a change of venue for a trial are not violative of §§ 10 or 11 of the Bill of Rights, where an impartial jury cannot be obtained in the county where the offense was committed.

*Hewitt v. State*, 43 Fla. 194, 30 So. 795; *O'Berry v. State*, 47 Fla. 75, 36 So. 440.

A court can take judicial notice of its own records in case at bar, and of all matters patent on the face of the records, including all prior proceedings in the same case.

15 R. C. L. §§ 44, 45, p. 1113; 7 Ency. Ev. 999; *Oliver v. Enriquez*, 16 N. M. 322, 117 Pac. 844, Ann. Cas. 1913A, 140; *Murphy v. Citizens' Bank*, 82 Ark. 131, 11 L.R.A.(N.S.) 616, 100 S. W. 894, 12 Ann. Cas. 535; *Sewall v. Johnson*, 165 Cal. 762, 134 Pac. 704, Ann. Cas. 1915B, 651; *McNish v. State*, 47 Fla. 69, 36 So. 170; *Winn v. Coggins*, 53 Fla. 327, 42 So. 897.

The objection to the indictment is purely a technical one, and could not embarrass the defendants in the trial of the case, nor subject them to a subsequent trial for the same offense.

*Johnson v. State*, 58 Fla. 68, 50 So. 520; *Savage v. State*, 18 Fla. 909; *Peeples v. State*, 46 Fla. 101, 35 So. 223, 4 Ann. Cas. 870; *Williams v. State*, 42 Fla. 205, 27 So. 898.

**Mr. H. E. Carter** also for relator.

**Whitfield, J.**, delivered the opinion of the court:

The alternative writ of mandamus issued herein to the circuit judge alleges in effect:

That certain named persons were indicted in Suwannee county, in the third judicial circuit, for a felony for a violation in that

county of the banking laws of the state; that on motion of the defendants the causes were transferred to Madison county, in the same circuit; that on motion of the defendants the indictments were in Madison county quashed; that the acting state attorney presented a petition alleging that "a grand jury is now in session in this (Madison) county, that there is great prejudice among the people of Suwannee county against the said parties, and it is therefore inexpedient to form a grand jury in said Suwannee county to investigate charges at this time. Wherefore your petitioner prays an order of this court authorizing the grand jury now in session in the circuit court of Madison county to investigate the charges to be presented against the said J. B. Barton, H. E. Tolar, and G. S. Mobley, and take such action thereon as to the said grand jury may appear meet and proper."

That the court in Madison county ordered that, "the above and foregoing petition being considered, it is adjudged that because of prejudice existing among the people of Suwannee county, Florida, against J. B. Barton, H. E. Tolar, and G. S. Mobley, it is inexpedient to form a grand jury in said county of Suwannee to investigate criminal charges against the said J. B. Barton, H. E. Tolar, and G. S. Mobley, and it is ordered and adjudged that the grand jury now in session in Madison county, Florida, do proceed to investigate certain charges which may be brought to its attention, wherein it is alleged that the said J. B. Barton, H. E. Tolar, and G. S. Mobley have violated certain criminal laws of Florida in the said county of Suwannee, and that the said grand jury do make report of its findings to this court." That "thereupon the grand jury of said court, duly impaneled and sworn, were called into court, and in open court the Honorable M. F. Horne, judge of said court, presiding, gave to the said grand jury a special charge regarding the matter of violations of the criminal laws of Florida in connection with the affairs of the Live Oak Citizens' Bank of Live Oak, with request that the said grand jury investigate the same, as appears from the record of the minutes of said court as follows, to wit: 'The grand jury having more business before them, the judge in open court also gave the grand jury a special charge regarding the matter of the Live Oak Citizens' Bank of Live Oak, Florida, with a request that they investigate the same; and the grand jury retired to their rooms in charge of their sworn bailiff to further deliberate upon their findings.'"

That thereafter the said grand jury in and for Madison county presented indictments against the named parties, the in-

dictments stating that "the grand jurors of the state of Florida, inquiring in and for the body of the county of Madison, upon their oaths, present that H. E. Tolar, J. B. Barton, and G. S. Mobley, late of the county of Suwannee, in the state of Florida," committed the offenses charged. That thereafter, on motion of the defendants, the court in Madison county made the following order:

"This cause coming on to be heard on defendants' motion for change of venue as to each of the four indictments in the above-stated cause, which were at this present term of the circuit court in and for Madison county presented the grand jury of the state of Florida, inquiring in and for the body of the said county of Madison; and it appearing to the court by the exhibits attached to said motion and made a part thereof to its satisfaction that a fair and impartial trial cannot be had in the county of Suwannee, where the said offense is alleged to have been committed, and that it is impractical to get a qualified jury to try the said cases in said county of Suwannee; and it is further impractical to get a qualified jury in any other county in the third judicial circuit; and the court being of the opinion that a fair and impartial trial cannot be had anywhere in said circuit,—it is, upon consideration thereof, ordered and adjudged that a change of venue be had in said cases, and that said cases be and they are hereby moved to the circuit court of the fifth judicial circuit in and for Marion county, Florida." That the causes were duly docketed in Marion county, in the fifth judicial circuit. That upon motion of the state attorney for the fifth judicial circuit the court in Madison county made the following order: "This cause came on to be heard on motion of the Honorable Geo. W. Scofield, state attorney for the fifth judicial circuit court of Florida. From an inspection of the record, which is a certified copy of the proceedings of the circuit court for Madison county, it appears that at a regular term begun on October 8, 1916, on October 10, 1916, on motion of Honorable R. H. Buford, state attorney, reciting that certain indictments that had been returned against the defendants in Suwannee county, Florida, where the alleged crime was committed, had by the judge then holding said term in Madison county been quashed, and suggested, upon statements made by him, that the grand jury, then in session for Madison county do investigate the same. On the same day in open court in Madison county the judge ordered that it was inexpedient to form a grand jury in Suwannee county, and did direct the grand jury sworn to inquire in and for Madison county to in-

vestigate the same, and on the 11th day of October, 1916, the grand jury for Madison county presented four indictments against the persons named as in this case. There is in the record four papers appearing in form to be indictments against the four persons named, and filed by 'D. F. Burnett, Jr., clerk circuit court,' and on these same four papers are also marked: 'Filed Oct. 19, 1917. J. W. Bryson, clerk circuit court, Suwannee county, Florida.' But no other or further identification or authenticity appears.

"There is no order, or motion, in Suwannee county, adjudging or finding that it was inexpedient or impracticable to form a grand jury in Suwannee county, after the indictments that had been previously found in Suwannee county had been quashed in Madison county, nor any evidence, or any suggestion that there had been any evidence, showing that it was inexpedient or impracticable to form a grand jury in Suwannee county, or order transferring the case to Madison county for investigation by the grand jury.

"There appears a certified copy of the order of the judge, styled 'In the Circuit Court of Suwannee County,' purporting to de 'done and ordered at Madison, Florida, 15th day of October, 1916,' and certified to by 'J. W. Bryson, clerk of the circuit court in and for said county' of Suwannee, that the said order 'was duly recorded in the public records of said county in Chancery Order Book No. 2,' reciting that four indictments which were at this present term of the circuit court in and for Madison county presented, which on motion of the defendants was transferred to the circuit court for Marion county, Florida.

"From these proceedings, I am of the opinion that there was no authority for the grand jury of Madison county to present the indictments and said matter appearing in the record, and no cause pending, or any valid proceedings to transfer to this court, and no authority shown to authorize this court to proceed in the trial of said cause. I decline to entertain jurisdiction thereof. It is considered and ordered that this court is without legal power to try said case, and the clerk will transmit the entire record to the court from which he received the same.

"Done and ordered at Ocala, Florida, in open court, January 8, 1918.

"[Signed] W. S. Bullock, Judge."

That the "respondent, as judge of the circuit court for Marion county, Florida, declined and refused to entertain jurisdiction of said cases, and to try the same, for no other reason than that respondent was

of the opinion that there was no authority for the grand jury of Madison county to present the indictments, and that there was no cause pending or any valid proceedings to transfer to the said circuit court in Marion county, and no authority shown to authorize respondent to proceed in the trial of said cases."

The command of the writ is that the respondent judge of the fifth judicial circuit do "cause the said cases to be redocketed in the said circuit court in Marion county, and that you entertain and exercise jurisdiction thereof, and proceed to the trial and determination of said cases as made by the said indictments so returned by the grand jury of Madison county and transferred to the circuit court of Marion county, Florida, for trial," or show cause for not doing so.

A demurrer to the alternative writ presents questions as to the constitutional validity of the statute and the sufficiency of the proceedings under which the indictments for offenses alleged to have been committed in Suwannee county were found and presented in Madison county and the causes transferred to Madison county.

The provisions of the Constitution and the statute to be considered are as follows: "No person shall be tried for a capital crime or other felony, unless on presentment or indictment by a grand jury. . . ." Declaration Rights, § 10.

The statute is: "Whenever the judge shall deem it impracticable or inexpedient to form a grand jury in any county for want of sufficient number of qualified jurors therein, or on account of any undue excitement or prejudice among the people, it shall be lawful for the grand jury of any county within the circuit to indict any person for crime committed in the county first mentioned, but the trial thereof shall be in the county where the crime was committed, unless the judge shall otherwise order upon motion of the defendant, and on such motion the defendant may be tried in any county in the state." Chapter 7363, Acts 1917, amending § 4000, Gen. Stat.

This statute was originally enacted in 1868, and was considered in *Curry v. State*, 17 Fla. 683; the second headnote in the case being as follows: "When the judge is of the opinion that it is impracticable or inexpedient to form a grand jury in any county for reasons mentioned in subchapter 13, § 14, of chapter 1637, Laws of 1868, to make it lawful for the grand jury of any other county in the same circuit to indict any person for any offense committed in the county first mentioned in said section such opinion of the judge should be em-

bodied in an order and made a part of the record in the case."

The requirement of the Constitution that the trial of a felony shall be "on presentment or indictment of a grand jury" does not limit the provision to a grand jury of the county where the crime was committed, but to "a grand jury." Any principle of the common law may be changed by statute, when the Constitution is not thereby violated. *Ruff v. Georgia*, S. & F. R. Co. 67 Fla. 224, 64 So. 782, 5 N. C. C. A. 698; *Dutton Phosphate Co. v. Priest*, 67 Fla. 370, 65 So. 282; *Missouri P. R. Co. v. Castle*, 224 U. S. 541, 56 L. ed. 875, 32 Sup. Ct. Rep. 606.

Assuming that the common law required indictments to be found by a grand jury of the county where the crime was committed, a change of this common-law rule by statute, in the public interest, so as to authorize indictments under certain adjudged conditions to be found by a grand jury in a county of the circuit other than the one in which the crime was committed, is not expressly or impliedly forbidden by the Constitution. See *State v. Lewis*, 142 N. C. 626, 7 L.R.A. (N.S.) 669, 55 S. E. 600, 9 Ann. Cas. 604.

In *English v. State*, 31 Fla. 340, 12 So. 689, and *Donald v. State*, 31 Fla. 255, 12 So. 695, it was held that the provision of a statute authorizing a grand jury of less than twelve members to find an indictment is in conflict with the quoted provision of the Constitution requiring trials of felonies to be upon "indictment by a grand jury," because at common law twelve grand jurors must concur in finding an indictment. This holding does not require a determination that a statute violates the quoted organic provision when it authorizes, under conditions affecting the public interests, a grand jury in one county to indict for felonies committed in another county of the circuit. A grand jury is merely the accusing body. The qualifications of its members are fixed by statute, without reference to their qualifications at common law.

The above-quoted provision of § 10 of the Declaration of Rights is quite unlike the provision of § 11 of the Declaration of Rights that "in all criminal prosecutions the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed."

Section 10 relates to indictments, while § 11 relates to trials. See *Ashley v. State*, 72 Fla. 137, 72 So. 647; *O'Berry v. State*, 47 Fla. 75, 36 So. 440; *Hewitt v. State*, 43 Fla. 194, 30 So. 795.

The state attorney of the fifth judicial circuit moved a remand of the cases, on

the ground that the court in Marion county is without jurisdiction to try them, and the court ordered the remand.

The basis of the action of the grand jury in Madison county in finding the indictments there was an order made under the statute by the judge whose circuit included both Suwannee and Madison counties. The order was made in Madison county, on an application by the acting state attorney, alleging that, owing to great prejudice among the people of Suwannee county against the parties, it is inexpedient to form a grand jury in that county to investigate the charges made against the accused.

The judge of the circuit embracing both counties "adjudged that because of prejudice existing among the people of Suwannee county" against the accused "it is inexpedient to form a grand jury in said county of Suwannee to investigate criminal charges against the said" parties, and "ordered and adjudged that the grand jury now in session in Madison county, Florida, do proceed to investigate certain charges

which may be brought to its attention, wherein it is alleged that the said" parties "have violated certain criminal laws of Florida in the said county of Suwannee, and that the said grand jury do make report of its findings to this court." This order, made in Madison county by the judge whose circuit included both Suwannee and Madison, was a sufficient basis for the action taken by the grand jury in Madison county under the statute above quoted.

The transfer of the cases to Marion county, in the fifth judicial circuit, was at the instance of the defendants, pursuant to the statute.

Under the indictment as found and the transfer of the cases under the statute, the judge of the fifth judicial circuit, in Marion county, has jurisdiction to try the cases and to adjudge the sufficiency of the indictments.

The demurrer is overruled.

Ellis and West, JJ., concur.

Browne, Ch. J., and Taylor, J., dissent.

**Annotation—Power of legislature to provide for indictment in county or district other than that in which crime is alleged to have been committed.**

The present annotation is supplementary to that to *State v. Lewis*, 7 L.R.A. (N.S.) 669. As shown by that note the rule is that, in the absence of any limitation either express or implied by constitutional provision, the power of a state legislature to fix the venue of criminal prosecutions in a county or district other than that in which the crime was committed is unrestricted, but that the question is one of construction of the various constitutional provisions which relate more or less directly to the venue of criminal prosecutions. The diversity of phraseology of the various constitutions creates a like diversity of conclusion, and in addition in some instances the courts do not seem to be in accord.

Thus, under a constitutional provision merely guaranteeing trial by jury it has been held, applying the rule that such a provision must be construed as reserving to the people the common-law right of trial by jury in the county where the alleged offense was committed, that a statute providing that larceny from a railroad car en route may be prosecuted in any city through which the car passes is unconstitutional. *People v. Brock* (1907) 149 Mich. 464, 119 Am. St. Rep. 684, 112 N. W. 1116.

On the other hand, in *Dies v. State* L.R.A.1918F.

(1909) 56 Tex. Crim. Rep. 32, 117 S. W. 979 (expressly following *Mischer v. State* (1899) 41 Tex. Crim. Rep. 212, 96 Am. St. Rep. 780, 53 S. W. 627, which is set out and quoted in the earlier note), it was held that a statute providing that prosecutions for rape shall be commenced and carried on in the county in which the offense is committed, or in any county of the judicial district in which the offense is committed, or in any county of the judicial district the judge of which resides nearest the county seat of the county in which the offense is committed, did not contravene a constitutional provision that "no person shall be held to answer for a criminal offense unless on indictment of a grand jury," and that it was not in derogation of the 6th Amendment to the Federal Constitution, requiring that criminal prosecutions shall be tried in the district wherein the crime shall have been committed, because that restriction applied only to Federal procedure. And these rulings were again approved in *Brown v. State* (1909) 57 Tex. Crim. Rep. 269, 122 S. W. 565; and *Eckermann v. State* (1909) 57 Tex. Crim. Rep. 287, 123 S. W. 424.

Where the Constitution merely provides for a speedy trial by an impartial jury of the vicinage, it has been held

that a statute providing that under certain circumstances a criminal trial may be had in another parish than that in which the offense was committed is valid. *State v. Moore* (1916) 140 La. 281, 72 So. 965.

In *State v. Carroll* (1909) 55 Wash. 588, 133 Am. St. Rep. 1047, 104 Pac. 814, 19 Ann. Cas. 1234, a statute providing that "when property taken in one county by burglary, robbery, larceny, or embezzlement is brought into another county, the jurisdiction is in either county," was held unconstitutional as obnoxious to a constitutional provision guaranteeing a "public trial by an impartial jury of the county in which the offense is alleged to have been committed." This decision is cited with approval in *State ex rel. Howard v. Superior Ct.* (1915) 88 Wash. 344, 153 Pac. 7.

And that a statute authorizing a crime to be prosecuted in a county in which the offense was not committed when the crime was committed within 100 yards of the boundary lines of the county is unconstitutional and void where the Constitution provides that trials of crime shall be in the county where the alleged offense was committed, see *State v. McAllister* (1909) 65 W. Va. 97, 131 Am. St. Rep. 955, 63 S. E. 758, citing *State v. Lowe* (1883) 21 W. Va. 782, 45 Am. Rep. 570, which is cited in the note in 7 L.R.A.(N.S.) 669, on page 672.

And in Louisiana the rule is that a constitutional provision that prosecutions shall take place in the parish in which the offense was committed con-

trols any statute to the contrary. *State v. Kinchen* (1910) 126 La. 39, 52 So. 185, following *State v. Montgomery* (1905) 115 La. 155, 38 So. 949, which is set out in the note in 7 L.R.A.(N.S.) 669 on page 672. And to the same effect is *State v. Moore* (1916) 140 La. 281, 72 So. 965, holding that the enactment of the constitutional provision rendered a previous statute null and void. But that a statute providing that when a person is wounded in one county and die thereof in another county, an indictment may be found in either county, is not impliedly repealed by the subsequent adoption of a constitutional provision requiring trial in the county where an offense is committed, see *State v. McCoomer* (1907) 79 S. C. 63, 60 S. E. 237, wherein the court said that the statute was in effect an enactment that in contemplation of law the offense should be considered to have been committed in both counties, and that when the Constitution provided for the trial of the defendant in the "county where the offense was committed," it meant in the county where the offense was deemed committed under the law as it then was; wherefore the statute was not impliedly repealed by the enactment of the constitutional provision.

In *People v. Price* (1911) 250 Ill. 109, 95 N. E. 68, it was held that the legislature of one state has no power to make an act committed in a foreign state or country a felony in the former state simply because the offender might be found and apprehended therein. G. J. C.

#### KENTUCKY COURT OF APPEALS.

S. H. MARTIN, Appt.,  
v.

MELVINA FRANCIS, Admr., etc., of G.  
W. Francis, Deceased, et al.

(173 Ky. 529, 191 S. W. 259.)

#### Contract — to withdraw candidacy — validity.

1. A contract between the candidates of rival political parties for a certain office, that if one will withdraw just prior to the election when it is too late to substitute another candidate, the other when elected

Note. — As to liability of stakeholder or depositary of funds to be held in connection with an illegal transaction, see annotation following this case, post, 972.

As to validity of agreement made in consideration of withdrawal of candidate for office, see note to *Com. ex rel. Layman v. Sheeran*, 37 L.R.A.(N.S.) 289.

L.R.A.1918F.

will appoint him as deputy and divide with him the fees of the office, is void as against public policy.

For other cases, see *Contracts*, III. c, 4, in *Dig. 1-52 N. S.*

#### Stakeholder — money to secure illegal contract — recovery.

2. Money deposited to secure performance of a contract by one candidate for public office to appoint his rival a deputy if he will withdraw from the contest, cannot be recovered from the stakeholder after the contract has been performed.

For other cases, see *Contracts*, III. g, 2, in *Dig. 1-52 N. S.*

(January 30, 1917.)

**A**PPEAL by defendant from a judgment of the Circuit Court for Knott County in favor of cross petitioner in an action brought to recover the amount alleged to be due on a promissory note. Reversed.

The facts are stated in the opinion.

**Messrs. W. E. Faulkner, Faulkner & Faulkner, John Caudill, and W. A. Stanfill, for appellant:**

The demurrer of defendant to the petition of Peyton Richie should have been sustained because the contract set out in it, and out of which Richie's claim against defendant grows and on which it is based, was an illegal contract and against public policy, and no court should permit an action to be maintained on such a contract, or give relief to a person participating in it.

**Schneider v. Local Union**, 116 La. 270, 5 L.R.A. (N.S.) 891, 114 Am. St. Rep. 549, 40 So. 700, 7 Ann. Cas. 868; 9 Cyc. 465, 466, 481, 485, 499, 546; **Clark, Contr.** 2d ed. 291; **Nichols v. Mudgett**, 32 Vt. 546; **Roller v. Murray**, 112 Va. 780, 38 L.R.A. (N.S.) 1202, 72 S. E. 665, Ann. Cas. 1913B, 1088; **Kennedy v. Lonabaugh**, 19 Wyo. 352, 117 Pac. 1079, Ann. Cas. 1913E, 133; **O'Brien v. Shea**, 208 Mass. 528, 95 N. E. 99, Ann. Cas. 1912A, 1030; **Northwestern Salt Co. v. Electrolytic Alkali Co.** Ann. Cas. 1915B, 228, and note, [1913] 3 K. B. 422; **Wright v. Gardner**, 98 Ky. 454, 33 S. W. 622, 35 S. W. 1116; **Bull v. Harragan**, 17 B. Mon. 349; **Gray v. Roberts**, 2 A. K. Marsh. 208, 12 Am. Dec. 383; **Morton v. Fletcher**, 2 A. K. Marsh. 137, 12 Am. Dec. 366; **Todd v. Caplinger**, 4 Bush, 139; **Lewis v. Knox**, 2 Bibb, 453; **Love v. Buckner**, 4 Bibb, 506; **Outon v. Rodes**, 3 A. K. Marsh. 432, 13 Am. Dec. 193; **Davis v. Hull**, 1 Litt. (Ky.) 9; **Baldwin v. Bridges**, 2 J. J. Marsh. 7; **Oldham v. Hume**, 4 Ky. L. Rep. 355; **Field v. Chipley**, 79 Ky. 260, 42 Am. Rep. 215; **Holt v. Thurman**, 111 Ky. 84, 98 Am. St. Rep. 399, 63 S. W. 280; **Eversole v. Holliday**, 131 Ky. 202, 114 S. W. 1195; **Campbell v. Offutt**, 151 Ky. 229, 151 S. W. 403; **Com. ex rel. Layman v. Sheeran**, 145 Ky. 361, 37 L.R.A. (N.S.) 289, 140 S. W. 568.

There is a plain distinction between an executory and an executed illegal contract. In the latter case courts will not render relief, especially where the parties are in *pari delicto*.

**Bernard v. Taylor**, 23 Or. 416, 18 L.R.A. 859, 37 Am. St. Rep. 693, 31 Pac. 968; **Wassermann v. Sloss**, 117 Cal. 425, 38 L.R.A. 176, 59 Am. St. Rep. 209, 49 Pac. 566; **Pullman's Palace Car Co. v. Central Transp. Co.** 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808; **Congress Spring Co. v. Knowlton**, 103 U. S. 49, 26 L. ed. 347.

**Messrs. Smith & Combs, for appellee Richie:**

The agreement by which appellee Richie was to appoint Cody his deputy and pay to him the full fees of the office for two years

as compensation was not at all contrary to the statute, nor against public policy.

**Com. ex rel. Layman v. Sheeran**, 145 Ky. 361, 37 L.R.A. (N.S.) 289, 140 S. W. 568.

When the act contemplated is *mala prohibita*, as in this instance, and not *mala in se*, there is a right of repentance before the illegal object is carried out and the money under such circumstances may be recovered, even if it has been paid to the other party, and a fortiori when the money has never been delivered to the other party, and is yet in the hands of a third party or stakeholder.

**Stacy v. Foss**, 19 Me. 335, 36 Am. Dec. 755; **Vischer v. Yates**, 11 Johns. 23; **Wassermann v. Sloss**, 117 Cal. 425, 38 L.R.A. 176, 59 Am. St. Rep. 209, 49 Pac. 566; **Hampden v. Walsh**, L. R. 1 Q. B. Div. 189, 45 L. J. Q. B. N. S. 238, 33 L. T. N. S. 852, 24 Week. Rep. 607; **Bernard v. Taylor**, 23 Or. 416, 18 L.R.A. 859, 37 Am. St. Rep. 693, 31 Pac. 968; **M'Allister v. Hoffman**, 16 Serg. & R. 147, 16 Am. Dec. 556; **Norton v. Blinn**, 39 Ohio St. 145; **Dunlap's Paley, Agency**, 66; **Taylor v. Lendey**, 9 East, 49, 103 Eng. Reprint, 492; **Adams Exp. Co. v. Reno**, 48 Mo. 264; **Peters v. Grimm**, 149 Pa. 164, 34 Am. St. Rep. 590, 24 Atl. 192; **Morgan v. Groff**, 4 Barb. 524; **Bone v. Eckless**, 5 Hurlst. & N. 925, 157 Eng. Reprint, 1450, 29 L. J. Exch. N. S. 438.

**Mr. J. D. Smith for other appellees.**

**Carroll, J.**, delivered the opinion of the court:

Passing several questions of practice raised by counsel for appellant, and going at once to the merits of the case, we find that on October 31, 1913, Martin the appellant, together with Napier, Sturgill, and Casebolt, executed to J. D. Smith a promissory note for five (six) hundred dollars, payable one month after date; that this note was assigned by Smith to one Cody, and by Cody to Francis; that in 1914 Francis brought suit on this note against the payors; that the appellee Richie, in November, 1915, came into the case by a petition to be made a party, which petition he made a cross petition against the defendant Martin, now the appellant. In his petition as amended he set out "that one H. Cody was the regular nominee of the Republican party for jailer of Knott county, and that this defendant was the regular nominee of the Democratic party for the same office in said county shortly prior to the regular November election, 1913, and to be voted for at said election. Defendant says that he and the said H. Cody, on or about the 30th day of October of said year

of 1913, entered into an agreement by which the said H. Cody was to resign his Republican nomination for the office of jailer, and in consideration therefor this defendant agreed to appoint said H. Cody a deputy jailer and to give to him the entire proceeds of said office for one half of his term; that in order to assure to the said H. Cody the due performance of said contract upon the part of this defendant, he, the defendant, deposited and placed in the hands of W. M. Sturgill the sum of \$500 to be held in trust by the said Sturgill, and to be repaid to this defendant in the event he performed the said contract, but, in the event that he failed to perform said contract, said fund was to be paid over to the said H. Cody. Said W. M. Sturgill placed said money in the hands of one John D. Smith pursuant to the terms of said agreement wherein this was to be done for the same purpose, after no further nomination could be made by the Republican party for said office. This defendant says that he is informed, so believes, and charges that said contract was and is illegal and contrary to public policy, and that he now and hereby repudiates same. Defendant says that said J. D. Smith heretofore, without his knowledge, delivered said fund to the defendant S. H. Martin, and no part of it has been paid to the said H. Cody. He says that the money loaned to defendant S. H. Martin by J. D. Smith, for which the note in controversy was executed, to wit, \$500, was the property of this petitioner; that he placed said money in the hands of the said John D. Smith to hold for him as his bailee and subject to his orders; that he did not authorize said John D. Smith to loan said money to the said S. H. Martin, or anyone else, but that he did so without his consent; that he did not place said money in the hands of said Smith for the purpose of loaning it, or for the purpose of using it in the election to buy votes, or otherwise; that the defendant S. H. Martin well knew the facts at the time, and knew that the money loaned to him by the said John D. Smith was the money and the property of this petitioner; that he also knew for what purpose it was placed in the hands of the said J. D. Smith to hold as bailee for this petitioner."

A demurrer by Martin to this pleading of Richie was overruled. After this the petition of Francis was dismissed, and, it appearing from the record that Martin failed to deny the averments of the pleading of Richie, judgment went against him for the debt, with interest, and he appeals.

Having reached the conclusion that the demurrer of Martin should have been sustained and the cross petition of Richie dis-

missed, we will proceed to state the reasons that influenced us to take this view of the case.

It will be seen from the cross petition that in consideration of the agreement of Richie to appoint Cody his deputy jailer and give him the fees of the office for one half of his term, or two years, and in further consideration of the fact that he deposited with Sturgill \$500 to insure the fulfillment of the contract with Cody, which money Cody was to have in the event Richie failed to comply with his agreement, Cody, who was the regular nominee of the Republican party for the office of jailer of Knott county, withdrew as a candidate for this office a few days before the regular election, and when it was too late for the Republican party to nominate another candidate for the office of jailer in place of Cody.

We may further assume, as a reasonable inference from the averments of the pleading and the failure of Cody to complain, that Richie was elected jailer at the November election, 1913, and performed his contract with Cody by appointing him deputy jailer and giving him the fees of the office as stipulated in the contract.

With this understanding of the record, the first question to be determined is the validity of the contract between Richie and Cody. Upon this subject we have no hesitancy in saying that it was immoral, illegal, and against public policy. Under our form of government nearly all of our public officers are elected by the people at regular elections held in the November preceding the beginning of the term of office in the following January, and in all cases; with rare exceptions, candidates for public offices at the regular November election are nominated as candidates for the offices at the primary election held in August preceding the regular November election by the voters of the party with whom the candidates affiliate.

It also fairly appears from the pleading that Richie, at the primary election held in August, 1913, had been nominated as the candidate of the Democratic party for the office of jailer, and that Cody, at his primary election, was the nominee of the voters of the Republican party, as its candidate for this office. We may further properly assume that the voters of the respective parties in Knott county, when they nominated these men as candidates for the office of jailer at the primary election held in August, 1913, had the right in good faith to believe that they would be the candidates of the respective parties at the regular November election. And when a candidate is so nominated at a primary election,



he should not be permitted to practise a fraud on the people who nominated him, and defeat the right of the party to have a candidate for the office for which he was nominated, by entering into a corrupt agreement with the candidate of the opposing party, or with any other person, or set of persons, by which he will withdraw as a candidate at a time when the party that nominated him cannot, in the regular way, nominate a candidate in his place, or at any time after he has been nominated. The sale by a candidate of his nomination, accompanied by his withdrawal, is an illegal, dishonest, and immoral thing. It is against public policy because it affects the integrity of the elective franchise, and puts it in the power of a corrupt person to defeat the will of the people, or, at any rate, to deprive a large part of them of the opportunity to have a candidate of their choice for the public office involved.

In addition to these reasons, arrangements such as were entered into between Richie and Cody affect the public good, because they impose on a public officer the obligation to appoint an assistant or deputy without reference to his fitness or qualifications for the place, and only for the reason that it was a part of an agreement entered into not for the benefit of the public, but pursuant to a corrupt bargain detrimental to the public.

Richie, of course, occupies no better place in this transaction than Cody. He was an active, participating party in the transaction, guilty of the same immoral, illegal, and corrupt conduct of which Cody was guilty. The public reasons that would forbid Cody to sell his nomination would forbid Richie to buy it. One of them was a bribe taker and the other a bribe giver, and in a court of justice neither of them, in any matter growing out of this transaction, should be entitled to any consideration. If Richie had failed to fulfil his corrupt bargain with Cody, plainly a suit by Cody, seeking performance of the contract or any part of it, would be promptly dismissed, and likewise, if Richie had performed this contract and in any way or manner Cody had secured possession of the \$500 deposited by Richie to secure its performance, Richie, if he brought a suit to recover it from Cody, would be turned out of court. The courts would have nothing to do with either of them. It would not give to either any relief, but would leave them to settle their differences without the assistance of the processes of the law.

It is said, however, that this court in the case of *Com. ex rel. Layman v. Sheeran*, 145 Ky. 361, 37 L.R.A.(N.S.) 289, 140 S. W. 568, partially, at least, recognized the

validity of contracts made between contending candidates for office by which one of them, for a stipulated consideration, should withdraw as a candidate in favor of the other. But we do not find in the opinion in that case any ground upon which to rest an argument that the validity of such a contract would be sanctioned. The question in that case did not concern the validity of a contract, and the court in the opinion was careful to say so. In that case Sheeran and one Taul were contending candidates in the Republican party for the nomination of the office of sheriff of Breckinridge county, and before the nominating convention was held Taul and Sheeran entered into an agreement that Taul would withdraw as a candidate for the nomination in consideration of Sheeran's appointment of him as deputy in the event of his election. Pursuant to this arrangement, Taul did withdraw as a candidate for the nomination, and thereafter Sheeran, who was nominated and elected, appointed Taul a deputy pursuant to the contract. Subsequently the commonwealth, on the relation of the commonwealth's attorney, brought suit against Sheeran, asking the forfeiture of his office upon the ground that the agreement Sheeran entered into was in violation of § 3740 of the Kentucky statutes and worked a forfeiture of his office. The court, however, found that this arrangement between Sheeran and Taul was not in violation of the statute relied on by the commonwealth, and dismissed the suit. This is all that was decided in that case.

In the later case of *Campbell v. Offutt*, 151 Ky. 229, 151 S. W. 403, the court had before it a case like this: Campbell and Young, attorneys, assumed liability on a note for the benefit of Offutt, and Offutt, who expected to be appointed revenue agent by Bosworth, who was then a candidate for auditor, executed to Campbell and Young his note for the liability they had assumed, and agreed with them that, if he should be appointed revenue agent, he would employ them in his official capacity as his attorneys. Bosworth was defeated as a candidate for auditor, and Offutt did not get the office of revenue agent. Thereupon Campbell and Young brought suit against Offutt on the note he had executed to them under the circumstances stated. In holding that they could not recover, the court said: "Such an agreement is contrary to public policy and is void. If Offutt had secured the office and had refused to employ Campbell and Young as his attorneys to attend to the business of the office and they had sued him upon this contract, no court would have enforced it, or given dam-

ages for its breach. The law requires of a public officer that he shall use his best skill and judgment for the protection of the public interest, and an agreement before his appointment to divide the fees of the office with an attorney, if sustained, might seriously cripple the public service; for in this event the public would secure the services of an attorney, in some instances, who would offer the best terms to the official to secure the employment. It is not material here that Offutt failed to get the office by reason of the fact that Bosworth was not elected auditor, and it is not material that the attorneys would in fact have discharged their duties faithfully and well. The agreement, being one which the law will not tolerate, cannot be enforced. The consideration of the transaction is the illegal agreement, and, as the notes rest upon an illegal transaction, they cannot be enforced."

But, conceding the illegality of the contract between Richie and Cody, and further conceding that a suit by either of them to obtain any relief arising out of this transaction would be dismissed, the argument is made on behalf of Richie that this money was delivered by Sturgill the stakeholder, to Martin without the consent of Richie, and therefore Martin should be treated as holding it in the same manner that Sturgill originally held it, as he had knowledge of the arrangement under which the money was placed in the hands of Sturgill. And so it is said that, as Richie would have the right to recover the money from Sturgill while it was in his hands, so he has the right to recover it from Martin, who, voluntarily and with knowledge of the facts, took the place of Sturgill in the transaction.

In order to give Richie the full benefit of this argument we will assume that Martin occupies the place of Sturgill as stakeholder, and consider the question as if it were a suit by Richie against Sturgill to recover from him the money. Looking at the matter from this standpoint is putting as favorable a view on the transaction as Richie could ask, and yet we are quite sure that Richie cannot have the relief he seeks. The arrangement between Richie and Cody was, as we have pointed out, corrupt and illegal, and the vicious qualities of the contract between them taint every aspect of the transaction to such an extent that neither of them should be afforded any redress in a court of justice on account of anything growing out of this business.

It is very true that there is abundant au-

thority for the proposition that money, wagered or bet and deposited in the hands of a stakeholder, to be held by him until the outcome of the wager or bet is determined, may be recovered from the stakeholder by the person making the deposit, while it is in the hands of the stakeholder. *Donahoe v. McDonald*, 92 Ky. 123. 17 S. W. 195; *Conner v. Ragland*, 15 B. Mon. 634; *Hutchings v. Stilwell*, 18 B. Mon. 776; *Turner v. Thompson*, 107 Ky. 647, 35 S. W. 210; *Gardner v. Ballard*, 114 Ky. 93, 70 S. W. 196. It should be said, however, that the decisions in these cases were rested on § 1959 of the Kentucky statutes, providing that "the stakeholder of any money or other thing that may be staked on any bet or wager, shall, when thereto notified, return the same to the person making the stake or deposit, and, for failing to do so, the amount or value of the stake may be recovered from him by the party aggrieved."

But aside from this statute and the Kentucky cases, it is a general and well-settled principle of law that money deposited with a stakeholder on account of a wager or bet of any kind may be recovered from the stakeholder, while it is in his hands, by the person making the deposit. *Stacy v. Foss*, 19 Me. 335, 36 Am. Dec. 755; *M'Alister v. Hoffman*, 16 Serg. & R. 147, 16 Am. Dec. 556; 20 Cyc. 947; 14 Am. & Eng. Enc. Law, 631; *Bernard v. Taylor*, 23 Or. 416, 18 L.R.A. 859, 37 Am. St. Rep. 893, 31 Pac. 968. But in all of these cases that we have had opportunity to examine, the stakeholder was holding the money pending the settlement of a wager or bet or the outcome of some kind of a gambling venture, and, so holding it, he was held to be acting as the agent of the depositor, with the right in the depositor to revoke the agency and demand the return of the deposit before it had been paid over. And a stakeholder, in some of the authorities, is defined as one in whose hands money or property is deposited to abide the event of a gambling contract. *Dauler v. Hartley*, 178 Pa. 23, 35 Atl. 857. For other definitions see *Bouvier's Law Dict.* title, "Stakeholder;" 36 Cyc. 813.

Ordinarily, wagers or bets or gambling contracts do not affect the public generally, but only the individuals directly concerned in the transaction, and consequently the courts hold that when an individual has made a deposit with a stakeholder of a sum of money to be paid over to another party on the happening of a certain contingency, although the transaction upon which the bet or wager was made may have been for-

bidden by law, the depositor may repudiate or withdraw his wager or bet and recover the deposit while in the hands of the stakeholder.

But the question we have goes far beyond the scope of an ordinary gambling contract or an ordinary violation of a statute. Its evil consequences were not confined to the persons immediately concerned in the transaction, and we are not disposed to extend to the facts appearing in this case the rule that money on deposit with a mere stakeholder, awaiting the outcome of some wager or bet or the result of some gambling contract, may be recovered by the depositor.

Numerous cases can be found illustrating the disposition of the courts to put contracts that have a tendency to injure the public service, or to interfere with or corrupt the free exercise of the elective franchise, or that affect public offices, in a class distinct from mere gambling contracts, or contracts involving the violation of a statute. *Schneider v. Local Union*, 116 La. 270, 5 L.R.A. (N.S.) 891, 114 Am. St. Rep. 549, 40 So. 700, 7 Ann. Cas. 868; *Basket v. Moss*, 115 N. C. 448, 48 L.R.A. 842, 44 Am. St. Rep. 463, 20 S. E. 733; *Livingston v. Page*, 74 Vt. 356, 59 L.R.A. 336, 93 Am. St. Rep. 901, 52 Atl. 965; *Exchange Nat. Bank v. Henderson*, 139 Ga. 260, 51 L.R.A. (N.S.) 549, 77 S. E. 36; *Marshall v. Baltimore & O. R. Co.* 16 How. 314, 14 L. ed. 953. See also *Greenhood*, Pub. Policy, 338.

The intent of the rule laid down in these cases, as well as in many others that might be referred to, manifests a purpose on the part of the court to protect public officers and public offices from all immoral and corrupting influences having a tendency to injuriously affect the public good, and there is no good reason why the wholesome principle running through these cases should not be extended and properly applied to the case we have. When so extended and applied, it forbids that courts should grant to any person connected with such affairs the relief that might be afforded if the transaction were looked on merely as a gambling or illegal contract or arrangement and *Sturgill* or *Martin* regarded as mere stakeholders for the parties concerned in the venture.

This money was deposited by *Richie* with *Sturgill* pursuant to and as a part of a corrupt, immoral, and illegal bargain, deeply affecting the public interest. It was not deposited as a result of any wager or

bet or gambling contract entered into between *Richie* and *Cody*, that concerned them alone. The voters and the people of *Knott* county, irrespective of party affiliation, and especially the Republican voters of that county, were directly affected by the illegality and the immorality of this contract. In its essential elements, the purpose of it was to obstruct and interfere with the elective franchise and to deprive, by means of a corrupt bargain, a body of citizens of the right to vote for the candidate of their party. And every contract that has for its essential purpose the obstruction of or interference with the elective franchise in any form or manner, or that involves the trading or trafficking in public offices, concerns matters too serious to be regulated by rules of law applied in mere gambling contracts between individuals. Contracts such as the one entered into between *Richie* and *Cody*, and every branch of such contracts, and everything arising out of them, deserve the severest condemnation, and no party to such a contract should be allowed to come into a court and obtain relief on account of anything connected with or arising on such a contract, unless it affirmatively appears that the party asking relief had in good faith rescinded or repudiated, or attempted in good faith to rescind or repudiate, the contract, before any material thing looking to its accomplishment had been done by any person connected with it. If the person asking relief from anything growing out of such a contract can affirmatively show that, after entering into the contract, he changed his mind and in good faith abandoned the contract, and everything connected with it, before it was consummated, he should have such relief as he would be entitled to in cases not affected by any vice or infirmity in the contract, but not otherwise.

And so in this case, if *Richie* had repented of his illegal purpose and demanded the return of this money before the withdrawal of *Cody*, we would say that he might recover it; but he did not do this. He did not seek to recover this money until long after *Cody* had withdrawn as a candidate, or until long after the corrupt bargain had been consummated and everything that was contemplated by the parties to it had been accomplished.

For the reasons set forth in the opinion, the judgment is reversed, with directions to set aside the judgment against *Martin* and dismiss the cross petition of *Richie*.

**Annotation—Liability of stakeholder or depositary of funds to be held in connection with an illegal transaction.**

**I. Scope, 972.****II. Liability to winner for both stakes, 972.****III. Liability to a party for his stake:**

- a. Where stake demanded before event, 972.
- b. Where stakeholder has not paid over the stake, 973.
- c. Where stake demanded before payment over, 974.

**I. Scope.**

Deposits with one of the parties are not included, nor deposits with a broker, nor agreements to indemnify stakeholders, nor stakes of articles to be sold or furnished by the stakeholder; the question of interest on stakes is also excluded.

For right of subscriber to lottery scheme to recover his subscription there-to, see the note to *Becker v. Wilcox*, 16 L.R.A.(N.S.) 571.

For the question whether promise by a third party to pay claim arising out of performance of contract between two other persons is tainted by the illegality of that contract, see the note to *Owens v. Davenport*, 28 L.R.A.(N.S.) 996.

For injunction in betting and gambling contracts, see the note to *Basket v. Moss*, 48 L.R.A. 844.

For cases where the victim of swindlers puts up his money to defraud others, see the note to *Hobbs v. Boatright*, 5 L.R.A.(N.S.) 906.

For conflict of laws as to betting and gaming, see the notes to *Winward v. Lincoln*, 64 L.R.A. 160, and *Lamson Bros. v. Bane*, 46 L.R.A.(N.S.) 650.

**II. Liability to winner for both stakes.**

The winner may not recover both stakes of an illegal wager from the stakeholder. *Bunn v. Riker* (1809) 4 Johns. (N. Y.) 426, 4 Am. Dec. 292; *Porter v. Sawyer* (1835) 1 Harr. (Del.) 517 (where there was also another reason for the decision).

He cannot recover both stakes from the stakeholder against the loser's objection. *McLain v. Huffman* (1875) 30 Ark. 428; *Worthington v. Black* (1859) 13 Ind. 344. Nor may he recover the loser's stake from the stakeholder, where the latter has already paid it to the loser on demand. *Rust v. Gott* (1828) 9 Cow. (N. Y.) 169, 18 Am. Dec. 497; *Hayden v. Little* (1865) 35 Mo. 418.

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**III.—continued.****d. Demands and notices, 975.****e. Where stake has been paid over without notice or demand, 976.****f. Payment with loser's consent, 976.****IV. Under particular statutes, 976.****V. Theory of no recovery, 978.****VI. Miscellaneous, 979.**

Where two bettors on a horse race deposited with the stakeholder money as forfeit money, and one of them failed to race, his forfeit could not be recovered by the other. *Corley v. Berry* (1830) 1 Bail. L. (S. O.) 593.

But it has been held in Missouri that a creditor of the winner may recover of the stakeholder, by garnishment, the stakes of both parties, if the loser has not claimed the money. *Wimer v. Pritchatt* (1852) 16 Mo. 252.

**III. Liability to a party for his stake.****a. Where stake demanded before event.**

A bettor may recover his stake from the stakeholder, when the stake is demanded or the wager repudiated before the event.

*Eltham v. Kingsman* (1818) 1 Barn. & Ald. 683, 106 Eng. Reprint, 251 (where it was not decided whether the wager was illegal or merely foolish); *Varney v. Hickman* (1847) 5 C. B. 271, 136 Eng. Reprint, 881, 5 Dowl. & L. 364, 17 L. J. C. P. N. S. 102; *Martin v. Hewson* (1855) 10 Exch. 737, 156 Eng. Reprint, 637, 24 L. J. Exch. N. S. 174, 1 Jur. N. S. 214; *Jeffrey v. Ficklin* (1840) 3 Ark. 227, 36 Am. Dec. 456 (both parties repudiated); *Wise v. Rose* (1895) 110 Cal. 159, 42 Pac. 569; *Alford v. Burk* (1857) 21 Ga. 46, 68 Am. Dec. 449; *Parmelee v. Rogers* (1861) 26 Ill. 56 (where there was a new promise by the stakeholder to pay back); *Stevens v. Sharp* (1861) 26 Ill. 404; *Taylor v. Moore* (1898) 20 Ind. App. 654, 50 N. E. 770; *Jennings v. Reynolds* (1866) 4 Kan. 110; *Cleveland v. Wolff* (1871) 7 Kan. 184 (before event completed); *Hoit v. Hodge* (1833) 6 N. H. 104, 25 Am. Dec. 451; *Barrett v. Neill* (1833) *Wright (Ohio)* 472 (where both parties canceled the bet); *Dunn v. Drummond* (1896) 4 Okla. 461, 51 Pac. 656; *Hilton v. Bailey* (1915) 46 Okla. 759, 149 Pac. 863; *Siegel v. Funk* (1866)

3 Pittsb. (Pa.) 28; Ryerson v. Derby (1875) 10 N. S. 13.

On the theory that one might withdraw his stake before the event, it was held in *Humphreys v. Magee* (1850) 13 Mo. 435, that the plaintiff might recover his stake from the stakeholder, as the wager was never determined, where the stakeholder paid over the stakes bet on a horse race when the judges were unable to agree.

A and B, having made a bet, with C as stakeholder, and wishing a new stakeholder, sought to get back the money, and C gave his note for it, with indorsers, which A had discounted at a bank and sold to D, who, after it had been protested, took it up after hearing the circumstances of origin. It was held that D, not being a bona fide holder for value, without notice, could not recover on the note, nor could he recover on the theory that A, having repudiated the bet, was entitled to his stake, though A, "when he comes into court with clean hands, may recover it." *Atwood v. Weeden* (1879) 12 R. I. 293.

But it is held in California that, where the making of a bet is a crime, a party cannot recover his stake from the stakeholder by repudiating an election bet, after the election, but before the decision. *Schenck v. Hirshfeld* (1913) 22 Cal. App. 709, 136 Pac. 725.

So, where both parties repudiated a bet on an interrupted wrestling match before the decision of the referee, they could not recover their stakes of the stakeholder. *Matthews v. Lopus* (1904) 24 Cal. App. 63, 140 Pac. 306.

In *White v. Gilleland* (1902) 93 Mo. App. 310, it was held that the loser might recover of the stakeholder, where he had demanded his money after the event, but before the result was known. The trial court considered the case as one at common law, and the appellate court seems content.

But it was held by the same court that, where a race was nearly over and the loser evidently beaten, it was too late, under the Missouri common law, for him to demand his stake of the stakeholder. *Cutshall v. McGowan* (1903) 98 Mo. App. 702, 73 S. W. 933.

So, the common-law right to withdraw the sum staked, before the determination of the bet, will not be enforced in Missouri, after the value of the risk has been greatly altered and the event can be foreseen. In such case one must proceed under the statute. *Ryan v. Judy* (1879) 7 Mo. App. 74.

On the other hand, it has been held in Rhode Island that the loser might recover his stake from the stakeholder, where, before the matter was finished, but when the result was indicated, he notified the stakeholder not to pay over the money. *McGrath v. Kennedy* (1886) 15 B. L. 209, 2 Atl. 438.

*b. Where stakeholder has not paid over the stake.*

A bettor may recover his stake from the stakeholder, if the stakeholder has not paid it over to the other party. *Shannon v. Baumer* (1859) 10 Iowa, 210; *Conner v. Ragland* (1855) 15 B. Mon. (Ky.) 634; *Hutchings v. Stilwell* (1857) 18 B. Mon. (Ky.) 776; *Gardner v. Ballard* (1902) 114 Ky. 93, 70 S. W. 196 (holding that, in such case, the stake is not forfeited to the state under the Kentucky Statute; *Dauler v. Hartley* (1896) 178 Pa. 23, 35 Atl. 857).

Where the stakeholder is an interested party, as in an admitted bucket shop, it has been considered that, in a transaction unfavorable to the customer, automatically the money vests in the winner, and cannot be recovered from the stakeholder after the event. *Davis v. Fleshman* (1914) 245 Pa. 224, 91 Atl. 489.

Money in the hands of the stakeholder is subject to attachment by a creditor of the staker. *Reynolds v. McKinney* (1866) 4 Kan. 94, 89 Am. Dec. 602.

It may be reached by a creditor of the depositor, on trustee process. *Ball v. Gilbert* (1847) 12 Met. (Mass.) 397.

In Missouri, a creditor of the winner may recover of the stakeholder by garnishment, the stakes of both parties, if the loser has not claimed the money. *Wimer v. Pritchardt* (1852) 16 Mo. 252.

But it was held in *Clark v. Gibson* (1841) 12 N. H. 386, that the creditor of a party may not collect his stake on a bet, from the stakeholder, where it does not appear that the debtor is insolvent.

In a few cases it is held that, at common law, the loser of an illegal wager may not recover his stake from the stakeholder after the event, although the stakeholder still has the money. *Yates v. Foot* (1814) 12 Johns. (N. Y.) 1, reversing (1814) 11 Johns. (N. Y.) 13; *Fowler v. Van Surdam* (1845) 1 Denio (N. Y.) 557.

At common law, the loser cannot recover his stake from the stakeholder after the event, unless he gives notice before the event. Like *v. Thompson* (1850) 9 Barb. (N. Y.) 315.

After the event of an illegal wager, but before the payment over, a notice by the loser to the stakeholder not to pay will not save him his stake. *Johnston v. Russell* (1869) 37 *Cal.* 670.

**c. Where stake demanded before payment over.**

The bettor may recover his stake from the stakeholder, where he demands it before it has been paid over to the other party.

*Robinson v. Mearns* (1825) 6 *Dowl. & R. (Eng.)* 26, 3 *L. J. K. B.* 124; *Hodson v. Terrill* (1833) 1 *Crompt. & M.* 797, 149 *Eng. Reprint*, 621, 1 *Dowl. P. C.* 264, 2 *L. J. Exch. N. S.* 282; *Hampden v. Walsh* (1876) *L. R. 1 Q. B. Div. (Eng.)* 189, 45 *L. J. Q. B. N. S.* 238, 33 *L. T. N. S.* 852, 24 *Week. Rep.* 607; *Diggle v. Higgs* (1877) *L. R. 2 Exch. Div.* 422, 46 *L. J. Exch. N. S.* 721, 37 *L. T. N. S.* 27, 25 *Week. Rep.* 777, 6 *Eng. Rul. Cas.* 482; *Batson v. Newman* (1876) *L. R. 1 C. P. Div. (Eng.)* 573, 25 *Week. Rep.* 85; *Wood v. Duncan* (1839) 9 *Port. (Ala.)* 227; *Ivey v. Phifer* (1847) 11 *Ala.* 535, s. c. second appeal (1848) 13 *Ala.* 821; *Pearce v. Provost* (1873) 4 *Houst. (Del.)* 467; *Agnew v. McWayne* (1881) 4 *Haw.* 422; *Lewis v. Littlefield* (1839) 15 *Me.* 233, (1840) 17 *Me.* 40 (holding also that infancy is no defense; *McDonough v. Webster* (1878) 68 *Me.* 530; *Gilmore v. Woodcock* (1879) 69 *Me.* 118, 31 *Am. Rep.* 255; *Morgan v. Beaumont* (1876) 121 *Mass.* 7; *Whitwell v. Carter* (1856) 4 *Mich.* 329; *Wilkinson v. Tousley* (1871) 16 *Minn.* 299, *Gil.* 263, 10 *Am. Rep.* 139; *Deaver v. Bennett* (1890) 29 *Neb.* 812, 26 *Am. St. Rep.* 415, 46 *N. W.* 161; *Ward v. Holliday* (1910) 87 *Neb.* 607, 127 *N. W.* 882; *Kelly v. Bartley* (1847) 1 *Sandf. (N. Y.)* 15; *Wood v. Wood* (1819) 7 *N. C. (3 Murph.)* 172; *Forrest v. Hart* (1819) 7 *N. C. (3 Murph.)* 458; *Willis v. Hoover* (1881) 9 *Or.* 418; *Conklin v. Conway* (1852) 18 *Pa.* 329; *Cassidy v. Maulick* (1910) 39 *Pa. Co. Ct.* 43; *Forscht v. Green* (1866) 53 *Pa.* 138; *Lillard v. Mitchell* (1896) — *Tenn.* —, 37 *S. W.* 702; *Lewy v. Crawford* (1893) 5 *Tex. Civ. App.* 293, 23 *S. W.* 1041; *Davis v. Hewitt* (1885) 9 *Ont. Rep.* 435.

The same doctrine was upheld in *Tarleton v. Baker* (1843) 18 *Vt.* 9, 44 *Am. Dec.* 358, where, however, there was evidence of the plaintiff's withdrawal from the wager before the event.

Probably the same was held in the obscure case of *Battersby v. Odell* (1864) 23 *U. C. Q. B.* 482, where, apparently,

all the stakes had been demanded, though the suit was for the plaintiff's stake.

A plea that the money was deposited on a wager, that the event had taken place, and that the wager had not been repudiated or any demand made before the event, is bad, as not averring that there had not been repudiation or demand before the money had been paid over. *Graham v. Thompson* (1867) 16 *Week. Rep.* 206, *Ir. Rep.* 2 *C. L.* 64.

Where, during a race, the plaintiff claimed a foul and that the race and money were his, and demanded the money, he might recover his stake from the stakeholder, the wager being illegal. *Perkins v. Hyde* (1834) 6 *Yerg. (Tenn.)* 288.

It has been held in California that after an illegal wager has been lost, but before the payment, a repudiation by the loser and a notice by him not to pay will not save him his stake. *Johnston v. Russell* (1869) 37 *Cal.* 670. But that if, after the event, the stakeholder pays the loser his stake, the winner cannot recover it from the stakeholder. *Hill v. Kidd* (1872) 43 *Cal.* 615.

And it has been held that one claiming to be the winner of a wager on a horse race could not recover the sum bet from the stakeholders, who alleged that they had paid it over to the other party, whom they alleged to be the winner. *Gridley v. Dorn* (1880) 57 *Cal.* 78, 40 *Am. Rep.* 110, where it does not appear whether any demand was made before payment.

Under the foregoing rule, the staker may recover his stake after the event, before payment. *Doxey v. Miller* (1878) 2 *Ill. App.* 30; *Gilmore v. Woodcock* (1880) 70 *Me.* 494; *Perkins v. Eaton* (1825) 3 *N. H.* 152; *Moore v. Trippe* (1844) 20 *N. J. L.* 263; *Huncke v. Francis* (1858) 27 *N. J. L.* 55; *App v. Coryell* (1832) 3 *Pennr. & W. (Pa.)* 494.

In *Marcotte v. Perras* (1896) *Rap. Jud. Quebec* 6 *B. R.* 400, the stakeholder having brought the money into court, each bettor was allowed his deposit.

This is so whether the result is disputed (*Cotton v. Thurland* (1793) 5 *T. R.* 405, 101 *Eng. Reprint*, 227; *Smith v. Bickmore* (1812) 4 *Taunt.* 474, 128 *Eng. Reprint*, 413; *Bate v. Cartwright* (1819) 7 *Price*, 540, 146 *Eng. Reprint*, 1054 (apparently); *Stacy v. Foss* (1841) 19 *Me.* 335, 36 *Am. Dec.* 755), or undisputed (*Wheeler v. Spencer* (1842) 15 *Conn.* 28; *House v. McKenney* (1858) 46 *Me.* 94).

### d. Demands and notices.

The courts are not agreed as to whether a demand of both stakes as winner, or a notice not to pay over to the other party, will support an action for the demander's or notifier's own stake; that is to say, as to whether a demand or notice must show a repudiation of or withdrawal from the wager, in order to recover one's stake.

Some of the cases hold that a demand as winner is sufficient to support an action for the demander's stake. *Hastelow v. Jackson* (1828) 8 Barn. & C. 221, 108 Eng. Reprint, 1026, 2 Mann. & R. 209, 6 L. J. K. B. 318; *Hale v. Sherwood* (1873) 40 Conn. 332, 16 Am. Rep. 37; *Jacobs v. Walton* (1834) 1 Harr. (Del.) 496; *Willis v. Hover* (1881) 9 Or. 418; *Livingston v. Wootan* (1818) 1 Nott. & M'C. (S. C.) 178 (not discussing the question); *Perkins v. Hyde* (1834) 6 Yerg. (Tenn.) 288; *Battersby v. Odell* (1864) 23 U. C. Q. B. 482 (probably; case not very clear.) Other cases hold the contrary. *McElwaine v. Mercer* (1858) 9 Ir. C. L. Rep. 13; *Savage v. Madder* (1867) 15 Week. Rep. (Eng.) 910, 36 L. J. Exch. N. S. 178, 16 L. T. N. S. 910; *Okerson v. Crittenden* (1883) 62 Iowa, 297, 17 N. W. 528.

In *Mearing v. Hellings* (1845) 14 Mees. & W. 711, 153 Eng. Reprint, 661, 15 L. J. Exch. N. S. 168, it was held that one suing the stakeholder as winner of an illegal bet could not recover his own stake.

It was held, under the Ohio statute, that, if the winner returns the loser's stake to the stakeholder, the loser may recover it of the stakeholder without a demand. *Ritt v. Ward* (1888) 13 Ohio L. J. 138, reversing (1882) 6 Ohio Dec. Reprint, 1129.

It was held in *Jones v. Cavanaugh* (1889) 149 Mass. 124, 21 N. E. 306, that a stakeholder, when a race is declared off, is not liable to suit until after a demand.

As to notice of withdrawal as a demand, under the Georgia statute, see *McLennan v. Whiddon* (1904) 120 Ga. 666, 48 S. E. 201; *infra*, IV.

### Notices.

It has been held that a notice not to pay over, given while the event was disputed, will not support an action for the notifier's stake. *Maher v. Van Horn* (1900) 15 Colo. App. 14, 60 Pac. 949. So, as to a notice not to pay, as the notifier will probably contest. *Colson v. Meyers* (1888) 80 Ga. 499, 5 S. E. 504, or a notice not to treat the other party

as winner until further notice. *Trenery v. Goudie* (1898) 106 Iowa, 693, 77 N. W. 467 (but here the notice was not given until after payment over.)

It may be noted that where a request by the loser to the stakeholder not to pay over until he could see the winner, as he wished him to take property instead of money, was followed three days later by the payment to the winner after the stakeholder had informed him of the loser's desire, it was held that the stakeholder was not liable to the loser, as there had been no expressed direction not to pay. *Frybarger v. Simpson* (1858) 11 Ind. 59.

On the other hand, in other cases, notices not to pay over have been held sufficient to support an action for the notifier's stake. So, where the notice was to hold, as there would be a contest, and the money was paid over before the decision. *Shackleford v. Ward* (1841) 3 Ala. 37, 36 Am. Dec. 435. So, also, where the notice was not to pay to the other party, probably on the ground that the event was undecided, the court holding that this was a sufficient revocation of authority, not discussing the point. *Corson v. Neatheny* (1886) 9 Colo. 214, 11 Pac. 82.

In *Fisher v. Hildreth* (1875) 117 Mass. 558, where there was some evidence that the notice not to pay an election bet was because the bet was off, and some evidence that the parties might abide by the decision of a certain person, the court said: "It cannot be ruled, as matter of law, that revocation of the authority to pay the winner is not a rescission of the bet. It is so, practically, and if once revoked the purpose with which it is done is immaterial."

In *Pabst Brewing Co. v. Liston* (1900) 80 Minn. 473, 81 Am. St. Rep. 275, 83 N. W. 448, it was held that when, after the event, one party notified the stakeholder not to pay the money to anyone unless he advised him to do so, and the stakeholder later paid it to the other party, the creditor of the first party might recover the money from the stakeholder by garnishment.

There are some cases holding that the bettor may recover his stake from the stakeholder, if, while it is still in the stakeholder's hands, he notifies him not to pay it over to the other party, where it is probably meant, though not reported, that the notice given was, in effect, that the plaintiff had withdrawn from the wager. *Alexander v. Mount* (1858) 10 Ind. 161; *Morris v. Philpot*

(1858) 11 *Ind.* 447 (obiter); *Burroughs v. Hunt* (1859) 13 *Ind.* 178; *Adkins v. Flemming* (1870) 29 *Iowa*, 122; *McAlister v. Hoffman* (1827) 16 *Serg. & R. (Pa.)* 147, 16 *Am. Dec.* 556; *Bledsoe v. Thompson* (1852) 6 *Rich. L. (S. C.)* 44, 57 *Am. Dec.* 777; *Sheldon v. Law* (1834) 3 *U. C. Q. B. O. S.* 85; *Anderson v. Galbraith* (1857) 16 *U. C. Q. B.* 57.

**e. Where stake has been paid over without notice or demand.**

The bettor cannot recover his stake from the stakeholder after the latter has without notice or objection, paid it over to the other party in good faith. *Okerson v. Crittenden* (1883) 62 *Iowa*, 297, 17 *N. W.* 528; *Riddle v. Perry* (1886) 19 *Neb.* 505, 27 *N. W.* 721; *Bates v. Lancaster* (1849) 10 *Humph. (Tenn.)* 133, 51 *Am. Dec.* 696.

The Massachusetts Statute of 1895 does not alter the rule that a stakeholder is not liable to the loser for money paid to the winner without objection. *Goldberg v. Feiga* (1898) 170 *Mass.* 146, 48 *N. E.* 1073.

A bill after the event, to prevent the stakeholder from paying the money over to the other party, should state that the money has not been paid over. *Petillon v. Hipple* (1878) 90 *Ill.* 420, 32 *Am. Rep.* 31.

But a bettor can recover his stake from the stakeholder when he paid it over to the other party before the event. *Brewer v. Gobble* (1889) 32 *Ill. App.* 115.

And a notice by the plaintiff to the stakeholder not to pay an election bet, given to him after he had paid the money, but before the official announcement of the result, is in time to hold the stakeholder liable to the plaintiff for his stake. *Lewis v. Bruton* (1883) 74 *Ala.* 317, 49 *Am. Rep.* 816.

The following case may be noticed in this connection. The loser bet a horse and wagon, giving a bill of sale therefor to the stakeholder, and the winner bet money, giving the stakeholder his note. On the decision, the stakeholder and winner went to the livery stable where the horse and wagon were kept, and removed them to the winner's barn. The loser demanded the return of the property, and later it was attached by one of his creditors. It was held that the attachment was good, that the bill of sale was void, and that there had been no delivery of the property to the stakeholder. *Franklin v. Stoddart* (1885) 34 *Minn.* 247, 25 *N. W.* 400.

**f. Payment with loser's consent.**

In the absence of statute, the loser cannot recover his stake from the stakeholder, who has paid it over to the winner with the loser's consent. *McLean v. Wilson* (1890) 36 *Ill. App.* 657, where the loser was an infant.

But under the New York statute the rule is otherwise. See cases *infra*, IV.

**IV. Under particular statutes.**

The recovery against the stakeholder was sustained in England, against the apparently clear provisions of the Statute of 8 & 9 *Vict. chap.* 109, § 18.

Thus, it was held that one who repudiates a wager before it is decided may recover his stake from the stakeholder, notwithstanding the statute (8 & 9 *Vict. chap.* 109, § 18) provides "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity, for recovering any sum of money or valuable thing, alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." *Varney v. Hickman* (1847) 5 *C. B.* 271, 136 *Eng. Rep.* 881, 5 *Dowl. & R.* 364, 17 *L. J. C. P. N. S.* 102.

So where, after the event, but before payment, the loser demands his stake back. *Hampden v. Walsh* (1876) *L. R.* 1 *Q. B. Div. (Eng.)* 189, 45 *L. J. Q. B. N. S.* 238, 33 *L. T. N. S.* 852, 24 *Week. Rep.* 607.

So, recoveries have been allowed after payments had been made against the loser's notice. *Diggle v. Higgs* (1879) *L. R.* 2 *Exch. Div.* 422, 46 *L. J. Exch. N. S.* 721, 37 *L. T. N. S.* 27, 25 *Week. Rep.* 777, 6 *Eng. Rul. Cas.* 482; *Batson v. Newman* (1876) 1 *C. P. Div. (Eng.)* 573, 25 *Week. Rep.* 85.

It has also been held that the statute (of 1892), avoiding any promise to pay any person any sum of money paid by him under or in respect of a wagering contract, does not prevent the loser from recovering his stake from the stakeholder, if demanded before payment over. *O'Sullivan v. Thomas* [1895] 1 *Q. B. (Eng.)* 698, 64 *L. J. Q. B. N. S.* 398, 15 *Reports*, 253, 72 *L. T. N. S.* 285, 43 *Week. Rep.* 269, 59 *J. P.* 134; *Burge v. Ashley & Smith*. [1900] 1 *Q. B. (Eng.)* 744, 69 *L. J. Q. B. N. S.* 538, 48 *Week. Rep.* 438, 82 *L. T. N. S.* 518, 16 *Times L. R.* 263.



And where the winner became a bankrupt, his trustee recovered his stake which was still in the hands of the stakeholder. *Shoolbred v. Roberts* [1899] 2 Q. B. (Eng.) 560, 68 L. J. Q. B. N. S. 998, 81 L. T. N. S. 522, 15 Times L. R. 523, 6 Manson, 397.

It is held in Iowa that a bettor may recover his stake from the stakeholder before he has paid it over, and that this is not against the statute providing that "all promises, agreements, notes, bills, bonds, or other contracts, mortgages or other securities, when the whole or any part of the consideration thereof is for money or other valuable thing, won or lost, laid, staked or bet at or upon any game of any kind, or on any wager, are absolutely void and of no effect." *Shannon v. Baumer* (1859) 10 Iowa, 210.

So, where the stakeholder had paid the stakes over against the loser's notice. *Adkins v. Flemming* (1870) 29 Iowa, 122.

But it was held in New Jersey that no recovery lies against the stakeholder, where the statute provides that a stakeholder shall be punishable by fine and imprisonment, and that "all promises and agreements made by any person, when the whole or any part of the consideration thereof shall be for money betted on the running or trotting of any horses, shall be utterly void and of no effect." *Sutphin v. Crozer* (1865) 32 N. J. L. 462, reversing (1863) 30 N. J. L. 257.

A notice to the stakeholder not to deliver to the other party the notifier's check, drawn to the stakeholder's order, is a sufficient notification under the statute which provides that "the stakeholder of any money or other thing that may be staked on any bet or wager shall, when thereto notified, return the same to the person making the stake or deposit, and for failing to do so, the amount or value of the stake may be recovered from him by the party aggrieved." *Turner v. Thompson* (1900) 107 Ky. 647, 55 S. W. 210.

A notification—here, before the event—that the bet has been withdrawn, is sufficient demand, under the statute providing that a stakeholder of money risked on a wager is bound to repay to the party depositing, at any time he may demand it before it is actually paid over to the winner; but if the money is paid over to the winner bona fide, and without notice of the party's intention to retract, this payment is a protection. *McLennan v. Whiddon* (1904) 120 Ga. 666, 48 S. E. 201.

Under the Missouri statute, the loser

may recover his money from the stakeholder if he demands it before it has been paid to the other party, although the demand was not made until after the determination of the bet, the statute providing that "every stakeholder . . . shall be liable to the party who placed such money or property in his hands, both before and after the determination of such bet, and the delivery of the money or property to the winner shall be no defense to any action brought by the losing party for the recovery thereof; Provided, that no stakeholder shall be liable afterwards, unless a demand has been made of such stakeholder for the money or property in his possession previous to the expiration of the time agreed upon by the parties for the determination of the bet or wager."

*Weaver v. Harlan* (1892) 48 Mo. App. 319. Followed in *Vandolah v. McKee* (1903) 99 Mo. App. 342, 73 S. W. 233, holding, also, that a notice not to pay one's stake to the other party is equivalent to a demand of it under the statute.

But it was held by the same court that, when the loser's demand on the stakeholder is not made till after the result is known, he cannot recover, either at common law or under the statute, although his demand was made before the money was paid over. *Dooley v. Jackson* (1903) 104 Mo. App. 21, 78 S. W. 330.

A stakeholder is liable to the loser for his stake, and will not escape it at all, although the loser offered that a part of his stake be paid to the winner. he receiving the balance, where the statute provides by one section, that any person who deposits money with a stakeholder, upon the event of a wager prohibited by that act or by any law of the state, may sue for and recover the same, whether the money has been paid over or the wager has been lost or not, and, by another section, that one who loses money upon a wager prohibited by a third section of the act may sue for and recover it from the stakeholder, whether he has paid it over or not, but such suit must be brought within six calendar months. *Hensler v. Jennings* (1898) 62 N. J. L. 209, 41 Atl. 918.

A stakeholder is liable to the loser for his stake, where the statute makes the stakeholders indictable, and declares all contracts and accounts of any money bet or staked on such races void in law, and authorizes the party to recover back the money paid on such unlawful race or game. *Simmons v. Borland* (1813) 10 Johns. (N. Y.) 468, where the court stated that there was no pretense that

the money was paid over without notice, nor would a stakeholder be permitted to set up any such defense.

The same was held when, after the event, the loser demanded his stake before payment over. *Allen v. Ehle* (1827) 7 Cow. (N. Y.) 496; *McKeon v. Caherty* (1830) 3 Wend. (N. Y.) 494 (obiter); *Kelly v. Bartley* (1847) 1 Sandf. (N. Y.) 15 (holding that the court had jurisdiction, although the statute provided that the authority of the court should not extend to "any debt or demand for any money or thing won at or by means of any kind of gaming, etc.)

Where, after the event, the stakeholder, upon the assent and request of the loser, pays over the stakes to the winner, the loser may nevertheless recover the amount of his stake from the stakeholder, when the statute makes the stake recoverable from the stakeholder, either before or after the loss of the race or game, whether the same has been paid over or not. *Ruckman v. Pitcher* (1848) 1 N. Y. 392; *Storey v. Brennan* (1857) 15 N. Y. 524, 69 Am. Dec. 629.

*Ruckman v. Pitcher* (N. Y.) *supra*, was followed in principle in *Mahony v. O'Callaghan* (1875) 6 Jones & S. (N. Y.) 461, though it seems doubtful whether the loser assented to the payment over.

Under the New York statute, a party may recover his stake from the stakeholder after the event. *O'Maley v. Reese* (1849) 6 Barb. (N. Y.) 658; *Stoddard v. McAuliffe* (1894) 81 Hun, 524, 31 N. Y. Supp. 38 (where the defendant had paid the money into court); *Liebman v. Miller* (1897) 20 Misc. 705, 46 N. Y. Supp. 532; *French v. Matteson* (1901) 34 Misc. 425, 69 N. Y. Supp. 809 (holding also that the penal statute forfeiting the stake was no defense to an action for it against the stakeholder by the bettor).

It was held in *McAllister v. Gallaher* (1832) 3 Penr. & W. (Pa.) 468, that a stakeholder who pays over forfeit money by unfair connivance with the payee is not protected by the limitation of two months against suit by the other party.

Where the directors of the poor did not bring an action for the money in the two years allowed them by statute, he loser might recover his stake from the stakeholder, having demanded it before it was paid over to the winner. *Forscht v. Green* (1866) 53 Pa. 138.

Under the Pennsylvania statute, the directors of the poor may collect from the stakeholder the stakes of a bet on the election, though not made until after the polls were closed. Poor Directors

*v. Phipps* (1877) 1 Chester Co. Rep. (Pa.) 25.

One "not the loser" may recover his stake from the stakeholder, when the statute provides that any person who shall pay or deposit any money upon the event of any wager or bet prohibited therein may sue for and recover the same of the stakeholder or other person in whose hands shall be deposited any such wager, bet, or stake, whether the same shall have been paid over by such stakeholder or not, and whether any such wager be lost or not. *Simmons v. Bradley* (1871) 27 Wis. 689.

The Wisconsin statute further provides that, if the staker does not sue the stakeholder in three months, "then any other person may, in his behalf and in his name, sue for and recover the same for the use and benefits of his family or his heirs, in case of his death from such stakeholder or third person, if the same is still held by him, within six months after such putting up, staking or depositing." *Harnden v. Melby* (1895) 90 Wis. 5, 62 N. W. 535.

Under a statute declaring that every deposit of money as a wager or bet upon elections is forfeited, the authorities may recover the stakes from the stakeholder. *Doyle v. Baltimore County* (1842) 12 Gill & J. (Md.) 484.

In *Hickman v. Littlepage* (1834) 2 Dana (Ky.) 344, it was held that, under the various Kentucky statutes, a bettor on an election could not alone, for his own benefit, sue the stakeholder for his stake, as the commonwealth had an interest in the money.

In *Gilmore v. Woodcock* (1880) 70 Me. 494, it was held to be no defense for the stakeholder that, after the action against him had begun, he paid the stake over to the mayor of the city, taking an indemnity receipt, as the money could not belong to the mayor until it had been so adjudicated in an action against the staker.

#### V. Theory of no recovery.

It has been held in one case that the plaintiff claiming to be winner of an illegal wager could not recover of the stakeholder his stake, as he was in *pari delicto*. *Murdock v. Kilbourn* (1857) 6 Wis. 468.

And, in *MARTIN v. FRANCIS*, ante, 966, that security deposited to secure the carrying out of an illegal contract cannot be recovered after the contract has been carried out.

Where A deposited money with a stakeholder who was to be informed by

C as to the disposition of the money, and the real agreement was that the money was to be paid to B if a nolle pros. was entered in a certain felony case, otherwise to A, and no nolle pros. was entered, it was held that A could not recover the money, for he had to show the illegal contract in order to obtain it. *English v. Rumsey* (1884) 32 Hun (N. Y.) 486.

It has also been held that, a bet on an election being a criminal offense, a party could not recover his stake from the stakeholder, although he demanded it back before the stakeholder paid it over. *Davis v. Holbrook* (1846) 1 La. Ann. 176.

Further, that where the bettor and the stakeholder are both guilty of a crime, the bettor cannot recover his stake from the stakeholder. *Schenck v. Hirshfeld* (1913) 22 Cal. App. 709, 136 Pac. 725; *Matthews v. Lopus* (1914) 24 Cal. App. 63, 140 Pac. 306.

Thus, where the loser of an election bet, after the event, notified the stakeholder not to pay, but he thereafter did so, it was held that the loser could not recover the stake from the stakeholder, both being in *pari delicto*, as under the Canadian statutes both were guilty of a misdemeanor. *Walsh v. Trebilcock* (1894) 23 Can. S. C. 695, reversing (1893) 21 Ont. App. Rep. 55.

#### VI. Miscellaneous.

When A hands B the fruits of an illegal contract between A and C, and directs him to hand it over to C, C may recover it from B. *Merritt v. Millard* (1868) 4 Keyes (N. Y.) 209.

Where the plaintiff sues the stakeholder for his stake, the stakeholder may not set off a like sum deposited by him with the plaintiff as stakeholder in another bet. *Bevins v. Reed* (1849) 2 Sandf. (N. Y.) 436.

While it is not intended to discuss questions arising out of deposits of stakes by agents, the following cases of that character ought not to be passed over.

In *Reynolds v. McKinney* (1866) 4 Kan. 94, 89 Am. Dec. 602, holding that money in the hands of a stakeholder may be attached by a creditor of the staker, it was further held that it was immaterial that the staker was an agent, and the money not his own, when he had not disclosed that fact to the other staker nor to the stakeholder.

A gave B money to bet on an election with C, and he did so, D being stakeholder; before the election B's creditor

attached the money deposited by B, in a suit in justice's court, where upon B informed D that the money belonged to A. On trial of the justice's suit, A applied for leave to appear, which was denied, and judgment went against B, and D who was ordered to pay the money to B's creditor, which he did. In a suit by A against D, for his stake, it was held that A should recover. *Hardy v. Hunt* (1858) 11 Cal. 343 (by agreement between B & C, C withdrew his money.)

In an action by a party against the stakeholder for his stake on a race, it appeared that the defendant was liable for expenses of the race, and collected entrance fees, part of which he handed to the plaintiff to pay such expenses, but the plaintiff did not pay them. It was held that the defendant could not recoup these expenses, as they were distinct from the wager, and the agreement as to them was illegal. *Morgan v. Beaumont* (1876) 121 Mass. 7.

The loser demanding his money from the stakeholder, the winner agreed to indemnify him against the expenses of a suit. The loser recovered against the stakeholder, and the expenses exceeded the winner's stake. It was held that the winner could not recover anything against the stakeholder. *Jordan v. McKenney* (1861) 48 Mo. 104.

After the event, despite the notice of the loser, the stakeholder delivered to the winner part of the stakes, and the balance by the stakeholder's check, which the winner sold to the plaintiff. It was held that the plaintiff could not recover on the check, the statute providing that all contracts and securities, whereof the whole or a part of the consideration shall be money or other valuable thing won, laid, or betted, etc., shall be utterly void. *Conklin v. Roberts* (1807) 36 Conn. 461.

When the loser staked property already in the hands of the stakeholder, who replied affirmatively to the winner's question whether he had the property and, later, assented to the ownership of the winner, who left it with him for a time, he could not thereafter claim that he had a lien upon the property at the time the bet was made. *Allgear v. Walsh* (1887) 24 Mo. App. 134.

If a stakeholder in an illegal bet deposits the money with a third person, such third person cannot resist the stakeholder's demand for the money. *Perkins v. Clemm* (1861) 23 Ark. 221.

It seems to have been held, in the obscure case of *Deweese v. Miller* (1851) 5 Harr. (Del.) 347, that, after the stake-

holder pays over the stake to the winner, the loser cannot recover his stake from the stakeholder.

While beyond the scope of this note, the following Massachusetts cases may be here referred to:

While the stakeholder paid over to the winner, on a promise of indemnity, the identical bills staked, after having been forbidden to do so by the loser in the winner's presence, the loser may re-

cover his stake from the winner. *McKee v. Manice* (1853) 11 Cush. (Mass.) 357.

So, where the payment was not in the identical bills. *Love v. Harvey* (1873) 114 Mass. 80.

The contrary was held, on similar facts to those of *Love v. Harvey*, in *Patterson v. Clark* (1879) 126 Mass. 531, on the ground that the loser had never revoked the authority to pay the whole to the winner. B. B. B.

## FLORIDA SUPREME COURT.

OSBORN WOLFE, Plff. in Err.,

v.

STATE OF FLORIDA.

(— Fla. —, 79 So. 449.)

**Bank — check without funds — liability.**

Chapter 7263, Acts of 1917, provides in effect that whoever gives, makes, or issues to another any draft, order, or check in payment for property, the title or possession of which shall have been transferred upon faith of payment of such draft, order or check and shall not at the time of giving making, issuing, or presentation of such draft, order, or check have sufficient money on deposit with the drawee to pay said draft, order, or check, and does not make restitution as stated in the act, shall be deemed guilty of a felony. Such statute is not violated when, at the time of issuing and presentation of a check, the drawer has to his credit in due course as a depositor with the drawee bank sufficient money to pay the check, even though, by arrangement with the bank presenting the check for payment in the forenoon, the drawee bank had until 4 P. M. to adjust payment by clearances, and prior to 4 P. M. and before actual payment of the check upon telegraphic advices that a draft given to the drawee bank by the drawer of the check had been dishonored, the amount of the draft was charged to the drawer, thereby making his deposit insufficient to pay the check.

*For other cases, see Fraud and Deceit, VI. in Dig. 1-52 N. S.*

(August 2, 1918.)

**ERROR** to the Criminal Court of Record for Dade County to review a judgment convicting defendant of violating an act known as the "Bad Check Law." Reversed.

The facts are stated in the opinion.

Headnote by WHITFIELD, J.

**Note.**—As to what constitutes a violation of a criminal statute against issuing checks or drafts without funds, see annotation following this case, post, 982, and references therein to annotations on related questions.

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Messrs. Grover C. McClure and E. P. Martin for plaintiff in error.

Messrs. Van C. Swearingen, Attorney General, and C. O. Andrews, Assistant Attorney General, for the State.

Whitfield, J., delivered the opinion of the court:

This writ of error was taken to a judgment of conviction on a charge that Osborne Wolfe did give, make, and issue to named payees a certain bank check in his own behalf in payment for a carload of grapefruit, the title to which grapefruit was then and there transferred to Wolfe upon faith of payment of said check, "and the said Osborne Wolfe did not at the time of presentation of said bank check have sufficient money on deposit with . . . the bank upon which said bank check was drawn . . . to pay said bank check, and the said Osborne Wolfe did not within twenty-four hours after written notice of the presentation and nonpayment . . . of said bank check, make full and complete restitution," etc.

The statute under which the information was filed is as follows:

"Chapter 7263. (No. 5.)

"An Act to Prohibit the Issuing by Any-one of Checks or Orders upon Banks or Other Persons, When the Makers of Such Orders or Checks Have Not Sufficient Funds on Deposit with the Drawee to Pay Such Order, to Prescribe a Rule of Evidence Therein, and to Provide Punishment Therefor.

"Be it enacted by the legislature of the state of Florida:

"Section 1. Whoever gives, makes or issues to another any draft, order or check, either in his own behalf, or as agent for any person or persons, firm or corporation in payment for goods or chattels, lands or tenements, or other things of value, the title or possession of which shall have been transferred upon faith of payment of such draft, order or check, and shall not at the time of giving, making, issuing or presenta-

tion of such draft, order or check have sufficient money on deposit with such bank, or banking house, person, firm or corporation to pay said draft, order or check by the bank, banking house, person, firm or corporation drawn upon, shall not within twenty-four hours after written notice of the presentation to and nonpayment by such bank, banking house, person, firm or corporation of such draft, order or check, make full and complete restitution by returning the consideration received for such draft, order or check to the person or persons in whose favor such draft, order or check was made payable, provided the same shall not have been transferred by the payee or by paying the amount of the same to the payee or the lawful holder thereof if the same shall have been transferred, shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for a period not greater than one year, or by fine not exceeding \$1,000, or by both such fine and imprisonment.

"Sec. 2. The introduction of such unpaid draft, check or order, with the supplementary oath of the payee or drawee, or his agent, that such draft, check or order was presented for payment or entered for collection, and that the same was returned unpaid, shall be deemed prima facie evidence of insufficient funds for the payment thereof, and a receipt from the registry department of any United States postoffice shall be deemed prima facie evidence of the actual delivery of notice as provided in this act.

"Sec. 3. All laws or parts of laws in conflict with this act are hereby repealed.

"Approved May 21, 1917."

It appears that the defendant, Wolfe, deposited with the drawee bank a draft on a party in Philadelphia sufficient to cover the check in controversy, and that the amount of the draft was credited to Wolfe; that subsequently he delivered to the payees a check on the bank for a carload of grapefruit; that, at the time the check was delivered to the payees, the defendant, Wolfe, had in the drawee bank sufficient funds to pay the check; that the check in question, drawn on the Fidelity Bank & Trust Company of Miami, Florida, was delivered to the payees in that city on Saturday morning, November 10, 1917; that the check was, on the same day, indorsed and deposited in the Bank of Bay Biscayne of that city; that on the following Monday the check was presented to the drawee bank by the bank in which it was deposited by the

payees and by arrangement between the banks the drawee bank had until 4 P. M. to pay the check through clearance processes; that at the time of presentation Wolfe had to his credit in the drawee bank a sufficient amount to pay the check, but about 2:49 P. M. of the day on which the check was presented to the drawee bank, that bank received telegraphic advice that payment of the Philadelphia draft deposited by the defendant with the drawee bank had been refused, and the check drawn by the defendant was returned to the bank in which it had been deposited by the payees thereof.

The statute makes it a crime to issue to another a check in payment for anything of value, the title or possession of which shall have been transferred upon faith of payment of such check, when the drawer has not "at the time of giving, making, issuing, or presentation" of such check "sufficient money on deposit with" the drawee to pay such check, and the party who gives, makes, or issues the check "shall not within twenty-four hours after written notice of the presentation" and nonpayment of the check "make full and complete restitution," etc. The information charges that the defendant "did not at the time of presentation of said bank check have sufficient money on deposit with the" payee bank "to pay said bank check." This material allegation is not proved; but, on the contrary, it appears without controversy that, when the check was presented for payment on the morning of November 12th, the defendant did have sufficient money on deposit with the drawee bank to pay the check, and that it would have been paid but for the arrangements between the bank that presented the check and the drawee bank that clearance adjustments could be made at any time before 4 P. M. of that day. Before the clearance for the day was consummated, the drawee bank, at 2:49 P. M., received telegraphic notice that payment of the draft drawn by the defendant on Philadelphia a few days before had been refused, and check was not paid in the clearance of the day, but was returned to the bank in which it was deposited by the payees. It does not appear that the defendant had reason to believe when he delivered the check that it would not be paid in due course. On the contrary, it appears that from November 9th to 2:49 P. M. of the 12th the defendant had sufficient money on deposit with the drawee bank to pay the check, and the bank officers testified that payment of the check would have been made if demanded between November 9th and 2:49 P. M. of the 12th, and that other drafts deposited by the de-

fendant had been paid. Whatever may be the legal rights of the parties to the transaction, the evidence does not show that the defendant has violated the quoted statute.

In charging the jury the court erroneously quoted the 2d section of the statute as

containing the word "available" before the word "funds."

Judgment reversed.

Browne, Ch. J., and Taylor, Ellis, and West, JJ., concur.

### **Annotation—What constitutes violation of criminal statute against issuing checks or drafts without funds.**

This note is limited to cases dealing with the criminal liability of one who, under his own or an assumed name, draws or delivers a check or draft which he represents to be valid, when he has neither sufficient funds nor credit with the drawee to meet it. Decisions involving the liability of bank officers for making or permitting overdrafts have been excluded. Nor does this note deal with the effect of the mere drawing of a check on a bank in which the drawer has no funds or credit, and passing the same, this subject having been treated in the notes to *State v. Hammelsy*, 17 L.R.A. (N.S.) 244; *Williams v. Territory*, 27 L.R.A. (N.S.) 1032, and *State v. Foxton*, 52 L.R.A. (N.S.) 919. Nor does it treat of the giving of a postdated check as a false pretense, which is the subject of the note appended to *State v. Ferris*, 41 L.R.A. (N.S.) 173.

As to obtaining property by check with intent to stop payment, see note to *People v. Orris*, 41 L.R.A. (N.S.) 170.

The question whether the obtaining of a check, draft, or bill of exchange will sustain a charge of obtaining property by false pretenses is considered in the annotation following *State v. Holmes*, L.R.A. 1916E, 1106.

Reliance on false pretenses as an element of the offense of obtaining money by false pretenses is treated in the note which accompanies *State v. Miller*, in 6 L.R.A. (N.S.) 365.

As to effect of coupling future promise with false pretenses, see note to *State v. Briggs*, 7 L.R.A. (N.S.) 278.

For evidence of other crimes in prosecution for obtaining money or property by fraudulent means, see note to *People v. Bercovitz*, 43 L.R.A. (N.S.) 667.

The giving of a check or draft drawn upon a bank or person with whom the drawer has neither funds nor credit sufficient to meet it, and thereby receiving for it something of value, has been deemed and prosecuted as the crime of false pretense, larceny, confidence game, or swindling. In many states statutes specially aimed at this practice have been passed.

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To sustain a conviction under these statutes, proof of a fraudulent intent is essential. To constitute crime, intent must concur with the act.

So, it is held that the gist of the offense of drawing a check or draft which the drawer has not sufficient funds or credit with the drawee to meet, in violation of Cal. Penal Code, § 476a, is in the fraudulent intent with which the check or draft is drawn and delivered, and knowledge by the drawer and deliverer, at the time of such drawing and delivery, that he was then without assets of any kind or character in the bank upon which it was drawn to satisfy or meet it. *People v. Wilbur* (1917) 33 Cal. App. 511, 165 Pac. 729.

But it is said that the intent of a person in drawing a check when he had no funds on deposit at the bank, although an important element of the offense, is not "the all-important element," and proof of intent is no more an important requisite than proof of the passing of the check itself. *People v. Freeman* (1916) 29 Cal. App. 543, 156 Pac. 994.

A conviction of obtaining money by false pretenses by giving a check therefor which proved to be worthless, but which the prosecutor agreed to hold two days before presenting, should be quashed where the drawer had reasonable cause to believe that the check would be paid at the time indicated. *Reg. v. Walne* (1871) 11 Cox, C. C. (Eng.) 647, 23 L. T. N. S. 748.

One who issues a check with good reason to believe and in the honest belief that he had authority to draw it, and that the then-existing facts were such that the check would be paid in the ordinary course of business, is not guilty of obtaining money by false pretenses under Minn. Gen. Stat. 1894, § 6711, making such an offense larceny. *State v. Johnson* (1899) 77 Minn. 267, 79 N. W. 968, 11 Am. Crim. Rep. 422.

A conviction of swindling by obtaining money on a check drawn on a bank in which the maker has not sufficient funds to pay the same, and no good reason to believe that the check will be paid,

in violation of Tex. Penal Code, § 1422, is not justified where it is not shown that at the time the check was drawn the maker had no good reason to believe that it would be paid. *Pruitt v. State* (1918) — *Tex. Crim. Rep.* —, 202 S. W. 81.

In order to warrant a conviction under Fla. Laws 1905, chap. 5468, p. 162, of the offense of drawing a draft upon one with whom the drawer did not have sufficient money on deposit to meet the same, it is incumbent upon the state not only to prove this fact, but also that the drawer did not "have reason to believe from an existing contract or from previous dealings with" the drawee that such draft would be paid; and the latter fact is not shown by the testimony of the drawee, who had paid former similar drafts, that he accepted the draft in question, but that he had no money with which to pay it. *Whitney v. State* (1912) 63 Fla. 53, 58 So. 230.

Nor is intent to defraud shown within the statute forbidding the obtaining of money by false pretenses, where a son drew a draft upon his father, and induced another to indorse it by representing that his father was indebted to him, and would pay the draft as soon as presented, when previous drafts drawn by the son had been paid by the father, who had under his control a trust fund in favor of the son, and the father gave as one of the reasons why he refused to pay the draft in question, that he feared his son was being defrauded. *Ketchell v. State* (1893) 36 Neb. 324, 54 N. W. 564.

A conviction for swindling is not justified, because of the absence of fraudulent intent, where one authorized to buy cattle for another and draw drafts on him with bills of sale attached is told by an officer of the bank through which he drew on his principal, that he might draw checks on the bank to pay for his purchases, which checks were not paid because the principal, who accepted and sold the cattle forwarded to him, did not honor the draft. *Williams v. State* (1895) 34 Tex. Crim. Rep. 606, 31 S. W. 649.

Giving a worthless check in payment of hay, which was accepted because of the drawer's representation that he was in partnership with a specified person, is not within the Missouri statute concerning the obtaining of property under false pretenses, where the drawer sustained a heavy loss on the shipment, due to the negligent manner in which the hay was baled by the seller, and he turned all his property over to his creditors and

protected them as far as he was able. *State v. Benson* (1892) 110 Mo. 18, 19 S. W. 213.

If one who has accepted a check in payment for personal property sold is not reasonably diligent in presenting it for payment, but carelessly neglects to do so until the funds of the maker of the check have been depleted, either designedly or inadvertently, so that it is his own fault if he failed to get the money, then such fault cannot be charged to the maker of the check. *Com. v. May* (1916) 63 Pa. Super. Ct. 521.

One who accepts a check drawn on no funds and payable to his order in payment of a loan, and, after indorsing it, exchanges it for goods and receives the balance in cash, is not guilty of swindling, in violation of Vernon's Penal Code, subd. 4, art. 1422, by obtaining money or other thing of value with intent to defraud by giving a worthless check, where no attempt to defraud is shown, but, in fulfillment of his liability as indorser, he deposited funds in the bank in ample time to have met the amount of the check, which was never presented. *Dawson v. State* (1916) — *Tex. Crim. Rep.* —, 185 S. W. 875.

A person who seeks to have a check payable to his order cashed guarantees payment, but may not know whether the account of the drawer of the check is good, and he will not be held liable criminally unless he makes some express material representations or knows that the check is not good. *People v. White-man* (1902) 72 App. Div. 90, 76 N. Y. Supp. 211, 16 N. Y. Crim. Rep. 461.

But that one who procured money on a check drawn upon a bank in which he had no funds, from one who relied upon his express representations that he had money on deposit to meet the check, intended to repay the amount at some future time in some other way, or to pay it if prosecution was commenced, does not relieve him from liability for the crime of obtaining money under false pretenses. *State v. Cooper* (1915) 169 Iowa, 571, 151 N. W. 835.

And evidence that one who drew and uttered a check on a bank in which he had no funds, and who claimed that he had made a mistake in the bank on which he drew, had a considerable balance in another bank at the time he drew the check, is admissible on his claim of good faith and lack of criminal intent in the transaction. *State v. Moore* (1915) 84 Wash. 263, 146 Pac. 627.

The person defrauded must rely on the false pretenses or false representa-

tions made in regard to the worthless check or draft which he accepts.

Unless the person who accepts a check drawn by the maker upon a bank in which he knew he had no funds believed the false pretense made in regard thereto to be true, there is no violation of Mo. Laws 1913, p. 222. *State v. Workman* (1917) — Mo. —, 199 S. W. 131.

A conviction of swindling by obtaining a loan of money on a worthless check is not justified where it does not appear that the check was delivered to or accepted by the person defrauded as the consideration upon which the money was loaned. *Lutton v. State* (1883) 14 Tex. App. 518.

And it has been held that an indictment drawn under the statute defining the offense of obtaining property by a false token need not allege specifically that the person defrauded parted with his property believing that the check was good, or relying on representations that it was good, where the connection between the pretense and the obtaining of the property is otherwise sufficiently shown by the indictment. *State v. Hinshaw* (1914) 92 Kan. 1007, 142 Pac. 960.

The intention of the legislature in drawing the Georgia Worthless Check Act of 1914, p. 86, was to penalize the drawing and uttering of drafts, checks, and orders only when the drawer did not have sufficient funds to meet the check, draft, or order at the time it was drawn, and where the person parting with money or other thing of value thereon, or induced thereby to postpone any remedy he might have against the drawer, did so in the belief that the drawer actually had at the time sufficient funds to meet such check, draft, or order. *Neidlinger v. State* (1916) 17 Ga. App. 811, 88 S. E. 687.

An indictment for obtaining goods under false pretenses in exchange for a worthless check, in violation of Wash. Penal Code, § 234, which alleges that defendant represented and pretended that the check was good and valid and that it would be paid on presentation, and which further alleges that it was delivered to the prosecutor, that the representations were false and known to the defendant to be false, and that by means thereof he obtained the goods from the prosecutor, sufficiently shows that the latter relied on a pretense, and was induced thereby to part with his property. *State v. Bokien* (1896) 14 Wash. 403, 44 Pac. 889.

But reliance on false representations sufficient to constitute the offense of

swindling is not shown where, when one drawing a check stated that he had money in the bank with which to meet it, the person advancing the money told him he did not believe he had the funds, but that he would give him the amount to catch him and prosecute him. *Thorpe v. State* (1899) 40 Tex. Crim. Rep. 346. 50 S. W. 383, 11 Am. Crim. Rep. 417.

The offense of obtaining money with intent to defraud by pretending to be an officer and employee of the United States, in violation of the Act of Congress of April 18, 1884 (23 Stat. at L. 11, chap. 26, Comp. Stat. 1916, § 10,196), is not committed where one who, while stopping as a guest at the prosecutor's hotel, falsely pretended to be a secret service operative, and returned ten months later, representing himself to be a traveling salesman, and towards the end of his stay obtained money on a check drawn on a bank which did not exist, the check ostensibly being made by his employers. *United States v. Farnham* (1904) 127 Fed. 478.

One who, without making any representations, procures from the cashier of a hotel at which he is stopping, the amount of a check payable to his order under an assumed name and indorsed with that name, is not liable under N. Y. Penal Code, § 529, for obtaining money by color or aid of false or fraudulent representations or pretense, with intent to deprive the true owner thereof, where the credit was extended to him as an individual, and not on the strength of the name assumed. *People v. Whiteman* (1902) 72 App. Div. 90, 76 N. Y. Supp. 211, 16 N. Y. Crim. Rep. 461.

A bank cashier is not guilty of obtaining property by means of a false token, in violation of *Bellinger & C. Anno. Codes & Stats.* § 1812, by drawing and certifying a check on his bank which he exchanges for the property, if at the time he states to the seller that the check is not collectable because the bank has not funds enough on hand to pay it, since the seller cannot be regarded as having relied on the token as valid. *State v. Miller* (1906) 47 Or. 562, 6 L.R.A.(N.S.) 365, 85 Pac. 81.

There is a dictum in *People v. Berco-vitz* (1912) 163 Cal. 636, 43 L.R.A.(N.S.) 667, 126 Pac. 479, which intimates that possibly a conviction could not be had under Cal. Penal Code, § 476a, where the fact of want of sufficient funds and credit is made known by the drawer to the person to whom he delivers the check or draft at the time of the delivery, and the payee chooses, with such knowl-



edge, to rely on a promise or representation of the drawer that he will make such provision that the amount of the check or draft will be paid on presentation.

Solvency of the maker, indorser, or drawee of a check or draft is not a sufficient defense, where the person accepting the instrument did not rely upon their solvency, but upon a representation that there was money in the bank to meet the obligation.

So, giving a worthless check in payment of the purchase price of a horse, which was accepted in reliance upon false and fraudulent representations that the check was good and that the drawer had money in the bank with which to pay it, constitutes an offense under Kan. Gen. Stat. 1889, § 2228, although it is not shown that the drawer was insolvent. *State v. McCormick* (1896) 57 Kan. 440, 57 Am. St. Rep. 341, 46 Pac. 777.

Drawing upon a bank which had no existence, a fraudulent draft represented to be good, and ostensibly given for the purchase of real estate, and delivery of it to one who had promissory notes in his possession, in an attempt to obtain them, constitutes an offense by attempting to obtain property by false pretenses, in violation of the statute, although it is not shown that the one who indorsed the draft was insolvent. *State v. Decker* (1887) 36 Kan. 717, 14 Pac. 283.

An indictment for swindling, which alleges that a husband drew a draft upon his wife and represented to the bank which cashed it that the money subject to the order of his wife was then in a specified bank, and which avers that, in reliance on these representations, the bank paid him the money, is sufficient without alleging the insolvency of the wife or that the draft was presented for payment. *Nasets v. State* (1895) — Tex. Crim. Rep. —, 32 S. W. 698.

The false representation must be of some fact, past or present, to come within the prohibition of the statutes. If it relates to a future event, it becomes a mere promise, and is removed from the category of crimes.

A statement made by one drawing a draft on a firm that he had credit with the drawee for the amount of the draft and that it would be honored, when he knew that he had no credit with the firm, and that the draft would not be honored or paid, is a false representation of an existing fact, and sufficient to bring the statement within Cal. Penal Code, § 532, forbidding the defrauding of any person of money or property by

a false or fraudulent representation or pretense. *People v. Wasservogle* (1888) 77 Cal. 173, 19 Pac. 270.

An indictment alleging the delivery with intent to cheat and defraud of a worthless check which is represented to be good, and which is to be kept as security for the loan of a sum of money equal to its face value, charges not only a false promise, but a false pretense as to an existing fact, and is sufficient. *Maley v. State* (1869) 31 Ind. 192.

But compare *Com. v. Garver* (1883) 40 Phila. Leg. Int. (Pa.) 210, where it is held that a representation that a draft drawn by one partner in the name of the firm, upon the other partner, is a good draft, is true, if it means merely that it is a genuine draft; and if it means that it will be promptly paid at maturity, is a mere promise, which can never be interpreted into a false pretense.

A guest at a hotel who draws a check without having funds on deposit to meet it, and requests the landlord to cash it for him, which is done, and thereafter states that the latter can get the money for the check in the morning, at which time the guest informs the landlord that he has been disappointed in his expectations of putting funds in the bank to meet the check, and requests that he will not present it that day, is not guilty of obtaining money by false pretenses, since it was obtained before any representation was made, and was a false promise rather than a false pretense. *Re Stuyvesant* (1819) 4 J. Y. City Hall Rec. 156.

A statement made in connection with the delivery of a worthless check, that the payee would have no trouble in getting his money, does not amount to a representation that the maker then had money in the bank or was authorized to draw against it, since it is not a representation of an existing fact, but relates to a future event, and is in the nature of a promise. *Martin v. State* (1896) 36 Tex. Crim. Rep. 125, 35 S. W. 976.

Representations made by one giving a worthless check in payment of mules, that he had no funds in the bank on which the check was drawn, but that the money would be in the bank by the time the check reached there for payment, do not constitute an offense under Mo. Rev. Stat. 1909, § 4565, relating to the obtaining of property by false pretenses, since an agreement to have the money in the bank to pay the check on a future date would make the alleged pretense but a mere promise. *State v. Young* (1915) 266 Mo. 723, 183 S. W. 305.

So, one who draws and delivers a

worthless check does not violate Miss. Laws 1916, chap. 120, forbidding the drawing or uttering of a check without sufficient funds in the bank to meet it, where he told the payee at the time that he did not have enough money in the bank to cover the check, but that he would deposit an amount sufficient to cover it the next day. *Hammack v. State* (1917) 114 Miss. 611, 75 So. 436.

A check given prior to the date it bears, it bearing a subsequent date as the time upon which it is to be paid, has only the effect of a promise to pay at a future time, and is not within S. D. Crim. Code, § 208, making it a misdemeanor to draw a check when the drawer has no funds on deposit to meet it. *State v. Winter* (1914) 98 S. C. 294, 82 S. E. 419.

Where the object of the statute is to prevent the obtaining of money, goods, credit, or other property of value from another by means of a check drawn on insufficient funds, a worthless check given in payment of a pre-existing debt is not within its purview.

Giving a check falsely represented to be good, in payment of a pre-existing debt, does not constitute the offense of swindling where no property was acquired thereby, nor the condition of the parties in any way changed. *Allen v. State* (1910) 58 Tex. Crim. Rep. 494, 126 S. W. 571.

Giving a worthless check for a pre-existing debt does not constitute a violation of W. Va. Code 1906, chap. 145, § 34, penalizing the drawing of a check on a bank in which the maker has not sufficient funds to meet it. *State v. Pishner* (1913) 72 W. Va. 603, 78 S. E. 752.

Drawing one's own check on a bank in which there are no funds to meet it, and giving it as a security for money theretofore advanced, and for the procuring of other sums to be advanced on a promise of giving further checks, although a fraud for which the drawer is answerable in a civil action, does not fall within the provisions of the New York statute forbidding the obtaining of money by false pretenses. *Re Lynch* (1816) 1 N. Y. City Hall Rec. 138.

One to whom goods are delivered and charged to his account upon the understanding that he is to pay for them upon a specified day is not guilty of the offense of obtaining property by false pretenses, in violation of Mo. Rev. Stat. 1889, § 3826, although on such date he gave the seller a check, payment of which was refused by the bank for want of funds. *State v. Willard* (1891) 109 Mo. 242, 19 S. W. 189.

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And one who buys merchandise on time and later gives a bad check in an attempt to pay the debt is not chargeable with false pretenses, and such a transaction does not come within the purview of Okla. Rev. Laws, § 2694, forbidding the obtaining of property upon false pretenses. *Jones v. State* (1913) 9 Okla. Crim. Rep. 621, 132 Pac. 914.

It has been held that freight on a carload of lumber is a "thing of value" within Pell's Revisal, § 3434b, denouncing the obtaining of anything of value by means of a worthless check. *State v. Freeman* (1916) 172 N. C. 925, 90 S. E. 507.

The following cases deal with the question whether one acquiring property, under the circumstances indicated, in exchange for a worthless check or draft, is guilty of the offense of obtaining property by false pretenses:

An indictment will lie against one who obtains goods by means of a check which he knows will not be paid. *Rex v. Jackson* (1812) 3 Campb. (Eng.) 370, 14 Revised Rep. 756.

One who, while property is being loaded which is to be paid for on delivery, tenders a worthless check in payment which he assures the prosecutor is "all right," is guilty of the offense of obtaining goods by false pretenses. *Rex v. Cosnett* (1901) 20 Cox, C. C. (Eng.) 6, 84 L. T. N. S. 800, 65 J. P. 472, 49 Week. Rep. 633, 17 Times L. R. 524.

A statement by one tendering a check in payment for goods purchased, that he wished to pay ready money, amounts to a representation that the check is equal to cash, and constitutes false pretenses when he had but a small balance at the bank, and much less than the amount of the check. *Reg. v. Hazelton* (1874) L. R. 2 C. C. (Eng.) 134, 31 L. T. N. S. 451, 13 Cox, C. C. 1, 41 L. J. Mag. Cas. N. S. 11, 23 Week. Rep. 139.

Representations by one who, with intent to defraud, tendered a check in payment of goods purchased, that it was a good and genuine check and that he had money on deposit in the bank on which it was drawn, and that it would be paid on presentation, are within the statute forbidding the obtaining of goods under false pretenses. *Smith v. People* (1872) 47 N. Y. 303.

A purchaser of goods for cash who states that he will go and bring the money, and returns with a worthless check, dated the following day, which he says is good, represents the check as drawn upon a fund then deposited in the bank, and is guilty of the crime of ob-

taining money by false pretenses. *Lesser v. People* (1878) 73 N. Y. 78.

One who falsely represents that he has money on deposit in a bank on which he has drawn a check, and obtains the money thereon in reliance on this statement, is guilty of the crime of obtaining money by false pretenses where he never had a deposit with the drawee bank, and it is immaterial that the check was dated ahead one day. *State v. Cooper* (1915) 169 Iowa, 571, 151 N. W. 835.

A conviction for obtaining property upon false pretenses is justified where the purchaser of sheep, after their weights were reckoned up, persuaded the seller to accept a check in payment, by falsely pretending, with intent to defraud, that the check was good, and that he had funds in the bank to meet it. *Com. v. Devlin* (1886) 141 Mass. 423, 6 N. E. 64.

One who, by means of a false representation that he has on deposit with the drawee money sufficient to pay a draft which he offers in payment of mules purchased, thereby obtains possession of them, is guilty of a violation of Mo. Rev. Stat. § 1561, making it a crime to obtain property by false pretenses. *State v. Dennis* (1883) 80 Mo. 589.

The presentation of a check upon a bank in which the maker knew that he had no funds is a false pretense within the Pennsylvania statute when done for the purpose of obtaining money or goods on the faith of such worthless check. *Com. v. Collins* (1871) 8 Phila. (Pa.) 609.

One who represents that he and his partner own certain real property and are in good financial condition, and induces one from whom he purchases personal property to accept his worthless check therefor, in reliance on such representations, is guilty of the crime of obtaining money under false pretenses. *Com. v. May* (1916) 63 Pa. Super. Ct. 521.

An indictment charging the crime of obtaining money by false pretenses is sufficient where it is alleged that the defendant on a certain date obtained money and property of a given value in exchange for a draft of a specified amount which he falsely and fraudulently, with intent to defraud, represented to be drawn against money on deposit in the drawee bank, and that the prosecuting witness relied on such representations and was deceived by them. *State v. Cadwell* (1890) 79 Iowa, 473, 44 N. W. 711.

A conviction for obtaining goods by false pretenses is justified where the purchaser of books gave his check therefor, dated on the day of sale, which he said would be paid on a specified date three weeks later, and further promised to take up the check and dispense with its presentation, where he had no account with the bank on which the check was drawn, or any money therein, and although he stated that he had bought property and placed his money in his business, and was frightened that he would not have money to pay the check. *Foot v. People* (1879) 17 Hun (N. Y.) 218.

A creditor who, in order to collect his claim, purchases a horse from his debtor and gives him therefor a worthless check which he represents to be good, is guilty of obtaining property by false pretenses, in violation of the Pennsylvania statute. *Com. v. Leisy* (1884) 1 Pa. Co. Ct. 50.

And one who, with intent to defraud, falsely pretends that he is authorized to draw upon a specified person for the amount of a draft which he has made out, and who thereby induces the prosecutor to indorse the same, is guilty of false pretenses. *Bargie v. United States* (1861) 2 Hayw. & H. 357, Fed. Cas. No. 18,229.

One who presents a check at a bank with which he has an account, but who has at the time no funds on deposit, is not subject to prosecution for obtaining money under false pretenses because of the overdraft. *Com. v. Drew* (1837) 19 Pick. (Mass.) 179.

An indictment for obtaining goods by false pretenses which alleges that the accused presented and offered checks to a third person and falsely represented that they were good and of nearly par value, and by means of such pretenses obtained property, is bad for want of an averment that the checks were delivered or were received in payment for the goods. *Johnson v. State* (1858) 11 Ind. 481.

One who draws drafts on a bank in which he has no funds, and has them sent forward for collection, taking the cashier's receipt for the same, which he exhibits for the purpose of obtaining a loan, is guilty of obtaining money under false pretenses within Iowa Rev. Stat. § 4394, although no false token was used. *State v. Reidel* (1868) 26 Iowa, 430.

But it seems that drawing a bill of exchange on one upon whom the drawer has no right to draw, and which has no chance of being paid, and depositing it

in the bank, and thereby securing credit, does not constitute the offense of obtaining money by false pretenses, within 7 & 8 Geo. IV. chap. 29, § 53. *Rex v. Wavell* (1837) 1 Moody C. C. (Eng.) 224.

The language used in representing that a worthless check is good is immaterial if its effect is to pretend that there is money on deposit with the drawee bank to meet the check; and where, on the strength of this representation, property is obtained with intent to cheat and defraud, the offense of false pretenses under the Pennsylvania statute is made out. *Com. v. Mullen* (1895) 4 Pa. Dist. R. 656, 26 Pittsb. L. J. N. S. 170.

Verbal representations as to the genuineness of a worthless draft are not essential to a conviction under Ill. Crim. Code, § 96, for obtaining money on such a draft. Conduct is often fully as expressive as words, and the passing for value of a draft known to be worthless is sufficient false pretense. *Whiteman v. People* (1898) 83 Ill. App. 369.

On the contrary, it has been held that one accustomed, on making a deposit in a bank, to go to the paying teller's window and draw a check against it, showing his bank book as evidence that his account is good for the amount, is not guilty of obtaining money by false pretenses where, after making a deposit, he presented a check largely in excess of his balance, which was paid on the supposition that it was covered by the deposit just made. *Re Allen* (1818) 3 N. Y. City Hall Rec. 118. This decision is based on the ground that a mere false show is not a sufficient pretense, but that an allegation by speech is necessary.

Averments in an indictment for obtaining money under false pretenses, that the defendant falsely pretended to the person defrauded that he had funds in a specified bank on which he could draw, and that he did draw a check thereon and obtained the money upon it, which was given him in reliance upon the false representations made, are sufficient, although it is not charged in terms that the defendant said that the check was good or that it would be paid, or that the check was presented at the bank and payment refused. *State v. Seipel* (1900) 104 La. 67, 28 So. 880.

An averment in an indictment for obtaining money by false pretenses that the defendant falsely represented that he had on deposit a large sum of money with which to meet the draft which he

tendered is not supported by proof that he said that the draft had been arranged for. *Semler v. State* (1905) 27 Ohio C. C. 581.

Under the circumstances indicated in the following cases, the crime of larceny exists:

A purchaser of goods for cash who states that he will send an expressman for them, and that they can be sent C. O. D. and he will pay the expressman, is guilty of larceny where he sends an employee for the goods, to whom they are given on his representations that he is an expressman, but who, instead of collecting the money on delivery, as directed, returns with his employer's worthless check. *Shipply v. People* (1881) 86 N. Y. 375, 40 Am. Rep. 551.

A passenger on a train who offered a check in payment of express charges demanded by a confederate, personating an express agent, both of whom persuaded another passenger to cash the check, which was represented as being good, on the promise that the money would be paid him as soon as a certain station was reached, is, together with his confederate, guilty of larceny, where, when the station was reached, both disappeared, taking the check and the money with them. *Grunson v. State* (1883) 89 Ind. 533, 46 Am. Rep. 178.

A person who gives in payment of a loan his check, and accompanies it with the false statement that it is good, and that he has plenty of money in the bank, is guilty of a violation of N. Y. Penal Code, § 529, declaring the obtaining of money by a fraudulent check or draft to be stealing. *People v. Huggins* (1906) 110 App. Div. 613, 97 N. Y. Supp. 187, 20 N. Y. Crim. Rep. 257.

One who induces another to indorse a check signed in the name of a man financially responsible, and represents the check to be genuine and valid when he knew that the alleged maker of the check had no funds on account at the bank mentioned at the time of the alleged giving of the check, is guilty of the crime of grand larceny as specified in N. Y. Penal Laws, § 1293. *People v. Pindar* (1913) 159 App. Div. 12, 144 N. Y. Supp. 242.

Signing a fictitious name to a worthless check given in payment of a pony and cart does not constitute the crime of forgery. *Reg. v. Martin* (1879) L. R. 5 Q. B. Div. (Eng.) 34, 41 L. T. N. S. 531, 14 Cox, C. C. 375, 49 L. J. Mag. Cas. N. S. 11, 28 Week. Rep. 232, 44 J. P. 74.

One who, by means of a forged telegram purporting to come from a bank,

induces another bank to cash a worthless draft, should be prosecuted not for forgery, but for uttering a forged instrument in writing. *Witherspoon v. State* (1896) — **Tex. Crim. Rep.** —, 37 S. W. 433.

In the following cases defrauding by means of worthless checks or drafts was prosecuted as swindling:

Presentation with intent to defraud, of a worthless check signed with an illegible name, which was accepted in payment for goods furnished in reliance on representations that the check was good, constitutes the offense of swindling. *Sherwood v. State*, (1875) 42 **Tex.** 498.

One who falsely represents to a merchant that a check which he fraudulently induces him to accept in payment of clothing purchased will be honored, and that he has got the money, is guilty of the crime of swindling. *Glover v. State* (1909) 57 **Tex. Crim. Rep.** 208, 122 S. W. 396.

One who, with intent to cheat and defraud a person, presents to him a worthless draft drawn upon a firm of which the drawer claimed to be agent, and falsely represents that a third person had told him that he could have the draft cashed and could procure the amount from the person addressed, and for him to pay it, commits the offense of swindling. *May v. State* (1884) 17 **Tex. App.** 213.

One who procures money from a bank by means of a worthless check which he represents as being drawn against funds which he has on deposit with the drawee bank may be convicted of swindling although he uses a fictitious name instead of his real name. *Brown v. State* (1898) — **Tex. Crim. Rep.** — 43 S. W. 986.

It is not, however, a violation of the statute against swindling simply to give a check on a bank where the maker has no money, but there must be some false and deceitful means and methods resorted to at the time the drawer obtains the money upon the check, such as representing that he has money in the bank, or that the check will be cashed, or something of this kind. *Blackwell v. State* (1899) 41 **Tex. Crim. Rep.** 104, 96 **Am. St. Rep.** 778, 51 S. W. 919.

An allegation in an indictment for the offense of cheating and swindling by obtaining money through false and fraudulent statements and representations, which gives the name of a certain person as the one so cheated and defrauded, is not supported by evidence that the

accused, upon representations that the check was good and would be paid upon presentation, induced such person, as assistant cashier of the bank, to cash the same. *O'Neal v. State* (1912) 10 **Ga. App.** 474, 73 S. E. 696.

The drawing of a check signed and indorsed without authority in the names of others, and procuring it to be cashed by a merchant by representing that it is the property of his debtor, who desires to pay a part of his account and to receive the balance in cash, which arrangement was carried out and the balance paid to the accused, constitutes a violation of Ill. Crim. Code, § 98, forbidding the practice of the confidence game. *Jurelich v. People* (1906) 223 **Ill.** 484, 79 N. E. 181.

One who falsely pretends to a merchant that he is the agent and representative of a business concern with which the merchant has had dealings, and thereby obtains his confidence and induces him to cash a worthless draft drawn upon his supposed principal, is guilty of a violation of Mo. Rev. Stat. 1899, § 2213, which relates to the obtaining of money or property from persons whose confidence has been first obtained by fraudulent representations, and with the intent to cheat and defraud. *State v. Wilson* (1909) 223 **Mo.** 156, 122 S. W. 701.

The following cases involve the fraudulent use of false, bogus, fictitious, or worthless checks:

Notes and orders signed by the accused in his own name, and containing no indorsement, are not "false or bogus checks" within the meaning of Ill. Crim. Code, § 98, denouncing the obtaining of money or property by means of the use of any false or bogus checks. *Pierce v. People* (1876) 81 **Ill.** 98.

A check is a "writing" within Ga. Penal Code, § 249, denouncing the obtaining of goods or money on a false writing. *Saffold v. State* (1912) 11 **Ga. App.** 329, 75 S. E. 338.

But a check is not a bill of exchange within Ga. Code, § 4453, penalizing the drawing, indorsement, or acceptance of a bill of exchange in a fictitious name. *Townsend v. State* (1893) 92 **Ga.** 732, 19 S. E. 55, 9 **Am. Crim. Rep.** 299.

A person who, for the purpose of fraudulently obtaining money from a bank, deposits with it a check signed in a fictitious name, and obtains credit thereon, and later procures its amount from the bank, is guilty of a violation of Ga. Pen. Code of 1910, § 249, forbidding the obtaining of money by means

of a false writing made in a fictitious name. *Saffold v. State* (Ga.) supra.

One who issues a draft or check drawn on a bank with which he has no account, and signed by a fictitious name, and receives its amount in cash from the bank with which he deposits it, should not be indicted under Ga. Penal Code, § 70, relating to cheating and swindling, but under § 247, making it punishable for any person to obtain money from another by color of any counterfeit letter or writing, made in any other person's name or fictitious name. *Sharp v. State* (1910) 7 Ga. App. 605, 67 S. E. 699.

It is not an essential element of the offense of drawing a check or draft without funds in bank, in violation of Cal. Penal Code, § 476a, that the instrument should have been properly indorsed, or so drawn or delivered as to make it legally binding upon the bank to pay it upon presentation, if the drawer then had adequate funds in, or credit with, the bank to satisfy it. *People v. Wilbur* (1917) 33 Cal. App. 511, 165 Pac. 729.

A check drawn to "cash or bearer" is an "instrument in writing for the payment of money" within Cal. Penal Code, § 476, relating to the passing of checks by one without funds on deposit with the drawee bank. *People v. Freeman*, (1916) 29 Cal. App. 543, 156 Pac. 994.

The presentation to the drawee bank of a check drawn by one without funds or credit therein is not essential to a conviction of the offense of drawing fraudulent checks, forbidden by Cal. Penal Code, § 476a. *People v. Weir* (1916) 30 Cal. App. 766, 159 Pac. 442.

That one deposited with a bank a check known by him to be fictitious, and had its amount credited to his account, warrants a finding of the uttering and publishing of a fictitious check with fraudulent intent, in violation of Cal. Penal Code, § 476, although he did not draw or attempt to draw on the account, and the bank was not in fact injured or defrauded by the transaction. *People v. Walker* (1911) 15 Cal. App. 400, 114 Pac. 1009.

The provision of the Fla. Acts of 1917, chap. 7263, making it a crime to issue to another a check in payment for anything of value when the drawer has not, at the time of the issuing or presentation of the check, sufficient money on deposit with the drawee to pay it, is not violated where, at the time the check was issued and presented, the drawer had to his credit as a depositor with the

drawee bank, sufficient money to pay the check, even though, by arrangement with the bank presenting the check for payment in the forenoon, the drawee bank had until 4 P. M. to adjust payment by clearness, and prior to 4 P. M. and before actual payment of the check, upon telegraphic advices that a draft given to the drawee bank by the drawer of the check had been dishonored, the amount of the draft was charged to the drawer, thereby making his deposit insufficient to pay the check. *WOLFE v. STATE*, ante, 980.

Evidence that a draft was presented for payment at the place named therein, that the drawee could not be found there, that the draft was not paid, that notice of its nonpayment was given to the drawer personally, and that it has never been paid, is sufficient, so far as presentment and notice of nonpayment are required, to uphold a conviction under Fla. Laws 1905, chap. 5468, p. 162, prohibiting the issuing of a draft without having sufficient money on deposit to pay it. *Ryan v. State* (1910) 60 Fla. 25, 53 So. 448.

The offense of fraudulently drawing a check or draft against insufficient funds, in violation of Ky. Stat. § 1213a, is committed where one, with intent to defraud, draws a check upon a bank in which he has no funds on deposit, and obtains the money upon it from another, who cashes it in reliance upon his false representations that he has money in the bank to meet the check. *Grisson v. Com.* (1918) 181 Ky. 189, 203 S. W. 1075.

The indorser of a worthless check or draft, who, with intent to defraud, and knowing at the time that the maker or drawer had not sufficient funds in the bank or other depository upon which it was drawn for its payment in full upon presentation, deposits it in a bank with which he has opened an account, and draws out the amount before the return of the check as worthless, is guilty of a violation of Ky. Stat. § 1213a, denouncing the drawing of worthless checks or drafts with intent to defraud. *Siegel v. Com.* (1917) 176 Ky. 772, 197 S. W. 467.

One who, with intent to defraud, gives a worthless check in payment of the freight on a car of lumber, and guarantees that the funds for payment are in the bank, is guilty of violation of Pell's Revisal, § 3434b, making it an offense to give a check on a bank in which the drawer has no funds. *State v. Freeman* (1916) 172 N. C. 925, 90 S. E. 507.

An essential condition of guilt under

Tenn. Laws 1915, chap. 178, making it unlawful to obtain money or credit on a worthless check, is that the maker must have failed to pay the check after the seven days' notice provided in the act. *State v. Crockett* (1917) 137 *Tenn.* 679, 195 *S. W.* 583.

The offense of fraudulently issuing a check under *Wis. Stat.* 1917, § 4438a, is complete when the paper is made, drawn, or uttered with intent to defraud; and the provision concerning payment of the check within five days after receiving notice that it has not been paid by the drawee is not an essential element of the offense. *Merkel v. State* (1918) — *Wis.* —, 167 *N. W.* 802.

A person who deposits a worthless draft for \$300 with a bank for collection

on the representation that he has funds to that amount with the drawee, an receives thereon \$37.50 in money before discovery of the fact that he had no funds on deposit with the drawee, is guilty of a misdemeanor only, since the amount received by him was less than \$50. *Faulk v. State* (1897) 38 *Tex. Crim. Rep.* 77, 41 *S. W.* 616.

One induced to indorse a worthless check which is cashed by a bank and the proceeds delivered to the drawer is the party defrauded rather than the bank, where he repays the money to the bank by reason of his indorsement. *State v. Pilling* (1909) 53 *Wash.* 464, 132 *Am. St. Rep.* 1080, 102 *Pac.* 230.

A. W. R.

# UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

PETER CHELENTIS, Plff. in Err.,  
v.

LUCKENBACH STEAMSHIP COMPANY.

(156 C. C. A. 234, 243 *Fed.* 536.)

## Master and servant — recovery for injury to seaman.

The rule that an injured seaman can recover in a common-law court only wages to the end of the voyage and expenses for maintenance and cure, regardless of the negligence of the shipowner or his own contributory negligence, was not changed by the Act of March 4, 1915, providing that seamen in command shall not be held to be fellow servants of those under their authority. *For other cases, see Seamen, in Dig. 1-52 N. S.*

(May 25, 1917.)

**E**RROR to the District Court of the United States for the Southern District of New York to review a judgment in favor of defendant in an action brought to recover damages for personal injuries, for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Argued before Ward, Rogers, and Hough, Circuit Judges.

**Note.**—The above case is cited in the note to *Larson v. Alaska S. S. Co.* L.R.A. 1917F, 678, on the question whether the substantive law of the state may be invoked in an action for personal injuries, not resulting in death, on waters within maritime jurisdiction. See that note for other cases on the question covered by the headnote.

L.R.A. 1918F.

Messrs. Silas B. Axtell and F. R. Graves for plaintiff in error.

Messrs. Carter & Carter for defendant in error.

Ward, Circuit Judge, delivered the opinion of the court:

This was an action at common law by a seaman employed on the steamer J. L. Luckenbach, against her owners, to recover damages for personal injuries sustained by him on his second voyage. The only charge of negligence is the complaint as to which there was any proof was as follows: “. . . Because said defendants and said persons in their service having command negligently and unlawfully compelled plaintiff to carry an ash bag across an open and exposed deck on board said vessel during a severe storm and while the waves were calculated to and did break over the same, plaintiff, although himself in the exercise of due care, was suddenly and without warning struck by a wave with great violence and precipitated from his feet, thereby sustaining severe, painful, and permanent personal injuries, as hereinafter more particularly set forth.”

The plaintiff sued for full indemnity, and on the trial declined to make claim for wages to the end of the voyage and expenses of cure and maintenance for a reasonable time thereafter, insisting that by virtue of § 20 of the Seamen's Act of March 4, 1915, he was entitled to full indemnity, and to go to the jury on the question of the defendant's negligence and of his own contributory negligence. This section reads: “Sec. 20. That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow servants with those under their authority.”

Judge Manton directed a verdict for the defendant, relying on the decision of the Supreme Court in *The Osceola*, 189 U. S. 158, 47 L. ed. 760, 23 Sup. Ct. Rep. 483.

December 28, 1915, the plaintiff Chelentis, a fireman, was in the watch of Snell, the second engineer, 12 to 4 A. M. At 4 A. M. he came on deck, in accordance with the regular practice, to rest for half an hour and then, with his mate, to take the ashes raked from the fires by the 4 to 8 watch and put into bags, lifted by machinery from the stokehole to the grating in the fire-room level with the deck. One man would take the bag off the hoist and deliver it to his mate, to be carried by him through the port door of the fireroom out on deck and dumped over the port side.

The only ash hoist was on the port side, and there was a coal bunker running across the grating in the fireroom from side to side. The cross bunker did not prevent anyone from going through the port door of the fireroom to the port side, but if the bags were to be dumped on the starboard side a third man would be needed, viz., one to take the bag from the hoist and deliver it to another, to carry it to and pass it over the cross bunker to a third, to carry it from there to the door on the starboard side and dump it over.

At 4:30 A. M. the plaintiff and his mate went to the engine room and asked Keyser, the first assistant engineer in charge of the watch, to give them a third man, so that they could dump the ashes over the starboard side, the sea being so high on the port side as to make it dangerous to dump them there. This, they testified, he refused, with oaths, and drove them out of the engine-room, ordering them to do the work as usual. As the plaintiff was returning to the ash hoist after emptying his first bag over the port side, a wave struck him and carried him over to the starboard side, causing him very severe injuries.

The defendant contended that Snell should have been on deck, supervising this operation of dumping the ashes by the men in his own watch, and that the plaintiff was not in Keyser's watch or subject to his orders. But the evidence is that Keyser was giving him orders, and we are clear that Snell's watch was bound to obey him. After the accident, three men were employed, and the ashes were dumped over the starboard side.

December 27th the steamer arrived in port and the plaintiff was taken to the Marine Hospital, where he remained three months and four days, it being found necessary to amputate his right leg six inches above his knee.

The contract of a seaman is maritime,

and has written into it those peculiar features of the Maritime Law that were considered in the case of *The Osceola*, supra; and although, because of these peculiarities, such contracts are almost invariably litigated in admiralty courts, still the contract must be the same in every court, maritime or common law. The only difference between a proceeding in one court or the other would be that the remedy would be regulated by the *lex fori*. If a seaman who had been locked up or put in irons for disobedience of orders, were to sue the master for damages in a court of common law, he could not recover like a shore servant, such as a cook or chauffeur, who had received the same treatment. So, a seaman, bringing suit in a common-law court for personal injuries, could recover even if guilty of contributory negligence, although a shore servant, suing in the same court, could not; and a seaman, suing in a common-law court for personal injuries, could recover (except in the case of unseaworthiness of the vessel or failure to give proper care and medical attention) only wages to the end of the voyage and the expenses for maintenance and cure for a reasonable time thereafter, whereas, in a similar case, a shore servant would be entitled to recover full indemnity. Therefore, by virtue of the inherent nature of the seaman's contract, the defendant's negligence and the plaintiff's contributory negligence were totally immaterial considerations in this case; the sole question for the jury to determine being whether the plaintiff was entitled to recover because he had not received from the defendant his wages to the end of the voyage and the expense for his maintenance and cure for a reasonable time thereafter.

Has Congress changed the situation by § 20 of the Seamen's Act, supra, as the plaintiff contends? He argues that the act makes the master a fellow servant of the seaman, and therefore that Congress intended to make the relation between the seaman and all the officers throughout the same as at common law. But the Supreme Court, in the case of *The Osceola*, supra, while reserving the question whether the master and seaman were fellow servants, held that it made no difference whatever in respect to the liability of the shipowners for an improvident order of the master, which resulted in personal injuries to the seaman. This was the precise question decided. The facts were that the master ordered a gangway to be hoisted by a derrick and swung outboard when the steamer was proceeding in a strong head wind, so that she might be ready for an immediate discharge of the cargo on arrival. The gangway, as soon as



it swung clear of the side, was turned broadside by the wind and threw down the derrick, which struck and injured the libellant. The first and third questions certified to the Supreme Court were answered, "No:"

"First. Whether the vessel is responsible for injuries happening to one of the crew by reason of an improvident and negligent order of the master in respect of the navigation and management of the vessel."

"Third. Whether, as a matter of law, the vessel or its owners are liable to the appellee Patrick Shea, who was one of the crew of the vessel, for the injury sustained by him by reason of the improvident and negligent order of the master of the vessel in ordering and directing the hoisting of

the gangway at the time and under the circumstances declared; that is to say, on the assumption that the order so made was improvident and negligent."

It follows that whether the master and seaman are fellow servants or not is quite immaterial in the case of a suit for injuries resulting from an improvident order of the master. For this reason the court was right in directing a verdict for the defendant, and the judgment is affirmed.

Affirmed by the Supreme Court of the United States June 3, 1918, in 245 U. S. 655, 62 L. ed. 533, 38 Sup. Ct. Rep. 501.

## NEBRASKA SUPREME COURT.

PEARL R. BRADY, Appt.,  
v.

STATE INSURANCE COMPANY OF  
NEBRASKA.

(100 Neb. 497, 160 N. W. 882.)

### Election of remedies — effect of choice.

1. One who has voluntarily chosen an appropriate legal remedy and obtained full satisfaction therefor, with knowledge of the facts and of his rights, will not, ordinarily, be allowed to afterwards resort to an inconsistent remedy involving a contradiction of the grounds upon which he before proceeded.

*For other cases, see Election of Remedies, II. in Dig. 1-52 N. S.*

### Insurance — fire — tornado — choice.

2. Where the owner of a building obtains separate policies of insurance thereon, one covering loss or damage by fire or lightning, and the other by wind or tornado, and the building is wholly destroyed, partly by fire and partly by tornado, the amount written in one policy cannot be recovered under the provisions of the valued policy law on the ground that the building was wholly destroyed by the elements therein insured against, when it appears that the assured has demanded and obtained payment of the full sum written in the other policy upon the claim that such building was wholly destroyed by the elements therein insured against. Such claims being clearly antagonistic to each other, the elec-

tion to pursue the remedy under one will be held to be a bar to the other.

*For other cases, see Election of Remedies, II.; Insurance, VI. c, 1, in Dig. 1-52 N. S.*

(December 9, 1916.)

**A**PPEAL by plaintiff from a judgment of the District Court for Douglas County in favor of defendant in an action brought to recover the amount alleged to be due on a fire insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. I. J. Dunn and T. E. Brady for appellant.

Messrs. Stout, Rose, & Wells, for appellee:

Plaintiff had claimed that her house was totally destroyed by tornado, and had been paid in full for a total loss by that hazard, and is estopped from claiming that the house was either wholly or partially destroyed by lightning or fire.

Lancashire Ins. Co. v. Bush, 60 Neb. 116, 82 N. W. 313; German Ins. Co. v. Eddy, 36 Neb. 462, 19 L.R.A. 707, 54 N. W. 856; Seyk v. Millers' Nat. Ins. Co. 74 Wis. 67, 3 L.R.A. 523, 41 N. W. 443; Monteleone v. Royal Ins. Co. 56 L.R.A. 784, note; Richards, Ins. 3d ed. § 240; Nave v. Home Mut. Ins. Co. 37 Mo. 430, 90 Am. Dec. 394; Huck v. Globe Ins. Co. 127 Mass. 306, 34 Am. Rep. 373; Insurance Co. of N. A. v. Bachler, 44 Neb. 549, 62 N. W. 911; Turner v. Grimes, 75 Neb. 412, 106 N. W. 466; Chicago, B. & Q. R. Co. v. Olsen, 70 Neb. 559, 97 N. W. 831, 99 N. W. 847; Stone v. Snell, 86 Neb. 581, 125 N. W. 1108; Gentry v. Bearss, 88 Neb. 742, 130 N. W. 428; Koeller v. Chicago, B. & Q. R. Co. 88 Neb. 712, 48 L.R.A.(N.S.) 440, 130 N. W. 420.

Plaintiff's proof of loss under tornado

Headnotes by FAWCETT, J.

**Note.** — As to election between causes of loss in case of property insurance, see annotation following this case, post, 997; and references therein to annotations on related questions.

policy furnishes complete defense under fallen building clause of fire policy.

*Nave v. Home Mut. Ins. Co.* 37 Mo. 430, 90 Am. Dec. 394; *Huck v. Globe Ins. Co.* 127 Mass. 306, 34 Am. Rep. 373; *Insurance Co. of N. A. v. Bachler*, 44 Neb. 549, 62 N. W. 911; *Nichols v. Sun Mut. Ins. Co.* 71 Miss. 326, 42 Am. St. Rep. 465, 14 So. 263; *Pelican Ins. Co. v. Troy Co-op. Asso.* 77 Tex. 225, 13 S. W. 980; *Home Mut. Ins. Co. v. Tompkins*, 30 Tex. Civ. App. 404, 71 S. W. 812, affirmed in 96 Tex. 187, 71 S. W. 814; *Fred J. Kiesel & Co. v. Sun Ins. Office*, 31 C. C. C. 515, 60 U. S. App. 10, 88 Fed. 243, certiorari denied in 171 U. S. 688, 43 L. ed. 1179, 19 Sup. Ct. Rep. 885; *Nelson v. Traders Ins. Co.* 86 App. Div. 66, 83 N. Y. Supp. 220, affirmed in 181 N. Y. 472, 74 N. E. 421; *Clayburgh v. Agricultural Ins. Co.* 155 Cal. 708, 102 Pac. 812, 18 Ann. Cas. 579; *Fountain v. Connecticut F. Ins. Co.* 168 Cal. 760, 139 Am. St. Rep. 214, 112 Pac. 546; *Loomis v. Connecticut F. Ins. Co.* 16 Cal. App. 532, 117 Pac. 642; *Moodey v. Connecticut F. Ins. Co.* 160 Cal. 630, 117 Pac. 773; *Beakes v. Phoenix Ins. Co.* 143 N. Y. 402, 26 L.R.A. 267, 38 N. E. 453; *Warmcastle v. Scottish Union & Nat. Ins. Co.* 201 Pa. 302, 50 Atl. 941.

The valued policy statute does not invalidate building clause.

*J. B. Ehsam Mach. Co. v. Phenix Ins. Co.* 43 Neb. 554, 61 N. W. 722; *Farmers & M. Ins. Co. v. Hahn*, 1 Neb. (Unof.) 513, 96 N. W. 256; *Seal v. Farmers & M. Ins. Co.* 59 Neb. 253, 80 N. W. 807; *Farmers & M. Ins. Co. v. Bodge*, 76 Neb. 35, 106 N. W. 1004, 110 N. W. 1018; *Farmers & M. Ins. Co. v. Jensen*, 56 Neb. 284, 44 L.R.A. 861, 76 N. W. 577, 78 N. W. 1054; *Home F. Ins. Co. v. Collins*, 61 Neb. 198, 85 N. W. 54; *Johansen v. Home F. Ins. Co.* 54 Neb. 548, 74 N. W. 866; *Home F. Ins. Co. v. Bernstein*, 55 Neb. 260, 75 N. W. 830; *Hughes v. Insurance Co. of N. A.* 40 Neb. 626, 59 N. W. 112; *Home F. Ins. Co. v. Wood*, 50 Neb. 381, 69 N. W. 941; *Slobodsky v. Phenix Ins. Co.* 52 Neb. 395, 72 N. W. 483; *Nebraska Mercantile Mut. Ins. Co. v. Saeck*, 64 Neb. 17, 89 N. W. 428; *Home F. Ins. Co. v. Garbacz*, 48 Neb. 827, 67 N. W. 864; *Phenix Ins. Co. v. Bachelder*, 32 Neb. 490, 29 Am. St. Rep. 443, 49 N. W. 217.

Fawcett, J., delivered the opinion of the court:

On the evening of Easter Sunday, March 23, 1913, plaintiff's dwelling house was completely destroyed, partly by the terrible tornado which swept through the city of Omaha about 6 o'clock that evening, and partly by fire. On February 14th, preceding the fire, plaintiff obtained from defendant

a policy of insurance in the sum of \$2,000, insuring her building against loss or damage by fire or lightning. At the same time, and as a part of the same transaction, but for a separate agreed consideration, defendant also issued to plaintiff a separate policy for the same amount, viz., \$2,000, covering the same property against loss by tornado. Two days after the destruction of the building, plaintiff executed and delivered to defendant sworn proofs of loss under the tornado policy, in which proofs she stated: "The total insurance on said property, or any part thereof, at the time of the tornado, including the above-mentioned policy, was two thousand and no/100 dollars, and no more."

She also stated in the affidavit that the "sound value" of the building was \$3,500; that the "total loss" thereof was \$3,500; that the "total insurance" on the building was \$2,000; that the "amount named in this policy" was \$2,000; and that she "claimed under this policy" \$2,000. Two days later, on March 27th, the defendant paid the amount thus claimed, in full. On the 8th day of November following, she instituted the present action, to recover the amount stated in the fire insurance policy, above referred to. At the conclusion of the trial the district court directed a verdict for defendant. Plaintiff appeals.

The errors assigned are that the court should not have directed a verdict for defendant; that the verdict is contrary to law, and not sustained by the evidence, but is contrary thereto. The petition is in the usual form. The answer denies generally all allegations of the petition, except as the corporate capacity of defendant and the issuance of the policy sued upon, and pleads, specifically: (1) That by the terms of the policy it was provided that, "if a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease;" that the building was blown down and destroyed by tornado, so that it fell, not as the result of any fire or lightning, but solely as the result of wind and tornado; that there was no loss or damage by fire or lightning to the building prior to the time it fell as the result of the tornado; that the liability of the defendant, under the terms of the policy, immediately ceased the moment the building fell as the result of the tornado; and (2) that, concurrently with the execution of the fire policy and for a like term and amount, and upon the same property, defendant issued to plaintiff a tornado policy: that on March 23d the house was totally destroyed by wind and tornado; the answer also sets out the presentation of sworn

proofs of loss under the tornado policy and settlement as above set forth, and alleges that by reason of the premises plaintiff is "barred and estopped from claiming that the said dwelling house was not totally destroyed by tornado and wind, and from claiming that the same was destroyed or damaged by fire or lightning."

Plaintiff testified that on the evening in question she was on the back porch of the house and saw the tornado approaching at a distance of about a block, and then observed flames, from 4 to 6 or 7 inches long, in a number of places along the roof of the porch where the electric wires were fastened; that the tornado struck the house (which must have been practically immediately), moving it bodily about 10 or 12 feet north and a little to the west, where it stood partly on the foundation and partly off the foundation, leaning a little because of the slope of the ground; that, when the storm had passed, the house was standing apparently in good shape except as described, and except the front porch, which was somewhat dilapidated, and possibly some windows broken; that the fire had increased in the meantime and could be seen at the back of the house by looking through the front windows; that the house continued to burn with more or less force, depending upon how hard it rained; that when she left there at the end of that time the house was still standing but burning generally all over; that when she next saw the place, the following day, the house had been entirely burned, and nothing but ashes and noncombustible portions of the house and furniture remained on the former site of the house.

Richard Brady (plaintiff's son) testified that as soon as he reached the cellar the house moved from over them, and the south and west foundation walls of cement fell in on top of them; that, as soon as the storm passed, he climbed out from under the debris and out of the cellar; that the house had been moved about 10 or 12 feet north and a little to the west; that it tilted a little on the foundation because of the slope of the ground; that the roof was still on the house and the house intact, except the front porch, which was somewhat damaged; that he did not go into the house, but could see things inside, which appeared to be all right; that the house was on fire generally; that when he left the house it was still blazing, most of it standing except the back wall; that the next morning nothing was left but ashes and pieces of iron and portions of some bedsteads.

R. H. Randall (plaintiff's father) testified that he was a carpenter and contractor;

that he built the house for plaintiff four years before the tornado, and described the character of the house. He testified that it would cost from \$3,000 to \$3,600 to construct one like it; that, after the tornado had passed, all of the north side of the west gable of the house was burning rapidly and the flames were coming out of the roof in several places; that the house seemed to be in good condition, the roof and sides all there, but the roof of the porch seemed to be gone and the house was tilted some because of the slope of the ground; that the sides of the house were all right except leaning over; that it continued to burn until past midnight, when it was all burned up.

This is substantially all of the evidence that was given as to the condition of the house immediately before and immediately after it was struck by the tornado. Taking this testimony as true, it clearly establishes that but little damage was done to the house by the tornado and that its total destruction was due to fire. In the light of this testimony, if there had been no fire, the loss which defendant would have been compelled to pay, by reason of the tornado, would have been a nominal amount as compared with the amount of the insurance. Under this testimony, the defendant would not have been liable under the valued policy law for the destruction of the building, as it had not, by reason of anything which had been done by the tornado, lost its distinctive character as a dwelling house. It was still resting partly upon the foundation, and it would not have been a difficult or expensive matter to have replaced it squarely upon the foundation and repaired the slight damage shown. It is hard to understand why plaintiff would sign proofs of loss for a total loss by the tornado, even though those proofs may have been prepared by a representative of the defendant, unless she fully understood that the limit of defendant's liability under both policies was the sum of \$2,000. That being true, then it mattered not to her, nor to the defendant, whether the sum of the insurance was paid to her under the one policy or the other, and this brings us to the controlling question in the case.

Under the valued policy law of this state, when insurance is written to insure real property against loss by fire, tornado, or lightning, and the property shall be wholly destroyed without criminal fault on the part of the insured, "the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages." Rev. Stat. 1913, § 3210. What was the amount

of insurance written by the defendant under its two policies issued February 14th? Was it \$2,000 under each policy, making an aggregate of \$4,000 under both, or did the amount stated in one policy constitute the value of the property to be insured, as contemplated by the contracting parties; and was the tornado policy merely an incident to and a part of the fire policy, so that \$2,000 in all was the sum upon which the minds of the parties met as the sum which should constitute plaintiff's indemnity in case of her loss of the building by any of the contingencies insured against? We think it is a matter of common knowledge, not only among insurers, but with the insuring public, that insurance for a certain sum against loss or damage by fire or lightning, and for the same sum for loss or damage by tornado, is understood and intended to mean that the insurance by the second policy is not for a sum in addition to the first, but is the assumption by the insurer of risk from elements not covered by the first policy. When a fire policy is taken on a building, it is not unusual for the insurer to grant additional protection against loss or damage by tornadoes by what is called a "rider" attached to the fire policy, in which the insurer, for a certain additional amount of premium, assumes the risk for damage by tornado; the amount of this additional premium being based upon the extent to which the insured desires the insurer to assume this additional risk. In such a case, it surely would not be claimed that under the valued policy law the insurer could be held liable for both amounts; this, for the reason that the assured can only recover under the provisions of the valued policy law when his building is "wholly destroyed;" and, as it could not be wholly destroyed by fire and also wholly destroyed by tornado, there will be no theory upon which the assured could recover under both. The case is entirely different from where two or more insurance companies, each with the consent of the others, write a specific amount of insurance upon a building covering the same liability. In such a case we concede that this court, following other courts, has held: "Where several concurrent policies of insurance upon real property have been written with the consent of the respective companies, and the property insured is wholly destroyed by fire, each company is liable for the full amount of its policy." *Home F. Ins. Co. v. Weed*, 55 Neb. 146, 151, 75 N. W. 540.

That those cases apply only where the several companies assume the same character of risk is made plain by a simple illustration. Suppose two different compa-

nies had insured plaintiff's building; company No. 1 against fire or lightning for \$2,000, and company No. 2 against tornado for \$2,000. Is there any possible theory upon which plaintiff could have recovered from both of those companies under the valued policy act? Clearly she could not. Why? Because the building could not have been "wholly destroyed" by the fire and "wholly destroyed" by the tornado. If one of these elements wholly destroyed the building, the other element certainly could not have wholly destroyed it. In such a case, the burden would have been upon plaintiff to show which of the elements wholly destroyed her property. If she proved that it was wholly destroyed by fire, company No. 1 would have to pay the loss, and company No. 2 would have no liability. If the evidence showed that it was wholly destroyed by the tornado, the situation of the companies would be exactly reversed. We are unable to see any difference between a case where two such policies were written by two different companies, and where they were both written by one. The testimony in the case before us shows, as above stated, that the building was not much damaged by the tornado: yet plaintiff recovered the full sum of \$2,000 under the tornado policy on the theory that the building had been wholly destroyed by the tornado. In doing so, she collected a sum largely in excess of what she now says was her actual tornado loss. Under her present testimony, she collected from defendant money which she was bound to know she was not entitled to receive. She should not be permitted to make a false claim and collect it and then assert the reverse of that claim at a later day, and, when her right to do so is challenged, invoke the strong arm of the law to enable her to enforce it. By asserting a total loss by tornado and collecting the full amount of the policy on the strength of her assertion, she has barred the door of inquiry as to the actual damage by tornado, against the defendant. That defendant never intended to assume more than \$2,000 liability on her building under both policies is too plain to require discussion, and that she so understood it is equally clear. Defendant knew that it was liable for the amount it had assumed, and it was justified in paying it under either policy, upon demand: but there is no reasonable theory upon which it should be required to pay the full amount under each. This would be to make a new contract for the parties and compel defendant to respond in double the amount that either party contemplated when the contract was entered into. If plaintiff's house was on fire when the tornado struck

it, either from a stroke of lightning or from defective wiring, and the fire continued to burn, notwithstanding the shock from the tornado, until it consumed the building, it is possible that plaintiff would have been entitled to recover for a total loss under her fire policy, in which case it would have been error to refuse to submit the question to the jury. If such a case had been presented, then the clause in defendant's policy, which provides that, "if a building or any part thereof shall fall, except as the result of fire, all insurance by this policy on such building, or its contents, shall immediately cease," would have been a proper issue to be also submitted to the jury. But that is not the case we have before us. In the case under consideration plaintiff is relying upon the valued policy law. She relied upon the statute in collecting the full amount of the tornado policy. She now relies upon the same statute to collect the full amount of the fire policy as we have already shown, she did not have a single remedy under both policies. Conceding that she had a remedy under either, she would be required to make her election. She made this election promptly, two days after the fire, by asserting her remedy under the tornado policy.

As held in *Dyckman v. Sevaton*, 39 Minn. 132, 39 N. W. 73: "One who has voluntarily chosen and carried into effect an appropriate legal remedy, with knowledge of the facts and of his rights, will not, in general, be allowed to afterwards resort to

an inconsistent remedy, involving a contradiction of the grounds upon which he before proceeded."

In *Turner v. Grimes*, 75 Neb. 412, 416, 106 N. W. 466, after quoting from the opinion in the Minnesota case, we added: "To sustain the present action requires a negation of the facts set forth in the petition in the first action, and having assumed a certain position in this litigation, and having vexed the defendant with a lawsuit based thereupon, he cannot now be permitted to change his position and harass the defendant with another action based upon another and totally different theory."

The language there used by Mr. Commissioner (now Judge) Letton exactly fits the case at bar. To sustain the present action requires a negation of the facts set forth in plaintiff's proof of loss under her tornado policy; and, having assumed the position then that defendant was liable for the full amount of her insurance under the tornado policy and obtained the same from defendant upon that claim, she cannot now be permitted to change her position and harass the defendant with an action based upon another and totally different theory, viz., that her house suffered little damage from the tornado, but was wholly destroyed by the fire.

The judgment of the District Court is right, and it is affirmed.

Rose and Sedgwick, JJ., not sitting.

Petition for rehearing denied.

### Annotation—Election between causes of loss in case of property insurance.

As to statutory provisions regulating valued policies as affecting provisions of policy for prorating loss in case of concurrent insurance, see note to *National F. Ins. Co. v. Dennison*, L.R.A.1916F, 997.

The decision in *BRADY v. STATE INS. Co.* ante, 993, is particularly interesting and valuable, as it appears to be one of first impression on the question under consideration. The plaintiff in that case having recovered the full amount of the tornado policy, upon the claim that the property had been destroyed by tornado, it seems clear that she ought not to recover again from the same defendant under the fire policy upon the theory that the property was wholly destroyed by fire, even

though that was the fact. A different question would have been presented if the plaintiff had failed in the action on the tornado policy because it was found that the loss was wholly due to fire. In this connection, see notes to *Clark v. Heath*, 8 L.R.A.(N.S.) 144, and *Harrill v. Davis*, 22 L.R.A.(N.S.) 1153, on effect of choosing by mistake remedy not legally available. Doubtless, however, as a practical matter, a mistake on the part of the insured as to the cause of loss might induce him to take or refrain from certain steps that, under the provisions of his contract or perhaps under general principles of estoppel, would seriously prejudice his rights.

J. T. W.

L.R.A.1918F.

## MINNESOTA SUPREME COURT.

C. S. BRACKETT COMPANY, Appt.,

v.

OTTO S. LOFGREN, Respt.

(— Minn. —, 167 N. W. 274.)

**Landlord and tenant — termination of lease.**

1. Where the parties to a five-year lease in writing agree orally that it shall be terminated and the lessee vacates and the lessor repossesses himself of the premises, the lease is effectually terminated.

*For other cases, see Landlord and Tenant, II. d, in Dig. 1-52 N. S.*

**Same — reduction of rent.**

2. Where parties to such a lease agree to reduce the rent, and month after month for two years the lessee pays and the lessor receipts for rent at the reduced rate, the lessor cannot thereafter recover the amount rebated.

*For other cases, see Landlord and Tenant, III. d, 1, in Dig. 1-52 N. S.*

**Contract — execution — Statute of Frauds.**

3. The modified lease having been executed, the Statute of Frauds gives no trouble.

*For other cases, see Contracts, I. e, 6, b, in Dig. 1-52 N. S.*

(April 12, 1918.)

**A**PPEAL by plaintiff from an order of the District Court for Hennepin County denying its motion for a judgment notwithstanding a verdict for defendant or for a new trial, in an action brought to recover rent alleged to be due and unpaid. Affirmed.

The facts are stated in the opinion.

Messrs. **Brady, Robertson, & Bonner**, for appellant:

The evidence wholly failed to show a surrender of the premises by operation of law and an acceptance of them by plaintiff.

Stern v. Thayer, 56 Minn. 93, 57 N. W. 329; 7 R. C. L. Corp. § 436, p. 450; Grant v. Duluth, M. & N. R. Co. 66 Minn. 349, 69

Headnotes by **HALLAM, J.**

**Note.** — The payment of part of a liquidated and undisputed debt as a consideration for the discharge of the whole is considered in the notes to Fuller v. Kemp, 20 L.R.A. 785; Melroy v. Kemmerer, 11 L.R.A. (N.S.) 1018; Ex parte Zeigler, 21 L.R.A. (N.S.) 1005; and Sherman v. Pacific Coast Pipe Co. L.R.A. 1917A, 719.

The effect of the Statute of Frauds upon the right to modify, by subsequent parol agreement, a written contract required by the statute to be in writing, is considered in the note to Bonicamp v. Starbuck, L.R.A. 1917B, 144.

L.R.A. 1918F.

N. W. 23; Bloomingdale v. Cushman, 134 Minn. 445, 159 N. W. 1078.

There was no consideration for the acceptance by the plaintiff of less rent than was reserved in the lease.

Wharton v. Anderson, 28 Minn. 301, 9 N. W. 860; Marion v. Heimbach, 62 Minn. 214, 64 N. W. 386; Hoidale v. Wood, 93 Minn. 190, 100 N. W. 1100; Foster County State Bank v. Lammers, 117 Minn. 94, 134 N. W. 501; Smith v. Pendergast, 26 Minn. 318, 3 N. W. 978; Burud v. Great Northern R. Co. 62 Minn. 243, 64 N. W. 562; Stauff v. Bingenheimer, 94 Minn. 309, 102 N. W. 694; Van Brunt v. Wallace, 88 Minn. 116, 92 N. W. 521.

Messrs. **Larrabee & Olson**, for respondent:

The premises were surrendered by defendant and accepted by plaintiff and the lease thereby terminated.

Wolfson v. Zimmerman, 132 Minn. 194, 156 N. W. 119; Millis v. Ellis, 109 Minn. 81, 122 N. W. 1119.

The agreement between plaintiff and defendant to reduce the amount of the rent under the lease, having been executed, required no consideration.

Stewart v. Hidden, 13 Minn. 43, Gil. 29; Foster County State Bank v. Lammers, 117 Minn. 94, 134 N. W. 501; Sage v. Valentine, 23 Minn. 102; Marion v. Heimbach, 62 Minn. 214, 64 N. W. 386; McClay v. Gluck, 41 Minn. 193, 42 N. W. 875; Copley v. Hyland, 46 Minn. 205, 48 N. W. 777; Potter v. Holmes, 72 Minn. 153, 75 N. W. 501; Peavey v. Wells, 136 Minn. 180, 161 N. W. 508; Snow v. Greisheimer, 220 Ill. 106, 77 N. E. 110; Doyle v. Dunne, 144 Ill. App. 14; Bowman v. Wright, 65 Neb. 661, 91 N. W. 580, 92 N. W. 580; Doherty v. Doe, 18 Colo. 456, 33 Pac. 165; Horgan v. Krumwiede, 25 Hun, 116; Evans v. Lincoln Co. 204 Pa. 448, 54 Atl. 321; Jones v. Longerbeam, 22 S. D. 625, 119 N. W. 1000; Ten Eyck v. Sleeper, 65 Minn. 413, 67 N. W. 1026.

**Hallam, J.**, delivered the opinion of the court:

Plaintiff leased to defendant part of the second floor of a business block in Minneapolis, for five years from May 1, 1912, at a rental of \$134 a month. About August, 1914, defendant found it difficult to pay his rent and was often in arrears. Plaintiff agreed to "cut the rent" to \$75 a month. This arrangement was followed out, defendant paying rent at this rate and plaintiff giving receipts therefor, for about a year, when plaintiff insisted on a restoration of the rate stipulated in the lease. They compromised on \$100 a month. This

continued until October, 1916, defendant paying rent monthly and receiving receipts according to the new agreement. In 1916 the owner of property adjoining erected a brick building in such manner as to close, as early as October 17, 1916, six windows of the place occupied by defendant. After conferences, defendant, early in October, vacated, and plaintiff took possession, made alterations, and on March 1, 1917, let the premises to other parties. This appeal involves: 1st, the right of plaintiff to collect rent after October 17, 1916; 2d, the right to collect rent at the rate stipulated in the lease from August, 1914, to October 17, 1916. The trial court held that the evidence presented no issue of fact on either proposition and directed a verdict for the defendant.

1. The first question gives us little difficulty. The evidence as to this is not in dispute. It was mutually understood between defendant and C. S. Brackett, representing plaintiff, that plaintiff could not collect rent after the windows were closed by the erection of the adjoining building; that defendant would then be entitled to vacate, but that defendant should pay rent until the windows were closed. Pursuant to that understanding, when the windows were closed, defendant vacated and plaintiff repossessed itself of the premises. This decisively terminated the lease. *Mills v. Ellis*, 109 Minn. 81, 122 N. W. 1119. Whether or not the parties had the correct notion of the law is of no concern. Plaintiff is asking no relief on the ground of mistake.

2. The second question is more troublesome. That the parties explicitly agreed upon the reduction of the rent in 1914 to \$75 a month and its readjustment in 1915 at \$100 a month is clear. The claim of plaintiff on this point is that the agreement was without consideration and for that reason void. We are referred to a long line of cases in this state holding that payment by the debtor and receipt by the creditor of a part of a liquidated demand is not a satisfaction of the whole, although the creditor agrees to accept it as such. The earliest case was *Sage v. Valentine*, 23 Minn. 102, and the latest, *Foster County State Bank v. Lammers*, 117 Minn. 94, 134 N. W. 501. The reason given for the rule is that "the agreement to receive the partial payment in satisfaction of the whole debt is without consideration." *Sage v. Valentine*, supra.

The rule is not a satisfactory one, particularly as applied to a case like this, where a landlord, wide awake, admittedly agreed to yield a portion of the rent, in-

tending to abide by the agreement, and in fact did abide by it month after month for two years, and then, after the monthly rebates had grown to a staggering amount, sued to recover in one lump sum the aggregate of the amounts voluntarily yielded.

Yet the rule is in accord with by far the greater number of decisions. It had its origin in a dictum of Lord Coke in *Pinnel's Case*, 5 Coke, 117, 77 Eng. Reprint, 237, that while a part payment in money would not sustain such agreement, the giving of a "horse, hawk, or robe" would do so because such article might be worth as much as the whole debt, while money less than the whole could not be. It harks back still farther to a statement of Brian, Ch. J., in *Year Book 10 Hen. VII. f. 4, pl. 4*, that "notwithstanding the horse may be worth only a penny, that is not material, for it is not apparent,"—a business proposition to which some may not agree. Many courts, while countenancing the rule, freely "criticize and condemn its reasonableness, justice, fairness, or honesty." *Jaffray v. Davis*, 124 N. Y. 164, 167, 11 L.R.A. 710, 26 N. E. 351; *Chicago, M. & St. P. R. Co. v. Clark*, 178 U. S. 353, 44 L. ed. 1099, 20 Sup. Ct. Rep. 924; *Ex parte Zeigler*, 83 S. C. 78, 21 L.R.A.(N.S.) 1005, 64 S. E. 513, 916; 1 C. J. 541. In one case it was said: "The logic is unimpeachable, but it fails to take into consideration the practical importance of the difference between the right to a thing and the actual possession of it." *Melroy v. Kemmerer*, 218 Pa. 381, 383 (11 L.R.A.(N.S.) 1018, 120 Am. St. Rep. 888, 67 Atl. 699).

It has been repudiated in some states (*Clayton v. Clark*, 74 Miss. 499, 37 L.R.A. 771, 60 Am. St. Rep. 521, 21 So. 565, 22 So. 189; *Frye v. Hubbell*, 74 N. H. 358, 17 L.R.A.(N.S.) 1197, 68 Atl. 325), and abolished by statute in many others (12 *Harvard L. Rev.* 524). It has been said: "Whenever the technical reason for its application does not exist, the rule itself is not to be applied." *Brooks v. White*, 2 Met. 283, 285, 37 Am. Dec. 95.

In some cases the delivery up of a note (*Stewart v. Hidden*, 13 Minn. 43, Gil. 29), in some, the delivery of a written receipt (*Dreyfus v. Roberts*, 75 Ark. 354, 69 L.R.A. 823, 112 Am. St. Rep. 67, 87 S. W. 641, 5 Ann. Cas. 521; *Aborn v. Rathbone*, 54 Conn. 444, 446, 8 Atl. 677; *Gray v. Barton*, 55 N. Y. 68, 14 Am. Rep. 181), and in others the giving of a new unsecured note (*Wells v. Morrison*, 91 Ind. 51; *Sibree v. Tripp*, 15 Mees. & W. 23, 153 Eng. Reprint, 745, 15 L. J. Exch. N. S. 318; *Jaffray v. Crane*, 50 Wis. 349, 7 N. W. 300), has been held ground for making an exception to the rule.

This much is clear. The rule must not be applied to a case where parties to a contract, still executory, agree to reduce the consideration, and thereafter both sides execute the contract as modified. After an agreement has been fully executed on both sides, the question of consideration becomes immaterial. A pure gift, fully executed, is valid. *Peavey v. Wells*, 136 Minn. 180, 161 N. W. 508. This lease was executory at the time the agreement to reduce the rent was made. The parties saw fit to execute it on both sides in accordance with the modified terms, for the period in controversy. To the extent that it was so executed, it became a closed incident, and the amount rebated cannot now be recovered. This position is sustained by reason and authority. *McKenzie v. Harrison*, 120 N. Y. 260, 8 L.R.A. 257, 17 Am. St. Rep. 638, 24 N. E. 458; *Ossowski v. Wiesner*, 101 Wis. 238, 77 N. W. 184; *Bowman v. Wright*, 65 Neb. 661, 91 N. W. 580, 92 N. W. 580; *Doherty v. Doe*, 18 Colo. 456, 33 Pac. 165; *Snow v. Griesheimer*, 220 Ill. 106, 77 N. E. 110; *Doyle v. Dunne*, 144 Ill. App. 14; *Norris v. Crowe*, 206 Pa. 438, 98 Am. St.

Rep. 783, 55 Atl. 1125; *Evans v. Lincoln Co.* 204 Pa. 448, 54 Atl. 321; 1 *Underhill, Land. & T.* § 349; 1 *Tiffany, Land. & T.* § 173.

*Wharton v. Anderson*, 28 Minn. 301, 9 N. W. 860, is not in point. That action was brought to recover rent for a period during which no rent had been paid. What was said as to the rights of parties after a lease is executed was obiter dictum.

In *Ten Eyck v. Sleeper*, 65 Minn. 413, 67 N. W. 1026, the tenant prevailed. A consideration was found, but it is not held that the result would have been different as to the executed portion of the lease had there been no consideration.

3. There is no trouble over the modification by parol of this written contract, within the Statute of Frauds. After the modified contract has been executed, this objection cannot be made. *Denison v. Sawyer*, 95 Minn. 417, 104 N. W. 305.

Nor is there any doubt that C. S. Brackett's acts bound plaintiff. *Olson v. Warroad Mercantile Co.* 136 Minn. 310, 161 N. W. 713.

Order affirmed.

#### VERMONT SUPREME COURT.

J. C. MORGAN

v.

VILLAGE OF STOWE.

(— Vt. —, 104 Atl. 339.)

#### Municipal corporation — location of fire hydrant — liability for injury.

The location of a hydrant by a municipal corporation for the purpose of affording fire protection to its inhabitants, under statutory authority to supply water for domestic use and for fire protection, is a governmental duty, for the negligent performance of which it is not answerable in damages to one injured by such location.

*For other cases, see Municipal Corporations, II. g, 1, in Dig. 1-52 N. S.*

(May 16, 1918.)

**E**XCEPTIONS by plaintiff to an order of the County Court for Lamoille County sustaining a demurrer to a declaration filed to recover damages for injuries alleged to have been sustained by the negligent location of one of defendant's hydrants. Affirmed.

The facts are stated in the opinion.

**Note.**—As to liability of municipality for tort in connection with its waterworks, see annotation following this case, post, 1005, and references therein to annotations on related questions.

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Messrs. M. P. Maurice, R. W. Hurlburt, and T. C. Cheney, for plaintiff:

A municipal corporation is liable for the damage caused by the negligent construction of a water system, used for both commercial and fire purposes, for the benefit of the inhabitants.

*Dill. Mun. Corp.* § 1670; *Hourigan v. Norwich*, 77 Conn. 358, 59 Atl. 487, 17 Am. Neg. Rep. 445; *Roberts v. St. Marys*, 78 Kan. 707, 98 Pac. 221; *Augusta v. Mackey*, 113 Ga. 64, 38 S. E. 339; *Henderson v. Young*, 119 Ky. 224, 83 S. W. 583; *Lynch v. Springfield*, 174 Mass. 430, 54 N. E. 871. 6 Am. Neg. Rep. 573; *St. Germain v. Fall River*, 177 Mass. 550, 59 N. E. 447; *Dammann v. St. Louis*, 152 Mo. 186, 53 S. W. 932; *Bullmaster v. St. Joseph*, 70 Mo. App. 60; *Boothe v. Fulton*, 85 Mo. App. 16; *Messersmith v. Buffalo*, 138 App. Div. 427. 122 N. Y. Supp. 918; *Chicago v. Selz, S. & Co.* 202 Ill. 545, 67 N. E. 386, 14 Am. Neg. Rep. 23; *Rice v. St. Louis*, 165 Mo. 636, 65 S. W. 1002; *Dunstan v. New York*, 91 App. Div. 355, 86 N. Y. Supp. 562; 28 Cyc. 1287, 1288; *Tiedeman, Mun. Corp.* § 328; *Jordan v. Hannibal*, 87 Mo. 673; *Weightman v. Washington*, 1 Black, 39, 17 L. ed. 52; *Milwaukee v. Davis*, 6 Wis. 377; *Jenney v. Brooklyn*, 120 N. Y. 164, 24 N. E. 274; *New Albany v. Ray*, 3 Ind. App. 321, 29 N. E. 611; *Langley v. Augusta*, 118 Ga. 590, 88 Am. St. Rep. 133, 45 S. E. 486; *Boston Belting Co. v. Boston*, 183



Mass. 254, 67 N. E. 428; *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762; *Winn v. Rutland*, 52 Vt. 481; *Bragg v. Rutland*, 70 Vt. 606, 41 Atl. 578.

Messrs. F. G. Flicetwood and J. W. Redmond for defendant.

Miles, J., delivered the opinion of the court:

This suit is brought to recover against the defendant for the negligent location of one of its hydrants, in consequence of which it is alleged that the plaintiff was injured. The declaration was demurred to and the demurrer was sustained, and the case comes here on exception to that action of the court.

The question here involved is of much importance, as it affects most, if not all, of the incorporated villages and cities in the state; for the hydrant, alleged to have been negligently placed, was located, with reference to the street and sidewalk, as hydrants are usually placed, and was constructed for the purpose for which hydrants are maintained and used in villages and cities.

The general rule as to the liability of municipalities for negligence, in the construction and maintenance of water systems, lighting plants, and the like, which are for the private advantage and emolument of the municipality, is that of a natural person; and for the negligence of its duly authorized agent in relation thereto, by which injury is done to another, without the fault of the injured party, the municipality is liable. This rule is not disputed by either party; nor is there any dispute but that the law in this state is well settled, whatever it may be in other jurisdictions, that a municipality is exempt from liability when injury results from a negligent performance of a governmental duty, by one authorized to perform it, though expense of the performance is borne by the municipality. The dispute in this case arises upon the application of these rules; the plaintiff claiming that the hydrant in question is a part of the water system, and not a governmental structure, and the defendant claiming that it is such a structure, exclusively constructed and maintained for a governmental purpose. By the defendant's charter it was created a fire district, and its trustees were given the power of and made subject to the same restrictions as prudential committees in fire districts, with power to make contracts and expenditures for the preservation of property, in the defendant village, from loss or damage by fire, and to provide a supply of pure water for fire, domestic, and other like uses, for itself.

The plaintiff in his declaration alleges

in substance that the defendant is the owner of the waterworks, and has operated the same for the purpose of supplying the inhabitants of the defendant with water for domestic purposes and for use in the protection of the property of the inhabitants from loss and damage by fire; that in the process of construction the defendant placed the hydrant in question in the margin of one of defendant's streets, very close to the traveled track and inside the sidewalk, and that, in consequence of its being placed so close to the traveled track, it endangered the life and property of the plaintiff, and of all persons having occasion to use the street. The declaration being demurred to, the facts stated above are taken to be true. In brief, the negligence alleged is that the hydrant was negligently placed in the street, and that that was the proximate cause of the plaintiff's injury. The defendant concedes that, if the facts stated in the declaration show that the defendant was using the hydrant for its own private advantage and emolument, the judgment below should be reversed; but it claims that the declaration shows that the hydrant was placed where it is located and was being maintained at the time of the alleged injury for the sole benefit of the public, and the act in placing it there was a governmental act.

For authorities sustaining its contention, the defendant relies principally upon the case of *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762. Plaintiff argues that that case is unlike the case at bar, because in that case the negligence complained of was the act of a public officer in the discharge of a governmental duty, and that the direct injury was caused by ice in the street, for which municipalities have never been liable. A complete answer to that position is that the declaration does not count upon a defect in the street, and the decision of that case was not based upon that ground, and the discussion of the case in the opinion of the court is with the reference to the liability of the village on account of its negligence in repairing one of its hydrants. The negligence counted upon in this and the *Welsh Case* is with reference to the hydrant, and in this respect they are alike; and the only difference is that in the *Welsh Case* the negligence alleged consisted in a failure to properly repair the hydrant, while in this case it is for a failure to properly locate the hydrant. The plaintiff further claims that the *Welsh Case* differs in principle from this case because in that case the facts show that there was a duly installed and duly authorized fire protective system. From the charter of the defendant and the

allegations in the declaration in this case, it appears that the defendant has a "duly installed and duly authorized fire protective system." Its charter powers for the installation of a fire system are as broad as those in the Welsh Case, and the declaration shows that its fire system was completely installed and organized; for the plaintiff alleges, as above set forth, facts indicating that the defendant duly organized as a fire district.

All that is alleged to have been done by the defendant in the construction of the fire department and the installation of the hydrant in question could not have been legally done without some kind of an organized system, and the presumption must be that it was done under its charter. The charter of Rutland was more restricted, if anything, than the defendant's charter; for the defendant's charter gave to the trustees of the defendant, as stated above, all the powers of prudential committees of fire districts; and for such powers see Pub. Stat. § 3653, to and including § 3656. The difference in the facts of the two cases is a difference in fact merely, and not in principle. In the Rutland charter the supervision of the fire department was largely committed to engineers and wardens, whose duties were defined in the charter. In the case at bar the supervision of that department is given to the trustees as prudential committees in fire districts, whose duties are declared in Pub. Stat. sections above referred to.

From a careful examination of the Welsh Case we think the principle involved in that case is not materially different from the principle involved in the case at bar; and if the repair of the hydrant in the Welsh Case was a governmental act, the placing of the hydrant in this case was equally a governmental act; and, if that case states the law, the placing of the hydrant in question was a governmental act. Strictly speaking, the hydrant in question was not a part of the water system over which the water commissioners had charge, and for which they were empowered to fix water rates; and, though the hydrant was connected with the water main, it was not a part of the water system constructed for the benefit or emolument of the defendant (*Sanborn v. Enosburg Falls*, 87 Vt. 479, 89 Atl. 746), and, though attached to that system, it was set apart for the exclusive benefit of the public.

In the *Sanborn* Case the facts disclosed that defendant put, on the side of one of its streets, a "barrel catch-basin;" that there was a tile running under the sidewalk into this barrel and a 6-inch tile from the barrel across the street, underground,

connected with the sewer of the village; that the tile was put in to protect the sidewalk and to carry surface water into the sewer; that the tile, sluice, and catch-basin became frozen and were neglected by the defendant, in consequence of which the plaintiff's property was injured by overflowing water.

The plaintiff sought to recover on the ground that the negligence was the defendant's failure to keep in repair its sewer system. The court held that the tile and catch-basin were not a part of the sewer system, though connected with it, but were maintained for the protection of the street, and that the defendant was not liable for the injury. In 19 R. C. L. 1116, § 397, it is stated that it makes no difference that the municipality uses the same reservoirs and pipes for its fire service that it employs for the distribution of a public supply for domestic purposes, from which it derives a profit, since the two functions are clearly distinguishable. So here, the hydrant was maintained for the protection of the public from loss or damage by fire, as stated in the plaintiff's declaration. This case, being in principle substantially like the Welsh Case, deserves the same disposition as should be given to that case. If the decision in that case is sound, the judgment in this case should be affirmed.

The Welsh Case has been cited as authority and with approval in *Weller v. Burlington*, 60 Vt. 28, 12 Atl. 215; *Bates v. Rutland*, 62 Vt. 178, 9 L.R.A. 363, 22 Am. St. Rep. 95, 20 Atl. 278; *School Dist. v. Bridport*, 63 Vt. 383, 22 Atl. 570; *Sanborn v. Enosburg Falls*, supra, and other Vermont cases; and it may now be treated as having declared the settled law of the state. The plaintiff does not directly attack its soundness, but seeks to avoid its effect by setting up a distinction between that case and the case at bar. He argues that in the Welsh Case the officer whose negligence was the alleged cause of the injury was a public officer, because he was a first assistant engineer of the fire department, and that in this case the hydrant in question was not located by any public officer.

We fail to see the distinction claimed by the plaintiff. In the Welsh Case the alleged negligent act was performed by an officer of the fire department under the direction of the village trustees, and in this case the negligent act was performed by "the defendant by its servants and agents." We do not apprehend it is necessary for an act to be performed by any particular officer, to give to the act the character of a public or governmental act. It is enough if the act is performed by one having legal

authority to perform it; and while performing the act he is, by virtue of the performance of that act, a public officer. *Bates v. Rutland*, 92 Vt. 178, 9 L.R.A. 363, 22 Am. St. Rep. 95, 20 Atl. 278, was an action for negligence in locating a stowage crusher too near the highway, in consequence of which the plaintiff's horse was frightened and the plaintiff thrown out and injured. The crusher was located by direction of the village trustees outside of the limits of the village, with the consent of a majority of the selectmen, and was being operated by authority of the trustees in preparing material with which to repair the village streets. It was held that the action did not lie, the court saying: "The officers by whom the work was being performed were, for this purpose, public officers, and for their negligent acts an action does not lie against the defendant."

In another place in the opinion the court, recognizing the principle that the character of the employment is determinative of whether the act is governmental or otherwise, say: "It must be conceded that the defendant corporation is a political subdivision of the state, chartered and organized mainly for governmental purposes. Then, were the trustees and street commissioner, at the time of the accident, engaged in a public service, or in a work that was for the peculiar benefit of the defendant in its local or special interests? The character of the employment is determinative of the defendant's liability for the acts of these officers."

In *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196, the court says: "It makes no difference whether the legislature itself prescribed the duties of the officers charged with the repair and management of fire engines, or delegates to the city or town the definition of those duties by ordinance or by-law. However appointed or elected, such persons are public officers, who perform duties imposed by law for the benefit of all the citizens, the performance of which the city or town has no control over, and derives no benefit from, in its corporate capacity."

In *Hafford v. New Bedford*, 16 Gray, 297, the court say: "The members of the fire department of New Bedford, when acting in the discharge of their duties, are not servants or agents in the employment of the city, for whose conduct the city can be held liable; but they act rather as officers of the city, charged with the performance of a certain public duty or service, and no action will lie against the city for their negligence or improper conduct, while acting in the discharge of their official duty."

In the *Welsh Case* the repair complained of was being done by the first assistant engineer, under the direction of the trustees. Under the *Rutland charter* the duties of the engineers and wardens were to inquire into the condition of the property of the fire department, and to supervise and care for the same, and report its condition to the trustees of the village as often as circumstances rendered it necessary, for the safe-keeping and proper repair of such property. This would seem to indicate that the duties of the engineers and wardens were to look after the property and report to the trustees, who were to direct to be made such repairs as they adjudged were necessary; and that was what was done in the *Welsh Case*. The trustees directed the engineer to do what he did do. The act was that of the trustees through the engineer; and, from anything appearing in the case, the legal effect of the act would have been the same if performed by the trustees personally, or by some other person, not connected with the fire department, under the direction of the trustees. It is the lawful act performed for the public good that determines its governmental character.

It does not appear in the case at bar who located the hydrant complained of, but we are to assume that it was by someone having legal authority to locate and construct it; and, that being so, and for the public good, and that alone, it falls within that class of cases of which the *Welsh Case* is one and the *Sanborn Case* and the cases therein cited are others. In the *Welsh Case* it is held as follows: "The fire department and its service are of no benefit or profit to the village in its corporate capacity. They are not a source of income or profit to the village, but of expense, which is paid, not out of any special receipts or fund, nor defrayed even in part, by assessments upon particular persons or classes benefited, as in case of sewers or waterworks, but from the general fund raised by taxation of all the inhabitants."

In another place, in the opinion of the court, it is said: "While it may be true that the hydrant is no part of the aqueduct, so far as private uses of the water thereby supplied are concerned, it is certainly the very means by which the public use of the water, namely, its use for the extinguishing of fires and the like, are obtained."

The *Welsh Case* clearly holds that a hydrant is a public or governmental structure; and it is a matter of common knowledge that it is used exclusively for public purposes, and is so constructed as to be of no value for individual or private

uses. This principle is recognized in *Tainter v. Worcester*, 123 Mass. 311, 25 Am. Rep. 90, in which the court say: "The protection of all the buildings in a city or town from destruction or injury by fire is for the benefit of all the inhabitants and for their relief from a common danger; and cities and towns are therefore authorized by general laws to provide and maintain fire engines, reservoirs, and hydrants to supply water for the extinguishment of fires."

And it is also recognized in *Jewett v. New Haven*, 38 Conn. 368, 9 Am. Rep. 382, in which the court quoted with approval from *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368, as follows: "The laws of this state have conferred upon its municipal corporations powers to establish and organize fire companies, procure engines and other instruments necessary to extinguish fires, and preserve the buildings and property within their limits from conflagration; and to prescribe such by-laws and regulations for the government of such companies as may be deemed expedient. But the powers thus conferred are in their nature legislative and governmental."

In *Fisher v. Boston*, *supra*, the court say: "Cities and towns are authorized by law to procure and maintain fire engines and reservoirs of water therefor, and to pay the necessary expense thereof, either by general taxation or out of moneys belonging to the town, because the prevention of damage to buildings by fire is an object which affects the interest of all the inhabitants and relieves them from a common burden and danger, and is therefore within the scope of municipal authority."

And further along in the opinion the court say: "In the absence of express statute, therefore, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair the fire engines owned by them than in the case of a town house or public way."

To the same effect are *Hafford v. New Bedford*, *supra*; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Bigelow v. Randolph*, 14 Gray, 541; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485.

The great weight of authority is to the effect that hydrants and apparatus for the extinguishment of fire in a municipality are in their nature public or governmental property, and that for negligence in their use and maintenance for a public purpose no action will lie.

The plaintiff claims that while it may be true that hydrants and apparatus used for the extinguishment of fires in a village or

city may be public or governmental property, yet in this case the defendant is liable, because of a faulty execution of the plan for the installation of the fire department. In support of this he can claim no more than is alleged in the declaration: namely, that the hydrant was improperly located. He fails to distinguish between a faulty execution of a plan and a faulty location of a part of a plan. In the location of a plan the village authorities must necessarily deliberate and adjudge upon the system or plan of location; and such action on the part of the village trustees is in its nature judicial, for which no private action is incurred for errors of judgment or want of forecast. Such is the holding in *Winn v. Rutland*, 52 Vt. 481, much relied upon by the plaintiff, in which the court say: "In acting under the chartered power, the village authorities must necessarily deliberate and adjudge upon the system or plan of the work, when to perform it and where to locate it. So far, no liability to private action is incurred for errors of judgment or want of forecast. The inauguration of a plan of sewerage, so long as it remains in mere resolution, cannot, in the nature of things, work actionable injury or harm to individuals. Having devised a plan, it may be carried into execution with due care and skill, without risk of private action."

The same principle is held in *Tainter v. Worcester*, *supra*, in which the court say: "The works to be constructed by the city of Worcester, under the statute of 1864, were, so far as related to safeguards against fire, to be erected and maintained by the city for the benefit of the public and without pecuniary compensation or emolument. The questions whether and where the public hydrants should be erected were within the exclusive discretion and control of the municipal authorities, as the public interest might seem to them from time to time to require."

To the same effect is *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332, in which the court say: "As to common sewers, built by municipal authorities under power conferred by law, it has been held, upon great consideration, that, as the power of determining where the sewers shall be made involves the exercise of a large and quasi judicial discretion, depending upon considerations affecting the public health and general convenience, therefore no action lies for a defect or want of sufficiency in the plan or system of drainage adopted within the authority so conferred."

We think, and so hold, that the location

of the hydrant in question was a public and governmental act performed by the defendant through its agents, who acted in the capacity of governmental officers, and

that the Welsh Case is full authority for this holding, and must control and govern this case.

Judgment affirmed.

### **Annotation—Liability of municipality for tort in connection with its water-works.**

This note is supplementary to notes to *Piper v. Madison*, 25 L.R.A.(N.S.) 239, and *Wigal v. Parkersburg*, 52 L.R.A.(N.S.) 465, where a reference is made to analogous notes.

As to liability of municipality for torts in connection with its lighting plant, see notes to *Brantman v. Canby*, 43 L.R.A.(N.S.) 862, and *Saulman v. Nashville*, L.R.A.1915E, 316. Many other concrete phases of municipal liability as affected by the distinction between the public or governmental and private or corporate functions of municipalities will be found in the L.R.A. Indexes under the title "Municipal Corporations," subtitle "Liability for damages."

#### **In general.**

Supplementary cases in notes in 25 L.R.A.(N.S.) 241, and 52 L.R.A.(N.S.) 466.

In *Fretz v. Edmond* (1916) — Okla. —, L.R.A.1918C, 405, 168 Pac. 800, a suit to enjoin a city from furnishing to a normal school water free of charge, it is stated that municipal corporations in operating a water plant exercise business and administrative functions rather than those strictly governmental in their nature, and in the exercise of such functions are governed largely by the same rules applicable to individuals or private corporations engaged in the same business. See, however, *MORGAN v. STOWE*, ante, 1000.

#### **Insufficient water supply.**

Supplementing 25 L.R.A.(N.S.) 239, and 52 L.R.A.(N.S.) 466.

The duty of a municipality or water company under its contract with the consumer to supply water for the extinguishment of fire is considered in the notes to *Niehau Bros. Co. v. Contra Costa Water Co.* 36 L.R.A.(N.S.) 1045, and *Jones House Furnishing Co. v. Arkansas Water Co.* 52 L.R.A.(N.S.) 402. In connection with these notes see also the case, *Howland v. Asheville* (1917) 174 N. C. 749, L.R.A.1918B, 728, 94 S. E. 524, holding that a municipal corporation which undertakes to maintain water mains and hydrants for fire protection is not liable for destruction

of a building within its limits, because the main was insufficient in size to supply water enough to extinguish a fire which consumed it.

A town was held not liable for damages sustained by the burning of a dwelling in *Thompson v. Calhoun* (1917) 20 Ga. App. 296, 93 S. E. 72, although in repairing its waterworks system it rendered useless a fire plug which otherwise could have been used in extinguishing the fire. The petition, observed the court, does not show that the alleged negligence of defendant was the proximate cause of the injury sustained; in fact it shows that there was an intervening agency other than the alleged acts of negligence. The allegations do not show that the damages claimed were the natural and probable consequences of the negligence charged against the defendant.

The rule that a city which has assumed the function of protection against fires by the installing of a waterworks system and a fire department is not liable for fire losses due to an entire lack or insufficient supply of water, is said to be inapplicable to the case of *Concordia Fire Ins. Co. v. Simmons Co.* (1918) — Wis. —, 168 N. W. 199. In this case a corporation which had pierced a water pipe while erecting a factory building was held liable to the owners of a building destroyed by fire which, owing to a lack of water, could not be extinguished.

#### **As employer.**

For cases under this head, see 25 L.R.A.(N.S.) 239, and 52 L.R.A.(N.S.) 466.

#### **Liability to others than servants—for damage caused by broken or leaking pipes.**

Supplementing 25 L.R.A.(N.S.) 242, and 52 L.R.A.(N.S.) 466.

A judgment against a city for negligent delay in shutting off water from a broken main, resulting in flooding premises, was affirmed in *Regan v. New York* (1916) 175 App. Div. 861, 162 N. Y. Supp. 400, following *Von Lengerke v. New York* (1912) 150 App. Div. 98, 134 N. Y. Supp. 832, set out in note in 52 L.R.A.(N.S.) 466.

A city was held not liable in *Wimpfheimer v. New York* (1918) — App. Div. —, 171 N. Y. Supp. 701, for injury to merchandise from overflow due to leak in water main. It may be, observed the court, that if the proofs were that there had been an application to the department to cut off and plug these service pipes, and that one of them was improperly plugged with concrete, and thereafter leaked, causing damage, negligence might be inferred from these circumstances, and the city be called upon for an explanation; for it would then be shown to have notice of interference with the supply that was under its control and supervision, and it would be its duty to see that it was done properly. But the department is not required to maintain a patrol along all the miles of city water pipes in order to prevent some persons from unlawfully cutting off service pipes and plugging them up without permission. The only proof tending to put the city on notice was that on May 17, 1911, an application was granted by the department to a plumber named MacLean for permission to tap the 6-inch main in Thirty-first street to connect the premises at the southwest corner of Thirty-first street and Fourth avenue with the main by means of a 2-inch tap; the permit requiring that "five old taps to be drawn and plugged, one old tap to be used if metered." It might be said that this drew the department's attention to the vicinity, and should have put it on notice that in all probability the service from the Fourth avenue side had been cut off, and that it therefore ought to have inspected and determined whether everything had been properly plugged. This proof might possibly constitute a *prima facie* case under the *res ipsa loquitur* rule, if it were not for the fact brought out in the plaintiff's case, that the service pipes from the 4-inch main had been properly hammered up and closed to the knowledge of the water supply department, and if any of them were thereafter opened, and improperly closed, it was without the city's knowledge. This, as it seems to me, prevents the application of the *res ipsa loquitur* rule (assuming that it can be invoked in such a case), because the evidence does not definitely place responsibility on the city, but leaves open the inference that the connections with the 4-inch main which the city inspector found closed and hammered up in November, 1910, were thereafter opened by unauthorized persons without its knowledge,

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and improperly plugged. Therefore, unless it is to be held that there is a duty of constant patrol and inspection on the part of the city, which would be most unreasonable, there was no sufficient legal basis for the finding of negligence, and the judgment and order should be reversed and a new trial ordered.

The rule is stated in *Stifel v. St. Louis* (1916) — Mo. —, 181 S. W. 577, that where a city has assumed control and supervision of the whole street in front of the building of an adjacent property owner, it is bound to exercise reasonable care in the installation and maintenance of water plugs on such streets, and to see that they are kept in reasonably safe repair after being so installed. Consequently, in this case, where a city owned a system of waterworks and retained supervisory control over a plug which, owing to its defective condition, permitted water to escape to the damage of plaintiff's building, the city was held liable. The court stated that, with respect to such plugs, the city was not acting in a governmental capacity.

—for acts of independent contractors.

See cases in notes in 25 L.R.A.(N.S.) 242, and 52 L.R.A.(N.S.) 467.

—for obstruction in street.

See cases in notes in 25 L.R.A.(N.S.) 244, and 52 L.R.A.(N.S.) 467.

—for negligence in maintenance of irrigation ditches in connection with waterworks.

See cases in notes in 25 L.R.A.(N.S.) 244, and 52 L.R.A.(N.S.) 467.

Miscellaneous cases.

Supplementing cases in notes in 25 L.R.A.(N.S.) 245, and 52 L.R.A.(N.S.) 467. See also *MORGAN v. STOWE*, ante, 1000.

Where one, under contract with a city to repair machinery connected with its waterworks system, was injured as a result of a flight of steps being out of repair, the liability of the city was in *Flutmus v. Newport* (1917) 175 Ky. 817, 194 S. W. 1039, said to be the same as that of a private owner of a waterworks. Citing rule stated in *Farnham on Waters*, § 158b. Here, observed the court, the plaintiff was an employee of a company that had contracted to repair the machinery, and was therefore on the premises by the invitation of the city. Since it was necessary for him to use the steps in the performance of the

work, in which he was engaged, the city was under the duty to exercise ordinary care to see that the steps were in a reasonably safe condition for his use. It

follows that the demurrer to the petition as amended should have been overruled. Judgment for defendant reversed. J. D. C.

# OKLAHOMA SUPREME COURT.

## CONTINENTAL CASUALTY COMPANY v. MABEL A. CLARK.

(— Okla. —, 173 Pac. 453.)

### Insurance — accident — sunstroke.

1. In an accident insurance policy which provides: "If sunstroke, freezing, or hydrophobia, due in either case to external, violent or accidental means, shall result, independently of all other causes, in the death of the insured within ninety days from the date of the exposure or infection, the company will pay said principal sum as indemnity for loss of life," held, that "accidental means" is used to denote "accidental cause," and in case of sunstroke, if the same was suffered while the insured was engaged in his usual avocation or going about his affairs in an ordinary manner, as any other person might have been under like or similar circumstances, and did not intentionally and voluntarily subject himself to an intense heat calculated to produce sunstroke, with the knowledge that it would probably occur, then the sunstroke was suffered from "accidental means" or "accidental cause," within the meaning of the policy.

For other cases, see *Insurance*, VI. b, 3, c, in *Dig. 1-52 N. S.*

### Same — increase of indemnity — absence of default.

2. In a policy which provides: "Each consecutive full year which this policy shall be carried without default in payment of premium therefor shall add 10 per cent to the indemnities payable under part II., but the total of such additions shall not exceed 50 per cent," held, that, the additional indemnity provided for in this paragraph being for the benefit of the insured, it is incumbent upon beneficiary to show that the payments of premiums were made without default, in order to increase the policy according to this provision, and the fact that the policy was in effect at the date of the death of the deceased did not justify the presumption that the premiums were paid without default.

For other cases, see *Evidence*, II. k, 1, in *Dig. 1-52 N. S.*

(April 30, 1918.)

Headnotes by WEST, C.

**Note.**—The risks covered by insurance against sunstroke are considered in the notes to *Continental Casualty Co. v. Johnson*, 6 L.R.A. (N.S.) 609, and *Pack v. Prudential Casualty Co.* L.R.A.1916E, 957.

L.R.A.1918F.

**C**ROSS WRITS of error to review a judgment of the District Court for Seminole County in favor of plaintiff in an action brought to recover an amount alleged to be due on an accident insurance policy, defendant excepting to the overruling of its motion for a new trial and the increase of plaintiff's judgment; and plaintiff excepting to the amount of the judgment. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Keaton, Wells, & Johnston, M. P. Corneliuss, and Manton Maverick, for defendant:

Sunstroke is a disease not effected by accidental means, when it is sustained by the insured while he is doing just what he intends to do, in the way intended.

*Elsey v. Fidelity & C. Co.* — Ind. App. —, 109 N. E. 413; *Bryant v. Continental Casualty Co.* — Tex. Civ. App. —, 145 S. W. 636, reversed in 107 Tex. 582, L.R.A. 1916E, 945, 182 S. W. 673, Ann. Cas. 1918A, 517; *Semancik v. Continental Casualty Co.* 56 Pa. Super. Ct. 392; *Dozier v. Fidelity & C. Co.* 13 L.R.A. 114, 46 Fed. 446; *Herdie v. Maryland Casualty Co.* 146 Fed. 396, affirmed in 79 C. C. A. 156, 149 Fed. 198; *Sinclair v. Maritime Pass. Assur. Co.* 3 El. & El. 478, 30 L. J. Q. B. N. S. 77, 7 Jur. N. S. 367, 4 L. T. N. S. 15, 9 Week. Rep. 342; *Continental Casualty Co. v. Pittman*, 145 Ga. 641, 89 S. E. 716.

There can be no recovery under a policy insuring against death occasioned by injury effected through accidental means, where such injury, although totally unexpected, undesigned, and not the probable effect of the means used, is occasioned by a voluntary act on the part of the insured, executed in an expected and ordinary way; since such injury, though accidental, is not effected through accidental means.

*United States Mut. Acci. Asso. v. Barry*, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755, affirming 23 Fed. 712; *McCarthy v. Traveler's Ins. Co.* 8 Biss. 362, Fed. Cas. No. 8,682; *Westmoreland v. Preferred Acci. Ins. Co.* 75 Fed. 244; *Shanberg v. Fidelity & C. Co.* 19 L.R.A. (N.S.) 1206, 85 C. C. A. 343, 158 Fed. 1, affirming 143 Fed. 651; *Fidelity & C. Co. v. Stacey*, 5 L.R.A. (N.S.) 657, 74 C. C. A. 409, 143 Fed. 271, 6 Ann. Cas. 956; *Hastings v. Travelers' Ins. Co.* 190 Fed. 258; *Southard v. Railway Pass. Assur. Co.* 34 Conn. 574,

Fed. Cas. No. 13,182; *Stokely v. Fidelity & C. Co.* 193 Ala. 90, L.R.A.1915E, 955, 69 So. 64; *Carnes v. Iowa State Traveling Men's Asso.* 106 Iowa, 281, 68 Am. St. Rep. 306, 76 N. W. 683; *Feder v. Iowa State Traveling Men's Asso.* 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252; *Smouse v. Iowa State Traveling Men's Asso.* 118 Iowa, 436, 92 N. W. 53; *Lehman v. Minneapolis & St. L. R. Co.* 153 Iowa, 118, 133 N. W. 327; *Lehman v. Great Western Acci. Asso.* 155 Iowa, 737, 42 L.R.A.(N.S.) 562, 133 N. W. 752; *Lick-leider v. Iowa State Traveling Men's Asso.* — Iowa, —, 151 N. W. 479; *Smith v. Travelers' Ins. Co.* 219 Mass. 147, L.R.A.1915B, 872, 106 N. E. 607; *New Amsterdam Casualty Co. v. Johnson*, 91 Ohio St. 155, L.R.A. 1916B, 1018, 110 N. E. 475; *Stone v. Fidelity & C. Co.* 133 Tenn. 672, L.R.A.1916D, 536, 182 S. W. 252, Ann. Cas. 1917A, 86; *Appel v. Aetna L. Ins. Co.* 86 App. Div. 83, 83 N. Y. Supp. 238, affirmed without opinion in 180 N. Y. 514, 72 N. E. 1139; *Niskern v. United Brotherhood*, C. J. 93 App. Div. 364, 87 N. Y. Supp. 640; *Schmid v. Indiana Travelers' Acci. Asso.* 42 Ind. App. 483, 85 N. E. 1032; *Cobb v. Preferred Mut. Acci. Asso.* 96 Ga. 818, 22 S. E. 976; *Clidero v. Scottish Acci. Ins. Co.* 29 Scot. L. R. 303, 19 *Rettie*, 355; *Re Scarr* [1905] 1 K. B. 387, 2 B. R. C. 358, 74 L. J. K. B. N. S. 237, 92 L. T. N. S. 128, 21 *Times L. R.* 173, 1 Ann. Cas. 787; *Fulton v. Metropolitan Casualty Ins. Co.* 19 Ga. App. 127, 91 S. E. 228; *Rock v. Travelers' Ins. Co.* 172 Cal. 462, L.R.A.1916E, 1196, 156 Pac. 1029.

The burden of proof is upon the plaintiff to prove payment of premium, and to introduce evidence tending to support every claim that she makes.

*Continental L. Ins. Co. v. Rogers*, 119 Ill. 474, 59 Am. Rep. 810, 10 N. E. 242; *Aronson v. Frankfort Acci. & Plate Glass Ins. Co.* 9 Cal. App. 473, 99 Pac. 537; *Lee v. Prudential L. Ins. Co.* 203 Mass. 299, 89 N. E. 529, 17 Ann. Cas. 236; *Wheeler v. United States Casualty Co.* 71 N. J. L. 396, 59 Atl. 347; *Life Ins. Co. v. Proctor*, 18 Ga. App. 517, 89 S. E. 1088; *Nyman v. Manufacturer's & M. Life Asso.* 182 Ill. App. 511.

*Messrs. Cobb & Cobb and E. L. Harris*, for plaintiff:

The sunstroke of which insured died occurred in all results or effects, of all means or causes that were, by the said contract of the parties, meant to be insured against.

*Bryant v. Continental Casualty Co.* 107 Tex. 582, L.R.A.1916E, 945, 182 S. W. 673, Ann. Cas. 1918A, 517; *Pack v. Prudential*

*Casualty Co.* 170 Ky. 47, L.R.A.1916E, 952, 185 S. W. 496; *Gallagher v. Fidelity & C. Co.* 163 App. Div. 556, 148 N. Y. Supp. 1016; *Continental Casualty Co. v. Johnson*, 74 Kan. 129, 6 L.R.A.(N.S.) 609, 118 Am. St. Rep. 308, 85 Pac. 545, 10 Ann. Cas. 851; *Mather v. London Guarantee & Acci. Co.* 125 Minn. 186, 145 N. W. 963.

**West, C.,** filed the following opinion:

This was a suit instituted in the district court of Seminole county on July 14, 1914, by defendant in error, plaintiff below, against plaintiff in error, defendant below, to recover on an accident insurance contract issued by plaintiff in error to Hartley M. Clark, in his lifetime, naming the defendant in error as beneficiary. The parties hereinafter will be referred to as they appeared in the court below.

On the 16th day of February, 1916, cause was tried to a jury: after the evidence of plaintiff had been introduced, defendant demurred to the evidence, the same was overruled, defendant refused to offer any testimony, and thereupon the court instructed the jury to return a verdict in favor of plaintiff for \$2,500. Both parties filed motion for new trial, and, upon consideration of the motion for new trial by plaintiff, the court increased the judgment from \$2,500 to \$3,000. To review this action of the court, the defendant has perfected its appeal. The plaintiff has perfected a cross appeal, complaining of the amount of the judgment.

The evidence adduced by plaintiff tended to show that Hartley M. Clark, the deceased, was a healthy person, and had been a resident of Seminole county about seven years; that on July 19, 1914, in company with George Killigsworth, the deceased drove to the country, a distance of about 6 miles, it being very dry, warm, and dusty, and on the completion of the journey, or about the time of returning home, suffered a sunstroke, from which he died a few days later; and that proof of loss had been made as provided in the policy.

The only question to be determined by the appeal presented by the defendant is the construction of paragraph 4 of said insurance contract, and whether or not, under the evidence adduced by plaintiff, the defendant is liable thereunder. Paragraph 4 of said contract is as follows: "If sunstroke, freezing or hydrophobia, due in either case to external, violent, and accidental means, shall result, independently of all other causes, in the death of the insured within ninety days from date of exposure or infection, the company will pay



said principal sum as indemnity for loss of life."

"Sunstroke" is defined by the New International Encyclopædia as follows: "The effect produced upon the body by exposure to intense heat, whether from the sun, from furnaces, or from the atmosphere."

The Universal Cyclopædia furnished this definition: "Fever due to excessive heat, but most commonly to exposure to the direct heat of the sun; indirect solar heat or artificial heat may have the same effect."

Billing's National Dictionary: "A popular term for insolation or heat stroke."

Gould's New Medical Dictionary gives the following definition: "A condition resulting from exposure to the heat of the sun, or to heat from other sources."

A number of other medical dictionaries give practically the same definition.

An "accident" is defined as follows: "An event that takes place without one's expectation."

"An undesigned, sudden, and unexpected event."

"An event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore unexpected."

It will be noted that sunstroke, freezing, and hydrophobia are treated in the same paragraph of the contract, and which provides that when either is suffered, due to external, violent, and accidental means, which result, independent of all other causes, in the death of the insured within ninety days from the date of the exposure or infection, the company will pay said principal sum as indemnity for the death or loss of life; and, when considered together and in the light of their connection with each other, it seems to us that the same conditions surrounding either of the injuries above referred to, in this clause of the contract fixing liability on the company, should be the same. It is easy to understand that hydrophobia, which is due generally to a bite of an animal, would be suffered by accidental means, unless the insured should intentionally subject himself to the bite of an animal suffering from hydrophobia. It is equally clear that freezing would be considered to be due to accidental means, should the insured suffer death by freezing in any manner, save and except when he subjected himself to a condition of the weather or climate which would necessarily convey, to a man of ordinary intelligence, [probability of] death by such action.

"Accidental means," as used in the policy, as we understand it, denoted "accidental cause." "Means" and "cause" could be and were intended to be interchangeably used

in this policy, so that, if the sunstroke was suffered while the insured was engaged in his usual avocation or going about his affairs in an ordinary manner, as any other person might have been under like or similar circumstances, and did not intentionally and voluntarily subject himself to an intense heat, calculated to produce sunstroke, with the knowledge that it would probably occur, then we could say that the sunstroke was suffered from accidental means or accidental cause; that is to say, that "sunstroke," as used in the policy and as understood by the insured, was treated in the nature more of an accident than as a disease. While the decisions generally, with a few exceptions, hold that sunstroke is a disease, it is not regarded as a disease in the popular mind. In the common understanding of the insuring public, it is accounted a kind of violent personal injury, from the very idea of sudden and external force carried by the word. If classed by medical authorities as technically a disease, to none but an expert medical mind would the provisions of this policy have carried this significance. Particularly is this true, when read in connection with the other two causes, freezing and hydrophobia, provided for in the same clause of the contract.

We have read some few cases treating upon this subject, none of which to our mind clearly clarify the situation presented by this appeal.

In the case of Continental Casualty Co. v. Johnson, decided June 9, 1906, by the supreme court of Kansas 74 Kan. 129, 6 L.R.A.(N.S.) 609, 118 Am. St. Rep. 308, 85 Pac. 545, 10 Ann. Cas. 851, the plaintiff in error in that case being the same as in this, this clause was under consideration: "The loss of . . . time as above provided, due solely to . . . sunstroke or freezing due solely to necessary exposure while engaged in his occupation, shall be deemed to be due to external, violent and purely accidental causes, and shall entitle the insured to full benefits according to the terms of this policy."

The only question in the Kansas case was as to whether or not any other heat force, other than that of the direct rays of the sun, was covered by the provisions of the policy above referred to, the insured in that case having suffered injury from excessive heat force emanating from a furnace. The second paragraph of the syllabus is as follows: "In an action upon an accident insurance policy, containing a provision that loss of time due to sunstroke should be deemed to be due to external, violent, and purely accidental causes, and should entitle the insured to full benefits according to the

terms of the policy, where the plaintiff's claim is based upon a loss which he alleged was due to sunstroke, he is not precluded from recovery by the fact that his disability was occasioned by exposure to the heat of a furnace, not to that of the sun."

In case of *Bryant v. Continental Casualty Co.* 107 Tex. 582, L.R.A.1916E, 945, 182 S. W. 673, Ann. Cas. 1918A, 517, the second paragraph of the syllabus is as follows: "In such case the term 'means' in the phrase 'due to accidental means,' is used in the sense of 'cause,' and the insurer is liable for the death of the insured, caused by exposure to the sun and humid atmosphere on a hot day, while pursuing his usual vocation in an ordinary way."

In the body of the opinion the court uses the following language: "If sunstroke is a disease, as the casualty company here contends, that is, a kind of brain fever, and was so dealt with in the present policy, its contraction, as we may in this connection call it, from exposure to excessive heat, its accepted inducing cause, must be regarded as proceeding from a purely natural cause, just as the contraction of malaria from subjection to the conditions which produce that form of disease is recognized as due to a natural cause. Regarded as a disease, and as thus naturally produced, there is no element of bodily injury about it, any more so than there is in the ordinary disease of malaria. Neither, in this view, would sunstroke be any more than proper subject of risk in an accident policy than would malaria; nor would the proper basis of liability under such a policy be any more furnished by death resulting from it than by death from malaria."

"The history of accident insurance, as found in the many judicial decisions upon the subject, reveals the constant denial by accident companies of any liability under the ordinary form of policy, for disease, though accidentally effected, unless proximately caused by a bodily injury, and their constant maintenance of the proposition that any other theory of their liability is opposed to the general scheme of accident insurance. This position, generally, has been sustained by the courts; close questions having at times arisen as to whether the given physical condition was to be properly deemed a bodily injury. Not only, therefore, is insurance against disease, as such, not within the general scope of accident insurance, but equally disease effected by accident is not within its theory, as its interpretation by accident companies is disclosed in the decisions, unless there is distinctly present the element of bodily injury."

"Under the contention of the casualty

company, the sunstroke provision of its policy is a plain contradiction of this essential principle of the character of insurance it is intended to provide. It is a repudiation of the general insuring clause of the policy, as expressing the kind of risk which the policy covers, the risk of 'personal bodily injury . . . effected by external, violent, and accidental means.' Accepting the company's construction of the policy, it is in the position, in the first place, of making a disease, rather than a bodily injury, the subject of an accident risk, and further, a disease, the accidental causing of which in the way it says is necessary in order for it to be accidentally effected, would present no element whatever of bodily injury, with the accident, in truth, not directly causing the disease, but, at most, only producing a condition favorable for its being incurred."

"Hydrophobia is a disease. But its common cause is the bite of an animal, a bodily injury; and its inclusion in the policy is therefore to be logically accounted for. It is generally thought of as a kind of casualty. But why was sunstroke here made the subject of accident insurance, in which the nature of the risk is some form of bodily injury, if, in the construction of the policy, it is to be considered as a disease, and is hence without any element of bodily injury in its cause? It was, in our opinion, expressly designated as a risk, not as a disease, but for the purpose of avoiding the effect of those decisions which have held it to be a disease,—in adoption of its popular conception as a species of personal injury, capable of accidental occurrence, and therefore properly a subject of this kind of insurance."

The evidence in this case discloses that the deceased was not engaged in any unusual, extraordinary undertaking, or any violent or extraordinary physical exertion, upon the day he suffered the sunstroke from which he died. He was merely going about his affairs in an ordinary manner, engaged upon this day as any other person might have been, under like circumstances."

There was no external, violent, and accidental cause which contributed to the sunstroke suffered, in the sense as contended by plaintiff in error. As, for instance, if the deceased had gone out in a top buggy on the day in question, and accidentally run against a limb and knocked the top off, and, by reason of this more direct exposure to the sun's rays than was contemplated by him upon the beginning of his journey, this would have been an accidental means which contributed to the accidental result; or, if he had had a runaway and been compelled

to walk in the hot sun for a long distance, that would, as they contend, have been an accidental means, which resulted in or contributed to an accidental result, or, if he had had a runaway and suffered an injury from which he had been compelled to lie in the sun, and thereby suffered the sunstroke, then that would be an accidental means which produced the accidental result; or any other unforeseen accident, which increased the liability of the deceased to suffer sunstroke, not contemplated by him upon the beginning of his journey, then it is admitted that the company would have been liable.

We do not concur in this view. In the first place, when you consider sunstroke in connection with freezing and hydrophobia, as stipulated in the contract, and the further fact that sunstroke is an accident, that is, "it is an event that takes place without one's foresight or expectation;" "an undesigned and unexpected event;" "an event which proceeds from an unknown cause or an unusual effect of a known cause, and therefore unexpected"—was it not covered by the contract? Insurance contracts should be construed, where there is doubt as to their exact meaning, against the insurer and in favor of the insured. These contracts are the contracts of insurance companies, and are drawn with a great deal of care, and always in light of the various judicial constructions placed upon them; they are often changed, as appears to have been done by the plaintiff in error in this case, as will be noted by a comparison of the contract before us, and the one in the Kansas case hereinbefore referred to. They are drawn to invite the most favorable consideration of the insuring public, with as little liability as possible. And, as was said, the provisions generally of insurance contracts are so drawn as "to make promise to our ear and break it to our hope."

In view of the mechanical construction of paragraph 4 of the contract in question, in placing sunstroke, freezing, and hydrophobia in the same paragraph, and providing that, in case of death caused by either, due to external, violent, and accidental means, the company would pay the principal sum as indemnity for loss of life, it being so very apparent that, if deceased had lost his life by freezing in such a way that death from said cause was without insured's expectations or was undesigned by him, or was an unusual happening from a known cause, the liability of the company would have been fixed and established, and this would have been true had deceased lost his life by hydrophobia, then why not when death resulted from sunstroke? Was not

the sunstroke suffered by the deceased an event that took place without his expectation, undesigned and unexpected? Is not this the reasonable construction to place on this contract, in the light of its context? If not, why was it placed in the same paragraph with the other two diseases or injuries, whichever you are pleased to call them, requiring this particular construction? To place any other construction upon this feature of the liability assumed by the company would practically read it out of the contract; and we therefore hold that, inasmuch as the evidence tended to show that the deceased, on the day in question, was going about his affairs in an ordinary manner, was engaged in no unusual or unnecessary exposure, and the sunstroke was without the expectation of the insured, was undesigned by him, and was an unusual happening, the same was suffered by "external, violent, and accidental means," within the meaning of the policy; and we accordingly hold that the defendant was liable upon this contract, under the evidence adduced at the trial.

Upon the cross appeal of the plaintiff, the only question to be determined is the amount of the recovery, and, in order to determine the same, it will be necessary to notice the evidence in connection with the following clause of the contract: "Each consecutive full year which this policy shall be carried without default in payment of premium therefor shall add 10 per cent to the indemnities payable under part II., but the total of such additions shall not exceed 50 per cent."

That is, it was provided in the contract that, each consecutive full year which said contract was carried without default in payment of premium, there should be added 10 per cent to the indemnity payable; in other words, the face of the policy, which was originally \$2,500, would be increased \$250 each year that the premium was paid without default, until the same should be increased 50 per cent or to the amount of \$3,750.

It is a general proposition of law that a condition precedent to plaintiff's right to recover, or determining the amount which he may recover, must be pleaded and proven, in order to make out his case; while a condition subsequent is generally a matter of defense, and plaintiff is not required to allege and prove same. In other words, as we understand it, it was a condition precedent, in order for the policy to be increased \$250 a year, that the premium should be paid without default.

A condition precedent in a contract is an act to be performed by one party before the

accruing of a liability of the other party, and it must be pleaded and proved. Chitty, Contr. 11th Am. ed. 1083.

"A condition which must be performed before the agreement of the parties becomes a valid and binding contract is a condition precedent, and must be alleged in the declaration or complaint, and performance thereof proved by the plaintiff, or he cannot recover on the contract. This rule is elementary. The reason of the rule is that performance of the condition is a constituent and indispensable part of the right of action. The condition being unperformed, there is not, and never was, any cause of action." Gould, Pleading, c. "f," § 13.

"A condition precedent calls for the performance of some act or the happening of some event after the terms of the contract have been agreed upon, before the contract shall take effect; that is to say, the contract is made in form, but does not become operative as a contract, until some future, specified act is performed, or some subsequent event occurs. Hence it is said: 'A condition precedent doth get and gain the thing or estate made upon condition by the performance of it, as a condition subsequent keeps and continues the estate by the performance of the condition.'" Jacob's Law Dict. "Condition."

In other words, this clause of the contract being for the benefit of the insured, and inuring to him only upon condition that he perform certain acts, as specified in the contract, the burden was naturally

upon plaintiff to show by the evidence that the premiums had been paid without default. She did introduce evidence to show that the last two years the premiums were paid when due, without default; but as to whether or not the premiums for the first three years were paid when they became due was not apparent.

It is our opinion that, in order to recover under this clause of the policy, any additional benefits, it was incumbent upon the plaintiff to show that the premiums had been paid promptly, without default, and, in the absence of such proof, the plaintiff could not recover this additional indemnity for the three years that the evidence failed to show that the premiums had been paid without default.

Inasmuch as the court rendered judgment for the two years in which the evidence showed there was no default in the payment of the premiums, we accordingly hold that the court committed no error in refusing to enter judgment for the additional indemnity for the three years that the evidence of plaintiff failed to show the premiums were paid without default.

Finding no error, judgment of the lower court is in all things affirmed.

**Per Curiam:**

Adopted in whole.

Petition for rehearing denied, June 25, 1918.

#### WASHINGTON SUPREME COURT. (Department No. 2.)

STATE OF WASHINGTON EX REL. NICK  
CONSTANTI

v.

LESTER H. DARWIN as State Fish Commissioner.

(— Wash. —, 173 Pac. 29.)

#### War — rights of alien enemies.

1. A resident citizen of Austria-Hungary whose business is fishing in the public waters of a state is entitled to a license to pursue such business as authorized by the state of his residence, under the proclamation of December 11, 1917, that so long as citizens of that government shall conduct themselves in accordance with law they shall be undisturbed in the peaceful prosecution of their lives and occupations.

For other cases, see *War*, in *Dig. 1-52 N. S.*

Note. — The rights of alien enemies as litigants are fully discussed in a note in L.R.A.1918B, 189, and its continuation in L.R.A.1918E, 801.

L.R.A.1918F.

#### Mandamus — right of alien enemy.

2. A resident alien enemy who, under the law, has a right to a license to pursue his usual occupation, may maintain a proceeding for writ of mandamus to compel its issuance.

For other cases, see *War*, in *Dig. 1-52 N. S.*

(Mackintosh, J., dissents.)

(May 10, 1918.)

**A**PPPLICATION for a writ of mandate to require respondent to issue a purse seine fishing license. Writ to issue.

The facts are stated in the opinion.

Mr. Clinton W. Howard, for relator:

In the absence of legislative action or executive proclamation, the modern common law rule is that resident subjects of alien countries who are permitted to enter and remain under license, express or implied, and who are neither by legislative act nor executive proclamation, either individually or as a class, expressly designated

as alien enemies, are in fact regarded as neutral or alien friends, and may pursue their usual occupations and maintain actions in the courts of the country.

Porter v. Freudenberg [1915] 1 K. B. 557, 5 B. R. C. 548, [1915] W. N. 43, 84 L. J. K. B. N. S. 1001, 112 L. T. N. S. 313, 31 Times L. R. 162, 59 Sol. Jo. 216, 20 Com. Cas. 189, Ann. Cas. 1917C, 215; Clarke v. Morey, 10 Johns. 69.

The status of resident subjects, as fixed by acts of Congress and proclamations, determines the limitations and the rights and privileges of such subjects, and also the course of conduct to be pursued toward them by the United States, the several states, and the citizens thereof.

Hamilton v. Dillin, 21 Wall. 73, 87, 88, 22 L. ed. 528, 530, 531; Ex parte Graber, 247 Fed. 882; Lockington v. Smith, Pet. C. C. 466, Fed. Cas. No. 8,448; Posselt v. D'Espard, 87 N. J. Eq. 571, 100 Atl. 893; Viola v. Mackenzie, M. & Co. Rap. Jud. Quebec, 24 B. R. 31, 24 D. L. R. 208; Topay v. Crow's Nest Pass Coal Co. 29 West. L. R. (Can.) 555, 18 D. L. R. 784; Fritz Schultz, Jr. Co. v. Raimes & Co. 99 Misc. 626, 164 N. Y. Supp. 454; Arndt-Ober v. Metropolitan Opera Co. 102 Misc. 320, 169 N. Y. Supp. 304; Speidel v. N. Barstow Co. 243 Fed. 621.

Even those persons or class of persons defined as enemies or as allies of enemies may be specially licensed by the President, and may sue in the courts so far as the subject of the action arises solely out of the business transacted within the United States under the license, and so long as the license remains in force.

Keppelman v. Keppelman, — N. J. Eq. —, 103 Atl. 27.

There is certainly no Federal or state policy to be subserved in limiting the food supply by preventing fishing, and the Food Act of August 10, 1917, is in letter and spirit entirely to the contrary.

The Habana, 175 U. S. 677, 686, 44 L. ed. 320, 323, 20 Sup. Ct. Rep. 290.

The decision of the Federal authorities that loyal resident subjects of Austria-Hungary are qualified and that a necessity exists for their engaging in the fishing business, are findings of fact that cannot be reviewed by the courts.

Ex parte Graber, 247 Fed. 882.

Messrs. W. V. Tanner, Attorney General, and Glen J. Fairbrook for respondent.

Mount, J., delivered the opinion of the court:

This is an application for a writ of mandate to require the fish commissioner of this state to issue to the relator a purse

seine fishing license for the Puget Sound district for the current year.

The facts are conceded as follows: The relator is a native of Austria-Hungary. He came to the United States in May, 1913, and since June of that year has been an actual resident of this state. On the 29th day of December, 1913, he regularly, and in the manner required by law, declared his intention to become a citizen of the United States. Since the year 1914, and during the years 1915, 1916, and 1917, his regular occupation has been that of a salt water fisherman, working on fishing appliances in the Puget Sound district under fishing licenses issued by the respondent. He owns property in the city of Tacoma, is a married man, forty-five years of age, having four children, two of whom were born in Austria-Hungary, and the two youngest were born in this state. On April 15, 1918, upon application therefor to the United States Food Administration, a fisherman's license was issued to the relator by that administration, authorizing the relator to engage in the business of catching and distributing salt water fish. On the 29th day of April, 1918, the relator applied to the respondent, who is the duly qualified and acting fish commissioner of this state, for a purse seine fishing license for the district of Puget Sound, and tendered the amount required by law to be paid therefor. The application was denied for the reason that the applicant was not a naturalized citizen of the United States, but a citizen of Austria-Hungary, with which country the United States are at war.

This application is resisted by the attorney general, upon behalf of the respondent, upon the grounds that the relator is an alien enemy and therefore is not entitled to maintain this proceeding, and under the law is not entitled to the license from this state. The statute of this state (Rem.) Code, § 5150—43) provides that: "No license for taking or catching salmon or other food or shell fish required by this act shall be issued to any person who is not a citizen of the United States of the age of eighteen years or over, unless such person has declared his intention to become a citizen, and is and has been an actual resident of the state for one year immediately preceding the application for such license. . . ."

It is plain under this provision of the statute that the relator, being an actual resident of the state for more than one year prior to the application, and having declared his intention to become a citizen of the United States, is entitled to the license he seeks unless the fact that this country is at war with Austria-Hungary

impels the suspension of the statute in so far as applicants are not citizens of the United States. On December 7, 1917, the Congress of the United States passed a resolution that a state of war is declared to exist between the United States of America and the imperial and royal Austro-Hungarian government. Thereafter, on December 11, 1917, the President, in pursuance of that resolution and in pursuance of §§ 4067-4070, of the Revised Statutes of the United States, Comp. Stat. 1916, §§ 7615-7618, relative to natives, citizens, denizens, or subjects of a hostile nation or government, issued a proclamation as follows:

"Now, therefore, I, Woodrow Wilson, President of the United States of America, do hereby proclaim to all whom it may concern, that a state of war exists between the United States and the imperial and royal Austro-Hungarian government; . . .

"And, acting under and by virtue of the authority vested in me by the Constitution of the United States and the aforesaid sections of the Revised Statutes, I do hereby further proclaim and direct that the conduct to be observed on the part of the United States towards all natives, citizens, denizens, or subjects of Austria-Hungary, being males of the age of fourteen years and upwards, who shall be within the United States and not actually naturalized, shall be as follows:

"All natives, citizens, denizens, or subjects of Austria-Hungary, being males of fourteen years and upwards, who shall be within the United States and not actually naturalized, are enjoined to preserve the peace towards the United States and to refrain from crime against the public safety, and from violating the laws of the United States and of the states and territories thereof, and to refrain from actual hostility or giving information, aid, or comfort to the enemies of the United States, and to comply strictly with the regulations which are hereby or which may be from time to time promulgated by the President; and so long as they shall conduct themselves in accordance with law, they shall be undisturbed in the peaceful pursuit of their lives and occupations, and be accorded the consideration due to all peaceful and law-abiding persons, except so far as restrictions may be necessary for their own protection and for the safety of the United States; and towards such of said persons as conduct themselves in accordance with law, all citizens of the United States are enjoined to preserve the peace and to treat them with all such friendliness as may be compatible with loyalty and allegiance to the United States.

"And all natives, citizens, denizens or

subjects of Austria-Hungary, being males of the age of fourteen years and upwards, who shall be within the United States and not actually naturalized, who fail to conduct themselves as so enjoined, in addition to all other penalties prescribed by law, shall be liable to restraint, or to give security, or to remove and depart from the United States in the manner prescribed by §§ 4069, and 4070, of the Revised Statutes, and as prescribed in regulations duly promulgated by the President;

"And pursuant to the authority vested in me, I hereby declare and establish the following regulations, which I find necessary in the premises and for the public safety:

"(1) No native, citizen, denizen, or subject of Austria-Hungary being a male of the age of fourteen years and upwards and not actually naturalized, shall depart from the United States until he shall have received such permit as the President shall prescribe, or except under order of a court, judge or justice, under §§ 4069 and 4070 of the Revised Statutes;

"(2) No such person shall land in or enter the United States, except under such restrictions and at such places as the President may prescribe;

"(3) Every such person of whom there may be reasonable cause to believe that he is aiding or about to aid the enemy, or who may be at large to the danger of the public peace or safety, or who violates or attempts to violate, or of whom there is reasonable ground to believe that he is about to violate, any regulation duly promulgated by the President, or any criminal law of the United States, or of the states or territories thereof, will be subject to summary arrest by the United States marshal, or his deputy, or such other officer as the President shall designate, and to confinement in such penitentiary, prison, jail, military camp or other place of detention as may be directed by the President.

"This proclamation and the regulations herein contained shall extend and apply to all land and water, continental or insular, in any way within the jurisdiction of the United States."

On the next day after this proclamation was issued, the Attorney General of the United States, referring to it, said: "This proclamation differs from the preceding proclamation relating to the subjects of the German Empire in that, while it authorizes the arrest and internment of any subjects of the dual Empire whose conduct may be a menace to the safety of the country, the only restrictions which it contains are prohibitions against either entering or leaving the United States without

first obtaining permission. Many subjects of Austria-Hungary have already demonstrated their strong loyalty to this country by their faithfulness in industrial work, their organization of recruiting committees, and in service with our armies. For the present, therefore, no restrictions will be placed upon the movements of subjects of Austria-Hungary. They are not subject to the restrictions of the previous proclamations relating to German enemy aliens; they will be permitted to reside and labor in prohibited areas and to travel freely without molestation. Only those who are dangerous or disloyal are subject to arrest."

It seems plain, under this proclamation, that, though the relator may be an alien enemy because he has not been naturalized, yet there is nothing in this proclamation which treats a native of Austria-Hungary as an alien dangerous to the peace and safety of the country. The proclamation declares, with reference to such persons, that: "so long as they shall conduct themselves in accordance with law, they shall be undisturbed in the peaceful pursuit of their lives and occupations and be accorded the consideration due to all peaceful and law-abiding persons. . . .

And that: "All citizens of the United States are enjoined to preserve the peace and to treat them with all such friendliness as may be compatible with loyalty and allegiance to the United States."

So, it is apparent that this proclamation recognizes such persons as friendly aliens, and not as alien enemies. That the legislature may prohibit any but citizens of this state and of the United States from receiving a fishing license within the state admits of no doubt. It has not done so. That the Federal government may establish the status of a subject of an enemy country residing within the United States also admits of no doubt. It has done so by authorizing the proclamation above quoted. That the Federal government, or the President of the United States under authority of Congress, may nullify the statute with reference to permitting privileges to aliens who have declared their intention to become citizens of the United States, admits of no doubt. In our opinion, this has not been done. But before the terms of the statute may be nullified or suspended by Congress, or by the President acting under authority of Congress, the intention to do so must be clear. We think such intention is not clear. On the other hand, it seems entirely clear that the proclamation of the President relating to natives of Austria-Hungary, quoted above, intended to preserve the rights of

such persons in this country to follow their peaceful pursuits and occupations, and to accord them the consideration due to all peaceful and law-abiding persons under the law of their domicil. As confirming this position, the Food Administration, acting under authority of Congress, has issued to this relator, knowing his nationality and his status, a license "to engage in the business of catching and distributing salt water fish, shellfish, and crustaceans."

The respondent argues that it was the intention of the legislature, in enacting § 5150—43, Rem. Code, above quoted, to confine the right of fishing in this state to citizens, or to those entitled to become citizens; and that, since § 2171, U. S. Rev. Stat., § 4362, Comp. Stat. 1916, provides: "No alien who is a native citizen or subject, or a denizen of any country, state, or sovereignty with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States," —the relator is not entitled to become a citizen of the United States, and for that reason the respondent was justified in refusing to issue the license. It is true relator is not now entitled to be admitted to citizenship. He declared his intention to become a citizen in December, 1913. The time of residence does not expire until December, 1918. He will then have two years in which to make his final proof and become a naturalized citizen. So, it is apparent that the relator may not at this time become a citizen. In due time he may, or he may not, as future events develop. We think this point is entirely immaterial, because the statute says a person who has declared his intention to become a citizen and has been a resident of the state for one year immediately preceding his application shall be entitled to such license. The legislature meant what it said in that respect. It made no exceptions; and since the statute has not been suspended or nullified by higher authority it is still in force and must be followed.

We think it clear that the relator is entitled to prosecute this action for the writ. If such persons shall be undisturbed in the peaceful pursuit of their lives and occupations, and be accorded the consideration due all peaceful and law-abiding persons, we think it follows that they are authorized to maintain actions to secure to themselves their lawful occupations. *Fritz Schultz, Jr. Co. v. Raimes & Co.* 99 Misc. 626, 164 N. Y. Supp. 454; *id.* 100 Misc. 697, 166 N. Y. Supp. 567; *Speidel v. N. Barstow Co.* (D. C.) 243 Fed. 621; *Porter v. Freu-*

denberg [1915] 1 K. B. 857, 5 B. R. C. 548, [1915] W. N. 43, 84 L. J. K. B. N. S. 1001, 112 L. T. N. S. 313, 31 Times L. R. 162, 59 Sol. Jo. 216, 20 Com. Cas. 189, Ann. Cas. 1917C, 215.

We are of the opinion, therefore, that the relator is entitled to the license and is authorized to maintain the action.

The writ will therefore issue as prayed for.

Ellis, Ch. J., and Fullerton and Parker, JJ., concur.

Mackintosh, J., dissenting:

The relator, being a subject of a country with which we are at war, cannot resort to our courts. As I read it, the President's proclamation does no more than preserve to the subjects of Austria-Hungary the privilege of peaceful life and work in this country, and does not attempt to abrogate the rule of law which closes our courts to them during war time. I therefore dissent.

Petition for rehearing denied June 19, 1918.

#### OKLAHOMA SUPREME COURT.

PRODUCERS' NATIONAL BANK et al.,  
Pliffs. in Err.,  
v.  
GEORGE A. ELROD.

(— Okla. —, 173 Pac. 659.)

#### Bills and notes — extraneous agreement — knowledge — effect.

Where the consideration for a negotiable promissory note is an executory contract to deliver certificates of stock in a corporation then being organized, knowledge of the transaction by the purchaser of such note in due course, before maturity, for value, will not prevent a recovery by him, in case of a subsequent breach of the agreement by reason of failure and inability to deliver the certificate of stock.

For other cases, see *Bills and Notes*, V. b, 2, in Dig. 1-52 N. S.

(June 11, 1918.)

**E**RROR to the District Court for Nowata County to review a judgment in favor of defendant, and overruling a motion for new trial, in an action brought to recover the amount alleged to be due on a promissory note. Reversed.

The facts are stated in the opinion.

Messrs. Glass & Weaver, for plaintiffs in error:

The mere failure to issue a certificate does not release the subscriber, and is no defense to an action on his subscription.

1 Thomp. Corp. 2d ed. § 774; Butler University v. Scoonover, 114 Ind. 381, 5 Am. St. Rep. 627, 16 N. E. 642; Kohlmetz v. Calkins, 16 App. Div. 518, 44 N. Y. Supp. 1031; San Joaquin Land & W. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349; Webb v. Bal-

Headnote by MILEY, J.

**Note.** — For failure of executory consideration for bill or note as affecting purchaser with knowledge of the character of the consideration, see annotation following this case, post, 1018.

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timore & E. S. R. Co. 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113; Columbia Electric Co. v. Dixon, 46 Minn. 463, 49 N. W. 244; Nebraska Exposition Asso. v. Townley, 46 Neb. 893, 65 N. W. 1062; Burr v. Wilcox, 22 N. Y. 551; Astoria & S. C. R. Co. v. Hill, 20 Or. 177, 25 Pac. 379; Glenn v. Rosborough, 48 S. C. 272, 26 S. E. 611; Paducah & M. R. Co. v. Parks, 86 Tenn. 554, 8 S. W. 842; Dallas Cotton & Woolen Co. v. Clancey, 4 Tex. App. Civ. Cas. (Willson) 293, 15 S. W. 194; 1 Cook, Corp. 6th ed. § 138; Gast v. King, 27 Okla. 554, 112 Pac. 907; Huster v. Newkirk Creamery & Ice Co. 42 Okla. 440; Woodruff v. Webb, 32 Ark. 612; Rudolph v. Brewer, 96 Ala. 189, 11 So. 314; Trigg v. Saxton, — Tenn. —, 37 S. W. 567; State Nat. Bank v. Cason, 39 La. Ann. 865, 2 So. 881; Saddle v. White, 14 La. Ann. 173.

Messrs. Schwabe & Raymond, for defendant in error:

Defendant had a good defense against the note in the hands of the payee tube company.

1 Thomp. Corp. 2d ed. §§ 775, 776; Clark v. Continental Improv. Co. 57 Ind. 135; St. Paul, S. & T. F. R. Co. v. Robbins, 23 Minn. 439; Pope v. Lake County, 51 Fed. 769; Potts v. Wallace, 32 Fed. 272; McCord v. Ohio & M. R. Co. 13 Ind. 220; Burrows v. Smith, 10 N. Y. 550; Knoxville, C. G. & L. R. Co. v. Knoxville, 98 Tenn. 1, 37 S. W. 883; Level Land Co. v. Hayward, 95 Wis. 109, 69 N. W. 567; Lathrop v. Kneeland, 46 Barb. 432.

Plaintiff bank took the note, subject to all defenses.

Lilly v. Hamilton Bank, 29 L.R.A. (N.S.) 558, 102 C. C. A. 1, 178 Fed. 53; First Nat. Bank v. Burns, 88 Ohio St. 434, 49 L.R.A. (N.S.) 764; Brookhouse v. Union Pub. Co. 73 N. H. 368, 2 L.R.A. (N.S.) 993, 111 Am. St. Rep. 623, 62 Atl. 219, 6 Ann. Cas. 679; National Security Bank v. Cushman, 121 Mass. 490; Morris v. Georgia Loan Sav. & Bkg. Co. 109 Ga. 12, 46 L.R.A. 506, 34 S. E. 378; Anderson v.



Kinley, 90 Iowa, 554, 58 N. W. 909; Black Hills Nat. Bank v. Kellogg, 4 S. D. 312, 56 N. W. 1071; Barksdale v. Finney, 14 Gratt. 338, 14 Mor. Min. Rep. 541; Lea v. Iron Belt Mercantile Co. 147 Ala. 421, 8 L.R.A.(N.S.) 279, 119 Am. St. Rep. 93, 42 So. 415; First Nat. Bank v. Blake, 60 Fed. 78; Oak Grove & S. V. Cattle Co. v. Foster, 7 N. M. 650, 41 Pac. 522; Lowndes v. City Nat. Bank, 82 Conn. 8, 22 L.R.A. (N.S.) 408, 72 Atl. 150; Niblack v. Cosler, 26 C. C. A. 16, 47 U. S. App. 637, 80 Fed. 596; Farmers' Bank v. Saling, 33 Or. 394, 54 Pac. 190; Wilson v. Pauly, 18 C. C. A. 475, 37 U. S. App. 642, 72 Fed. 129; City Nat. Bank v. Martin, 70 Tex. 643, 8 Am. St. Rep. 632, 8 S. W. 507; Cook v. American Tubing & Webbing Co. 28 R. I. 41, 9 L.R.A. (N.S.) 193, 65 Atl. 641; Ditty v. Dominion Nat. Bank, 22 C. C. A. 376, 43 U. S. App. 613, 75 Fed. 769; Johnston Fife Hat Co. v. National Bank, 4 Okla. 17, 44 Pac. 192; Selma Sav. Bank v. Harlan, 167 Iowa, 673, 149 N. W. 882; First Nat. Bank v. New Milford, 36 Conn. 93; 5 Cyc. 464; Antrim Lumber Co. v. Oklahoma State Bank, — Okla. —, L.R.A.1918A, 528, 162 Pac. 723.

Miley, J., delivered the opinion of the court:

This action was commenced by plaintiffs in error as plaintiffs below, to recover of defendant in error, defendant below, the amount due upon a certain negotiable promissory note executed and delivered by defendant to the Perfection Tube Sales Company, and by it indorsed and delivered to plaintiff bank for value, before maturity. Defendant denied that the bank became the holder of the note sued on for value, and in due course of business, before the maturity thereof, and further alleged: "That said note just referred to was executed by defendant and delivered to F. B. Reynolds and A. J. Reynolds, cashier and assistant cashier, respectively, of the Producers' National Bank, one of the plaintiffs herein upon the express condition, promise, and agreement that said note was not to become effective, and was not to become a binding obligation on the part of the defendant, until the delivery to the said F. B. Reynolds and A. J. Reynolds, as officers and agents of said Perfection Tube Sales Company, of certificates of stock in said Perfection Tube Sales Company, in the amount and of the value of \$1,000; that said certificates of shares for which said note was executed by defendant were never delivered to defendant, and defendant has never received any consideration whatever for the execution of said note."

There was trial by a jury, verdict for defendant, and judgment thereon. Motion

for new trial being overruled, plaintiff has appealed. Of the numerous assignments of error it is necessary to consider only one. We think the motion of plaintiffs for a peremptory instruction should have been sustained. The execution and delivery of the note was admitted. It was indorsed and delivered by the payee to the bank the day following its execution, long before maturity, the bank paying full value therefor. The note was given by the maker in payment for a subscription in the amount of the principal to the capital stock of the payee, then being organized. F. B. Reynolds and A. J. Reynolds, the cashier and assistant cashier, respectively, of the bank, were also agents of the tube company, and solicited the subscription and received the note. The certificate for the shares of stock, though demanded, was never delivered, and at the time of trial the company was insolvent. There was no evidence to support the allegation of the answer of an agreement that the note was not to become effective and a binding obligation of the defendant until the delivery of the certificate of stock. On the contrary, the evidence conclusively establishes that it was understood by both the maker and payee that it would be immediately negotiated. From the nature of the transaction, an agreement to deliver to the maker a certificate of stock will, of course, be implied. Assuming that the evidence is sufficient to defeat recovery by the payee, is it sufficient to defeat recovery by the indorsee? In considering the question, we will assume that the bank was chargeable with the knowledge of the transaction had by its cashier and assistant cashier. The knowledge which the bank thus had was that the note was given in consideration of an executory agreement of the payee to deliver certificate of stock to the maker. There had been no breach of this agreement at the time the note was negotiated, though subsequently demand was made for the certificate, which was not complied with by the payee, and it is now impossible for it to do so.

The authorities seem to be in accord on the proposition that failure of consideration after a bona fide transfer does not affect the character of the purchaser, although he had full knowledge of the original consideration for which the note was given. Wilensky v. Morrison, 122 Ga. 664, 50 S. E. 472; Black v. First Nat. Bank, 96 Md. 399, 54 Atl. 88; Jennings v. Todd, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148; Nebraska Nat. Bank v. Pennock, 55 Neb. 188, 75 N. W. 554; Davis v. McCready, 17 N. Y. 230, 72 Am. Dec. 461; McSpedon v. Troy City Bank, 2 Keyes, 35; Maas v. Chatfield, 90 N. Y. 303; United States Nat.

*Bank v. Floss*, 38 Or. 68, 84 Am. St. Rep. 752, 62 Pac. 751; *Merchants' & P. Bank v. Penland*, 101 Tenn. 445, 47 S. W. 693. The rule is thus stated in *United States Nat. Bank v. Floss*, 38 Or. 68, 84 Am. St. Rep. 752, 62 Pac. 751: "The breach of an executory contract which forms the consideration for a negotiable . . . note is not . . . a defense in whole or in part against an indorsee, who took the note for value, before maturity, even if he had notice of the contract, unless he was also informed of the breach before its purchase."

The reason upon which the rule rests is stated by Judge Denio in *Davis v. McCready*, 17 N. Y. 230, 72 Am. Dec. 461. In that case, the consideration for the acceptance of a bill of exchange was the sale of a brig, accompanied by an agreement of the vendor to make repairs necessary to render her seaworthy. The defense in an action by an indorsee of the bill was that this agreement had not been performed. The court said: "The plaintiffs were not bound to follow up the transactions between the original parties to the bill. To hold otherwise would attach an inconvenient and repugnant condition to such an acceptance. By accepting simply and unconditionally a negotiable bill, the defendants are to be held as intending to give it all the qualities of commercial paper, one of which is that it shall circulate freely for the purposes of business, and be available in the hands of any holder for value. To decide that one who proposed to purchase it, and who had a knowledge of the nature of the transaction upon which it was given, must await the consummation of that transaction, would essentially impair its character and legal effect."

In *Jennings v. Todd*, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148, the supreme court of Missouri said: "We think, however, that no well-considered case can be found in which a collateral contemporaneous agreement, providing that the note should not be paid in the event that an executory contract, which was the consideration of the note, should not be performed, has been allowed to defeat the negotiability of the note in the hands of an indorsee, though he had notice of such agreement. A great part of the improvement of the country, and of business generally, is carried on with money raised by the discount of notes given upon executory contracts and if the maker could be allowed to defend against such notes, in case of a breach of contract, on the ground that the indorsee, though in other respects bona fide, had knowledge of the transaction out of which the note grew, all confidence in such notes as negotiable paper would be destroyed, and such business would be paralyzed. By making and delivering a negotiable note, the maker is held to intend that it may be put in circulation, and that no defenses against it exist. In purchasing such note no inquiry as to the consideration is required. If a failure of consideration occurs, the maker must look to the payee for indemnity."

The judgment is accordingly reversed and the cause remanded.

Sharp, Ch. J., and Kane, Hardy, and Rainey, JJ., concur. Turner, Owen, Brett, and Tisinger, JJ., not participating.

### **Annotation—Failure of executory consideration for bill or note as affecting purchaser with knowledge of the character of the consideration.**

This note is supplementary to that published under the same title and appended to the report of the case of *Flood v. Petry*, 46 L.R.A. (N.S.) 861. It begins where the former note ended, and continues the subject by presenting the pertinent cases which have since been reported, and it has the same scope and limitations.

The principal case, *PRODUCERS' NAT. BANK v. ELROD*, ante, 1016, agrees with the cases cited in the prior note as supporters of the general principle that the failure of an executory consideration of a negotiable promissory note or bill of exchange constitutes no defense against

a purchaser of the paper before its maturity, who paid value, but had knowledge of the character of the consideration, without any notice that it had failed.

Another case in harmony was that of *Forster v. Enid, O. & W. R. Co.* (1915) — *Tex. Civ. App.* —, 176 S. W. 788, in which a bank which bought of a railroad company for value and before maturity a negotiable promissory note was held to have been a purchaser in good faith notwithstanding it purchased the paper with knowledge that the consideration for it, which afterwards failed, was corporate stock to be issued

after it was delivered and the completion of the railroad in course of construction at the time of delivery.

Another case in accord was *Citizens' Bank & T. Co. v. Limpwright* (1916) 93 Wash. 361, 160 Pac. 1046, in which an executory agreement by the vendor of an automobile to credit the buyer, as a payment upon his promissory note for the purchase price, sixty days after date, a stated sum as the value of his used car, turned in on account, did not affect the right of the plaintiff bank to which the paper was endorsed before its maturity, for value, and before the sixty days had run, to recover from the maker. In that case the court laid down the proposition that one who takes before maturity, and for value, negotiable paper that is fair on its face, owes no duty actively to inquire concerning it of him who gave it currency, in order to avoid an imputation of bad faith. And it proceeded to say: "This court, following preponderant authority, has repeatedly held that knowledge of the indorsee of a note given in consideration of some executory contract or agreement of the payee, which the payee thereafter fails to perform, will not deprive the indorsee of his character of a bona fide holder in due course unless, prior to his taking, he had notice that the breach of the executory agreement had already occurred."

It is well to note the reasoning by which the court reached its conclusion in the case last cited above. It said: "The trial court seems to have been of the opinion that respondent was wholly without fault, and that the equities of the case were clearly with him. We cannot so read the evidence. He gave his note to Pittman without any indicia whatever that it was not to be negotiated, and without any agreement that it was not to be negotiated. If the note was not to be used, the reasonable thing, the safe thing, and the thing which would have protected all parties absolutely, was not to give it. By giving it and taking the collateral agreement he reposed confidence in Pittman personally, and in Pittman alone. To permit that agreement to defeat the note in appellant's hands, and for which it had admittedly paid value, would place all the care and caution touching negotiable paper upon the taker rather than upon the maker, thus reversing the law merchant and the Negotiable Instruments Acts, and running counter to that cardinal rule of equity that he who makes a loss possible should suffer the loss."

Except that the argument was more tersely stated, it follows closely that of the court in the Early New York case of *Davis v. McCready* (1858) 17 N. Y. 230, 72 Am. Dec. 461, affirming (1855) 4 E. D. Smith, 565, cited in the primary note on this subject.

The supreme court of Florida, in the recent case of *Sumter County State Bank v. Hays* (1914) 68 Fla. 473, 67 So. 109, took the opposite side. That case was an action upon a negotiable promissory note purchased for value and before maturity by a bank of discount from a corporate holder, brought by the bank to recover the sum due upon it, against the maker and indorsers. For defense the individual defendants pleaded that the sole consideration for such note was a subscription to the capital stock of the corporation before it was organized, delivered upon the condition, never fulfilled, that the corporation should be formed, fully equipped, and should produce a stated output within a limited time; and the plea averred that the plaintiff had actual notice of such condition, and that the consideration had totally failed. In the replication the bank did not deny knowledge of the executory contract or of the character of the consideration of the note, but it did allege that it had no notice or knowledge of any breach of the contract. A demurrer to this replication was sustained, and on the refusal of the plaintiff to plead further, judgment against the bank was rendered and affirmed.

In that case the court was of the opinion that the replication, by impliedly admitting the bank's knowledge of the executory contract and its conditions as the sole consideration for the note in suit, made the plaintiff not a holder in due course without "notice of any infirmity in the instrument or defects in the title" of the corporation which transferred it, within the purview of the pertinent statute (Fla. Gen. Stat. 1906, §§ 2962, 2985 and 2988). The decision was not rested upon authority. No case was cited to support it. The court reasoned to its conclusion, very briefly, as follows: "The replication alleges that the plaintiff purchased the note immediately after it was executed. This, of course, was before the breach of the condition of the executory contract, which contract was the sole consideration for the note. As the plaintiff bank knew the contract was the consideration for the note, and that a breach of the condition of the contract would affect the consideration for the note, the

bank took no better title than its indorser, the canning company, had. This being so, the note taken by the bank with knowledge of the contract is affected by the failure of consideration caused by a breach of the contract after the bank took the note, since a breach of the contract was one of the contingencies affecting the consideration for the note. Not being a holder in due course, within the meaning of the statute, the plaintiff cannot enforce the payment of the note against the averments of the pleas."

Two other cases in point upon this subject are the only additional ones disclosed by a careful search. Each rests upon its own particular facts.

In one, the maker of a promissory note was the client of the payees, a firm of lawyers, and made and delivered the instrument upon the sole consideration that the payees were to bring and prosecute to judgment for him certain lawsuits, for a compensation wholly contingent upon their success. The maker signed and delivered the paper in the belief, induced by fraud and misrepresentations of the payees, that it embodied a statement of the consideration. The payees, without performing their contract, dissolved partnership and became enemies. One of them afterwards transferred the note to another client, who sued the maker upon it. The court held that the plaintiff was not a holder

in good faith, for value, and that the consideration having wholly failed, the defendant was not liable. *Harris v. Clanton* (1915) 46 Okla. 183, 148 Pac. 683.

In the other case, the defense in an action by the holder against the acceptors of two bills of exchange, negotiated to the plaintiff for value and before maturity, was that the bills had been accepted partly to pay for shares of stock in the corporate drawer, and upon the understanding and condition that they were not to be or become complete binding obligations or payable until and unless the drawer sold certain bonds which the acceptors had delivered to it to sell; and, that the paper had been negotiated contrary to the understanding and condition, and that the plaintiff had notice of these facts when it received the bills. It was averred that the consideration for the paper had wholly failed, as the condition upon which it was accepted had never been met. This defense was unsuccessful because the court held that the asserted condition and consideration had been wholly disproved by the evidence. *Banque Franco-Americaine v. Bergstrom* (1916) 171 App. Div. 870, 157 N. Y. Supp. 635.

It need only be said that the cases decided and reported since the publication of the primary note have in no wise changed the situation. J. B. G.

#### ALABAMA SUPREME COURT.

CITY OF SELMA, Appt.,  
v.  
EMMA JONES.

(— Ala. —, 79 So. 476.)

#### Nuisance — statutory authority — effect.

1. Statutory authority to a municipality to maintain a sanitary system does not include authority to maintain a rubbish dump in such condition as to constitute a nuisance.

*For other cases, see Nuisances, II. d, in Dig. 1-52 N. S.*

#### Same — private action.

2. A municipal rubbish dump may be a

**Note.** — The question of legislative authority as a defense to a public nuisance is treated in the note to *Toledo Disposal Co. v. State*, L.R.A.1915B, 1207; and see later cases, *Taylor v. Baltimore*, L.R.A.1917C, 1046, and *Stuhl v. Great Northern R. Co.* L.R.A.1917D, 317. See also the above-mentioned note for references to annotation on related subjects.

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private nuisance to adjoining property which will authorize an action by the owner of such property, although it is also a public nuisance which will sustain an action by the public authorities.

*For other cases, see Nuisances, II. a, in Dig. 1-52 N. S.*

#### Injunction — nuisance — submission to jury.

3. The question of nuisance vel non need not be submitted to a jury as a condition to the granting of an injunction to abate a nuisance.

*For other cases, see Jury, I. b, 1 b, in Dig. 1-52 N. S.*

(May 16, 1918.)

**A** PPEAL by defendant from an order of the Circuit Court for Dallas County overruling a demurrer to a bill filed to abate a nuisance. **Affirmed.**

The facts are stated in the opinion.

Messrs. Leo Leva and Reese & Reese, for appellant:

The public health is the object of paramount concern, and the city wisely lodges

in municipalities discretion and power adequate to such emergencies.

*Spear v Ward*, — Ala. —, 74 So. 27.

In determining this question the court should weigh the injury that will result to the public by granting the injunction.

*Clifton Iron Co. v. Dye*, 87 Ala. 471, 6 So. 192; *Wood v. Sutcliff*, 2 Sim. N. S. 162, 61 Eng. Reprint, 303, 21 L. J. Ch. N. S. 253, 16 Jur. 75, 8 Eng. L. & Eq. Rep. 217; *East & West R. Co. v. East Tennessee, V. & G. R. Co.* 75 Ala. 275; *Columbus & W. R. Co. v. Witherow*, 82 Ala. 190, 3 So. 23; 1 High. Inj. § 589; *Davis v. Sowell*, 77 Ala. 262; *Torrey v. Camden & A. R. Co.* 18 N. J. Eq. 293; *McBryde v. Sayre*, 86 Ala. 458, 3 L.R.A. 861, 5 So. 791.

If complainant has sustained or is sustaining injury, she has an adequate remedy at law for such damages as she may be able to show she has sustained.

*Clifton Iron Co. v. Dye*, 87 Ala. 471, 6 So. 192; *Vernon v. Wedgeworth*, 148 Ala. 490, 42 So. 749; *Dennis v. Mobile & M. R. Co.* 137 Ala. 649, 97 Am. St. Rep. 69, 35 So. 30; *Rosser v. Randolph*, 7 Port. (Ala.) 238, 31 Am. Dec. 712; *Highland Ave. & Belt R. Co. v. Matthews*, 99 Ala. 24, 14 L. R. A. 462, 10 So. 267; *Jones v. Adler*, 183 Ala. 435, 62 So. 777; *Crofford v. Atlanta, B. & A. R. Co.* 158 Ala. 288, 48 So. 366; *Arndt v. Cullman*, 132 Ala. 540, 90 Am. St. Rep. 922, 31 So. 478.

The establishment of the sanitary plant and its maintenance, being authorized by law, cannot be a nuisance.

*Jones v. Adler*, 183 Ala. 435, 62 So. 777; *Crofford v. Atlanta, B. & A. R. Co.* 158 Ala. 288, 48 So. 366; *Highland Ave. & Belt R. Co. v. Matthews*, 99 Ala. 24; 14 L.R.A. 462, 10 So. 267.

Mr. Arthur M. Pitts, for appellee:

Defendant's acts in using the lots as a dumping place constitute a nuisance.

*Hundley v. Harrison*, 123 Ala. 292, 26 So. 294.

A court of equity has jurisdiction to restrain the continuance of a nuisance, public or private.

*Ogletree v. McQuaggs*, 67 Ala. 580, 42 Am. Rep. 112; *Barnett v. Tedeschi*, 154 Ala. 474, 45 So. 904; *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412.

A municipal corporation is bound to have respect, as an individual, for the rights of citizens who live on the adjoining lots.

*Vernon v. Wedgeworth*, 148 Ala. 490, 42 So. 749.

The legislature has not the authority to authorize the city to take private property for public use without compensation.

*Hundley v. Harrison*, 123 Ala. 292, 26 So. 294; *Smith v. Sedalia*, 152 Mo. 283, 48 L.R.A. 711, 53 S. W. 907; *Selfert v. Brook-*

*lyn*, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321; *Adams v. Modesto*, 131 Cal. 501, 63 Pac. 1083; *Dierks v. Highway Comrs.* 142 Ill. 197, 31 N. E. 496; *Ft. Worth v. Crawford*, 74 Tex. 404, 15 Am. St. Rep. 840.

*Mayfield, J.*, delivered the opinion of the court:

Appellee filed her bill against appellant to abate a nuisance. The alleged nuisance consisted of a dump pile, created and maintained by the city, near to the premises of complainant. The nuisance is alleged in the fifth and sixth paragraphs of the bill as follows:

"(5) That the said dumping place is not a fit or suitable plant to be established in a residential section of the city; that the plant, as well as the way in which the same is operated, is a nuisance, which is continual, and constantly recurring; that the board of health of Dallas county has declared the said dumping place where located a nuisance, and has requested the city of Selma through her duly authorized officers to abate the same; that the city of Selma, by and through her duly authorized officers, agents, servants, and employees, continues to operate the said dumping plant on the said place; that unless the city of Selma, her officers, agents, servants and employees, are restrained from operating the said dumping place, your complainant will be compelled to inhale and smell air polluted by the noxious odors, vapors, and gases that arise from the opening in the sewer, and from the emptying of the cans of human feces and excreta that has remained closed in said cans for almost a week's time.

"(6) That complainant's home has been rendered valueless as a home by the operation of said plant; that it is a place unfit for a human being to reside in as long as the city is permitted to continue to so operate said dumping place on said lots in said residential section of the city of Selma: that the injury to her property as above set forth is of such a nature, and so recurring each day, that she cannot be fully compensated in damages; that under the facts as above set forth she has not an adequate remedy at law; that the city started to operate the said dumping place in the year 1917, and is continuing to operate the same."

The city demurred to the bill, assigning various grounds, among them being the grounds that the bill showed the defendant to be a municipality, and as such authorized by law to establish and maintain a sanitary system, and that the alleged nuisance was a necessary part of such system, and that that which is authorized by law

cannot be a nuisance; that the bill showed complainant to have a plain and adequate remedy at law; that the bill showed a public nuisance, and showed no damages or injury to the complainant, different in kind from that suffered by the public; that to grant the relief prayed would, instead of abating a nuisance, create one, in that it would destroy the sanitary system of the city. The trial court overruled the demurrer, and the respondent appeals.

We are of the opinion that the trial court ruled correctly. The fact that the city is given authority by law to establish and maintain a sanitary system for the community, and that the dump pile is a part thereof, does not prevent the acts complained of from constituting a private or a public nuisance. Such authority, conferred on the city by law, is to promote the health and comfort of the citizens, and not to impair or destroy the health or comfort of any of the citizens. There does not appear on the face of the bill any attempt thus far on the part of the legislature to confer authority on the city to do what would otherwise constitute a nuisance. Hence the question is not here presented whether or not the legislature could authorize the city to do what, without such authority, would be a nuisance. This question was presented to this court in the cases of *Adler v. Pruitt*, 169 Ala. 213, 32 L.R.A.(N.S.) 889, 53 So. 315, and *Murkerson v. Adler*, 178 Ala. 622, 59 So. 505. In the first of these cases it was ruled that "where a county, through a commission created by a local act authorizing a sewer system and purification plant, constructed said plant, after contracting with an individual to pay for the cost of the plant and its maintenance, in consideration of the exclusive right to use the products of the plant, the county stipulating for the exclusive control of the purification of the sewerage, and the plant was built and the individuals operated it, and paid the cost thereof directly, but the plant was unequal to the accomplishment of its purpose, and a nuisance was created by its operation, in the absence of an express statutory provision, it will not be assumed that it was intended to legalize an act necessarily resulting in a nuisance, nor that the system would have been constructed except for treatment of the sewerage in a purification plant, and hence the proximate cause of the nuisance was not the statutory authorization, but was the operation of the plant by the individual, and consequently he was liable therefor." 169 Ala. 213.

The following expression, used in the opinion in that case, may be applied to this case: "Those are joint tort-feasors who contribute to the tort with common intent,

. . . not of course the intent to work injury to the plaintiff, but the intent to maintain the purification plant which did result in injury. If it be assumed for a moment that the defendants co-operated with private individuals, as they did with the county and its commissioners, it would seem to be clear that they thereby became liable with those individuals as joint tort-feasors, not because defendants furnished the money with which to build the plant, nor because they contracted to receive the valuable separated constituents of the sewerage, but because they actively participated in the daily operation of the plant." 169 Ala. 221, 222.

A nuisance is thus defined by both the statutes and the decisions of this state:

A nuisance is anything that works hurt, inconvenience, or damage to another; and the fact that the act may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful, nor such as would affect only one of fastidious taste, but it should be such as would affect an ordinarily reasonable man.

Nuisances are either public or private. A public nuisance is one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals. A private nuisance is one limited in its injurious effects to one or a few individuals. Generally, a public nuisance gives no right of action to any individual, but must be abated by a process instituted in the name of the state; a private nuisance gives a right of action to the person injured. Code, §§ 5193-5196. "Nuisance" signifies "anything that worketh inconvenience," and a common or public nuisance is defined to be an offense against the public, either by doing a thing which tends to the annoyance of all persons, or by neglecting to do a thing which the common good requires. *State v. Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564; *Ferguson v. Selma*, 43 Ala. 398. Mr. Wood, in his work on Nuisances (§ 753) states the law to be that a person or corporation authorized by law to do a particular thing is not indictable for a nuisance arising therefrom as a natural and probable result, but that "if the nuisance is not the necessary result of the act or work authorized, or if it might be exercised in such a way as to obviate the nuisance, legislative authority will not be inferred from the grant to create the nuisance, and will not operate as a protection or excuse therefor, either against an indictment or a suit in behalf of the public at law or in equity to abate the nuisance." Judge Dillon says a municipal corporation has no right to license or maintain a nui-

sance. *Mun. Corp.* §§ 374n, 378n. This doctrine is fortified by *Richardson v. Vermont C. R. Co.* 25 Vt. 465, 60 Am. Dec. 283; *Pine City v. Munch*, 42 Minn. 342, 6 L.R.A. 763, 44 N. W. 197.

If the averments of this bill are true, and on demurrer they must be so treated, the city had created and was maintaining a nuisance, and complainant's damages were different from those of the public, in such sense as to authorize the maintenance of this bill. While it is true the dump pile was not on complainant's land, her land and property were subjected to the nuisance, on account of proximity to the dump pile. The noxious and offensive odors and gases omitted from the dump pile, according to the averments of the bill, were naturally cast upon complainant's premises, so as to render them less desirable and less valuable for the uses to which they were put. The averments bring the bill clearly within the rules laid down by this court in the cases of *Hundley v. Harrison*, 123 Ala. 292, 26 So. 294; *English v. Progress Electric Light & Motor Co.* 95 Ala. 264, 10 So. 134, and *Rouse v. Martin*, 75 Ala. 515, 51 Am. Rep. 463. The general rule to be deduced from all our cases on the subject has been thus stated or approved often by this court: "Any establishment erected on the premises of the owner, though for the purpose of trade or business lawful in itself, which, from the situation, the inherent qualities of the business, or the manner in which it is conducted, directly causes substantial injury to the property of another, or produces material annoyance and inconvenience to the occupants of adjacent dwellings, rendering them physically uncomfortable, is a nuisance. In applying this principle, it has been repeatedly held that smoke, offensive odors, noise, or vibrations when of such degree or extent as to materially interfere with the ordinary comfort of human existence, will constitute a nuisance." *Hundley v. Harrison*, 123 Ala. 298, 26 So. 295.

This text cites *Rouse v. Martin*, *supra*. The ancient English rule as to granting injunctions to abate nuisances, to the effect

that the question of nuisance *vel non* must be first established by the verdict of a jury, does not prevail in this state. This is pointed out in the above case, and in previous cases cited in the opinion. The rule in this state is probably best stated in *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412, to the effect that "the jurisdiction of the court to enjoin the erection or the continuance of private nuisances, compelling their abatement, at the instance of a party aggrieved, is well established. . . . There is, in the contemplation of the court, a very just distinction between injuries in their nature temporary and fugitive, and injuries permanent, continuous, constantly recurring. In reference to temporary injuries, the intervention of the court may depend upon the adequacy of legal remedies. But when the injury is permanent, continuous, constantly recurring, there may be a remedy at law, but its inadequacy is obvious. The court of law cannot restore the party complaining to the condition in which he was before the wrong was done, and in which he has the legal right to remain."

It was added, referring to the facts of that case: "Nor, if the right of the complainant is clear—if, as matter of law, the lands of the defendants are burdened with the servitude claimed—it is essential that, as a condition precedent to the interference of the court, the right should have been established by a verdict and judgment at law. Substantial, actual injury has resulted, and there can be no necessity for sending the party to a court of law, for the determination of a mere legal question, compelling submission to the wrong during the pendency of the action."

It follows that the trial court properly overruled the demurrer to the bill.

Affirmed.

Anderson, Ch. J., and Somerville and Thomas, JJ., concur.

Petition for rehearing denied in June 20, 1918.

#### CALIFORNIA SUPREME COURT. (Department No. 2.)

CHARLES GRAHAM, Resp't.,  
v.

W. F. MIXON, Impleaded, etc., Appt.

(— Cal. —, 169 Pac. 1003.)

**Venue — publication of libel — where circulated.**

An action for libel is not one for injury to the person, within a statute permitting

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such action to be brought where the injury occurs, and therefore it must be brought where the defendant resides; and the mere fact that the libel was circulated in a particular county does not give its courts jurisdiction.

For other cases, see *Venue*, I. in *Dig.* 1-52 N. S.

(December 28, 1917.)

Note. — As to venue of civil action for libel or slander, see annotation following this case, post, 1026, and references therein to annotations on related questions.

**A**PPEAL by defendant *Mixon* from a judgment of the Superior Court for Sacramento County in favor of plaintiff, and from an order denying a motion for change of venue, in an action brought to recover damages for the publication of an alleged libel. Reversed.

The facts are stated in the opinion.

Messrs. *Hurst & Hurst* and *Arthur C. Huston*, for appellant:

Defendant was entitled to a change of venue.

*Brady v. Times-Mirror Co.* 106 Cal. 56, 39 Pac. 309; *Griffin & S. Co. v. Magnolia & H. Fruit Cannery Co.* 107 Cal. 380, 40 Pac. 495.

In all cases as to which express provision is not made to the contrary, the proper county for trial, subject to the power of the court to change the place of trial on account of convenience of witnesses, disqualification of judge, and inability to have an impartial trial, is the county in which the defendants, or some of them, reside at the commencement of the action.

*Bonestell, R. & Co. v. Curry*, 153 Cal. 420, 95 Pac. 887; *Louisville & N. R. Co. v. Gaines*, 2 Flipp. 621, 3 Fed. 267; *People ex rel. Atty. Gen. v. Eichelroth*, 78 Cal. 141, 2 L.R.A. 770, 20 Pac. 364.

Messrs. *J. M. Inman* and *Ralph W. Smith*, for respondent:

If the action is brought in the county where the injury occurred, the court has no authority to change the place of trial to the county of the defendant's residence, on the ground that the latter alone was the proper county.

*Gridley v. Fellows*, 166 Cal. 765, 138 Pac. 355; *Rains v. Diamond Match Co.* 171 Cal. 326, 153 Pac. 239.

An action for libel is a personal injury.

*McKenzie v. Doran*, 39 Mont. 677, 104 Pac. 677; *McDonald v. Brown*, 23 R. I. 546, 58 L.R.A. 768, 91 Am. St. Rep. 659, 51 Atl. 213; *Riddle v. McFadden*, 201 N. Y. 215, 94 N. E. 644.

An injury to reputation is an injury to the person.

*Times-Democrat Pub. Co. v. Mozee*, 69 C. C. A. 418, 136 Fed. 761; *Cohen v. New York Times Co.* 153 App. Div. 242, 138 N. Y. Supp. 206.

*Melvin, J.*, delivered the opinion of the court:

Plaintiff, who resides in Sacramento county, brought an action for libel against defendants, who live in Yolo county and there publish *The Mail of Woodland*. This newspaper, in which, according to the complaint, the alleged libel was published, is circulated and read in Sacramento county, according to the averments of said com-

plaint. Defendants moved for a change of the place of trial to the county of their residence, which, they say, is the only proper place of trial. If this contention be correct, they were entitled to the order which they sought. Code Civ. Proc. § 397. The motion was denied upon the sole ground that an action for libel is one "for injury to person," and therefore, under the provisions of § 396 of the Code of Civil Procedure, as such section has stood since 1911, is triable in the county "where the injury occurs." The appeal is from the order denying defendants' motion.

In considering the meaning which the legislature intended to impart to the words "injury to person," it is legitimate and proper for us to contemplate the consequences which would follow any certain construction of those words. If the legislators intended to include "libel," under the general designation "injury to person," it would follow that a man of state-wide reputation for good citizenship would be injured in his person, in each county in which a libelous article regarding him would be circulated, and might select any one of such counties as the place for the commencement of his action against the publisher. Each county would be, as to him, "the county where the injury occurs," within the purview of § 396 of the Code of Civil Procedure. On the other hand, the man of local reputation might suffer detriment only in the county or counties in which the attack upon his character would amount to an injury. There can be little doubt that the legislature contemplated no such result, when using the expressions, "if it be an action for injury to person," and "in the county where the injury occurs."

Even if we say that the presumption of injury arises from the libelous publication, and that therefore there is no difference between the man of local and the one of general reputation, in the matter of available places for libel suits, we are confronted with another inequality in the operation of the statute, which surely was not intended by the lawmakers. If libel be an "injury to person," the victim has a broader field of action against the owner of a newspaper of general circulation, publishing the libel, than would be available to him if he should receive serious bodily hurt from the negligent operation of an automobile owned by a resident of a county other than the one in which the accident might occur. In the former case, he might have as many places for the commencement of his action as there are counties in the state, while, in the latter, he would be limited to the county in which the accident occurred, or that in which



the owner of the motor car resided at the time of the infliction of the injury. We can think of no good reason why the legislature should so broaden the venue of civil actions for libel, while the Constitution makes indictments found or informations laid for publications in newspapers, triable only in the counties where the publication offices of the newspapers are situated, or in the counties where the parties libeled reside. Const. art. 1, § 9. The purpose of this constitutional provision, as revealed by the debates of the constitutional convention, was, on the one hand, to prevent the dragging of a publisher the length of the state, for trial on a charge of misdemeanor, at the whim of the prosecutor, and, on the other, to permit a citizen, who had been unjustly attacked by a newspaper, to gain vindication in his own home. *Older v. Superior Ct.* 157 Cal. 770, 109 Pac. 478. The same reasons apply, with only slightly diminished force, to the proper venue of civil actions for damages on account of libel. Therefore we ought to hesitate, unless compelled by the unequivocal force, and significance of the language used, to attribute to the legislature the meaning for which respondent contends.

It is conceded by appellant (as, indeed, it must be) that an action such as the one prosecuted by plaintiff is one growing out of a violation of personal rights, as distinguished from rights of property. Civil actions arise out of obligations or injuries. Code Civ. Proc. § 25. An obligation is due to a contract or to operation of law. Code Civ. Proc. § 26. Section 27, Code of Civil Procedure, describes injuries as of two kinds, to the person and to property. Section 28 defines injury to property, and § 29 classifies every other injury as "an injury to the person." This is a very concise and convenient classification, and one conforming to our simplified form of action; but, because it exists in one part of one of the Codes, we are not therefore bound to say that, wherever employed in any law, the expression "injury to person" must be interpreted to mean every invasion of personal rights. In drawing statutes, legislators are sometimes unconsciously influenced by distinctions which prevailed under the highly technical practice of the common law; and, at the common law, actions in tort were classified with reference to the physical or to the merely consequential injury to person or property. Professor William Carey Jones, in vol. 2 of *Modern American Law*, at page 10, uses the following language: "Modern procedure has abolished forms of action, and technical questions of procedure have lost their importance. Nevertheless, the language of

the old forms of action is still used, and the distinctions made therein are often useful if not necessary in determining the basis of liability in tort. It is therefore advisable to understand the distinction between the action of trespass and the action of trespass on the case, or, as it is more commonly called, case. Trespass was the action used for any wrongful and direct application of force, whether to the person or property. Case was a supplementary form of action, provided for all kinds of injury which did not amount to a trespass."

He also quotes a passage, to the same effect, from *Leame v. Bray*, 3 East, 593, 102 Eng. Reprint, 724, and concludes the introduction to his article on torts with the following sentences: "Where there is no physical interference with the person or property, then the action in tort is not trespass, but case. For example, in deceit, malicious prosecution, or libel, the action employed is case."

To the lawyer trained in the common law, therefore, there exists a distinction between actions for libel and those arising out of physical interference with the person. Perhaps this distinction was in the mind of the draftsman of the statute before us, and perhaps for this reason he and his colleagues, who voted for its adoption, had no thought of including libel within the category of actions for injuries to persons, to which it was intended that § 395, Code of Civil Procedure, should apply. Or it may be that the lawmakers employed the words, "injury to person," according to the general and approved usage (Civ. Code, § 13), and not in a special and technical sense, and by that expression intended the ordinary meaning, namely "bodily injury." In either event, the true significance of the section would support appellant's contention. In discussing § 395, Code of Civil Procedure, this court has held it to be constitutional, although it applied to bodily injuries and not to other invasions of personal rights, such as slander and libel. *Gridley v. Fellows*, 166 Cal. 765, 138 Pac. 355. The following quotations from the opinion prepared by Mr. Justice Shaw clearly indicate the views of the court in this regard. At page 769 of 166 Cal. the following language is used: "The sole question for consideration is whether causes of actions for bodily injury or for injuries to property are so alike in all respects to other causes of action, such as actions for slander or libel, or actions on contract at law or in equity, that no reasonable basis can be found for a provision allowing the former to be tried in the county where the injury occurred, which is not the residence of the defendant, which does not apply

with equal force to the latter actions mentioned."

On the same page we find this language: "Actions to recover damages caused by bodily injuries, or by injuries to property, are well known as distinct classes of actions. They are each separately treated in the textbooks of law. Each forms a distinct and well-known class, with attributes and qualities of its own, and each is or has been affected and controlled to some extent by distinct and different rules of law, evidence, and procedure. They are so clearly distinguished from other actions that there is no difficulty in recognizing and classifying them. We think they are sufficiently distinguished by the probable interests and convenience of the parties, and by considerations of public convenience and policy, not applying so strongly to other actions, to justify the Legislature in providing, as it has, that the defendant shall not have the absolute right to demand that the cause be removed for trial to the county of his residence, in case it is not the county in which the injury occurred."

This decision strongly supports appellant's position, because, as his counsel contend in their brief, if respondent's view were the correct one, this court would have held that the section did not violate the rule against special legislation, because it embraced all personal actions, including libel. Instead, the holding was that it excluded libel and certain other actions, but was founded, nevertheless, upon a proper classification.

In the later case of *Rains v. Diamond Match Co.* 171 Cal. 326-328, 153 Pac. 239, 240, Mr. Justice Sloss, who wrote the opin-

ion, said, regarding the amendment to § 395, Code of Civil Procedure, enacted in 1911: "The change in the law was designed to enlarge the rights of plaintiffs by giving them a choice of two counties, where theretofore the defendant had enjoyed the right of trial in the county of his residence."

It will thus be seen that this court has never regarded the section as one which applies, so far as actions for personal injuries are concerned, to any but those based upon physical lesions. It is also to be remembered that, although injuries are classified as injuries to property and injuries to the person (Code Civ. Proc. §§ 28 and 29), causes are more elaborately differentiated in designating the classes of actions which may be united. Those for "injuries to character" and "injuries to person" are separately enumerated. Code Civ. Proc. § 427. It will thus be seen that, in the Code itself, the expression "injuries to person" is not always used with the same broad significance as respondent would have us give to it, following § 29 of the Code of Civil Procedure.

We conclude that § 395 of the Code of Civil Procedure must be interpreted as not giving to a person, against whom an alleged libel is published in a newspaper, the right to maintain his action, against the defendant's protest, in any county in which the newspaper may circulate.

The order is reversed, and the cause remanded for action by the superior court in accordance with the views expressed above.

We concur: Henshaw, J.; Victor E. Shaw, Judge pro tem.

### Annotation—Venue of civil action for libel or slander.

For venue of the criminal offense of libel, see *State v. Piver*, 49 L.R.A. (N.S.) 941, and the note thereto.

In general, personal actions, whether sounding in tort or contract, are transitory and, in declaring, the matter may be laid as having taken place in the county where the action is to be tried, without any reference to the place where the thing really happened. So, under a declaration in slander which alleged the words to have been spoken in a certain county in New York, plaintiff was allowed to prove, as a substantive cause of action, that the words were spoken in Canada; and an action for slanderous words will lie by one citizen of the state against another, though the words were spoken in Canada. *Lister v. Wright* (1842) 2 Hill (N. Y.) 320.

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So, an action for slander will lie for words spoken in another state, charging plaintiff with larceny. *Offutt v. Earlywine* (1838) 4 Blackf. (Ind.) 460, 32 Am. Dec. 40; *Linville v. Earlywine* (1838) 4 Blackf. (Ind.) 469 (or forgery); *Hull v. Vreeland* (1864) 42 Barb. (N. Y.) 543. So, the action for slander being transitory, it is not generally necessary to allege a speaking of words within the state in which the action is brought. *Emmerson v. Marvel* (1876) 55 Ind. 265.

In *Worth v. Butler* (1844) 7 Blackf. (Ind.) 251, it is held, in an action for slander, that the words will be presumed to have been spoken in the state in which the suit was brought, until the contrary is proven.

As the venue in slander is transitory

and need not be proved, an allegation that the speaking was at a certain place is immaterial, and not descriptive of the offense, and need not be proved. *Owen v. McKean* (1853) 14 Ill. 459.

Being a transitory action, if the words spoken were actionable at common law, the action may be brought, though they were spoken in another state; but, if they are actionable only by statute, it must be shown that they are actionable according to a statute in the state in which they were spoken. *Stout v. Wood* (1820) 1 Blackf. (Ind.) 71.

In *Caldwell v. Story* (1899) 107 Ky. 10, 45 L.R.A. 735, 52 S. W. 850, it was held that where a note was sent for collection through a bank in one county to another bank in the county where the maker resided, and upon presentation the maker stated that he never signed the note and that it was a forgery, which statement was indorsed on the note by the cashier of the bank, and the note returned to the forwarding bank, it was held, in an action for libel against the cashier and the maker, that as to the cashier the statement was privileged, and as to the maker he was guilty, if at all, of slander instead of libel, and the venue of the action against him was in the county where the note was presented and the words spoken, instead of in the county where plaintiff resided and to which the statement was transmitted by mail by the cashier.

Libel, being a personal action, must be brought in the county where the defendant resides, under a Code provision that, "except when otherwise provided herein, personal actions must be brought in a county where some of the defendants actually reside," the court saying that there was no other provision respecting it. *Hall v. Royce* (1880) 54 Iowa, 136, 6 N. W. 177.

It is the publication, not the writing, of libelous matter that is actionable, and even if some outsider repeated the defamation elsewhere it would not change the principle. *Wallace v. Southern Exp. Co.* (1910) 7 Ga. App. 565, 67 S. E. 694.

So, in *Bree v. Marescaux* (1881) L. R. 7 Q. B. Div. (Eng.) 434, 50 L. J. Q. B. N. S. 676, 44 L. T. N. S. 765, 29 Week. Rep. 858, it was held that, where a slander was spoken abroad, and special damage occurred in England because of its repetition there by others, there was no cause of action in England against the person who originally uttered the slander.

And under a statutory provision that, "where the foundation of the suit is

some crime or offense or trespass for which a civil action in damages may lie, in which case the suit may be brought in the county where such crime or offense or trespass was committed or in the county where the defendant has his domicile," an action for slander may be brought in the county in which the slander was uttered; but, if a slander is uttered in one county and repeated by the hearer in another county, suit may not be brought in the second county against the person originally uttering the slander. *Parr v. Thompson* (1907) 45 Tex. Civ. App. 337, 100 S. W. 792.

The venue of an action for libel contained in a telegram is where the telegram was received by the addressee. *Leduc v. Théoret* (1897) Rap. Jud. Quebec 11 C. S. 305.

So, the venue of an action for libel contained in a letter is where it is received and read. *Marcotte v. Therien* (1902) Rap. Jud. Quebec 22 C. S. 315.

In *Freeman v. Norris* (1789) 3 T. R. 306, 100 Eng. Reprint, 590, it was held that the court would change the venue of an action for libel into a county in which it was both written and published, the libel being contained in a letter which was written in one place and sent to another in the same county.

In *Metcalf v. Markham* (1790) 3 T. R. 652, 100 Eng. Reprint, 785, an action for libel, contained in a letter written in a certain county in England and mailed to Germany, in which it was contended that a cause of action arose in each county through which the letter passed, it was held that the only part of the transaction out of which the cause of action arose, which happened in England, happened in the county in which the letter was written, and therefore the cause of action arose there, and not elsewhere within the Kingdom.

In a suit for libel, contained in a letter written in one county and mailed into another county, which was brought in the latter county, the court refused to grant a change of venue to the county in which the letter was written, because the defendant could not make the usual affidavit that the cause of action arose wholly in that county, and not elsewhere. *Clissold v. Clissold* (1787) 1 T. R. 647, 99 Eng. Reprint, 1299.

A cause of action for a libel published in a newspaper arises in a jurisdiction in which the paper is circulated. *Haaskell v. Bailey* (1894) 11 C. C. A. 476, 25 U. S. App. 99, 63 Fed. 873; *Bailey v. Chapman* (1897) 15 Tex. Civ. App. 240, 38 S. W. 544; *Pinkney v. Collins* (1787)

1 T. R. 571, 99 Eng. Reprint, 1257; *Irvine v. Duvernay* (1878) 4 *Quebec L. R.* 85; *Blackburn v. Cameron* (1871) 5 *Ont. Pr. Rep.* 341.

So, a libel printed in a newspaper in one state, and circulated in another state by sale of the paper there, will give a cause of action for libel in the state in which it is circulated. *Vitolo v. Bee Pub. Co.* (1901) 66 App. Div. 582, 73 *N. Y. Supp.* 273.

An action for a libel which was dispersed in several counties is transitory, and, unless special circumstances are shown, the venue of an action commenced in a county in which plaintiff resides, and in which the newspaper containing the libel was circulated, will not be changed to the residence of defendant, where the libel was printed. *Root v. King* (1825) 4 *Cow. (N. Y.)* 403.

And, in an action for libel against the editor of a paper which was circulated in the county in which plaintiff resided, where the action was commenced, it was held, upon a motion for a change of venue to the county in which the paper was printed, that there was no ground for the application. *Clinton v. Crowell* (1804) 2 *Caines (N. Y.)* 245, 2 *Am. Dec.* 235.

Where libelous articles were printed and published in a certain county, and nearly everything complained of in the plaintiff's complaint took place in that county, the action should be tried there. *Griffin v. Olean Times Pub. Co.* (1911) 126 *N. Y. Supp.* 1102.

Where plaintiff brought an action for libel in each county or the state in which the newspaper containing the libel was circulated, the libel being published originally in the county where both parties resided, the court required a consolidation of all the actions, for trial in such county, that, under the Code, being a place in which they were all triable. *Percy v. Seward* (1858) 6 *Abb. Pr. (N. Y.)* 326.

Under statutes which declare a libel to be an offense punishable by a fine or imprisonment, and provide that, where the foundation of a suit is some crime or offense or trespass for which a civil action in damages will lie, the suit may be brought in the county where such crime, offense, or trespass is committed, or in the county where the defendant has his domicile, an action for a libel published in a newspaper may be brought in any county in which the newspaper is circulated. *Belo v. Wran* (1884) 63 *Tex.* 686.

Likewise, under a Code provision that

"every action for an injury to the character of the plaintiff against a defendant residing in this state must be brought in the county in which the defendant resides or in which the injury is done," an action for a libel published in a newspaper may be brought in any county in which the paper containing the libelous article was circulated. *Louisville Press Co. v. Tenny* (1899) 105 *Ky.* 365, 49 *S. W.* 15; *Cincinnati Times-Star Co. v. France* (1901) 22 *Ky. L. Rep.* 1666, 61 *S. W.* 18.

In *Dubuc v. Delisle* (1908) 10 *Quebec Pr. Rep.* 253, *Rap. Jud. Quebec* 33 *C. S.* 456, a suit for libel brought in Quebec was referred for trial to the district where the article was written and published in a newspaper, at which place both plaintiff and defendant resided. See also *Cie de Pulpe de Chicoutimi v. Delisle* (1908) *Rap. Jud. Quebec* 34 *C. S.* 294.

Where a constitutional provision gives a right to sue a corporation, either where the breach occurs or in the county where the principal place of business of the corporation is situated, and the Code gives to an individual the right to have a cause of action tried in the county of his residence, a plaintiff in a suit for libel, by joining an individual with a corporation in the action, waives the right given by the Constitution, of suing the corporation where the breach occurred, and must bring the action in the county in which the corporation was located, where that coincides with the residence of the individual defendant. *Brady v. Times-Mirror Co.* (1895) 106 *Cal.* 56, 39 *Pac.* 209.

Under that constitutional provision, a corporation may be sued for libel in the county in which the newspaper containing the libel is circulated, which is also the residence of plaintiff, although the paper is published in another county, in which the principal place of defendant's business is located. *Tingley v. Times-Mirror Co.* (1904) 144 *Cal.* 205, 77 *Pac.* 918.

An action for libel is not one for "injury to person," within a Code provision that such an action may be brought "where the injury occurs," so as to enable one who has been libeled in a newspaper to bring his action in any county in which the newspaper was circulated. *GRAHAM v. MIXON*, ante, 1023.

In *Houston v. Pulitzer Pub. Co.* (1913) 249 *Mo.* 332, 155 *S. W.* 1068, it was held that, under a statute providing that "suits against a corporation shall be commenced either in the county where

the cause of action accrued or in any county where such corporation shall have or usually keep an office or agent for the transaction of the usual and customary business," a corporation publishing a newspaper could be sued for a libel contained therein, only in the county where plaintiff resided, or where the defendant first published the libel, or had an office or agent, and not in any other county in the state in which the paper circulated, on the ground that, inasmuch as an individual under the terms of a general statute relating to suits commenced by summons, could be sued for libel only in the county of his residence, or within which the plaintiff resides and the defendant may be found, the construction contended for would render the statute unconstitutional, as not affording to defendant corporations equal protection of the law. In so deciding, the court expressly overruled upon this question, *Julian v. Kansas City Star Co.* (1907) 209 Mo. 35, 107 S. W. 496, and inferentially overruled *Meriweather v. Publishers: George Knapp & Co.* (1908) 211 Mo. 199, 16 L.R.A.(N.S.) 953, 109 S. W. 750; *Branch v. Publishers: George Knapp & Co.* (1909) 222 Mo. 580, 121 S. W. 93; *Cook v. Globe Printing Co.* (1910) 227 Mo. 471, 127 S. W. 332, and *Tilles v. Pulitzer Pub. Co.* (1912) 241 Mo. 609, 145 S. W. 1143, which had followed the *Julian Case*.

The *Houston Case* (Mo.) supra, has been followed by *Jones v. Pulitzer Pub. Co.* (1914) 256 Mo. 57, 165 S. W. 304, and *Davidson v. Pulitzer Pub. Co.* (1915) — Mo. —, 178 S. W. 68.

Where, by the law of a state, a resident corporation must be sued for libel either where the libel is published or at the location of its principal office, a suit for a libel, which was written by an agent at a place other than the principal office, and mailed to another agent in another county, where it was opened and read by several persons, must be brought in the latter county, or in the county where the principal office is located; and the fact that the agent receiving the letter mailed it back to the writer would give no authority for bringing suit in the county where it was written. *Wallace v. Southern Exp. Co.* (1910) 7 Ga. App. 565, 67 S. E. 694.

The refusal of the court to grant a change of venue, in *Barnes v. Roosevelt* (1914) 87 Misc. 55, 149 N. Y. Supp. 291, in which action was brought in the county in which plaintiff resided, the only other county in which it could properly have been brought in the first instance,

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under the statute, being that in which defendant resided, was reversed in (1914) 164 App. Div. 540, 150 N. Y. Supp. 30, and the venue changed to a county in which neither party resided, because of possible bias of the jurors at the residence of either party.

In *Kelly v. Haugh* (1897) 60 N. J. L. 124, 37 Atl. 435, changing the venue from the county in which the defendant was served, to the county in which both parties resided, and where the cause of action arose, the court merely followed the plain terms of the statute, which only gave the court the discretion of permitting trial in the county in which the cause of action arose, or that in which the plaintiff or defendant resided at the time the action was instituted.

Under a Code provision that "every action for an injury to the character of the plaintiff against a defendant residing in this state must be brought in the county in which the defendant resides or in which the injury is done," either a resident or a nonresident of the state may be sued in the county in which the injury is done; and, where suit is brought in such county, it is immaterial that plaintiff failed to allege that defendant was a resident of the state. *Bright v. Hammond* (1899) 105 Ky. 762, 49 S. W. 773.

In *Clerk v. James* (1601) Cro. Eliz. pt. 2 p. 870, 78 Eng. Reprint, 1096, it was held that upon a plea of justification of slanderous words, by facts alleged to have occurred at a different place from where the words were spoken, the venue should be where the justification arose, as, by the justification, the words were confessed, and the issue was only upon the justification.

R. L. S.

#### CALIFORNIA SUPREME COURT. (In Banc.)

ETHEL W. BANCROFT, Appt.,  
v.

GRIFFING BANCROFT, Resp't.

(— Cal. —, 173 Pac. 579.)

**Divorce — collusion — relief.**

Equity has no jurisdiction to set aside

**Note.**—The right of a party obtaining or consenting to a divorce to contest its validity is treated in the notes to *Karren v. Karren*, 60 L.R.A. 294, and *Robinson v. Robinson*, 51 L.R.A.(N.S.) 534; and see later case, *Chapman v. Chapman*, L.R.A. 1916F. 528. Specifically as to collusion, see page 297 of the note in 60 L.R.A. and page 535 of the note in 51 L.R.A.(N.S.).

an interlocutory decree of divorce after the time has elapsed for securing relief within the action by appeal or application under the statute, merely because it was procured by collusion between the parties.

*For other cases, see Equity, l. c, in Dig. 1-52 N. S.*

(June 3, 1918.)

**A**PPEAL by plaintiff from a judgment of the Superior Court for San Diego County sustaining a demurrer to the complaint and dismissing an action brought to set aside an interlocutory divorce decree. Affirmed.

The facts are stated in the opinion.

Messrs. Luce & Luce and Joseph L. Lewinsohn for appellant.

Messrs. Sweet, Stearns, & Forward and Ward, Ward, & Ward, for respondent.

Richards, Judge pro tem., delivered the opinion of the court:

This is an appeal from a judgment of dismissal of this action after an order sustaining the defendant's demurrer to the plaintiff's complaint. The action was brought by the plaintiff to have set aside an interlocutory decree in the case of Bancroft v. Bancroft (L. A. No. 5419) — Cal. —, 173 Pac. 582, upon the ground that such decree was procured by collusion between the parties to that action, who are also the parties to this one. The facts out of which this action arose as set forth in the complaint herein are as follows: The parties were married on or about October 30, 1901. Three children were born of this marriage, a daughter named Barbara, now of the age of fourteen years, and two sons, Griffing, Jr., and Hubert Howe, whose ages are now respectively eleven and eight years. On October 30, 1914, the plaintiff left the home of the defendant and herself in or near San Diego, with the defendant's knowledge and consent, for the purpose of paying a visit to her parents in Washington, District of Columbia, intending and expecting to return to her said home in about two months, and without any intention of deserting the defendant. That in the month of January, 1915, the plaintiff received a letter from the defendant informing her that the defendant had decided that they could no longer live together as husband and wife, and directing her not to return to their home, and agreeing and promising that he would pay her the sum of \$125 as a monthly allowance, and permit her to have the custody and care of their daughter Barbara, and to see and visit their two sons upon some satisfactory arrangement. That the plaintiff upon receipt of this letter did not return

to the home of herself and defendant on account of such direction and arrangement, but went to reside in the city of New York. During the month of May, 1916, the defendant wrote to plaintiff informing her that he desired and intended to secure a divorce from her, and desired and requested her to consent to such divorce action, and to refrain from contesting his application for a decree therein. That the plaintiff thereupon agreed with the defendant not to institute a contest, nor offer any objection to his proceeding for a divorce, nor to file any answer or offer any testimony therein, provided the defendant would make provision in the decree therein regarding the custody of their children. That thereafter the defendant arranged with an attorney to represent this plaintiff in said action, and caused this plaintiff to instruct said attorney to enter her appearance therein as her attorney of record, but to offer no objection to the entry of a decree therein dissolving the bonds of matrimony between the parties thereto. That thereafter and on June 5, 1916, the defendant herein commenced such action for divorce in the county of San Diego against this plaintiff, alleging wilful desertion as the ground of divorce. That in accordance with their aforesaid understanding this plaintiff's attorney so provided entered her appearance therein, but offered no objection to the proceedings therein, but facilitated the same in every way possible to the end that the defendant herein should secure an interlocutory decree in his favor in said action. That when said cause came on for trial the defendant herein as plaintiff therein testified falsely that this plaintiff had wilfully deserted him, and that such desertion had continued for more than a year prior to the inception of said action. That no objection was made by or on behalf of this plaintiff to such testimony, or to any of the proceedings in said action, or to the granting of the interlocutory decree therein, and such interlocutory decree was accordingly granted and duly entered on June 22, 1916, notwithstanding the fact that the plaintiff herein had a good and valid defense to said action which she did not present on account of the prior agreement and understanding between herself and the plaintiff therein. That thereafter and in the month of May, 1917, the defendant herein informed the plaintiff herein that he would not permit her to see or visit their two sons, and did thereafter so refuse to permit this plaintiff to see or visit her two children, and also failed and refused and still refuses to longer pay this plaintiff her agreed allowance of \$125 a month. That this

plaintiff thereupon came to San Diego and took steps to procure counsel and to assert her rights in the premises, and was informed by her said attorneys that said divorce decree was invalid, and was also advised that the defendant herein was about to apply for a final decree in said action, whereupon she instituted this action, setting forth the foregoing facts, and praying that said interlocutory decree be set aside, and that the defendant herein be enjoined from procuring a final decree. The defendant demurred to this complaint upon several grounds, but chiefly that the same did not state facts sufficient to constitute a cause of action. The court sustained the demurrer without leave to amend, and entered judgment accordingly, dismissing the action, and from such order and judgment the plaintiff prosecutes this appeal.

The appellant herein contends that the trial court, sitting as a court of equity, had power, and that it was its duty to entertain this action and to set aside the interlocutory decree of divorce given and made in the defendant's favor in said action wherein he was plaintiff, upon the facts recited in her complaint herein, showing that said interlocutory decree had been obtained by a collusive agreement between herself and the defendant herein, by which a fraud had been practised upon the court.

We are unable to give our support to this contention upon the facts set forth in the appellant's complaint. It is practically conceded by the appellant herein that as a general rule courts of equity will not interfere to relieve a party to an action from a judgment which has been procured through a collusive agreement between the parties to the action, to the effect that either of said parties shall commence the action and obtain by the connivance or consent of the other a judgment to which he would not otherwise be entitled. This rule has been uniformly adhered to in this state. *Pico v. Cohn*, 91 Cal. 129, 13 L.R.A. 336, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537; *Fealey v. Fealey*, 104 Cal. 354, 43 Am. St. Rep. 111, 38 Pac. 49; *Sohler v. Sohler*, 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282; *Hanley v. Hanley*, 114 Cal. 690, 46 Pac. 736; Civ. Code, §§ 3515, 3517, 3524. The appellant, however, contends that however correct in principle and policy this rule may be in its general application, an exception should be made in its application to divorce cases, for the reason that in this class of cases it is to

the public interest, not only that the courts should not be imposed upon in the commencement and prosecution of divorce cases, but also that the marriage relation should be maintained and not be permitted to be sundered for light or trivial causes, or through the collusion or consent of the parties to it. While the cases cited by counsel for the appellant make application of the foregoing rule to the facts of such cases, they are not to be understood as insisting upon its universal application to every action brought to have a decree of divorce set aside upon the ground of collusion between the parties thereto, but that being an exception to the otherwise general rule above stated, it is to be confined in its application to those cases where, in the action itself, the court has full control over its own orders and decrees. The cases of *Mulkey v. Mulkey*, 100 Cal. 91, 34 Pac. 621, and *Reh fuss v. Reh fuss*, 169 Cal. 86, 145 Pac. 1020, may be referred to as illustrating the class of cases to which application of the exception to the general rule may be given. In each of these cases the application for relief was made under § 473 of the Code of Civil Procedure. In the former of these cases the record discloses that in entering into the collusive agreement for the divorce the party seeking to avoid it had been grossly deceived and misled by her husband, and by means thereof had been induced to enter into the collusive agreement. In the case of *Reh fuss v. Reh fuss*, supra, the party seeking to set aside the interlocutory decree also made her motion under said section of the Code of Civil Procedure, basing the same upon a showing that her consent to the granting of the decree had been induced by fear occasioned by the threat of her husband that if she defended the action her infant child would be taken from her and placed in a public institution.

There is a distinction to be drawn, however, between cases where the application for relief from a decree collusively obtained is made in the action itself and within the time prescribed by § 473 of the Code of Civil Procedure, or before the period passes within which the interlocutory decree may be assailed upon appeal, and cases where relief is sought in an independent action. For the period of six months the trial court has full control over the case, and may grant relief within the action itself to either party; but after the expiration of that period the rights of the parties have become fixed beyond the power of the court to grant relief under §

473 of the Code of Civil Procedure, and also beyond remedy by appeal; and the party who has allowed this period to expire without any effort to obtain relief within the action itself, and who thereafter seeks the aid of another tribunal in an independent action, should be required to make an affirmative showing of some equitable consideration, or of some good reason sounding in public policy sufficient to justify the interference of equity with the crystallized status of the parties in the particular case. On the other hand, the authorities are numerous to the effect that in the absence of such equitable considerations or of any showing that the public interest or policy in preserving the marriage relation in the particular case would be subserved, the general rule will prevail in divorce as in other cases; and courts of equity will not interfere with judgments in such cases obtained solely through the collusive connivance of the parties to the proceeding. The following authorities fully sustain this view: Hubbard v. Hubbard, 19 Colo. 13, 34 Pac. 170; Robinson v. Robinson, 77 Wash. 663, 51 L.R.A.(N.S.) 534, 138 Pac. 288; Whittley v. Whittley, 60 Misc. 201, 111 N. Y. Supp. 1078; Newman v. Newman, 27 Okla. 381, 112 Pac. 1007; Karren v. Karren, 25 Utah, 87, 60 L.R.A. 294, 95 Am. St. Rep. 815, 69 Pac. 465; Smith v. Smith, 48 Mo. App. 612; Nichols v. Nichols, 25 N. J. Eq. 60; Simons v. Simons, 47 Mich. 253, 645, 10 N. W. 360. We are satisfied that the rule of noninterference adopted in the foregoing cases should be applied to the case at bar. A review of the facts and circumstances of the case in detail justifying this conclusion would subserve no useful purpose.

Judgment affirmed.

We concur: Angellotti, Ch. J.; Sloss, J.; Wilbur, J.

Melvin, J., concurring:

I concur in the judgment and in everything written by Mr. Justice Richards in the opinion, and I do so the more readily because I have never believed in the soundness of the doctrine announced in such cases as Deyoe v. Superior Ct. 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28, and Grannis v. Superior Ct. 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891; that the state is a party interested in every divorce case. I do not believe that in any logical sense the state should be considered a party to a divorce proceeding any more than it is a party to any other suit to terminate

a status fixed by contract. Heretofore the doctrine of the state's being a party interested in such an action has been useful only to save the procedure prescribed by statutes which would be otherwise vulnerable to the charge of unconstitutionality. Perhaps the end justified the fiction; but if it were more than a fiction of very limited applicability, the supposed standing of the state as a party in interest in every action for divorce might be invoked, with reason, it seems to me, as giving to a court of equity jurisdiction of an action to set aside an interlocutory decree obtained by collusion of husband and wife.

Shaw, J., concurring:

I concur in the judgment, on the ground that, while it is to the interest of the state that divorces shall not be obtained by collusion between the parties, that interest does not extend so far as to prevent the operation of the doctrine that equity will not relieve a party from an improper judgment rendered upon his own invitation, upon full knowledge of the facts and without coercion, imposition, or fraud upon him. I am not ready to approve the opinions in Mulkey v. Mulkey, 100 Cal. 91, 34 Pac. 621, and Rehfuß v. Rehfuß, 169 Cal. 86, 145 Pac. 1020, in so far as they appear to intimate that the superior court, in a proceeding ostensibly under § 473, Code of Civil Procedure, may set aside a judgment of divorce, in the absence of any showing of mistake, inadvertence, surprise, or excusable neglect on the part of the party applying for relief. The intimations to that effect were not necessary to the decision of either case. Section 473 does not give such power. I see no sound reasons for holding that the court has any greater power to set aside a judgment for fraud or mistake within the period of six months after it is rendered than it would have at any time within the statutory period of limitation for such actions.

In view of the concurring opinion of Justice Melvin, I wish to add that I do not understand that this court, either in Deyoe v. Superior Ct. 140 Cal. 476, 98 Am. St. Rep. 73, 74 Pac. 28, or Grannis v. Superior Ct. 146 Cal. 245, 106 Am. St. Rep. 23, 79 Pac. 891, has announced the doctrine that the state is a party interested in every divorce case. The cases, as I understand them, merely say that the state is interested in the matter of granting of divorces, not that it is a party to the action in any ordinary sense of the word.



## KANSAS SUPREME COURT.

LOUISE BROWN

v.

JAMES E. BROWN (Cox), Appt.

(103 Kan. 53, 172 Pac. 1005.)

**Judge — disqualification — relation to attorney.**

1. Where the judge of the district court is related to an attorney in the cause, whose fee is to be fixed and determined by the court, the attorney is one of the "parties" in interest within the meaning of § 57 of the Code, which provides that when the judge is related to either of the parties the place of trial shall be changed, or another district judge called in to try the cause.

*For other cases, see Judges, III. in Dig. 1-52 N. S.*

**Appeal — refusal to change venue.**

2. In a suit for divorce, where the wife's attorney is the son of the judge of the court, and asks for an allowance of counsel fees, and the defendant applies for a change of venue on the ground of the relationship between the judge and the plaintiff's attorney, it is error to refuse to grant the application.

*For other cases, see Venue, II. a, in Dig. 1-52 N. S.*

(May 11, 1918.)

**A** PPEAL by defendant from a judgment of the District Court for Barton County in favor of plaintiff in a suit for divorce and alimony. Reversed.

The facts are stated in the opinion.

Messrs. Carr W. Taylor and Charles L. Carroll, for appellant:

Judge Banta, by reason of his relationship with plaintiff's attorney was incompetent to try the case, within the intent and meaning of § 6947, of the General Statute of Kansas, 1915.

23 Cyc. 585; Howell v. Budd, 91 Cal. 342, 27 Pac. 747; Patrick v. Crowe, 15 Colo. 543, 25 Pac. 985; Vine v. Jones, 13 S. D. 54, 82 N. W. 82; Roberts v. Roberts, 115 Ga. 259, 90 Am. St. Rep. 108, 41 S. E. 616; Crook v. Newborg, 124 Ala. 479, 82 Am. St. Rep. 190, 27 So. 432; Fowler v. Brooks, 64 N. H. 423, 10 Am. St. Rep. 425, 13 Atl. 417; Tootle v. Berkeley, 60 Kan. 446, 56 Pac. 755; State ex rel. Lloyd v. Superior Ct. 55 Wash. 347, 25 L.R.A. (N.S.) 387, 104 Pac. 771.

Headnotes by PORTER, J.

**Note.** — For relationship to attorney in cases as disqualifying judge, see annotation following this case, post, 1036, and references therein to annotations on related questions.

L.R.A.1918F.

Mr. A. C. Banta, for appellee:

The trial judge was not interested in the case, otherwise than to see that substantial justice was done; and the evidence all shows that it was done.

Brittain v. Monroe County, 214 Pa. 648, 63 Atl. 1076, 6 Ann. Cas. 617; Lassen Irrig. Co. v. Superior Ct. 151 Cal. 357, 90 Pac. 709; State ex rel. Cook v. Houser, 122 Wis. 534, 100 N. W. 984; Taylor v. Williams, 26 Tex. 583; Foreman v. Hunter, 59 Iowa, 550, 13 N. W. 659; Lawton Rapid Transit R. Co. v. Lawton, 31 Okla. 458, 122 Pac. 212.

The judge was not disqualified by reason of his relationship to the attorney, whether the fee of the attorney was contingent or not.

George Knapp & Co. v. Campbell, 14 Tex. Civ. App. 199, 36 S. W. 765; Winston v. Masterson, 87 Tex. 200, 27 S. W. 768; Jones v. Williamsburg City F. Ins. Co. 83 Kan. 686, 112 Pac. 826.

Porter, J., delivered the opinion of the court:

This was a suit for divorce and alimony. The plaintiff recovered, and the defendant appeals.

The plaintiff, who is a negro woman, alleges that the defendant, a white man, is her husband, by a marriage which she claims took place in Louisiana about 1904. The defendant's true name is James E. Cox. On May 10, 1890, he was married in Indiana to Nellie A. Logan; they afterwards moved to Illinois, and five children were born of that marriage. In March, 1902, the defendant abandoned his wife and family, assumed the name of James E. Brown, and lived at various places in the South until he came to Kansas. He denies that he and plaintiff were ever married, and alleges that in Louisiana it was unlawful for whites and blacks to marry. The plaintiff and the defendant lived together in Louisiana as husband and wife, and the defendant subsequently came to Great Bend, where he engaged in his trade of blacksmithing. Shortly thereafter, the plaintiff followed him, and they lived there together until a short time before this suit was begun. In February, 1917, plaintiff wrote and mailed the following letter to the former wife of defendant.

Great Bend, Feb. 5, 1917.

Mrs. Anne Cox:

Dear Madam:—

I write to let you know that I am a negro, and that your former husband, J. E. Cox, and I have been living together for thirteen years. I am his common-law wife. I think it justice to you that you should

know this. He has lived with me under an assumed name, J. E. Brown, and have denied you and your children, and I just recently knew he was a married man, and after we were separated about three weeks ago was when I first learned of you, and since he has been in this country he has been passing as a negro. Included you will find postage. Please answer on return mail.

Mrs. J. E. Brown or Lula Brown,  
1102 Kansas Ave.

Nellie A. Cox, the first wife of the defendant, secured a divorce from him in Indiana on January 29, 1912, but the fact was not known to either the plaintiff or defendant, until after this suit was begun.

On the same day the petition was filed and before service was had upon the defendant, the court made an ex parte order, requiring the defendant, within five days, to pay to the clerk of the court \$50 for the use and benefit of plaintiff's attorney, and to deposit \$25 security for costs, and to pay to the clerk for the support and maintenance of plaintiff and her daughter the sum of \$25; and to pay each thirty days thereafter a sum of \$25 until the further order of the court. The case afterwards proceeded to trial on the merits, and the court refused to find that any marriage ceremony ever took place between the parties, holding that, if there was one, it was illegal and void under the laws of Louisiana, but that the plaintiff was the common-law wife of the defendant, and the court granted her a divorce on the ground of extreme cruelty, setting apart to her two of the four lots owned by the defendant, including the lots upon which the residence is situated, and giving the defendant two vacant lots, which, defendant claims, are worth about \$150. In the decree the court allowed to plaintiff's counsel \$150 attorney fees.

There are a number of claims of error, but the only one which we find necessary to consider is the contention that it was error to refuse to grant a change of venue. The suit was commenced January 11, 1917; four days later defendant filed a motion to vacate the order for the payment of attorney's fees, suit money, and the money for the support and maintenance of plaintiff and her daughter, setting up as one of the grounds that he was never at any time married to the plaintiff, that she is not his wife, and that he is not the father of her child. While this motion was pending, the defendant filed an application for a change of venue, on the ground of the relationship existing between the judge of the district court and plaintiff's attorney, who is a son of the judge. Motions were also filed asking the court to reserve the questions of

alimony, suit money, and attorney's fees until the case could be finally heard before a qualified judge. The motions were overruled, and the defendant filed his verified answer to the petition, setting up the defense already referred to. A second motion for a change of venue was filed on March 13th, alleging as one of the grounds that the attorney for the plaintiff was the son of the judge of the district court, and that, by reason of their relationship, the judge was disqualified under the statute to try the case.

Section 57 of the Code (Gen. Stat. 1915, § 6947) reads in part as follows: "In all cases in any of the district courts of this state in which it shall be made to appear that a fair and impartial trial cannot be had in the county where the suit is pending, or when the judge is interested or has been of counsel in the case or subject-matter thereof, or is related to either of the parties, or otherwise disqualified to sit, the court may, upon application of either party, change the place of trial to some county where the objection does not exist."

Provision is made in the same section for calling in some other district judge to attend and sit as judge of the court where the case is pending.

It is the defendant's contention that the son of the district judge is a "party," within the meaning of the statute. There are two lines of authorities respecting the construction which should be given to the term "parties," as used in constitutional or statutory provisions intended to disqualify a judge from sitting in a cause in which he is related to one of the litigants. In some jurisdictions, the word is given a narrow and technical meaning, and the judge will not be held disqualified unless the person to whom he is related is, in strictness, one of the parties to the cause. In other jurisdictions, the rule adopted is that, if the judge is related to an attorney in the cause whose fee is contingent upon success, or the amount of the fee is to be fixed and determined by the court, he is a party, within the meaning of the provision requiring a change of venue where the judge is related to one of the parties. In our opinion the spirit and purpose of the statutory provision is best subserved by the latter construction. In 15 R. C. L. 534, it is said: "The great weight of authority is that a judge whose relation, within the specified degree, is attorney in an action, with fees contingent on recovery, is disqualified to sit therein, under a constitutional provision that no judge shall preside in the trial of a case where either of the parties shall be connected with him by

consanguinity within a certain degree, although the authorities are not all agreed on this point."

In 23 Cyc. 585, it is said: "But where the attorney's compensation depends on the contingency of recovery, he is, in some jurisdictions, regarded as an interested party, so that relationship to him will disqualify, although the client may have agreed to pay fees commensurate with the services rendered, independently of success."

A leading case is *Roberts v. Roberts*, 115 Ga. 259, 90 Am. St. Rep. 108, 41 S. E. 616. There the judge was related to the counsel of an applicant for alimony and counsel fees in a divorce proceeding, and it was held that he was disqualified from presiding in the case and passing upon the application, although such counsel may have had a contract with the applicant, binding her to pay them for their services, independently of the success of the application for alimony and counsel fees. In the opinion it was said: "It is the pecuniary interest of the attorney in the result of the case which disqualifies the judge. If the applicant did not ask any allowance of counsel fees, of course the fact that her counsel was related to the judge, no matter how closely, would not have the effect to disqualify the judge from presiding. The moment the applicant asks for counsel fees, her counsel becomes pecuniarily interested in the result of the suit, and, so far as these fees are concerned, the counsel are as much parties to the case as if they were parties to the record. . . . In an application for alimony and counsel fees, the counsel for the applicant are thus not only pecuniarily interested in the result of the suit, but, if counsel fees are allowed, a judgment is obtained which is absolutely under their control, independently of anything which might be done by their client in reference to the main case, and which can be enforced for their benefit, certainly in the name of their client, even if the cases above referred to are not authority for the proposition that it can be enforced in their own names. In such a case, we do not think that a judge who is related within the fourth degree of consanguinity or affinity, to any counsel for the applicant, should preside. The reason and spirit of the Code section above referred to, as well as a proper construction of the word 'party' therein contained, would disqualify a judge so situated from presiding in the case. In such a case the judge determines not only the question as to whether, under the circumstances of the case, counsel fees should be allowed, but he also determines the amount; the allow-

ance of fees and the amount thereof being left, under our law, to his discretion."

The question is also the subject of a note in 15 Ann. Cas. 533, where it is stated that the courts adopting the contrary view are those inclined to construe the term "parties" in its limited or strict sense. A recent case, involving the very question now under consideration, *Yazoo & M. Valley R. Co. v. Kirk*, 102 Miss. 41, 42 L.R.A. (N.S.) 1172, 58 So. 710, 834, reported with notes in Ann. Cas. 1914C, 970. In a well-considered opinion reviewing the leading cases, the supreme court of Mississippi adopted the broad and liberal rule of construction, and held a judge disqualified to sit in a divorce and alimony case, because he was related to an attorney for one of the parties, expressly declaring in the opinion that if the numerical weight of authority rested with the narrow view, or if there were no precedent to follow, the court would unhesitatingly adopt the broad and liberal construction of the statute, because of the general policy of the law. In the opinion it was said: "We are convinced that the broad and liberal rule of construction is the soundest and wisest rule, and, adopting this rule as our guide, we conclude that the circuit judge was disqualified to preside at the trial of this case. If the numerical weight of authority rested with the narrow view, we would unhesitatingly follow the lead of those courts adopting the broad and liberal construction of statutes and constitutions similar in language to our own Constitution. In the absence of precedent, we would feel constrained to create a precedent in harmony with our views. Every litigant is entitled to nothing less than the cold neutrality of an impartial judge, who must possess the disinterestedness of a total stranger to the interests of the parties involved in the litigation, whether that interest is revealed by an inspection of the record, or developed by evidence aliunde the record. The real parties in interest furnished the reason for the judge to recuse himself when it becomes known that they are related to the judge, although they may not be parties *eo nomine*."

An examination of the cases cited on both sides of this question convinces us that the weight of authority, giving due consideration to the more recent expressions of the courts and law writers, favors the adoption of a broad and liberal rather than a narrow construction of the term "parties" as it is used in statutory or constitutional provisions similar to the provision in our Code. In some of the cases which adopt the other view, the fact that, at the common law, relationship of the judge to one of

the litigants did not disqualify him from sitting in the cause, is given more consideration and force than it is entitled to, in our opinion. In *Roberts v. Roberts*, supra, the supreme court of Georgia lays stress upon the statutory disqualification of a juror who is related to one of the parties, or has an interest in the result of the suit, and the court in the opinion said: "The reasons at the foundation of the rule which forbid a juror from sitting in a case, where he is related to someone pecuniarily interested in the result of the suit, would also apply in the case of a judge who was in a similar situation. If one not a party to the record, but directly and pecuniarily interested in the result of the cause, would be such a party thereto as to disqualify one of his kinsman from being a juror, he would also be such a party as to disqualify his kinsman from presiding as judge. Especially would the judge be disqualified, in a proceeding where he presides not only with

the powers of a judge to determine the questions of law arising in the case, but with the powers of a jury to absolutely settle all disputed questions of fact, as is the case in an application for the allowance of temporary alimony and counsel fees, when one or more counsel for the applicant in whose behalf the fees are asked are related to the judge, within the degree referred to in the statute declaring when a judge should be disqualified."

Among the grounds under our Code for the peremptory challenge of a juror are "that he has an interest in the action . . . or is of kin to either party." Civ. Code, § 282 (Gen. Stat. 1915, § 7182).

Our conclusion is that, under the facts in this case, the judge of the district court was disqualified, and it was error to refuse to change the venue.

The judgment is reversed, and the cause remanded for further proceedings.

### Annotation—Relationship to attorney in case as disqualifying judge.

This note is supplemental to the note to *Yazoo & M. Valley R. Co. v. Kirk*, 42 L.R.A.(N.S.) 1172, where the earlier cases are collected.

It will be seen that, in *BROWN v. BROWN*, ante, 1033, a statute disqualifying a judge who is related to the parties disqualifies him from fixing and determining the fee of an attorney in a divorce case, who is his son.

In *White v. McClanahan* (1913) 133 La. 396, 47 L.R.A.(N.S.) 448, 63 So. 61, it was held that a statute, declaring that one of the causes for which a judge shall be recused is his being related to one of the parties in a certain degree, applies to a case where the son of the judge was one of the plaintiff's counsel, who were employed upon a purely contingent fee, the court stating that counsel so situated might, in effect, makes themselves parties of record, by filing their contracts.

Similarly, in *State ex rel. Mayo v. Pitchford* (1914) 43 Okla. 105, 141 Pac. 433, it was held that a statute disqualifying a judge when he is related to any party within a certain degree applies, where one of the plaintiff's attorneys of record was the judge's son, and was prosecuting the suit under a contract for a contingent fee, the court pointing out that, under the statute providing for contingent fees, an attorney so acting has, at least, an equitable interest in his client's cause of action. The court quoted with approval from *Yazoo & M. Valley R. Co. v. Kirk* (1912) 102 Miss. 41,

58 So. 710, Ann. Cas. 1914C, 968, prefixed to the note in 42 L.R.A.(N.S.) 1172.

And in *Cavanagh v. District Ct.* (1913) 163 Iowa, 76, 144 N. W. 25, where the matter was only collaterally involved, it was stated that a statute, disqualifying a judge from action in any case where he is related to either party, within a certain degree, prevents a probate judge from making an order directing the payment of a certain fee to counsel, whose associate was the son of the judge, such counsel having agreed with such associate to divide fees with him.

*Roberts v. Roberts* (1902) 115 Ga. 259, 90 Am. St. Rep. 108, 41 S. E. 616, cited in the earlier note, was followed in *Shuford v. Shuford* (1914) 141 Ga. 407, 81 S. E. 115, holding that, under a statute disqualifying a judge related to either party within a certain degree, a judge may not sit in a claim case, where one of the counsel, employed upon a contingent fee, is related to the judge within the specified degree.

But in *Young v. Harris* (1916) 146 Ga. 333, 91 S. E. 37, it was held (one judge dissenting), in an action by citizen taxpayers to enjoin a county from executing contracts for the building of a courthouse, that a judge was not disqualified because he was related to one of plaintiff's counsel, who was to receive a certain fee in any event, and more if his clients were successful. The court distinguished *Roberts v. Roberts* (Ga.)

supra, on the ground that there the attorney was interested in the res, while here he was not. It may well be doubted whether this distinction is sound. It was said in the Roberts Case, and quoted in *BROWN v. BROWN*, that "it is the pecuniary interest of the attorney in the result of the case, which disqualifies the judge." The majority opinion in the Young Case does not refer to Shuford v. Shuford (Ga.) supra, though that case is cited in the dissenting opinion.

*Young v. Harris* is referred to in the official syllabus, which constitutes substantially the report of *Kirkland v. Kirkland* (1916) 146 Ga. 347, 91 S. E. 119, where a mortgage provided for attorney's fees of 10 per cent, if the claim were placed in the hands of an attorney for collection, and the claim was placed

in the hands of an attorney for collection, under a special employment whereby he was to be paid a fee by the plaintiffs, not conditioned upon the collection of the fees specified in the mortgage. In a suit brought to enjoin the sale under the mortgage, it was held that the judge was not disqualified by relationship to such attorney. (It will be noted that it does not appear whether the attorney's fees were or were not conditioned on the recovery of the rest of the plaintiffs' claim other than the attorney's fees.)

For effect of fact that a judge, otherwise disqualified, is the only one who has power to try the case, see the note to *McCoy v. Handlin*, L.R.A.1915E, 858.

B. B. B.

# NEBRASKA SUPREME COURT.

JOHN KANE

v.

BROTHERHOOD OF RAILROAD TRAINMEN, Appt.

(— Neb. —, 168 N. W. 598.)

## Insurance — color blindness.

One who is color blind, but whose vision in other respects is unimpaired, has not suffered "complete and permanent loss of sight of both eyes." The fact that plaintiff is a railroad trainman, and on account of color blindness was discharged from his employment, does not entitle him to recover the amount payable under a provision of a benefit certificate that a member of the organization in good standing, "who shall suffer the complete and permanent loss of sight of both eyes, . . . shall be considered totally and permanently disabled;" there being no provision that the term "totally disabled" should mean "totally disabled" from following railroad work.

For other cases, see *Insurance*, VI. c. 2, in *Dig. 1-52 N. S.*

(Hamer, J., dissents.)

(July 8, 1918.)

Headnote by LETTON, J.

Note. — As to what constitutes disability within meaning of accident or health policy, see notes to *Turner v. Fidelity & C. Co.* 38 L.R.A. 529; *Keith v. Chicago, B. & Q. R. Co.* 23 L.R.A.(N.S.) 352; *Industrial Mut. Indemnity Co. v. Hawkins*, 29 L.R.A.(N.S.) 635; *Brotherhood of Locomotive F. & E. v. Aday*, 34 L.R.A.(N.S.) 126, and *Holcomb v. Grand Lodge, B. R. T.* L.R.A.1917B, 107, which include cases of loss of sight. See

L.R.A.1918F.

APPEAL by defendant from a judgment of the District Court for Douglas County in favor of plaintiff in an action brought to recover the amount alleged to be due on a benefit certificate. Reversed.

The facts are stated in the opinion.

Messrs. Weaver & Giller for appellant.

Messrs. Smith & Schall for appellee.

Letton, J., delivered the opinion of the court:

The facts in this case are similar to those in the case of *Routt v. Brotherhood of R. Trainmen*, 101 Neb. 763, 165 N. W. 141. A motion for rehearing in that case has been filed, and will be considered and disposed of with the case at bar. Several questions are presented, but the main and determining question is identical with that presented in the *Routt* Case. The constitution of the defendant provides that a beneficiary member of the class to which the plaintiff belongs in good standing, "who shall suffer the complete and permanent loss of sight of both eyes shall be considered totally and permanently disabled, and shall thereby be entitled to receive, upon furnishing sufficient and satisfactory proofs of such total and permanent disability, the full amount of his beneficiary certificate, but not otherwise."

The majority opinion in the *Routt* Case

also *Kane v. Chicago, B. & Q. R. Co.* 36 L.R.A.(N.S.) 1145, and note thereto, as to whether color blindness constitutes sickness or disease.

For extent of loss or mutilation contemplated by provision in accident policy as to loss or removal of bodily member or part thereof, see note to *Moore v. Aetna L. Ins. Co.* L.R.A.1915D, 264, especially section on "provisions as to loss of eyesight."

held, in substance, that the language of the contract was ambiguous, and that a member of the association who is unable longer to continue in train service, and is discharged therefrom, on account of color blindness, has suffered a complete and permanent loss of sight of both eyes, within the meaning of the contract.

The order, by its constitution, insures only against death and against certain specified disabilities. It makes no provision to insure against the multitude of other classes of injuries which a member may sustain, and which may equally incapacitate him from carrying on his work, and is therefore not avocational insurance.

The evidence shows that plaintiff's sight is perfect except that he is unable to distinguish certain colors. In the ordinary use and meaning of language, when one has suffered the complete and permanent loss of sight of both eyes, he is totally blind. It is true that ambiguous expressions in an insurance contract should be construed most strongly against the insurer, because he writes the contract; but where there is no ambiguity, and the plainest and clearest of ordinary language is used, courts are not warranted in striving to give distorted and unusual meanings to words in order to reach what is believed to be a benevolent result. Furthermore, § 85 of the constitution of the defendant order specifies its provisions "shall be interpreted and construed according to their most plain and obvious meaning." In order to bring plaintiff within the insured class there must be a complete perversion of the usual and

ordinary meaning of the language employed.

In a case in Kentucky, *Holcomb v. Grand Lodge*, B. R. T. 171 Ky. 843, L.R.A.1917B, 107, 188 S. W. 885, the facts were that a flagman was insured by this defendant under the same provisions as the plaintiff. He was injured by a cinder striking his left eye, by which he practically lost the sight of that eye, and the vision of the other was injured, and in consequence lost his position as a flagman. His eyesight, after the injury, was much more defective than that of plaintiff. The construction of the contract is discussed at length in the opinion, and it is said: "The language is clear, explicit, and unambiguous, and that appellant has not suffered the complete and permanent loss of the sight of both eyes is perfectly clear, and for that reason there can be no recovery."

The court of appeals of Ohio, the state where the order is domiciled, takes a similar view as to the obligations of the contract.

We are of the opinion that the district court erred in instructing the jury that, "under the laws of the state of Nebraska, one who is in the train service of a railroad company and is color blind to the extent that he is unable to distinguish colors and signals such as are used in the train service of a railroad company has suffered the permanent loss of sight of both eyes."

Its judgment is therefore reversed, and the cause dismissed.

**Hamer, J., dissents.**

#### NORTH DAKOTA SUPREME COURT.

PETERNELLE C. ARNTSON, Appt.,

v.

FIRST NATIONAL BANK OF SHELDON  
et al., Respts.

(— N. D. —, 167 N. W. 760.)

**Trust — promise as to disposition of property.**

1. Where one sick unto death calls his children to him, and says: "I want mother [his wife] to have all, and I want you boys to deed it to her when I am gone. This will

Headnotes by BRUCE, Ch. J.

Note. — For annotation of the question whether a constructive trust may be based upon an undertaking to hold for another's benefit property received through devise or inheritance where no actual testamentary intention has been frustrated, see post, 1045.

As to whether a constructive trust arises out of the fraud of an heir, devisee, or

be as good as a will,"—and the sons promise to convey such property to the mother, and in reliance on such promise the father dies without making a will, a constructive trust, according to the ordinary rules of equity, an involuntary trust, under the provisions of §§ 6273 and 6280 of the Compiled Laws of 1913, is created, which may be enforced against the sons, and which is superior to the liens of the judgments of their individual creditors.

*For other cases, see Trusts, I. d, in Dig. 1-52 N. S.*

**Same — execution — effect.**

2. Where an oral trust is created by the promise of the sons at the sickbed of their father to convey the property, which de-

legatee in frustrating decedent's intention to give the property to a third person, see note in 8 L.R.A.(N.S.) 698, and its continuation in 31 L.R.A.(N.S.) 176.

Upon the question whether a grantee's oral promise to the grantor to hold in trust will give rise to a construction trust, see note in 39 L.R.A.(N.S.) 906.

scends to them, to their mother after their father's death, the subsequent execution of a conveyance will take the transaction out of the provisions of the statutes, which generally require trusts in relation to real property to be created in writing.

*For other cases, see Contracts, I. e, 6, b, in Dig. 1-52 N. S.*

**Same — parol — enforcement.**

3. The law refuses its aid to enforce agreements creating trusts or charges upon land when they rest altogether in parol, not because the trusts are therefore void, but because it will not permit them to be proved by such evidence. But when a person who has received the title to such lands for the benefit of another, although not having declared the fact in writing, recognizes and fulfils the trust, it is not the duty of the court to deny its existence, nor can an individual creditor of such trustee dispute the same.

*For other cases, see Specific Performance, I. b, in Dig. 1-52 N. S.*

**Judgment — lien — what bound.**

4. The interest which the lien of the judgment affects is the actual interest which the debtor has in property, and a court of equity will always permit the real owner to show, there being no intervening fraud, that the apparent ownership of another is or is not real, and when the judgment debtor has no other interest except the naked legal title, the lien of the judgment does not attach.

*For other cases, see Judgment, III. b, in Dig. 1-52 N. S.*

**Trust — necessity of writing.**

5. The term "created or declared by operation of law," as found in § 5364 of the Compiled Laws of 1913, and which exempts from the requirement of expression in writing the trust so created, includes constructive trusts.

*For other cases, see Trusts, I. c, in Dig. 1-52 N. S.*

**Same — undue influence.**

6. Where confidential relations prevail between the parties to an oral trust, and the trust is violated, the law presumes that the influence of the confidence upon the mind of the person who confided was undue and a case of a constructive trust arises, not, however, on the ground of actual fraud, but because of the facility for practising it; and in such a case courts of equity will enforce the promise to convey, even though it may be not in writing, as the mere refusal to carry it out is constructively fraudulent.

*For other cases, see Trusts, I. c and d, in Dig. 1-52 N. S.*

**Trust — constructive.**

7. "Constructive trusts" are such as are raised by equity in respect to property which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds it.

*For other cases, see Trusts, I. d, in Dig. 1-52 N. S.*

**Same — statute — effect.**

8. Section 5366 of the Compiled Laws of 1913, which provides "that no implied or resulting trust can prejudice the rights of a purchaser or encumbrancer of real property for value, and without notice of the trust," and § 5594, which provides for the recording of deeds, merely protect creditors and purchasers against unrecorded conveyances of, or secret trusts upon, the property of their debtors, and of property which, if it had not been for the secret trusts or the unrecorded conveyances, would have been properly subjected to their debts.

*For other cases, see Records and Recording Laws, III. c, in Dig. 1-52 N. S.*

**Same — who may attack.**

9. The strictness of the law in relation to the execution of wills is not due to any solicitude for the creditors of the heirs, but to a desire that the real intention of the testator shall be ascertained and prevail. A personal creditor of one of the heirs, therefore, cannot complain that the deceased, instead of making a will of his property to his wife, created a trust by which his children agreed to convey it to her.

*For other cases, see Trusts, I. a, in Dig. 1-52 N. S.*

(April 12, 1918.)

**A**PPEAL by plaintiff from a judgment of the District Court for Ransom County in favor of defendants in an action brought to quiet title to certain real estate. Reversed.

**Statement by Bruce, Ch. J.:**

This is an action to quiet title in the plaintiff, Peternelle C. Arntson, in certain real estate owned by her husband while living. The plaintiff claims under a deed executed by her sons after the death of their father, and in pursuance of an agreement made with him shortly before his death. The defendant bank claims title to the interest of one of the sons, Ingebrigt E. Arntson, and bases its claim on a purchase made by it on an execution sale for a deficiency decree on the foreclosure of a mortgage made by the said Ingebrigt Arntson, said mortgage having been made to the said defendant, and the defendant purchasing at its own sale, the levy having been made prior to the execution of the deed by the sons to their mother, but the sale being subsequent to execution and recording of the instrument. Briefly and in chronological order the facts are as follows: On August 7, 1912, respondent commenced an action to foreclose its mortgage on real estate owned by one I. E. Arntson, in Ransom county, the action being afterwards decided in favor of Arntson in the lower court, and respondent herein appealed. Meantime, and while the appeal was pending, Eric Arntson,

the father of said I. E. Arntson, became sick unto death, called his five boys about his deathbed and said to them, in substance:

"I haven't much property to leave, but what have want mother (his wife) to have it all, as she has got to have someone to take care of her, and I want you boys to deed it to her when I am gone. This will be as good as a will."

The five boys agreed to this and so told their father, who died a few days later, April 17, 1914. About a month after this agreement between the father and sons and the father's death, this court reversed the decision of the lower court in the foreclosure action, and judgment was entered against I. E. Arntson; the land covered by the mortgage was sold, and a deficiency judgment for \$669.31 entered. In November, 1915, execution issued on this deficiency judgment, and was levied on the interest of said I. E. Arntson in 260 acres of land of which his father, Eric Arntson, died seised, the land the sons had agreed at their father's deathbed to convey to their mother. On December 4, 1915, all the five boys joined in a deed to their mother of their father's land, said deed reciting that it was executed to carry out and execute the parol trust declared and created by their father at his death. This deed was recorded on December 4, 1915. Thereafter, and on the 5th day of February, 1916, the sheriff sold the lands levied on, and the creditor defendant purchased at such sale, and this action was hereafter brought by appellant, the widow of Eric Arntson and the mother of the five boys, to quiet her title as against the sheriff's certificate held by such creditor bank, the respondent herein. Respondent counterclaimed, appellant replied, and the case was heard by Judge Pollock on said counterclaim and reply, and a decision rendered for respondent, whereupon this appeal was perfected and a trial de novo demanded.

Messrs. Kvello & Adams, for appellant:

Plaintiff is the owner in fee simple of all the real estate of which her husband died seised, by virtue of the execution by the trustees—her sons—of a parol trust created by her husband on his deathbed; and oral testimony of the creation of said parol trust may be offered and must be received as an incident to the establishment of her case.

Richmond v. Bloch, 36 Or. 590, 60 Pac. 385; Ratigan v. Ratigan, — Iowa, —, 162 N. W. 580; Tonkawa Nat. Bank v. Dyson, 35 Okla. 572, 130 Pac. 924; Desmond v. Myers, 113 Mich. 437, 71 N. W. 877; Silvers v. Potter, 48 N. J. Eq. 539, 22 Atl. 584; Sieman v. Austin, 33 Barb. 9; Karr v. Washburn, 56 Wis. 303, 14 N. W. 189;

Insurance Co. v. Waller, 115 Am. St. Rep. 774, note.

Messrs. Pierce, Tenneson, & Cuyler, for respondent Bank:

No trust was created.

39 Cyc. 76; 1 Perry, Trusts, 5th ed. §§ 99, 100, pp. 103, 105; Brabrook v. Boston Five Cents Sav. Bank, 104 Mass. 228, 6 Am. Rep. 222; Jones v. Lock, L. R. 1 Exch. 25, 35 L. J. Exch. N. S. 117, 11 Jur. N. S. 913, 13 L. T. N. S. 514, 14 Week. Rep. 149; Re Small, 27 App. Div. 438, 50 N. Y. Supp. 341.

The arrangement was void as a testamentary disposition.

Diefendorf v. Diefendorf, 29 N. Y. S. R. 122, 8 N. Y. Supp. 617; Hill v. Hill, 7 Wash. 409, 35 Pac. 360; Chestnut Street Nat. Bank v. Fidelity Ins. Trust & S. D. Co. 186 Pa. 333, 65 Am. St. Rep. 860, 40 Atl. 486; 1 Perry, Trusts, §§ 89-94, pp. 91-93.

An express trust in real property cannot be created or proved by parol evidence.

39 Cyc. 46; Cardiff v. Marquis, 17 N. D. 110, 114 N. W. 1088; Carter v. Carter, 14 N. D. 66, 103 N. W. 425; Smith v. Mason, 122 Cal. 426, 55 Pac. 143; Von Trotha v. Bamberger, 15 Colo. 1, 24 Pac. 883; Reagan v. McKibben, 11 S. D. 270, 76 N. W. 943. 19 Mor. Min. Rep. 556; McCammon v. Pettitt, 3 Sneed, 242; 2 Devlin, Real Estate, 3d ed. § 1183; Brown v. Barngrover, 82 Iowa, 204, 47 N. W. 1082; Merchants State Bank v. Tufts, 14 N. D. 238, 116 Am. St. Rep. 682, 103 N. W. 760; Ildvedsen v. First State Bank, 24 N. D. 227, 139 N. W. 105.

Bruce, Ch. J., delivered the opinion of the court:

The question to be decided in this case is whether the deed of the children to their mother was effective as against the levy of the judgment of the First National Bank of Sheldon, and against the sheriff's certificate which it obtained at the sale under said judgment. Did or did not the oral promise of the children of the deceased to convey the property to their mother create a trust which was superior to such lien and to such certificate? Was there any property of the defendant, Ingebrigt Arntson, on which the lien of the judgment could operate?

(1) The contention of the defendant, the First National Bank of Sheldon, is that no trust was created because the title to the property remained in the hands of the deceased up to the time of his death, and there was no conveyance to trustees.

(2) That from everything that was done and said it clearly appears that the deceased intended that the arrangement should be the same as a will, and that no title or interest should pass from him until after his



death; that the arrangement, therefore, amounted to a testamentary disposition, and, being oral and not in writing, and not being executed with the formality required by law in the case of wills, it was null and void.

(3) That the trust, if any, was oral, and that, under the statutes of North Dakota, an oral trust is void.

(4) That under §§ 5742 and 7691 of the Compiled Laws of 1913, the judgment became a lien upon the interest of Ingebrigt Arntson in his father's estate immediately upon his father's death.

(5) That defendant bank is a judgment creditor of the said I. E. Arntson, and is placed in the same position as a purchaser under § 5594 of the Compiled Laws of 1913, which relates to the recording of deeds.

(6) That at the judgment sale it became a purchaser of the property from the heir, and as such was protected by the provisions of § 5727 of the Compiled Laws of 1913 from secret gifts made by the deceased.

(7) That, under the provisions of § 6755 of the Compiled Laws of 1913, a defeasance is not enforceable as against any person other than the grantee, unless it is in writing and recorded.

The sections of the Compiled Laws, which need to be considered in this case, are the following:

Section 5364: "No trust in relation to real property is valid unless created or declared:

"1. By a written instrument subscribed by the trustee or by his agent thereto authorized in writing. [See § 4821, Revised Codes of 1905. Subdivision 1 of § 5364, as given in the Compiled Laws of 1913, is incorrectly compiled.]

"2. By the instrument under which the trustee claims the estate affected; or,

"3. By operation of law."

Section 5366: "No implied or resulting trust can prejudice the right of a purchaser or encumbrancer of real property for value and without notice of the trust."

Section 5742: "The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the county court and to the possession of any administrator appointed by that court for the purpose of administration."

Section 7691: "On filing a judgment roll upon a judgment directing in whole or in part the payment of money, it may be docketed with the clerk of the court, in which it was rendered, in a book to be known as the judgment docket, and in any other county upon filing with the clerk of the district court for said county a tran-

script of the original docket, and it shall be a lien on all the real property except the homestead in the county where the same is so docketed of every person against whom any such judgment shall be rendered, which he may have at the time of the docketing thereof in the county in which such real property is situated or which he shall acquire at any time thereafter, for ten years from the time of docketing the same in the county where it was rendered, and no judgment heretofore rendered shall hereafter become a lien on real property as herein provided, unless it is docketed in the county where the land is situated."

Section 5594: "Every conveyance by deed, mortgage or otherwise, of real estate within this state, shall be recorded in the office of the register of deeds of the county where such real estate is situated, and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any part or portion thereof, whose conveyance, whether in the form of a warranty deed or deed of bargain and sale, deed of quitclaim and release, of the form in common use or otherwise, is first duly recorded; or as against any attachment levied thereon or any judgment lawfully obtained, at the suit of any party, against the person in whose name the title to such land appears of record, prior to the recording of such conveyance. . . ."

Section 5727: "The rights of a purchaser or encumbrancer of real property in good faith and for value derived from any person claiming the same by succession are not impaired by any devise made by the decedent from whom succession is claimed, unless the instrument containing such devise is duly proved as a will, and recorded in the office of the county court having jurisdiction thereof, or unless written notice of such devise is filed with the county judge of the county where the real property is situated within four year after the deviser's death."

Section 6755: "When a grant of real property purports to be an absolute conveyance, but is intended to be defeasible on the performance of certain conditions such grant is not defeated or affected as against any person other than the grantee or his heirs or devisees or persons having actual notice unless an instrument of defeasance duly executed and acknowledged, shall have been recorded in the office of the register of deeds of the county where the property is situated."

Section 6273: "An involuntary trust is one which is created by operation of law."

Section 6280: "One who gains a thing by fraud, accident, mistake, undue influence,

the violation of a trust or other wrongful act is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it."

There can be no doubt that there was in the case at bar no express trust, as there was no transfer of the title in the property to the trustee or trustees during the lifetime of the deceased. It seems, indeed, that the intention was merely that the arrangement should take the place of a will; or, to use the language of the testator, "be as good as a will;" and that not only was no transfer to the mother contemplated during the deceased's lifetime, but no present transfer to his children, as trustees, was either contemplated or made.

It is also clear from the evidence that no conveyance was made until after the execution of the First National Bank had been levied; and it is clear that since, under § 5742 of the Compiled Laws of 1913, the title to the property vested in the heirs immediately upon the death of the deceased, subject only to debts of the intestate and the control of the administrator for the payment of such, the lien of that judgment was paramount, unless it could be defeated by a subsequent execution of the parol trust, or there was a prior and enforceable constructive trust.

This subsequent execution of the deed can only be held to have defeated the judgment lien on the theory that the judgment creditor merely stood in the shoes of his debtor, and had no greater right than he had, and that the real estate, though nominally in the names of the sons and daughter at the time of the levy of the execution, did not in fact belong to them, and could not have been voluntarily used by them in the payment of their debts. This theory, however, we believe to be correct and to be controlling. The question is one primarily of proof. The action is one to determine adverse claims. The plaintiff introduces in evidence a deed from the heirs to herself, executed, it is true, after the lien of the judgment had attached, but by those in whom the legal title to the land vested after the death of the deceased; the defendant bank relies upon the sheriff's certificate, and asks to have the deed set aside. It is clear that, as between the sons and daughters and their mother, the deed is valid and binding, as it seems to be well established that "the law refuses its aid to enforce agreements creating trusts or charges upon lands, when they rest altogether in parol, not because the trusts are therefore void, but because it will not permit them to be proved by such evidence. But when a person who has received the title to lands purchased for

the benefit of another, although without having declared the fact in writing, recognizes and fulfils the trust, it is not the duty of the court to deny its existence. . . .

A debtor will not be permitted to convey away his property, either real or personal, and relieve it from the encumbrances occasioned by his debts; but there is nothing to prevent his restoring to others their property if it has been placed in his hands. Nor is there any reason why the property of others should be subjected to the payment of his debts, if he is honest enough to refuse to avail himself of an opportunity to use it for that purpose." *Sieman v. Austin*, 33 Barb. 9; *Borst v. Nalle*, 28 Gratt. 423; *Freeman's notes* in 115 Am. St. Rep. 783; *Eaton v. Eaton*, 35 N. J. L. 290; *Hays v. Reger*, 102 Ind. 524, 1 N. E. 386; *Robbins v. Robbins*, 89 N. Y. 251; *Gallagher v. Northrup*, 215 Ill. 563, 74 N. E. 711, reversing 114 Ill. App. 368; *Collins v. Collins*, 98 Md. 473, 103 Am. St. Rep. 408, 57 Atl. 597, 1 Ann. Cas. 856.

It is also well established that "the interest which the judgment lien affects is the actual interest which the debtor has in the property; and a court of equity will always permit the real owner to show, there being no intervening fraud, that the apparent ownership of another is or was not real; and when the judgment debtor has none other interest than the legal title, the lien of the judgment does not attach." *White v. Carpenter*, 2 Paige, 219, note; *Keirsted v. Avery*, 4 Paige, 9; *Thomas v. Kennedy*, 24 Iowa, 397, 95 Am. Dec. 740; *Brown v. Pierce*, 7 Wall. 205, 19 L. ed. 134; *Monticello Hydraulic Co. v. Loughry*, 72 Ind. 562; *Hays v. Reger*, 102 Ind. 524, 1 N. E. 386; *Richmond v. Bloch*, 38 Or. 317, 60 Pac. 388.

It is true that, in the majority of the cases upon the subject, and which have held the trust superior to the judgment lien, there was an actual transfer of the legal title to the trustee by the grantor or creator of the trust; but we do not see that this alters the situation. There was an oral promise, and in consideration of or relying upon that promise the deceased refrained from making a will. Immediately upon his death the title to the property vested in those whom he had intended to create trustees. Why should equity treat the case any differently than if he had actually deeded the land to these persons, taking from them an oral promise which they afterwards performed?

The defendant bank was neither a party to nor a privy to the transaction which it here assails, and it will not be heard to object to it on account of the nature of the evidence by which it is proved, since the parties themselves have executed it and are

satisfied with it. *Dixon v. Duke*, 85 Ind. 434; *Savage v. Lee*, 101 Ind. 514; *Hays v. Reger*, 102 Ind. 524, 1 N. E. 386; *Richmond v. Bloch*, 38 Or. 317, 60 Pac. 398.

We are satisfied, indeed, that even if the children had refused to convey the property to their mother, they could have been compelled to do so on the theory of a constructive trust, and that the equities of the plaintiff are much greater than those of the defendant bank, which, if the deceased had not relied upon the promises of his children and had made a will, would have had no property to attach whatever. The creditors of heirs are not privies to the making of a will by the testator and to his acts. As against the wife and mother, the bank has no equities. It has parted with nothing of value. It did not loan the money on the strength of Ingebrigt Arntson's title to the land, for at the time of the loan the land belonged to his father, and his father could do with it as he chose.

Although there is some conflict upon the subject, the courts now seem generally to concede that, under statutes such as § 5364 of the Compiled Laws of 1913:

Constructive trusts come within the definition and exception of trusts which are "created or declared . . . by operation of law." "In the light of the judicial discussion, . . . the phrases 'trusts by implication of law,' 'trusts by operation of law,' 'implied trusts,' and 'trusts arising or resulting by operation of law,' are all synonymous and embrace all trusts where a transaction of equitable cognizance is inseparably connected with the creation of the trust." *Freeman's notes* in 115 Am. St. Rep. 775; *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 640.

"A constructive trust . . . is merely an express trust wherein some transaction of equitable cognizance is inseparably connected with the creation of the trust, so that a court of equity has jurisdiction to administer relief to the parties on the whole transaction, including the express agreement between them, notwithstanding that agreement is oral and would not be cognizable in a court of justice in the absence of the equitable elements connected with it. A constructive trust can never arise in the absence of an express agreement of trust between those concerned in the transfer of the legal title of land, but is always superimposed upon and could not exist without an express oral trust, which in turn would be unenforceable without the constructive trust." *Freeman's notes* in 115 Am. St. Rep. 775.

We believe that there was a constructive trust in the case which is before us.

It is true as a general proposition that

a mere breach of an oral agreement to convey an interest in land is not such a fraud as will create a constructive trust and justify the intervention of a court of equity, but "where confidential relations prevail between the parties to an oral trust and the trust is violated, the law presumes that the influence of the confidence upon the mind of the person who confided was undue, and a case of constructive trust arises, not, however, on the ground of actual fraud, but because of the facility for practising it. *Hayne v. Hermann*, 97 Cal. 259, 32 Pac. 171. [115 Am. St. Rep. 791, note]; *Allen v. Jackson*, 122 Ill. 567, 13 N. E. 840.

It is immaterial, indeed, whether the fraud was intentional or not, or whether it existed when the legal title passed, for "in such a case courts of equity do not enforce the trust in violation of the Statute of Frauds, but relief is granted as based on the constructive fraud and the confidential relation." *Cardiff v. Marquis*, 17 N. D. 110, 114 N. W. 1088; *Hanson v. Svarverud*, 18 N. D. 550, 120 N. W. 550; *Ransdel v. Moore*, 153 Ind. 393, 408, 53 L.R.A. 753, 53 N. E. 767; *Powell v. Yearance*, 73 N. J. Eq. 117, 67 Atl. 892; *Kimball v. Tripp*, 136 Cal. 631, 69 Pac. 428; note to *Stahl v. Stahl*, 2 Ann. Cas. 777. The case at bar comes clearly within this rule. *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; *Bohm v. Bohm*, 9 Colo. 100, 10 Pac. 790; *Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 680; *Goldsmith v. Goldsmith*, 145 N. Y. 313, 39 N. E. 1067; *Russell v. Jackson*, 10 Hare, 204, 68 Eng. Reprint, 900; *Re O'Hara*, 95 N. Y. 403, 413, 47 Am. Rep. 53; *Ragsdale v. Ragsdale*, 68 Miss. 92, 11 L.R.A. 316, 24 Am. St. Rep. 256, 8 So. 315; *Dixon v. Olmuis*, 1 Cox, Ch. Cas. 414, 29 Eng. Reprint, 1227.

Under circumstances such as those before us courts of equity will enforce the promise to convey, as the refusal to carry it out is constructively fraudulent, and this even though the promise was not in writing. *Beach, Tr. & Trustees*, § 225; *Cardiff v. Marquis*, supra; *Hanson v. Svarverud*, 18 N. D. 550, 120 N. W. 550.

It is not always necessary that fraud in the inception of the transaction should be proved in order that there should be a constructive trust. "Constructive trusts," indeed, "are such as are raised by equity in respect to property which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds the legal title." 2 Washb. Real Prop. 520; *Lewis v. Lindley*, 19 Mont. 422, 48 Pac. 765. In the case before us, also, we clearly have an involuntary trust, as defined by §§ 6273 and 6280 of the Compiled Laws of 1913,

and which seem to include both a constructive and a resulting trust. These sections are as follows:

Section 6273: "An involuntary trust is one which is created by operation of law."

Section 6280: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it."

"In the case of a resulting trust there is always the element, although it is an implied one, of an intention to create a trust, by reason of which, although it is by no means an express trust, it approaches more nearly thereto. Constructive trusts, on the other hand, have none of the elements of an express trust, but arise entirely by operation of law without reference to any actual or supposed intention of creating a trust and often directly contrary to such intention. They are entirely in invitum, and are forced upon the conscience of the trustee for the purpose of working out right and justice or frustrating fraud." 39 Cyc. 27.

If, in the inception of the transaction before us, the children of the deceased and the defendant Ingebrigt Arntson purposely induced the deceased to refrain from making a will by promising him to convey the property to his wife when the same should vest in them by virtue of the statutes of inheritance, we have all of the elements of a constructive trust. If, on the other hand, we have an intention, expressed or implied, to create a trust, that is to say, an intention to allow the property to descend to the heirs of the estate under the promise of these heirs to convey their interest to the wife of the deceased, we have a resulting trust. In both cases we have involuntary trusts, and in both cases the practical result is the same. In one case the fraud would lie at the root of the transaction, and the trust, springing from the fraud by which the title was obtained, would be constructive. In the other, the transaction is based upon the promise itself, and the fraud upon the refusal to carry it out after the title to the property had been obtained. The trust, whether it be called constructive or resulting or involuntary, springs from the intention of the testator and the promise of the legatee, and a trust clearly exists where heirs and next of kin induce their ancestor or relative not to make a will by promising, in case his property falls to them through intestacy, to dispose of it, or a part of it, in the manner indicated by him. The rule is founded on the principle that the legacy would not have been given or intestacy allowed to ensue unless the

promise had been made; and hence the person promising is bound in equity to keep it, as to violate it would be fraud. *Amherst College v. Ritch*, 151 N. Y. 282, 37 L.R.A. 305, 45 N. E. 876; *Mead v. Robertson*, 131 Mo. App. 185, 110 S. W. 1095; *McDowell v. McDowell*, 141 Iowa, 286, 31 L.R.A. (N.S.) 176, 133 Am. St. Rep. 170, 119 N. W. 702.

It is clear, also, that § 5366 of the Compiled Laws of 1913, which provides that "no implied or resulting trust can prejudice the right of a purchaser or encumbrancer of real property and without notice of the trust," does not apply. As far as the bank's right as a purchaser at the sale was concerned, the proof shows that the deed from the heirs was recorded before the sale. As far as its rights as an encumbrancer are concerned, it is clear that the debtor, Ingebrigt Arntson, had no interest which was subject to the levy.

The deed did not constitute the foundation of the trust, but evidence merely; and, as we have before said, the trust could have been enforced against the lien of the bank, even though no deed had been executed. The property, in short, never belonged to the children, nor to the said Ingebrigt Arntson. The bank certainly had no claim upon it prior to the death of the deceased, as the deceased owed it nothing. Section 5366 and the recording statute merely protect creditors and purchasers against secret trusts upon and unrecorded conveyances of the property of their debtors, and of property which, if it had not been for the unrecorded conveyances, would have been properly subject to their debts.

Since, indeed, the heirs would have been compelled to convey to their mother, it is immaterial whether the deed was executed after the levy of the execution or not.

Nor can the defendant bank complain on the ground that, by the means adopted, the deceased avoided the requirements of the statutes which relate to the execution of wills. The strictness of the law in relation to these matters is not due to any solicitude for the creditors of the heirs, but to a desire that the real intention of the deceased shall be ascertained and prevail.

The judgment of the District Court is reversed, and the cause is remanded, with directions to enter judgment quieting the title of the plaintiff against the claim of the defendants.

**Birdzell, J.**, concurring specially:

I concur in the reversal of the judgment and in the reasons given therefor, which are stated in paragraphs 2, 3, 4, 5, 7, 8, and 9 of the syllabus. Inasmuch, however, as the trust in this case is executed, I express no

opinion as to whether or not a trust created under the circumstances shown to have existed in this case is one that could be enforced if it remained executory. I am of the opinion that the transfer cannot be said to have been fraudulent and void as to creditors, nor one subject to a lien in favor of creditors upon a larger interest of

the judgment debtor than he himself claimed under the circumstances; and I deem it unnecessary to say that an enforceable constructive trust existed.

I am authorized to say that Mr. Justice Christianson concurs in the view herein expressed.

**Annotation—May a constructive trust be based upon an undertaking to hold for the benefit of another property received through devise or inheritance, where no actual testamentary intention has been frustrated.**

This note supplements one in 33 L.R.A.(N.S.) 996, on the same subject.

In *O'Donnell v. Murphy* (1911) 17 Cal. App. 625, 120 Pac. 1076, a testatrix who had entertained the intention of devoting a large portion of her fortune at her death toward the erection of a memorial gateway in a city park, but who was advised that a testamentary provision to that effect would be invalid, made a will in which she described that intention, and went on to state: "But there being some doubt as to whether or not a donation for that purpose would or would not be considered a charity or unlawful trust and be set aside at the instigation of someone claiming heirship to me to whom I had left nothing and to whom I desire to leave nothing, I have therefore abandoned that idea, and do now devise and bequeath to Adolph B. Spreckels & R. H. Lloyd, two of the park commissioners of the city and county of San Francisco, the sum of two hundred thousand dollars (\$200,000). This is an absolute bequest to them without any trust or understanding, either express or implied, as to its use or appropriation or otherwise." Her next of kin and heirs at law brought an action to have declared a resulting trust in their favor in the subject of the foregoing bequest, on the ground that it was upon a trust void by reason of a statute providing that a testator may devise or bequeath not more than one third in value of his estate to charitable uses. It appeared that the residuary legatee, who was also the executor, to whom all illegal or inoperative devises or bequests were expressly given, but who knew nothing about the will or its contents until after it had been executed, promised the testatrix that he would see that her will was carried out; but there was nothing to show that either he or she in any way spoke of any gate for the park, or of any purposes she had as to

the disposition of her estate other than as shown upon the face of her will. Of the two legatees named, who were men of ample private fortune, and who had taken great interest in the development of the park, one knew nothing whatever about the will or its contents or the purposes of the testatrix until after her death. The other, who was her attorney, had advised her that a bequest for the erection of the gate would be invalid, but that she might give her property to anybody individually so long as she did not put any strings on it, whereupon she expressed an intention to give it to him absolutely, to do as he liked with it. He testified that neither he for himself, his colleague, or the residuary legatee, made any promise, express or implied, with relation to the use of the legacy in question. The legatees, however, after her death and the probate of the will, joined in executing a declaration of trust as to the legacy for the purpose of securing its application to the erection of such a gate as she had wished to be erected. It was held that the evidence was such as to warrant the trial court in finding that the bequest was not the subject of a secret or constructive trust, and accordingly that it was valid.

In *People v. Schaefer* (1915) 266 Ill. 334, 107 N. E. 617, where a testator devised all his property to his brother absolutely, with the understanding that the latter would carry out the testator's wishes expressed in a memorandum forming part of the will, and the brother in turn bequeathed the same property to his legal adviser, having received from him a promise that he would carry out such of the directions of the original testator as remained unexecuted, it was held that the brother and his legal adviser each took the property impressed with a trust, and accordingly that it was not subject to an inheritance tax; the

court saying: "Where a party receives property by conveyance or devise under assurances that he will transfer the property to or hold and appropriate it for the use and benefit of another, a trust for the benefit of such other person is charged upon the property not merely by reason of the oral promise, but because of the fact that the transfer of the property was induced thereby."

In *Rice-Stix Dry Goods Co. v. W. S. Albrecht & Co.* (1916) 273 Ill. 447, 113 N. E. 66, where a mother devised property to a daughter pursuant to an agreement by which she was to pay her sisters certain sums of money, it was held that a court of equity would not permit her to betray the confidence put in her by the testatrix, but would raise a constructive trust in favor of her sisters, even though the agreement rested entirely in parol; and therefore that a conveyance of the real estate by the devisee, made in good faith, to secure the performance of her agreement with the testatrix, would be upheld as against an attaching creditor.

In *Golland v. Golland* (1914) 84 Misc. 299, 147 N. Y. Supp. 263, where a mother made a will leaving her property to two of her sons, who were experienced and successful business men, with the understanding that they should hold it for the benefit of her other children, some of whom were inexperienced and others incompetent, it was held that although the promise which induced the gift was made by only one of the sons, and notwithstanding the sons never repudiated such promise, they took the property subject to a constructive trust which the court would declare and enforce as against their assignee in bankruptcy.

In *Chapman v. Chapman* (1913) 152 Ky. 344, 153 S. W. 434, where a son devised his property to his father in reliance on the latter's promise that he would devise such property to the children of a deceased brother, and the father made a will to that effect, but afterwards, having lost his wife, married again and left a will by which he gave to his second wife all of his property for life, with remainder to his infant son by her, it was held that the agreement between the testator and his father constituted an enforceable parol trust, the law implying a fraud from the failure of the father to perform the annexed conditions.

In *Crinkley v. Rogers* (1916) 100 Neb. 647, 160 N. W. 974, where a wife made a will by which she bequeathed and de-

vised all her property of every kind to her husband, who survived her, upon the understanding that he would make a will devising and bequeathing the estate received from her to certain persons, it was held that a constructive trust arose in favor of such persons.

In *Hollis v. Hollis* (1916) 254 Pa. 90, 98 Atl. 789, it was said that a trust orally annexed by a testator to a bequest or devise absolute in form and accepted by the legatee or devisee at the time when the provision was made (or by his assent given prior to and continuing at that time), either expressly or by words or acts of encouragement, or by silent acquiescence, may be enforced in equity, because a refusal to perform the trust under such circumstances is a fraud. The evidence, however, was held insufficient to establish the existence of an agreement on the part of a devisee to hold the property for the benefit of other persons.

The reader may be interested to know that the case of *Barrell v. Hanrick* (1868) 42 Ala. 60, cited in the note to which the present is supplemental, has been, insofar as it asserts the broad proposition that the mere repudiation or violation of a parol promise or trust offensive to the Statute of Frauds is a fraud which will authorize a court of equity to relieve against the words of the statute, repudiated in later Alabama decisions not in point on the specific question under discussion. See *Patton v. Beecher* (1878) 62 Ala. 579; *Brock v. Brock* (1890) 90 Ala. 86, 9 L.R.A. 287, 8 So. 11; *Manning v. Phippen* (1891) 95 Ala. 541, 11 So. 56. So far as its decision is based upon the facts therein involved, it has not, however, been overruled. See *Moore v. Campbell* (1893) 102 Ala. 450, 14 So. 780. E. S. O.

#### OKLAHOMA SUPREME COURT.

F. M. WOODEN, Plff. in Err.,  
v.

STATE OF OKLAHOMA.

(— Okla. —, 173 Pac. 829.)

Office — failure to enforce laws — removal.

The charter of the city of Tulsa makes

Headnote by HARDY, J.

Note. — As to removal of public officer for failure to enforce criminal or penal law or ordinance, see annotation following this case, post, 1049.

the mayor of said city the chief executive officer thereof, and imposes upon him the duty to see that all the laws of the city are enforced; in addition to which the chief of police is placed under his superior authority, and he is made a conservator of the peace with power to arrest in all cases. Ordinances of the city prohibiting the traffic in intoxicating liquors and gambling were openly and notoriously violated, of which the mayor had personal knowledge. Held, that it was the duty of the mayor to see that said ordinances were enforced, and for his wilful failure to do so he might be removed from office.

*For other cases, see Officers, I. c. 3, in Dig. 1-52 N. S.*

(May 14, 1918.)

**E**RROR to the District Court for Tulsa County to review a judgment removing defendant from the office of mayor for alleged wilful failure to enforce certain ordinances. **Affirmed.**

The facts are stated in the opinion.

Messrs. C. B. Stuart and Martin & Moss for plaintiff in error.

Messrs. S. P. Freeling, Attorney General, and Smith C. Matson, for the State.

Where a public officer is charged with the duty of seeing that the penal laws of the state or city are enforced, and he has been placed in command of the means and agencies to enforce such laws, a duty which he owes to the public under such circumstances is a mandatory one which he cannot evade.

State ex rel. Jackson v. Wilcox, 78 Kan. 597, 19 L.R.A.(N.S.) 224, 13 Am. St. Rep. 385, 97 Pac. 372; State ex rel. Johnston v. Foster, 32 Kan. 14, 3 Pac. 534, affirmed in 112 U. S. 201, 28 L. ed. 629, 5 Sup. Ct. Rep. 897; State ex rel. Martin v. Ryan, 92 Neb. 636, 139 N. W. 235, Ann. Cas. 1914A, 224; State ex rel. Timothy v. Howse, 134 Tenn. 67, L.R.A.1916D, 1090, 183 S. W. 510, Ann. Cas. 1917C, 1125; People ex rel. Connolly v. Police Comrs. 11 Hun, 403.

Hardy, J., delivered the opinion of the court:

Plaintiff in error, F. M. Wooden, was removed from the office of mayor of the city of Tulsa upon the grounds set forth in an accusation returned by the grand jury of Tulsa county. Plaintiff in error was convicted upon two grounds of said accusation, one of which charged him with the failure to enforce the ordinance against the keeping and the sale of intoxicating liquor, and the other for the failure to enforce the ordinance against gambling and kindred offenses.

There is but one question presented to us, which is: Did plaintiff in error as mayor,

under the power and authority granted him by the charter and ordinances of the city, have authority, and was he charged with the duty as the chief executive officer of said city with the enforcement of its laws and ordinances, to see that the ordinances against the keeping and sale of intoxicating liquor and against gambling were diligently enforced? Plaintiff in error denies that it was his duty to do so, and contends that the provisions of the charter and ordinances conferred no specific duty nor power upon him in the enforcement of the ordinances of the city.

Section 1 of article 3 of Tulsa City Charter creates a board of commissioners, composed of the mayor and four commissioners, and provides that all powers conferred on the city when not otherwise provided shall be exercised by said board, and declares: "The mayor and members of the board of commissioners shall be conservators of the peace, with the full powers to make arrests in all causes the same as police officers."

Section 6, art. 3, reads in part as follows: "The mayor shall be a member of the board of commissioners, with all the rights, powers, and duties pertaining thereto. He shall be the chief executive officer of said city and shall see that all the laws thereof are enforced. . . ."

Section 8 of said article 3 requires the board of commissioners to designate one of their members as police and fire commissioner, who shall have under his special charge enforcement of all police regulations of said city and general supervision over the fire department, and who shall perform such other duties as may be required by the board of commissioners; and § 13 confers upon the board of commissioners control and supervision over all the departments of the city except as otherwise provided in the charter, and confers upon them power to make such rules and regulations as they may see fit and proper concerning the organization, management, and operation of all the departments of the city and the agencies that may be created for the administration of its affairs.

Under the authority granted by the charter, ordinance 1171 was passed, which provided for the organization of a police force, and by § 4 of said ordinance it is enacted: "The chief of police shall be executive head of the police force, but he shall be subject to the superior authority of the police and fire commissioner, mayor, and board of commissioners. . . ."

By the charter provision quoted, the mayor is designated as the chief executive officer of the city, and the duty is imposed

upon him of enforcing all the laws and ordinances of the city. To the end that these laws might be enforced, the police department was created with the chief of police at its head, and it is specifically provided that said chief of police shall be subject to the superior authority of the mayor, thus constituting the mayor one of the controlling heads of the police force. Not only has the duty of enforcing the laws been delegated to and imposed upon the mayor, but the instrumentality through which these laws shall be enforced has been created and placed under his superior authority; in addition to which, there is expressly conferred upon him the powers of any other police officer to make arrests in any case.

The evidence abundantly establishes the fact that open and notorious violations of the ordinances in question have been systematically and continuously carried on, and the plaintiff in error had actual knowledge thereof; that there was a system prevailing in the municipal court whereby fines might be paid periodically or moneys deposited in lieu of bail should be forfeited, and in this way large revenues have been obtained from liquor dealers and gamblers during the entire term of plaintiff in error as mayor of said city; and it is made to appear that this system was so open and notorious as to have become a matter of common knowledge throughout the city.

On this state of facts, we entertain no doubt that the verdict and judgment was right, because plaintiff in error, being charged with the mandatory duty of seeing that said ordinances were enforced, and having the superior authority to require said laws to be executed by the police department, cannot evade that responsibility.

It was the clear intent of the freeholders in adopting the charter that the officers upon whom these duties were imposed should be diligent and efficient in the performance thereof; and it is no defense to say that the police department failed to do its duty, when plaintiff in error had actual personal knowledge of the conditions that were notorious and long continued. In fact, it is admitted by plaintiff in error that he did nothing, either to compel enforcement of the laws by the police officers of the city or to cause the removal of his guilty subordinates, or took any step in any way to perform the duties imposed upon him. In *State ex rel. Jackson v. Wilcox*, 78 Kan. 597, 19 L.R.A. (N.S.) 224, 130 Am. St. Rep. 385, 97 Pac. 372, the mayor of the city of Coffeyville was ousted from office for failure and neglect of official duty in the enforcement of the law relating to the sale of intoxicating liquor and the keeping of

gambling houses. In that case, it was made to appear that the mayor had personal knowledge of the violations complained of, and that a system of paying monthly fines of fixed amounts by joint keepers was permitted to be carried on. In *State ex rel. Connolly v. Howse*, 134 Tenn. 67, L.R.A. 1916D, 1090, 183 S. W. 510, Ann. Cas. 1917C, 1125, judgment removing the mayor of Nashville for allowing saloons and gambling houses to run in violation of law was affirmed.

Here the duty to enforce the ordinances of the city was imposed upon the plaintiff in error by the charter of the city.

In *State ex rel. Martin v. Ryan*, 92 Neb. 636, 139 N. W. 235, Ann. Cas. 1914A, 224, respondents were members of the board of fire and police commissioners, who, together with police officers under their supervision and control, had actual knowledge of the frequent violations of the laws of the state by saloon keepers by selling intoxicating liquors on election day, Sundays, and prohibited hours of the night, and made no attempt in good faith to suppress such crimes and enforce the law, and respondents were held guilty of a wilful refusal to perform their duty, and judgment of ouster was rendered removing them from office. It was urged in that case, as here, that it was not the duty of the board of fire and police commissioners to enforce the laws which had been violated, but that such matters were under the sphere and duty of the mayor and chief of police. This contention was denied, and attention was called to the fact that, under the governing statutes, the chief of police, although he had supervision and control of the police force of the city, was subject to the board of fire and police commissioners. So, in the case before us, although the chief of police is executive head of the police force, he is subject to the superior authority of the police and fire commissioner, mayor, and board of commissioners, in the order named; and it was within the scope of authority vested in plaintiff in error to require the chief of police and the force under him to enforce the laws of the city with reference to the matters involved, and the intention of the freeholders was to require an earnest, continued, and persistent effort to enforce the laws and prevent violations thereof, or to punish those guilty of violations, and to require good faith and a reasonable effort upon the part of all officers upon whom such duties were imposed, either by themselves or through instrumentalities placed at their disposal.

*Field v. People*, 3 Ill. 79, is not controlling; for in that case the governor had no



power to direct and control the actions of the secretary of state nor to dismiss him for not conforming to executive directions.

In *Re Fire & Excise Comrs.* 19 Colo. 482, 36 Pac. 234, the right of the governor to remove the police and fire commissioners on assigning in writing therefor a cause not political was upheld, but his power to use the Militia to instal his appointees was de-

nied, as his responsibility and duty were held to cease upon making the appointment.

The other decisions relied upon are not more in point than the ones reviewed.

The judgment is affirmed.

All the Justices concur, except Miley, J., disqualified. Brett and Tinsinger, JJ., absent.

### Annotation—Officers: removal for failure to enforce criminal or penal law or ordinance.

This annotation is supplemental to a note considering the same subject appended to *State v. Roth*, 50 L.R.A. (N.S.) 841.

Since the earlier note and in harmony with the decision in *WOODEN v. STATE*, ante, 1046, it was held in *State ex rel. Thompson v. Reichman* (1916) 135 Tenn. 653, 188 S. W. 225, Ann. Cas. 1918B, 899, that failure of sheriff to enforce the laws against the sale of intoxicating liquors is ground for removal.

So, too, in *State ex rel. Timothy v. Howse* (1916) 134 Tenn. 67, L.R.A. 1916B, 1090, 183 S. W. 510, Ann. Cas. 1917C, 1125, it was held that the mayor of a city is subject to removal from office for refusal to execute a state prohibitory liquor law, although the persons who elected him to office desire that it shall not be enforced.

And see *State ex rel. Burns v. Linn* (1915) 49 Okla. 526, 153 Pac. 826, Ann. Cas. 1918D, 139, which held that a chief

of police of a city may be removed under the general laws of the state for failure to enforce the prohibition laws, although the city charter contains provisions for removal of officers.

The removal of a sheriff for failure to suppress a riot was held in *State v. Driscoll* (1914) 49 Mont. 558, 144 Pac. 153, to be warranted, where, although neither cowardice nor self interest on his part was shown, there was shown such a degree of inadequacy and lack of preparation and such indisposition to resort to any effective means for the discharge of his obvious duties as to amount to official incompetency and neglect.

In South Carolina, it seems that under the Constitution and the statutory law of the state a governor cannot remove a sheriff for neglect and refusal to enforce the liquor laws until after trial and conviction. *State ex rel. Huckabee v. Hough* (1915) 103 S. C. 87, 87 S. E. 436. J. H. B.

### NEW YORK COURT OF APPEALS.

LOUIS H. CHAPMAN, Respt.,

v.

JAMES C. FARGO, President of American Express Company, Appt.

(223 N. Y. 32, 119 N. E. 76.)

**Damages — delay in transportation — loss of profits.**

A mere notice to an express company when delivering to it motion picture films for transportation "to rush," because they are for exhibition, is not sufficient to entitle the consignee, in case of delay in delivery to the profits lost by inability to exhibit

them as advertised, on a holiday, at an increased admission fee.

For other case, see *Damages*, III. p. 1, in Dig. 1-52 N. S.

(February 26, 1918.)

**A**PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a trial term for Oneida County in favor of plaintiff, and from an order denying a motion for new trial, in an action brought to recover damages for alleged unreasonable delay in the transportation of moving picture films delivered to defendant for shipment to plaintiff. Reversed.

The facts are stated in the opinion.

Messrs. Jones, Townsend, & Casey, for appellant:

There is no evidence of defendant's negligence.

**Note.** — As to liability of carrier for loss of profits incident to delay in delivery of articles intended for use, and not for sale, see annotation following this case, post, 1053; and references therein to annotations on related questions.

Wibert v. New York & E. R. Co. 12 N. Y. 245; Geismer v. Lake Shore & M. S. R. Co. 102 N. Y. 563, 55 Am. Rep. 837, 7 N. E. 828; Tyrrell v. New York, 34 App. Div. 334, 54 N. Y. Supp. 372; Smith v. Wilcox, 24 N. Y. 353, 92 Am. Dec. 302; Baldwin v. United States Teleg. Co. 45 N. Y. 744, 6 Am. Rep. 165, 3 Mor. Min. Rep. 70; Brown v. Weir, 95 App. Div. 78, 88 N. Y. Supp. 479; Hamilton v. McPherson, 28 N. Y. 72, 84 Am. Dec. 330; Rochester Lantern Co. v. Stiles & P. Press Co. 135 N. Y. 209, 31 N. E. 1018; Griffin v. Colver, 16 N. Y. 494, 69 Am. Dec. 718.

The damages which plaintiff recovered are remote, contingent, and purely speculative.

Nash v. Thousand Island S. B. Co. 123 App. Div. 150, 108 N. Y. Supp. 336; Milton v. Hudson S. B. Co. 37 N. Y. 215; Witherbee v. Meyer, 155 N. Y. 446, 50 N. E. 58; White v. Miller, 71 N. Y. 133, 27 Am. Rep. 13.

Messrs. Lee & Dowling, for respondent:

Defendant was notified when the package was delivered to it at Troy, to be shipped to plaintiff, that it contained moving picture films both by direct statement and by pasters upon the package, and also from other surrounding circumstances.

Sloman v. Great Western R. Co. 67 N. Y. 208; Trimble v. New York C. R. Co. 162 N. Y. 89, 48 L.R.A. 115, 56 N. E. 532; Wells, F. & Co. v. Battle, 5 Tex. Civ. App. 532, 24 S. W. 353; 6 Cyc. 450.

Defendant did not deliver the films within a reasonable time and was clearly negligent in failing to do so; nor did the defendant deliver the films as quickly as it might have done, and therefore became liable to the plaintiff in damages.

Jennings v. Grand Trunk R. Co. 127 N. Y. 438, 28 N. E. 394; Monell v. Northern C. R. Co. 67 Barb. 531; Swain v. Schiefelin, 134 N. Y. 479, 18 L.R.A. 385, 31 N. E. 1025.

Defendant, having failed to deliver the films on Christmas day, after having been fully notified as to the contents of the package received by it at Troy, and of the purposes for which the contents were to be used, became liable to plaintiff for loss of profits.

Wakeman v. Wheeler & W. Mfg. Co. 101 N. Y. 214, 54 Am. Rep. 676, 4 N. E. 264; Illinois C. R. Co. v. Byrne, 205 Ill. 9, 68 N. E. 720.

As to whether or not the defendant had notice at the time of shipment of what the package contained and the purpose for which it was to be used, and whether or not delivery was made within a reasonable time, were questions of fact for the jury, and the ruling denying the motion for nonsuit was proper.

Trimble v. New York C. & H. R. R. Co. 162 N. Y. 89, 48 L.R.A. 115, 56 N. E. 532.

Hiscock, Ch. J., delivered the opinion of the court:

This action was brought to recover damages for unreasonable delay in the transportation of moving picture films which were delivered to the defendant express company in Troy for shipment to the plaintiff in Utica. There was evidence from which the jury could find as it did that there was unreasonable delay in the delivery of the films, and plaintiff has been allowed to recover as damages the receipts or profits which it is claimed he would have realized from the exhibition of said films if they had been delivered with reasonable promptness, through the attendance at his theater at a certain rate of admission of many people who stayed away or paid a lower rate of admission because said pictures were not exhibited. Upon this appeal the important propositions urged upon our attention are: First, that plaintiff was not entitled to recover such loss of profits; and, second, that even if he was, no competent evidence was given of their amount. In view of our conclusions in respect of the first proposition, it will be unnecessary to discuss the second one. The first step in the discussion will be to state the circumstances under which the films were received by defendant and the contract thereby established between him and the plaintiff, as such circumstances could be found most favorable to the plaintiff.

It appears, and I think defendant must be charged with knowledge of the fact, that films are sent out for use by a central company, and that after having been exhibited in one place they are shipped on for use in another one. These particular films were originally sent out by a company in New York, and after they had been exhibited in Troy they were brought to the defendant's office in that city for shipment to plaintiff. They were inclosed in "a leather grip or handbag" which was not the regulation package in which films were generally shipped. There were pasted on the handbag labels which contained respectively the word "Rush," the name of the company which originally shipped out the films, and the words "Motion Picture Films" or "Films." The messenger who brought the package to the express office told the agent "that the package contained films and should be rushed on account of showing; something to that effect: I won't say that those were the exact words." The package was directed to "L. H. Chapman, Toy Novelty Company," in Utica. In addition evidence was given by the plaintiff

that the pictures shown by these films were of an unusually attractive character; that he had especially advertised their exhibition on Christmas day in a theater owned by him, and also tending to show, as claimed, that if the films had been delivered with reasonable promptness his theater would have been attended by a large number of persons paying each 10 cents for admission, whereas, owing to the failure of delivery and inability to exhibit the pictures from these particular films, a large number of persons stayed away from his theater entirely, and a large number of others only paid an admission fee of 5 instead of 10 cents. On this evidence, as already stated, plaintiff was permitted to recover for loss of profits in the operation of his theater.

When we analyze this evidence for the purposes of this case we see that at the time of shipment the defendant knew that the package contained films which were to be exhibited, and that in general terms he was notified that transportation was to be "rushed" because they were to be exhibited. There was no notice, express or implied, that plaintiff was to be the exhibitor; that he owned a theater for which exhibition of said films on an important holiday like Christmas had been specially advertised; that said films possessed such particular attractiveness for the public that they could not be readily replaced; and that on failure by defendant to deliver them by a certain day it would be necessary to close the theater or supply their place with less attractive and less profitable ones. This notice was not enough to lay the basis for the present recovery.

Defendant, knowing that the package contained films which were passed around a circuit for exhibition, and having been notified to "rush" them on that account, is chargeable with such damages as would naturally result from unreasonable delay, and which, therefore, must be deemed to have been within the contemplation of the parties when the shipment was made. 3 Sutherland, Damages, 4th ed. §§ 903, 905, 913; 3 Hutchinson, Carr. 3d ed. § 1369; Harvey v. Connecticut & P. River R. Co. 124 Mass. 421, 26 Am. Rep. 673; Pilcher v. Central of Georgia R. Co. 155 Ala. 316, 46 So. 765; Louisville & N. R. Co. v. Mink, 126 Ky. 337, 103 S. W. 204; St. Louis & S. F. R. Co. v. Farmers' Union Gin Co. 34 Okla. 270, 125 Pac. 894.

In the case of property like films intended for the use as distinguished from sale or some other purpose, the ordinary damages would be the loss of rental value caused by the delay and perhaps certain incidental expenses if incurred. 4 Suther-

land, Damages, § 905; 3 Hutchinson, Carr. § 1373.

But before defendant could be held to special damages, such as the present alleged loss of profits on account of delay or failure of delivery, it must have appeared that he had notice at the time of delivery to him of the particular circumstances attending the shipment, and which probably would lead to such special loss if he defaulted. Or, as the rule has been stated in another form, in order to impose on the defaulting party further liability than for damages naturally and directly, i. e., in the ordinary course of things, arising from a breach of contract, such unusual or extraordinary damages must have been brought within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting. Generally, notice then of any special circumstances which will show that the damages to be anticipated from a breach would be enhanced has been held sufficient for this effect.

In this case it was not a sufficient basis for recovery for loss of special profits that the carrier should know of the general purposes for which the films were to be used. He should have been notified of the particular circumstances and purpose already recited, making important their delivery by a certain day, and which have been made the foundation of the special damages which have been allowed. In effect, he should have been made aware that plaintiff had made certain plans based upon the arrival of the films at a certain time, and that in case of nonarrival these plans would be destroyed in all probability, causing certain damages. 3 Hutchinson, Carr. § 1369; Booth v. Spuyten Duyvil Rolling Mill Co. 60 N. Y. 487; Illinois C. R. Co. v. Nelson, 139 Ky. 449, 97 S. W. 757; American Exp. Co. v. Jennings, 86 Miss. 329, 109 Am. St. Rep. 708, 38 So. 374; Higgins v. United States Exp. Co. 83 N. J. L. 398, 85 Atl. 450; Thomas, B. & W. Mfg. Co. v. Wabash, St. L. & P. R. Co. 62 Wis. 642, 51 Am. Rep. 725, 22 N. W. 827; Simpson v. London & N. W. R. Co. L. R. 1 Q. B. Div. 274, 45 L. J. Q. B. N. S. 182, 33 L. T. N. S. 805, 24 Week. Rep. 294; Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Reprint, 145, 2 C. L. R. 517, 23 L. J. Exch. N. S. 179, 18 Jur. 358, 2 Week. Rep. 302, 5 Eng. Rul. Cas. 502; Gee v. Lancashire & Y. R. Co. 6 Hurlst. & N. 210, 158 Eng. Reprint, 90, 30 L. J. Exch. N. S. 11, 6 Jur. N. S. 1118, 3 L. T. N. S. 328, 9 Week. Rep. 103; Mather v. American Exp. Co. 138 Mass. 55, 52 Am. Rep. 258; Swift River Co. v. Fitchburg

R. Co. 169 Mass. 326, 61 Am. St. Rep. 288, 47 N. E. 1015.

So far as textbooks are concerned, the rule which protects defendant in this case is well laid down in *Hutchinson on Carriers* (vol. 3, § 1369), where it is said that knowledge by the carrier of the "general use to which the article was to be put will not be sufficient to charge him with liability for loss of its use or the profits which would thereby have been made. The special circumstances of the case requiring care or expedition must have been brought to his attention." Of the cases which have been cited as sustaining the rule only two need be commented upon at any length.

The case of *Hadley v. Baxendale* is a leading one. It repeatedly has been cited with approval by the courts of this country, and the principles therein laid down in our judgment fully cover the present case and prohibit recovery of plaintiff's alleged loss of profits. In that case the plaintiffs, being the owners of a mill, sent a broken iron shaft to the defendants, who were common carriers, to be conveyed by them, and the latter were told that the mill was stopped, and that the shaft must be delivered immediately. Instead of this, delivery was delayed for an unreasonable time, in consequence of which plaintiffs were unable to work their mill from want of a new or other shaft, and incurred a loss of profits. It was held that damages for such loss of profits could not be recovered. Baron Alderson, delivering the judgment of the court, stated the general rule that damages could be recovered for breach of a contract which could be fairly and reasonably considered as arising naturally "according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it," and that, "if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated." He then says that in the case before the court the only circumstances communicated to the defendants at the time the contract was made were that the article to be carried was a broken shaft of a mill, and that the plaintiffs were the owners of that mill; and he then reached the conclusion that

those circumstances did not reasonably show that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft; that in the great multitude of cases of millers sending off broken shafts by a carrier, such consequences, through lack of another shaft, would not in all probability have occurred; and that the special circumstances resulting in loss were not communicated to the defendants by the statement at the time of shipment.

The case of *American Express Co. v. Jennings* is a well-considered case in which the *Hadley Case* is cited with approval. In this case complainant sought to recover special damages for miscarriage of a piston rod, whereby he was compelled to shut down his cotton mill, the express company having had no notice of the circumstances which rendered this result probable. The court said: "If one of the parties to a contract is to be made liable for extraordinary damages, it is right that, before the contract is made, he should have notice of the exceptional circumstances that may warrant them."

And again: "Special damages will not be allowed, unless it shall appear that before the articles were received by the South Express Company for shipment it had notice of the special circumstances of plaintiff's situation, and of the great importance to him of prompt carriage and delivery."

Certain cases are relied on which are supposed to be similar to the present one where there have been allowed as damages for the failure of a carrier promptly to transport a theatrical company or scenery the profits which were lost through inability to give an entertainment which was prevented by the carrier's default. *Weston v. Boston & M. R. Co.* 190 Mass. 298, 4 L.R.A. (N.S.) 569, 112 Am. St. Rep. 330, 76 N. E. 1050, 5 Ann. Cas. 825, 19 Am. Neg. Rep. 306; *Illinois C. R. Co. v. Byrne*, 205 Ill. 9, 68 N. E. 720. But the decisions in these cases are entirely in accordance with the general rules which have been stated. As was pointed out in the *Weston Case*, the ordinary result of failure to transport a traveling theatrical company of its properties would be prevention of a performance, and the loss of expected returns from such entertainment would not be special profits or damages, but ordinary damages, such as were to be anticipated.

Inasmuch as this case has been tried three times, and, therefore, all of the evidence possessed by the plaintiff presumably presented, and which evidence does not entitle him to recover, we think that not only

should the judgment be reversed, but that the complaint should be dismissed, with costs to appellant in all courts.

Collin, Cuddeback, Cardozo, Pound, and Crane, JJ., concur. Andrews, J., not sitting.

**Annotation—Liability of carrier for loss of profits incident to delay in delivery of articles intended for use, and not for sale.**

The earlier cases are treated in the notes to *Wells v. National Life Asso.* 53 L.R.A. 33, and *Harper Furniture Co. v. Southern Exp. Co.* 30 L.R.A.(N.S.) 483.

For cases involving the measure of the carrier's liability for preventing an exhibition or show by breach of contract of carriage, see notes in 4 L.R.A.(N.S.) 569, and 49 L.R.A.(N.S.) 491.

As shown by the authorities treated in the earlier notes, the weight of authority is to the effect that loss of profits incident to delay in the delivery of articles intended for use, if not too remote and speculative to be susceptible of computation with reasonable accuracy, may be recovered, provided the carrier had notice or knowledge of such facts and circumstances as would inform it that special damages would follow delay in delivery. Of course, as has been said (*Ft. Smith & W. R. Co. v. Williams* (1912) 30 Okla. 726, 40 L.R.A.(N.S.) 494, 121 Pac. 275): "It has been and always will be impossible to lay down any fixed and definite rule correctly applicable in all cases," and "there has never been a rule established which was decisive and universally followed by the courts in all cases." But, as the court in this case also said: "The inclination of the earlier authorities to hold that contemplated profits per se were improper elements of damage has given way under the riper wisdom of jurisprudence, and, instead of holding to the earlier inclination, the weight of authorities in modern jurisprudence either holds or concedes that, where a loss of profits is not too remote or conjectural to be susceptible of computation with reasonable accuracy, they are proper elements of damage."

Thus, in *Delta Table & Chair Co. v. Yazoo & M. Valley R. Co.* (1913) 105 Miss. 861, 63 So. 272, where a shipper of sample furniture to be exhibited at a manufacturers' market, at the time of shipment fully advised the carrier of the probable consequences of a delay in delivery, it was held that the shipper was entitled to recover the profit on prospective sales which the negligent delay of the carrier prevented him from making, and that he should not have been limited as he was by the trial court

to a recovery of the value of the furniture actually delayed in transit. And in *Ft. Smith & W. R. Co. v. Williams* (1912) 30 Okla. 726, 40 L.R.A.(N.S.) 494, 121 Pac. 275, where a carrier contracted to deliver a merry-go-round by a certain date, with full knowledge that it was to be used during a two-day picnic, and of the loss of profits which would result from a failure to have it there at the agreed date, it was held that contemplated profits lost as a result of a delay in delivery caused by a lack of diligence could be recovered, the court applying the rule that "where a loss of profits is not too remote or conjectural to be susceptible of computation with reasonable accuracy, they are proper elements of damage." And again, in *Detmer Wallen Co. v. Delaware, L. & W. R. Co.* (1915) 89 Misc. 252, 153 N. Y. Supp. 287, it was held that a shipper of sample cards of woollens, etc., manufactured by it, was entitled to recover, in a suit against the carrier for damages for breach of contract by delay in delivery of the cards, the prospective profits which the plaintiff would have made had the sample cards been promptly transported and delivered, the carrier having had notice of the urgent necessity for haste, and knowledge of the special reasons therefor, so that it could be said that such special damages were fairly within the contemplation of the parties to the contract. So, in *Gulf, C. & S. F. R. Co. v. Nelson* (1911) — Tex. Civ. App. —, 139 S. W. 81, where a carrier contracted to transport for one who had a contract to construct a dam across a river all the materials needed in the construction of the dam, and had notice of the circumstances making necessary the prompt delivery of the materials, and of the danger of special loss in case of unreasonable delay, it was held that profits lost on the contract by reason of unreasonable delays in delivery of materials were recoverable. And that profits lost during the period of delay in transporting a part of the machinery essential to the operation of a lumber and planing mill may be recovered where the carrier had proper notice that such special damages would result from failure to transport machin-

ery promptly, see *Wells, F. & Co. Exp. v. W. B. Baker Lumber Co.* (1914) 115 Ark. 142, 171 S. W. 132. And in *Piero v. Southern Exp. Co.* (1915) 103 S. C. 467, 88 S. E. 269, recovery for profits lost as the result of delay in the delivery of a piano which was essential to the conducting of a show was allowed, the showman, at the time of contracting for transportation, having fully notified the defendant carrier as to the necessity for prompt delivery and of the consequences which would attend a delay in delivery. And in *Altschuler v. Atchison, T. & S. F. R. Co.* (1913) 155 Wis. 146, 49 L.R.A.(N.S.) 491, 144 N. W. 294, where a railroad company failed to deliver the instruments of an orchestra in time for a performance, it was held that the receipts for such performance, which plaintiff had been compelled to refund, were proper elements of damage, the railroad company having prepared the plaintiff's itinerary with full knowledge of its purpose, and that the prepared schedule would be the guide for the giving of performances.

On the other hand, *CHAPMAN v. FARGO*, ante, 1049, is illustrative of those cases applying the same rule wherein it is held that before a carrier can be held to special damages such as prospective profits lost on account of delay in the delivery of articles intended for use, it must appear that it had notice at the time of delivery to it of the particular circumstances attending the shipment, and that, under such circumstances, a delay in delivery probably would lead to such special loss. This case is also of interest on the point as to what notice is sufficient to render the carrier liable for loss of profits resulting from delay in delivery. And in *Detmer Wallen Co. v. Delaware, L. & W. R. Co.* (1915) 89 Misc. 252, 153 N. Y. Supp. 287, in discussing the liability of a carrier for loss of profits resulting from a delay in delivery of cards of woolen samples, it was said: "Such damages may not be recovered unless by the terms of the contract, or by direct notice, they are within the expectation of the parties, so that it plainly appears that they were within the contemplation of the parties when the contract of shipment was made." And applying the rule that lost profits, being in the nature of special damages, cannot be recovered against a carrier for delay in the delivery of articles intended for use unless the carrier had notice of the circumstances, which were of a kind from which it could fairly and reasonably be

inferred, at the time of entering into the contract, that such damages would follow from a breach thereof under the circumstances so understood, it was held in *Simons-Mayrant Co. v. Atlanta Coast Line R. Co.* (1913) 207 Fed. 387, that loss of profits on a construction contract could not be recovered as damages resulting from delay in transporting and delivering a steamshovel, where the carrier had not been given notice sufficient to inform it that such damages might reasonably result from such a delay. And in *Illinois C. R. Co. v. Brothers* (1914) 12 Ala. App. 351, 67 So. 628, reaffirmed on subsequent appeal in (1917) — Ala. App. —, 77 So. 423, it was held that prospective profits lost by reason of delay in delivery of a cotton-gin outfit purchased to be operated for profit could not be recovered unless the carrier had notice of facts and circumstances sufficient to inform it that such damages would ensue from nonperformance; and that the notice implied from the fact that the carrier received the cotton-gin outfit for transportation at the beginning of the cotton-ginning season, consigned to an individual in the cotton-growing section, was not sufficient notice to permit recovery of damages for loss of profits on business offered during the period of delay. So, in *American Exp. Co. v. Burke* (1913) 104 Miss. 275, 61 So. 312, it was held that loss of profits resulting from the idleness of a printing press cannot be recovered as special damages for delay in the transportation and delivery of a part of the press, where the carrier did not have such notice or knowledge of the circumstances attending the shipment as would bring such damages within the contemplation of the parties as liable to flow from a delay in delivery. And in *Higgins v. United States Exp. Co.* (1912) 83 N. J. L. 398, 85 Atl. 450, where mill casings were shipped to be repaired, it was held that profits lost while the mill was shut down as a result of the carrier's delay in delivery could not be recovered, the carrier not having been notified as to the necessity for prompt transportation and delivery, or of the fact that the mill would be forced to remain closed during any delay. So, in *Goodfield v. Platt* (1911) — App. Div. —, 130 N. Y. Supp. 180, it was expressly held that special damages for delay in delivery of an essential part of a machine cannot be recovered in the absence of an express contract giving the carrier notice of the necessity for immediate delivery, since otherwise such damages

cannot be regarded as within the contemplation of the parties. And the rotting of a portion of plaintiff's tomato crop is not such special damages as may be recovered for delay in transportation of material for crates, the lack of which prevented the shipping of the tomatoes; at least, where the carrier did not have notice or knowledge of such special facts and circumstances as to inform it, at the time of the delivery of the material to it, that such deterioration and consequent damage would result from a failure promptly to deliver the boxing material. *Florida East Coast R. Co. v. Peters* (1916) — Fla. —, 73 So. 151. And building contractors who are unable to complete their contract within the stipulated time because of a delay in the delivery of materials by one to whom they had been delivered for transportation cannot, in an action for breach of contract by delay in delivery, recover the amount they paid in compromise of the penalty for failing to complete the building in time, and the interest on money which they were compelled to borrow because of the delay, or for their personal loss of time, as such damages cannot be regarded as within the contemplation of the parties at the time the contract was made. *Carr v. Southern R. Co.* (1913) 12 Ga. App. 830, 79 S. E. 41, holding that the first two items above mentioned could be recovered in an action for tort for negligent delay.

And in some instances it has been held that mere knowledge of the purpose and intended use of the article is not sufficient to enable one to recover damages for loss of profits resulting from delay in delivery of the article, but that, to warrant the recovery of such elements of damage, the carrier must have express and special notice that the same would attend a delay in delivery. This rule was applied in *Chicago, R. I. & P. R. Co. v. Reid* (1913) 38 Okla. 214, 132 Pac. 812, wherein recovery of profits alleged to have been lost as a result of delay in delivery of certain well machinery was not allowed because of lack of express notice. And that prospective profits alleged to have been lost as a result of the unreasonable and negligent delay in delivery of certain cotton-ginning machinery are not proper elements of damage unless expressly mentioned and made a condition of the contract at the time of its execution, and capable of being estimated with reasonable certainty, see *St. Louis & S. F. R. Co. v. Farmers' Union Gin Co.* (1912) 34 Okla. 270, 125 Pac. 894. And to the same effect,

see *Atchison, T. & S. F. R. Co. v. Sun Drilling Co.* (1917) — Okla. —, 165 Pac. 1133, which involved a delay in the delivery of oil and gas well drilling machinery. And see *Goodfield v. Platt* (N. Y.), as set out supra.

And anticipated profits which are too uncertain, subject to too many contingencies, and too elusive to constitute a safe guide for the measuring of damages for delay in transporting articles for use, cannot be recovered. See *Simons-Mayrant Co. v. Atlanta Coast Line R. Co.* (1913) 207 Fed. 387; *St. Louis & S. F. R. Co. v. Lilly* (1911) 1 Ala. App. 320, 55 So. 937, holding that a salesman traveling on commission cannot recover profits on sales which he might have made during a period of unreasonable delay by defendant carrier in transporting and delivering a trunk of samples, even though the carrier was notified of the contents of the trunk and the consequences which would attend failure to deliver same promptly; the court saying that such damages were too speculative and contingent, and that the recovery should be limited to reasonable expenses incurred and compensation for the time lost. *Ft. Wayne & D. C. R. Co. v. Willie S. & J. B. Ikard Co.* (1911) — Tex. Civ. App. —, 140 S. W. 502, holding that each particular case must be decided on its own facts, and that shippers of cattle for exhibition at a stock show could not recover as damages for delay in delivery the amount of prizes which it was claimed the cattle would have taken at the show, the court ruling that such damages were too remote and speculative; and *Altschuler v. Atchison, T. & S. F. R. Co.* (1913) 155 Wis. 146, 49 L.R.A.(N.S.) 491, 144 N. W. 294, holding that where a railroad company failed to deliver the instruments of an orchestra in time for a matinee, but did deliver them in time for an evening performance, damages caused by an alleged decrease in the sale of tickets for the evening performance which resulted from the failure to give the afternoon concert were too remote and speculative, and not within the contemplation of the parties. And in *Central of Georgia R. Co. v. Weaver* (1915) 194 Ala. 37, 69 So. 521, an action against a carrier for delay in transporting certain shows and performers scheduled to appear as a carnival outfit at a fair, it was held that knowledge by the carrier of the general use to which the property was to be put did not impose liability for the loss of profits or value of the use; and, moreover, that evidence of

such profits were "too speculative" when consisting merely of estimates by the owner of profits he would have made. This decision is admittedly in conflict with *Weston v. Boston & M. R. Co.* (1906) 190 *Mass.* 298, 4 L.R.A.(N.S.) 569, 112 *Am. St. Rep.* 330, 76 *N. E.* 1050, 5 *Ann. Cas.* 825, which is set out in the note in 30 L.R.A.(N.S.) at page 487.

But some courts in recent instances have been more liberal in allowing recovery for loss of profits the amount of which could not be determined with any great degree of accuracy. For instance, the supreme court of Mississippi in *Delta Table & Chair Co. v. Yazoo & M. Valley R. Co.* (1913) 105 *Miss.* 861, 63 *So.* 272, in holding that prospective profits from the anticipated sale of furniture at a manufacturers' market could be recovered where the loss of such sales resulted from a delay in delivery of samples shipped for exhibit, went so far as to say that where the books speak of profits as not recoverable because speculative and uncertain, they have reference to the question whether loss of profits was the result of the breach, and not whether the amount of the damages was certain. And again in *Detner Wal-*

*len Co. v. Delaware, L. & W. R. Co.* (1915) 89 *Misc.* 252, 153 *N. Y. Supp.* 287, in allowing recovery for prospective profits lost by reason of delay in transportation and delivery of sample cards of woollens, etc., it was held that since the carrier had notice of the purpose of the samples and the urgent necessity for prompt delivery, and admitted an unreasonable delay, the case fell within the rule that where damage is certain but the amount is uncertain, a recovery may be had, including loss of prospective profits, although the amount of such loss is uncertain.

And as is pointed out in *Ft. Smith & W. R. Co. v. Williams* (1912) 30 *Okl.* 726, 40 L.R.A.(N.S.) 494, 121 *Pac.* 275, the modern rule of many courts is that prospective profits lost as a result of delay in the delivery of an article intended for use, and not for sale, are not too remote or conjectural to be proper elements of damages provided they can be computed with "reasonable accuracy." And that the amount of anticipated profits need not be definitely known, see *Gulf, C. & S. F. R. Co. v. Nelson* (1911) — *Tex. Civ. App.* —, 139 *S. W.* 81.

G. J. C.

#### WASHINGTON SUPREME COURT. (Department No. 2.)

STATE OF WASHINGTON EX REL. ALBERT M. DEARLE et al., Respts.

v.

C. R. FRAZIER, as Superintendent of Schools et al., Appts.

(— Wash. —, 173 *Pac.* 35.)

**Constitutional law — examining school children in Bible literature.**

An examination of the pupils upon the historical, biographical, narrative, and literary features of the Bible for the allowance of school credits for work done outside the school, violates a constitutional provision against applying public money to any religious exercise or instruction.

For other cases, see *Schools, V. in Dig.* 1-52 *N. S.*

(Holcomb, J., dissents in part.)

(May 10, 1918.)

**A** PPEAL by defendants from a decree of the Superior Court for Snohomish County in favor of petitioners in a proceed-

**Note.** — As to religious exercises or instructions in public schools, see notes to *Church v. Bullock*, 16 L.R.A.(N.S.) 860, and *Herold v. Parish Bd.* L.R.A.1915D, 941.

L.R.A.1918F.

ing for a writ of mandamus to compel defendants to give them an examination in a Bible study course and high school credits for graduation for such study. Reversed.

The facts are stated in the opinion.

Messrs. Lloyd L. Black, Clifford Newton, and John Sandidge, for appellants:

The state Constitution forbids the use of public funds or public property for religious and sectarian instruction, and is mandatory to the effect that the public schools shall be forever free from sectarian control or influence.

*State ex rel. v. Weiss* District Bd. 76 *Wis.* 177, 7 *L. R. A.* 330, 20 *Am. St. Rep.* 41, 44 *N. W.* 967; *Board of Education v. Minor*, 23 *Ohio St.* 245, 13 *Am. Rep.* 233; *People ex rel. Ring v. Board of Education*, 245 *Ill.* 334, 29 L.R.A.(N.S.) 442, 92 *N. E.* 251, 19 *Ann. Cas.* 220.

Mr. William A. Johnson, for respondents:

There is no sectarian control or influence shown here, and such must be shown before any court will intervene upon that ground.

*Stevenson v. Hanyon*, 7 *Pa. Dist. R.* 585; *State ex rel. Nevada Orphan Asylum v. Hallock*, 16 *Nev.* 373; *State ex rel. Weiss v. District Bd.* 76 *Wis.* 177, 7 *L. R. A.* 330, 20 *Am. St. Rep.* 41, 44 *N. W.* 967; *State ex rel. Freeman v. Scheve*, 65 *Neb.* 853, 59



L.R.A. 927, 91 N. W. 846, 93 N. W. 169; *Billard v. Board of Education*, 69 Kan. 53, 66 L.R.A. 166, 105 Am. St. Rep. 148, 76 Pac. 422, 2 Ann. Cas. 521; *Hackett v. Brooksville Graded School Dist.* 120 Ky. 608, 69 L.R.A. 592, 117 Am. St. Rep. 599, 87 S. W. 792, 9 Ann. Cas. 36; *Church v. Bullock*, 104 Tex. 1, 16 L.R.A. (N.S.) 860, 109 S. W. 115; *Cook County v. Chicago Industrial School*, 125 Ill. 540, 1 L.R.A. 437, 8 Am. St. Rep. 386, 18 N. E. 183; *People ex rel. Roman Catholic Orphan Asylum Soc. v. Board of Education*, 13 Barb. 400; *Spiller v. Woburn*, 12 Allen, 127; *Moore v. Monroe*, 64 Iowa, 367, 52 Am. Rep. 444, 20 N. W. 475; *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256; *Vidal v. Philadelphia*, 2 How. 127, 11 L. ed. 205.

There is no expenditure whatever of public funds except it be found in the overhead expense connected with giving the examination.

*Pfeiffer v. Board of Education*, 118 Mich. 560, 42 L.R.A. 536, 77 N. W. 250.

**Chadwick, J.**, delivered the opinion of the court:

This cause is one brought by the petitioners below, respondents on this appeal, to compel appellants by writ of mandate to give petitioners an examination in the course of Bible study, and to compel appellants to give them high school credits for graduation for such Bible study.

"A large proportion of the early inhabitants of this country were driven from their native homes by religious persecution, and sought an asylum in a savage wilderness, preferring hardships, privations, and danger rather than to submit to any interference with their right to worship Almighty God according to the dictates of their own consciences. To Massachusetts came the Puritans; to Rhode Island, the Baptists; to the Carolinas, the Huguenots; to Maryland, the Catholics; to Pennsylvania, the Quakers; while other denominations established themselves in different localities where they could enjoy this inestimable privilege, either alone or in comity with other tolerant sects. It was, no doubt, with a full consideration of the heterogeneous elements composing our nation, and the memory of the persecutions of their ancestors, that the people of all the states adopted constitutional safeguards against religious intolerance, and all but two of the original thirteen states declared a complete divorce between government and creed. . . . This growth of public sentiment has continued until the adoption of our own Constitution, the provisions of which on this

subject are as broad, if not broader, and more positive and more comprehensive, than similar provisions in any of the other state Constitutions. This growth does not, however, indicate a decrease in religious sentiment among the people; these provisions have not been the work of the enemies, but of the friends, of religion. It is not that the men who framed and the people who adopted these constitutional enactments were wanting in reverence for the Bible, and respect and veneration for the sublime and pure morality taught therein, but because they were unwilling that any avenue should be left open for the invasion of the right of absolute freedom of conscience in religious affairs; because that they were unwilling that any man should be required, directly or indirectly, to contribute toward the promulgation of any religious creed, doctrine, or sentiment to which his conscience did not lend full assent." 1 Ops. Atty. Gen. 142.

Two provisions of our state Constitutions to which the attorney general has attended, and which have a bearing upon our present discussion, are as follows:

"All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." Article 9, § 4.

"No public money or property shall be appropriated for, or applied to, any religious worship, exercise or instruction or the support of any religious establishment." Article 1, § 11.

The question calling for this opinion was: "Can a teacher employed in the common schools of this state, without violating any law of the state, or any provision of the state Constitution, conduct devotional or religious exercises at the opening of the school day, or during any part of the school day as prescribed by law, by the singing of hymns or other sacred music, or by reading passages from the Bible, without comment, or by repeating or causing to be repeated, without comment, what is usually known as the Lord's Prayer?"

This opinion has ever been regarded as fair interpretation of the intent of the framers of our Constitution and of the people who adopted it. It has been twice followed by succeeding attorneys general. Ops. Atty. Gen. 1909-1910, 135; Ops. Atty. Gen. 1915-1916, 254. In the first instance the query was: "Has a teacher the legal right to open school each morning with a prayer?"

In the second instance in answer to the query: "May the directors or a school district prescribe a course of Bible study for high school students and grant school cred-

its to apply toward graduation from such high schools to students who successfully pass examinations upon such course of Bible study, provided that such Bible study shall be optional and shall be pursued outside of the public school buildings, and that no part of the public school money, time, or property be used in conducting such courses?"—the attorney general held that "the legal objection to the proposed system of Bible study is that the courses of study are made a part of the public school curriculum."

Many people sincerely believe that a cultivation of religious sentiment, which we may admit is essential to the development of an enlightened citizenship, should be a part of the education and training of the children of our country, and they as firmly believe that the version of the Bible which is accepted and acknowledged by the great majority of the citizens of this country should be made the vehicle of that development. They believe that the Constitution can have no application, unless an attempt is made to advance the doctrine of a particular denomination, or to instill the dogma of sect in the mind of the pupil. Consequently it has been resolved by assemblies of teachers in this country and other countries that a course in Bible study should be a part of school work. In 1915 the state board of education adopted the following resolution: "Since the board looks with favor upon allowing credits for Bible study done outside of school, it is moved that a committee be appointed to consider a plan for allowing such credits, one-half credit to be given for Old Testament, and one-half credit for New Testament, on the basis of thirty to thirty-two credits for high school graduation, and that a syllabus of Bible study be issued under the auspices of the state department of education with rules and regulations for the distribution of examination questions at least once a year."

The plan thus outlined is in effect, so we are informed by counsel, in Spokane, Tacoma, Centralia, Sunnyside, and Everett, from whence this case comes. To make the plan feasible, and to avoid the rock of the Constitution as we may well presume, the school board adopted the following resolution:

"Resolved, by the board of education, Everett, Washington, that high school credit for Bible study may be allowed to the members of the Everett High School to the extent of one credit on Old Testament Scriptures and one credit on New Testament Scriptures, under the following conditions:

"First. Credit shall be granted only after successfully passing an examination cover-

ing the historical, biographical, narrative and literary features of the Bible, and based upon an outline to be hereafter adopted by the board of education.

"Second. Supervision of instruction in Bible shall not be undertaken by the high school beyond the furnishing of a syllabus or outline and the setting of examination, rating of papers, and determining of credit.

"Third. It is contemplated that all personal instruction and interpretation shall be given in the home or by the religious organization with which the students are affiliated, following the outline furnished by the board of education.

"Fourth. Not more than one credit in Bible shall be allowed an individual in any one school year.

"Fifth. It is assumed that this work will require the equivalent of one 45-minute lesson per week through the school year and the equivalent of three hours per week in outside study."

Authority for this resolution is found by counsel in the resolution of the state board of education, and in the Code:

"Every board of directors of a school district of the first class shall . . . have the power: . . . Second. To prescribe a course of study and a program of exercises which shall not be inconsistent with the course of study prepared by the state board of education, for the use of the common schools of the state. . . . Fourth. To adopt and enforce such rules and regulations as may be deemed essential to the well-being of the schools, and to establish and maintain such credits and departments, including night, high, kindergarten, manual training, and industrial schools, . . . as shall, in the judgment of the board, best promote the interests of education in that district." Rem. Code, § 4509.

Counsel for respondent bases his argument upon two propositions:

First. The resolution does not establish or maintain any school system which is under sectarian control or influence.

Second. There is no expenditure of public funds for any religious worship, exercise, or instruction, or the aid or support of any religious establishment.

The first premise will be dismissed, not because it will not bear argument, for there is much argument and authority on either side, but because the case can be determined by reference to the second premise alone. The framers of the Constitution were not content to declare that our public schools should be kept free from sectarian control or influence; they went further and made it certain that their declaration should not be overcome by changing sentiments or opinions. They declared that "no public

money or property shall ever be appropriated or applied to any religious worship, exercise, or instruction," and in this respect our Constitution differs from any other that has been called to our attention.

It has been held in several of the states that the reading of the Bible, or the Ten Commandments, or the recital of the Lord's Prayer, without comment or remark, does not violate a Constitution providing that no person shall be compelled to attend or support any place of religious worship, or to pay taxes for the support of any minister of the gospel or teacher of religion, or that no public moneys shall ever be used for sectarian purposes, or for the support of sectarian schools, or equivalent expressions. *Church v. Bullock*, 104 Tex. 1, 16 L.R.A. (N.S.) 860, 109 S. W. 115; *Pfeiffer v. Board of Education*, 118 Mich. 560, 42 L. R.A. 536, 77 N. W. 250; *Billard v. Board of Education*, 69 Kan. 53, 66 L.R.A. 166, 105 Am. St. Rep. 148, 76 Pac. 422, 2 Ann. Cas. 521; *Moore v. Monroe*, 64 Iowa, 367, 52 Am. Rep. 444, 20 N. W. 475. But these cases are based upon provisions that go no further than article 9, § 4, of our own Constitution. Their purpose is to prevent the teaching of any of the beliefs, creeds, doctrines, opinions, or dogmas of any sect, and to prevent the appropriation of money for parochial and denominational schools; a privilege that had been abused by the legislature of some of the states, and of which the people were no doubt mindful at the time our Constitution was adopted. In the light of other Constitutions, the abuses in other states, and the evident purpose of the framers of the Constitution to save some of the questions which had there arisen, there can be no doubt that more was intended than a simple declaration that our schools should be kept free of sectarian influences. Article 1, § 11, is all-significant. The words, "no public money shall be appropriated for or applied to any religious worship, exercise, or instruction," are sweeping and comprehensive.

Our inquiry may be limited then to the one question whether an examination of pupils upon "the historical, biographical, narrative and literary features" of the Bible is religious instruction within the meaning of the Constitution. To meet the premise of counsel for respondent, we would have to read the prohibition as if it were, "No public money shall be applied to any denominational or sectarian worship, exercise, or instruction," and reject the broader term "religious;" for his argument proceeds as if the sole object of the Constitution was to keep the schools free of sec-

tarian influences. While selections such as the Lord's Prayer, the Twenty-third Psalm, and the Sermon on the Mount are regarded as masterpieces of literature, and inspiring-ly grateful to a thirsty soul, they are calculated to invite or excite the youthful mind to inquiry and the elder to resentment, for some, the Jew for instance, while accepting the Twenty-third Psalm might reject the Lord's Prayer and the Sermon on the Mount as the work and words of one whom he regards as an impostor. Then, too, the Twenty-third Psalm as we understand it is not the Twenty-third Psalm in the Douay Bible, but the Twenty-second. Neither is the translation the same as in our own Bible. Nor is the Lord's Prayer translated in the same way. These objections to many of us would seem light and trivial, but history has been made over the controversies that have arisen out of such as these; and that such innocent uses of the Bible has led to civil strife and discussion is abundantly proved by the cases to which we have referred.

We have then not only "religious exercise" and "instruction" which is prohibited, but their natural consequence,—religious discussion and controversy. The most ready and popular argument for the avoidance of these constitutional provisions has been that whereas the Bible inculcates a code of morality, which if understood and practised will make for better citizenship, and whereas it is essential that the youth should be impressed with an understanding of the fundamental principles of right and wrong, and thus grow in moral stature, that Bible instruction by reading selected passages without comment can do no violence to the Constitution, no hurt to the principle of divorce of church and state, and that it should be therefore not only tolerated, but encouraged. *Hackett v. Brooksville Graded School Dist.* 120 Ky. 608, 69 L.R.A. 592, 117 Am. St. Rep. 599, 87 S. W. 792, 9 Ann. Cas. 36.

It is upon these cases and those cited above that counsel relies; and as paradoxical as it may seem, our best authority for rejecting the doctrines announced is to be found in the cases themselves. Quickly put they distinguish religion in its broader sense from the dogmas, creeds, or opinions of sect, and hold that although the Bible may be the text-book of every sect, yet in its history, narrative, biography, and its moral persuasions, it serves no sect, but on the contrary is a spiritual stimulant in every individual whether he be a Jew or a Gentile, a Catholic or a Protestant, a Moslem or a Buddhist, a Christian or a Pagan, a believer or an atheist.

That the study of the Bible for its history, narrative, biography, or literary features serves the religious impulse and the ends of those who would aid the growth of religion as distinguished from mere sect, is acknowledged.

"Every pupil who enters a public school has a right to expect, and the public has a right to demand, of the teacher that such a pupil shall come out with a more acute sense of right and wrong, higher ideals of life, and a more independent and manly character, a higher conception of his duty as a citizen, and a more laudable ambition in life, than when he entered. The system ought to be so maintained as to make this certain. The noblest ideals of moral character are found in the Bible. To emulate these is the supreme conception of citizenship. It could not, therefore, have been the intention of the framers of our Constitution to impose the duty upon the legislature of establishing a system of common schools where morals were to be inculcated and exclude therefrom the lives of those persons who possessed the highest moral attainments." *Billard v. Board of Education*, 69 Kan. 53, 66 L.R.A. 166, 105 Am. St. Rep. 148, 76 Pac. 422, 2 Ann. Cas. 521.

It will thus be seen that the cases cited were dealing only with the question whether the reading or study of the Bible might be a sectarian influence, and not with the question whether such reading or study was religious instruction. To prove that it is not sectarian instruction they affirm that it is no more than religious or moral instruction, and so affirming logically hold that if their Constitutions had been such as ours they would have held to the contrary.

But it is said that the teaching is to be upon the historical, biographical, narrative, and literary features of the Bible only, and in this the instruction will be neither sectarian, doctrinal, denominational, or religious. This might be true if all citizens were agreed that the King James's translation of the Bible is a true version of the Scriptures, and then only if the teaching were under the control of those who are selected through the means and methods provided by law. But the vice of the present plan is that school credit is to be given for instruction at the hands of sectarian agents. Then, too, all citizens are not agreed as to the narrative and historical worth of the Bible. It is true that some of the events there recorded have shaped the destinies of millions of people, yet they are not mentioned in profane contemporaneous history. Some are not agreed whether

many of the events there narrated are historical or allegorical. Whether the earth was created in six days, where Cain obtained his wife, whether the whole earth was covered with a flood of waters, whether Jonah was swallowed by a whale, whether Elijah was translated by a whirlwind into heaven, whether Lot's wife was turned into a pillar of salt, whether our God stopped the sun in its course that Joshua might overcome his enemies, whether He made the waters of the sea to recede that His chosen people might pass to the promised land, whether God spake with the prophets, or ordered the lives of such great rulers as David and Solomon, are questions all sounding in narrative and history that have excited differences and controversies that are never settled.

That Bible history, narrative, and biography cannot be taught without leading to opinion and oftentimes partisan opinion, is understood and anticipated by the school board. They admit as plainly as language can admit that Bible teaching does lead to sectarian opinion and differences of opinion upon religious questions. They employ the word "religious" in a narrow and sectarian sense. They speak of "religious organizations," and provide that "interpretation" shall be given in the home, or by some "religious organization." Now we had thought that "history, biography, and biblical narrative" would require no interpretation,—certainly no interpretation calling for the doctrinal opinion of a religious organization. And who of authority in our schools is to say that a pupil shall or shall not have credit if he answers questions in a way that is different from the way intended by those who prepared the course of instruction? It may be said that the pupil is entitled to credit if he answers in a way that is consistent with the faith of his instructor. But there are two objections to this. The one is that the examiner may not know the faith and teachings of those of a different faith; the other and more conclusive objection is that to give a credit in the public school for such instruction is to give a credit for sectarian teaching and influence, which is the very thing outlawed by the Constitution.

"Courts have been zealous in protecting the money set apart for the maintenance of the free schools of the country. They have turned a deaf ear to every enticement and frowned upon every attempt, however subtle, to evade the Constitution. Promised benefit and greater gain have been alike urged as reasons, but without avail." *School Dist. v. Bryan*, 51 Wash. 498, 20 L.R.A. (N.S.) 1033, 99 Pac. 28.

In that case it was sought to justify the expenditure of school money for the instruction of children outside the public schools. The logic of our opinion is that instruction upon all subjects proper for the advancement or credit of a pupil should be given within and not without the schools, or at least under the immediate tuition of a teacher who has qualified to teach under the laws of this state.

The plan for the education of our youth as outlined by the legislature indicates that it had no intention of ever providing credit for work done under the tuition of anyone who had not been licensed to teach by the school authorities.

No person shall be accounted as a qualified teacher . . . who is not the holder of a valid teacher's certificate, or diploma issued by lawful authority of this state." Rem. Code, § 4543.

The law provides (Rem. Code, § 4550) that it shall be the duty of the teacher to impress upon the minds of the pupils morality, truth, etc. It would seem that the legislature would have declared in words that the Bible should be regarded as a textbook, and that credits could be given for study outside the school and under those not holding either teacher's certificate or diploma if it had so intended. It is no more than a subterfuge to urge that the public moneys will not be applied for religious instruction, because the teaching is done outside the school by a preacher or priest, or in the home of the pupil, or by a religious organization, with which the student may be affiliated; for the time of the teachers as well as their technical skill will be consumed while under the pay of the state in furnishing the syllabus or outline, the conducting of examinations, the rating of papers, and the determining of proper credits.

There are many cases in the books upon the questions herein discussed, but none of them have reference to a constitutional provision exactly like our own. They are collected in the several series of selected cases. *Pfeiffer v. Board of Education*, 118 Mich. 560, 42 L.R.A. 536, 77 N. W. 250; *Church v. Bullock*, 104 Tex. 1, 16 L.R.A.(N.S.) 860, 109 S. W. 115; *State ex rel. Weiss v. District Bd.* 76 Wis. 177, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967; *Cook County v. Chicago Industrial School*, 125 Ill. 540, 1 L.R.A. 437, 8 Am. St. Rep. 386, 18 N. E. 183; *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 29 L.R.A. (N.S.) 442, 92 N. E. 251, 19 Ann. Cas. 220; 35 Cyc. 1127. The following cases, however, support our views: *State ex rel. Weiss v. District Bd.* 76 Wis. 717, 7 L.R.A.

330, 20 Am. St. Rep. 41, 44 N. W. 967; *People ex rel. Ring v. Board of Education*, 245 Ill. 334, 29 L.R.A.(N.S.) 442, 92 N. E. 251, 19 Ann. Cas. 220.

We shall not go far afield when we suggest that it is a matter within the common knowledge of those who followed the discussion attending the framing of our Constitution, that it was the purpose of the men of that time to avoid all of the evils of religious controversies, the diversion of school funds to denominational schools and institutions, and the litigation that had occurred in other states. For it was known that religious opinion is a thing that men will fight for, and sometimes in most insidious ways. The question then was, and the people who adopted the Constitution were so advised, whether we should adopt a Constitution which provided in terms that no religious instruction should ever be a part, directly or indirectly, of the curriculum of our schools. To compromise opinion in these matters is to lead to confusion, which would make the courts the arbiter of what is and what is not religious worship, instruction, or influence, which would be as intolerable to the citizen as it would be to leave a decision to a school board. To this end the supreme court of Iowa had led the law, as witness their halting after declaring that their Constitution did not interdict Bible reading. They say, "It is perhaps not to be denied that the principle carried to extreme logical results might be sufficient to sustain the appellant's position," which means no more than this: The courts will say how far you may go in matters of this kind, whereas if the right or prohibition be in the Constitution, there is no middle ground; no twilight zone for the courts to explore. It is either a right or a prohibition. Then, too, witness the illogic of the Kentucky court in *Hackett v. Brooksville Graded School Dist.* 120 Ky. 608, 69 L.R.A. 592, 117 Am. St. Rep. 599, 87 S. W. 792, 9 Ann. Cas. 36. It says: "The Book [meaning the Bible] itself to be sectarian must show that it teaches the peculiar dogmas of a sect as such, and not alone that it is so comprehensive as to include them by the partial interpretation of its adherents."

Notwithstanding it is known of all men that the rock upon which the religious opinions of men have split is the "Word," and that every sect is able to sustain itself at least to its own satisfaction, by reference to the literal word of the Bible. It is the other sect that is the victim of partial interpretation.

In disregard of the deeper reasons which prompted the people to take some security

against the breeding of religious controversies in schools supported by the public school funds, reasons adverted to in many of the decisions, some courts as it seems to the writer of this opinion have inclined to the letter rather than to the spirit of the Constitution. To illustrate, the supreme court of Nebraska held their Constitution, providing that "no sectarian instruction shall be allowed in any school or institution supported, in whole or in part, by the public funds set apart for educational purposes," forbade the reading of passages from King James's version of the Bible, the singing of religious songs, and songs sung in "orthodox evangelical churches," and the offering of prayer in accordance with the customs of usages of sectarian churches or religious organizations. On rehearing, evidence was quoted to show that the first opinion of the court was well founded upon the facts of the case at hand. The court met the vigorous assault made upon the first opinion by declaring that "the decision does not, however, go to the extent of entirely excluding the Bible from the public schools. It goes only to the extent of denying the right to use it for the purpose of imparting sectarian instruction," and to quote from the syllabus prepared by the writer of the opinion on rehearing: "The courts have no right to declare its use to be unlawful because it is possible or probable that those who are privileged to use it will misuse the privilege by attempting to propagate their own peculiar theological or ecclesiastical views and opinions. . . . Whether it is prudent or politic to permit Bible reading in the public schools is a question for the school authorities, but whether the practice of Bible reading has taken the form of sectarian instruction is a question for the courts to determine upon evidence. . . . It will not be presumed in any case that the law has been violated; every alleged violation must be established by competent proof." *State ex rel. Freeman v. Scheve*, 65 Neb. 853, 877, 59 L.R.A. 927, 93 N. W. 169.

There is another reason for our holding, which is not suggested in the briefs, but it nevertheless seems forceful to the writer. It is, that neither the board of education nor the school board has undertaken to define the meaning of the word "Bible." It may be said that they did not have the Jewish Bible in mind, for credit is provided for instruction and examination in the New Testament, but we apprehend that this would not be binding on a Jewish school board. It would be free to prescribe the Talmud. A school board made up of Pro-

testants would have in mind and provide for instruction and examination in the King James's version. A board made up of Catholics would no doubt insist upon the use of the Douay Bible, while a board made up of Lutherans would hold the pupil to the translations of Luther.

"For more than three centuries it has been the boast and exultation of the Protestants and a complaint and grievance of the Roman Catholics that the various translations of the Bible, especially of the New Testament, into the vernacular of different peoples, have been the chief controversial weapons of the former, and the principal cause of the undoing of the latter. For making of such translations Wyclif, Luther, Tyndale, and others have been commended and glorified by one party, and denounced and anathematized by the other. Books containing such translations have been committed to the flames as heretical, and their translators, printers, publishers, and distributors persecuted, imprisoned, tortured, and put to death for participating in their production and distribution. The several popular versions differ in some particulars from each other, and all differ from the Catholic canon, both in rendition of passages from which sectarian doctrines are derived by construction, and in the number of books or gospels, constituting what is regarded as the written record of Divine revelation. In addition to this, there are persons who are convinced, upon grounds satisfactory to them, that considerable parts of the writings accepted by all Protestant denominations are not authentic, while devout Hebrews maintain that the New Testament itself is not entitled to a place in the true Bible. *State ex rel. Freeman v. Scheve*, 65 Neb. 853, 59 L.R.A. 927, 91 N. W. 846.

And it is not beyond the realm of imagination to believe that the framers of our Constitution foresaw the possibility of a school board divided in its religious beliefs.

Another reason which strengthens our opinion is that the people amended article 1, § 11, at the general election in 1904, by adding the words: "Provided, however, that this article shall not be so construed as to forbid the employment by the state of a chaplain for the state penitentiary and for such of the state reformatories as in the discretion of the legislature may seem justified."

We regret that we have not been able to find the history of this amendment, but the time we are able to give to this opinion will not admit of further search. It would seem, however, that the people were satis-

fied with the construction given the article by the attorney general. The proviso makes specific provision and a rule of interpretation that excludes a like interpretation of the other parts of the article.

The resolution provides that the syllabus or course of study is to be made up by the school board. What guaranty has the citizen that the board having a contrary faith will not inject those passages upon which their own sect rests its claims as the true church under the guise of "narrative or literary features;" and if they did so, where would the remedy be found? Surely the courts could not control their discretion, for judges are made of the same stuff as other men, and what would appear to be heretical or doctrinal to one may stand out as a literary gem or as inoffensive narrative to another, and thus the evil at which the Constitution is aimed would break out with its ancient vigor. If the sentiment of the people has so far changed as to demand the things sought to be done, the remedy is by amendment to the Constitution.

Being controlled in our judgment by our conception of the Constitution, we are constrained to reverse the judgment of the

court below, and to remand the case, with directions to deny the writ.

Ellis, Ch. J., and Fullerton and Mount, JJ., concur.

Holcomb, J., dissenting in part:

I do not agree with, and see no need of, many of the observations and much of the controversial discussion contained in the prevailing opinion. The state Constitution (art. 1, § 11) contains the specific and positive inhibition: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction."

That is plain, simple, and mandatory, and by it the legislature, school authorities, and courts are bound. The school authorities are forbidden to apply any of the public money or property to any religious exercise or instruction. The curricula of the public educational institutions cannot be made to include any kind of religious worship, exercise, or instruction. The language is most comprehensive, and argues itself. For that sole and sufficient reason I am bound to and do concur in the result.

#### NORTH DAKOTA SUPREME COURT. Rescission — duty to restore.

MIKE SWAN, Resp.,

v.

GREAT NORTHERN RAILWAY COMPANY, Appt.

(— N. D. —, 168 N. W. 657.)

#### Compromise — effect.

1. A compromise and settlement fairly made operates as a merger of, and bars all right to recovery on, the claim or right of action included therein. The compromise agreement is substituted for the pre-existing claim or right, and the rights and liabilities of the parties are measured and limited by the terms of the agreement.

*For other cases, see Compromise and Settlement, in Dig. 1-52 N. S.*

#### Same — as contract.

2. A compromise stands upon the same footing as other contracts. Either party may enforce it, or recover damages for its breach, and, if procured by fraud, the defrauded party may rescind it, if he elects to do so.

*For other cases, see Compromise and Settlement, in Dig. 1-52 N. S.*

Headnotes by CHRISTIANSON, J.

**Note.** — As to return or tender of consideration for release of claim for personal injuries set aside on the ground of fraud, see annotation following this case, post, 1078.

3. In order to effect rescission, the party rescinding must ordinarily restore or offer to restore the consideration received, on the condition that the other party shall do likewise, unless the latter is unable or positively refuses to do so.

*For other cases, see Contracts, V. c, 2, in Dig. 1-52 N. S.*

#### Release — claim for personal injuries.

4. Where a party agrees to compromise and settle a claim for personal injuries, and, with full knowledge of the contents, and the nature, character, purpose, and effect of the instrument, executes and delivers to the other party a release of the claim for personal injuries, he cannot avoid the compromise and release and recover on the original cause of action, on the ground that the compromise or release was procured by fraud, unless he repays or tenders back the consideration received.

*For other cases, see Contracts, V. c, 2, in Dig. 1-52 N. S.*

(June 10, 1918.)

**A**PPEAL by defendant from a judgment of the District Court for Eddy County in favor of plaintiff in an action brought to recover damages for personal injuries, alleged to have been caused by the negligence of defendant's servants. Reversed.

The facts are stated in the opinion.

Messrs. Murphy & Toner, for appellant:

The plaintiff should have been required to

return or tender the money received by him on settlement as a condition precedent to maintaining the suit.

*Pattison v. Seattle, R. & S. R. Co.* 64 Wash. 370, 35 L.R.A.(N.S.) 660, 116 Pac. 1089; *Louisville & N. R. Co. v. McElroy*, 100 Ky. 153, 37 S. W. 844; *Hill v. Northern P. R. Co.* 51 C. C. A. 544, 113 Fed. 914; *Price v. Conners*, 77 C. C. A. 17, 146 Fed. 503; *Heck v. Missouri P. R. Co.* 147 Fed. 775.

Where the fraud or misrepresentation complained of goes to the nature or value of the consideration only, the release is not void, but voidable merely, and it cannot be revoked in an action at law for damages.

*Smith v. St. Louis & S. F. R. Co.* 112 Miss. 878, 73 So. 801; *Shampeau v. Connecticut River Lumber Co.* 42 Fed. 760; *Perry v. M. O'Neill & Co.* 78 Ohio St. 200, 85 N. E. 41; *Moline Plow Co. v. Bostwick*, 15 N. D. 658, 109 N. W. 923; *Pacific Mut. L. Ins. Co. v. Webb*, 84 C. C. A. 603, 157 Fed. 155, 13 Ann. Cas. 752; *Kosztelnik v. Bethlehem Iron Co.* 91 Fed. 606; *Connor v. Dundee Chemical Works*, 50 N. J. L. 257, 12 Atl. 713; *Hill v. Northern P. R. Co.* 104 Fed. 754, 113 Fed. 914; *Vandervelden v. Chicago & N. W. R. Co.* 61 Fed. 54; *Illinois C. R. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593; *McMahon v. Plummer*, 6 Dak. 42, 50 N. W. 480; *Chicago, R. I. & P. R. Co. v. Lewis*, 109 Ill. 120; *Hartley v. Chicago & A. R. Co.* 214 Ill. 78, 73 N. E. 398; *Whitney & S. Co. v. O'Rourke*, 172 Ill. 177, 50 N. E. 242; *Homuth v. Metropolitan Street R. Co.* 129 Mo. 629, 31 S. W. 903; *Hancock v. Blackwell*, 139 Mo. 440, 41 S. W. 205.

If the promise made by a party to a contract is one that he can be compelled to perform, or pay damages for his failure, there is no element of fraud involved, and whether the promise was made with or without intention to perform is immaterial.

12 Cyc. 13; *Tamlyn v. Peterson*, 15 N. D. 488, 107 N. W. 1081.

**Mr. N. J. Bothne**, for respondent:

It was unnecessary to return or tender the consideration as a prerequisite to the maintenance of the action for damages.

*Clark v. Northern P. R. Co.* 36 N. D. 503, L.R.A.1917E, 399, 162 N. W. 406; *Hedlun v. Holy Terror Min. Co.* 16 S. D. 261, 92 N. W. 31; *O'Brien v. Chicago, M. & St. P. R. Co.* 99 Iowa, 644, 57 N. W. 425; *Pattison v. Seattle, R. & S. R. Co.* 64 Wash. 370, 35 L.R.A.(N.S.) 660, 116 Pac. 1089; *Girard v. St. Louis Car Wheel Co.* 46 Mo. App. 79, 123 Mo. 358, 25 L.R.A. 514, 45 Am. St. Rep. 556, 27 S. W. 648; *Marple v. Minneapolis & St. L. R. Co.* 115 Minn. 262, 132 N. W. 333, Ann. Cas. 1912D, 1082; *Jaques v. Sioux City Traction Co.*

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124 Iowa, 257, 99 N. W. 1069; *Jeez v. A. Y. McDonald Mfg. Co.* 179 Iowa, 193, 161 N. W. 62; *Bowé v. Gage*, 127 Wis. 245, 115 Am. St. Rep. 1010, 106 N. W. 1074; *Missouri P. R. Co. v. Goodholm*, 61 Kan. 758, 60 Pac. 1066; *Northwestern Mut. L. Ins. Co. v. Woods*, 54 Kan. 663, 39 Pac. 189; *Chicago, R. I. & P. R. Co. v. Doyle*, 18 Kan. 58; *St. Louis, I. M. & S. R. Co. v. Brown*, 73 Ark. 42, 83 S. W. 332, 3 Ann. Cas. 573; *St. Louis, I. M. & S. R. Co. v. Sandidge*, 81 Ark. 264, 99 S. W. 68; *St. Louis, I. M. & S. R. Co. v. Hambright*, 87 Ark. 614, 113 S. W. 803; *Myrick v. Jacks*, 33 Ark. 425; *Chicago, R. I. & P. R. Co. v. Lewis*, 109 Ill. 120; *Indiana, D. & W. R. Co. v. Fowler*, 201 Ill. 152, 94 Am. St. Rep. 158, 66 N. E. 394; *Spring Valley Coal Co. v. Buzis*, 213 Ill. 341, 72 N. E. 1061; *Quincy Horse R. & Carrying Co. v. Omer*, 109 Ill. App. 238; *Jones v. Alabama & V. R. Co.* 72 Miss. 22, 16 So. 379; *Brown v. Norman*, 65 Miss. 369, 7 Am. St. Rep. 663, 4 So. 293; *Genest v. Odell Mfg. Co.* 75 N. H. 365, 74 Atl. 593; *Galveston, H. & S. A. R. Co. v. Cade*, — Tex. Civ. App. —, 93 S. W. 124; *International & G. N. R. Co. v. Shuford*, 36 Tex. Civ. App. 251, 81 S. W. 1189; *Jones v. Gulf, C. & S. F. R. Co.* 32 Tex. Civ. App. 198, 73 S. W. 1082; *The Oriental v. Barclay*, 16 Tex. Civ. App. 193, 41 S. W. 117; *Bjorklund v. Seattle Electric Co.* 35 Wash. 439, 77 Pac. 727, 1 Ann. Cas. 443, 17 Am. Neg. Rep. 139; *Kley v. Healy*, 127 N. Y. 555, 28 N. E. 593; *Allerton v. Allerton*, 60 N. Y. 670; *Meyer v. Haas*, 126 Cal. 560, 58 Pac. 1042; *Butler v. Richmond & D. R. Co.* 88 Ga. 594, 15 S. E. 668; *Roberts v. Colorado Springs & I. R. Co.* 45 Colo. 188, 101 Pac. 59; *McGill v. Louisville & N. R. Co.* 114 Ky. 358, 70 S. W. 1048; *Bliss v. New York C. & H. R. R. Co.* 160 Mass. 447, 39 Am. St. Rep. 504, 36 N. E. 65; *St. Louis & S. F. R. Co. v. Richards*, 23 Okla. 256, 23 L.R.A.(N.S.) 1032, 102 Pac. 92; *Ellison v. Beanabiah*, 4 Okla. 347, 46 Pac. 477; *Georgia Home Ins. Co. v. Rosenfield*, 37 C. C. A. 96, 95 Fed. 358; *Hayes v. Atlanta & C. Air Line R. Co.* 113 N. C. 125, 55 S. E. 437, 10 Ann. Cas. 737; *Crossen v. Murphy*, 31 Or. 114, 49 Pac. 858; *Sisson v. Hill*, 18 R. I. 212, 21 L.R.A. 206, 26 Atl. 196; *Knoxville, C. G. & L. R. Co. v. Acuff*, 92 Tenn. 26, 20 S. W. 348.

The release was not only voidable for partial failure of consideration, but was voidable on the ground of actual fraud.

*Tamlyn v. Peterson*, 15 N. D. 488, 107 N. W. 1081; *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; *Cerny v. Paxton & G. Co.* 78 Neb. 134, 10 L.R.A.(N.S.) 640, 110 N. W. 882; *Lawrence v. Gayette*, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382, 17 Mor. Min. Rep. 169; *Lang-*



ley v. Rodriguez, 122 Cal. 580, 68 Am. St. Rep. 70, 55 Pac. 406; Girard v. St. Louis Car Wheel Co. 46 Mo. App. 79; Clark v. Northern P. R. Co. 36 N. D. 503, L.R.A. 1917E, 399, 162 N. W. 406; Viallet v. Consolidated R. & Power Co. 5 L.R.A.(N.S.) 463 and note, 30 Utah, 260, 84 Pac. 496; Haigh v. White Way Laundry Co. 50 L.R.A.(N.S.) 1091 and note, 164 Iowa, 143, 145 N. W. 473; Jacobson v. Chicago, M. & St. P. R. Co. 132 Minn. 470, L.R.A.1916D, 144, 156 N. W. 251, Ann. Cas. 1918A, 355; Christianson v. Chicago, St. P. M. & O. R. Co. 67 Minn. 94, 69 N. W. 640, 18 Am. Neg. Cas. 314; Petterson v. Butler Bros. 123 Minn. 516, 144 N. W. 407; Lusted v. Chicago & N. W. R. Co. 71 Wis. 391, 36 N. W. 857; Miller v. Spokane International R. Co. 82 Wash. 170, 143 Pac. 981; Bearden v. St. Louis, I. M. & S. R. Co. 103 Ark. 341, 146 S. W. 861; 34 Cyc. 1056; Pierson v. Kingman Mill. Co. 91 Kan. 775, 139 Pac. 394; Houston, S. & G. Co. v. Bain, 157 Ky. 623, 163 S. W. 765; St. Louis & S. F. R. Co. v. Nichols, 39 Okla. 522, 136 Pac. 159; Woods v. Wikstrom, 67 Or. 581, 135 Pac. 192; Russell v. Dayton Coal & I. Co. 109 Tenn. 43, 70 S. W. 1; Kelly v. Chicago, R. I. & P. R. Co. 138 Iowa, 273, 128 Am. St. Rep. 195, 114 N. W. 536.

The release was a matter of defense, and it was improper to anticipate such defense and set the same up in the complaint.

Trotter v. Mutual Reserve Fund Life Assn. 9 S. D. 596, 62 Am. St. Rep. 887, 70 N. W. 843; Hedlun v. Holy Terror Min. Co. 16 S. D. 261, 92 N. W. 31.

The respondent may show that the release was obtained by fraud, without raising the question by a reply, no reply being necessary under the statute.

Lyon v. Plankinton Bank, 15 S. D. 400, 89 N. W. 1017.

Christianson, J., delivered the opinion of the court:

The plaintiff was employed by the defendant as a section laborer. On or about October 5, 1915, while in such employ, he was injured by being thrown from a motor car. This action was brought by plaintiff to recover damages in the sum of \$2,975, alleged to have been sustained by him by reason of the injury then received. The defendant, by answer, alleged affirmatively that plaintiff, for a valuable consideration paid to him by the defendant, settled and adjusted all claims and demands against the defendant on account of the alleged cause of action set forth in the complaint, and fully released and discharged the defendant from all liability thereon.

The evidence shows that some time after the accident the defendant's claim agent,

one Mulcahy, entered into negotiations with the plaintiff with the result that plaintiff executed the following written release:

Know all men by these presents, that, in consideration of the sum of three hundred seventy-five and no/100 dollars, to me in hand paid by the Great Northern Railway Company, the receipt whereof is hereby acknowledged, have released, acquitted and discharged, and do, by these presents, release, acquit and discharge said railway company, its successors, and assigns of and from any and all liability, causes of action, costs, charges, claims or demands of every name and nature, in any manner arising or growing out of, or to arise or grow out of personal injuries received by me, at or near New Rockford, in the state of North Dakota, on or about the 5th day of November, 1915, while acting as a section laborer, I met with an accident and sustained personal injuries, or arising or to arise, out of any and all personal injuries sustained by me at any time or place while in the employ of said railway company prior to the date of these presents.

No promise of further employment has been made to me by said railway company as part consideration of this settlement and release, or otherwise.

In witness whereof, I have hereunto set my hand and seal this 27th day of December, A. D. 1915.

Mike Swan.

In presence of: { E. M. Watson.  
E. F. Mulcahy.

At the time of the execution of the release, the claim agent delivered to plaintiff a draft for \$375, on the treasurer of the railway company. The plaintiff indorsed and cashed the draft at one of the local banks, and received \$375 in cash. The draft was duly paid by the defendant in regular course of business. The plaintiff retained the money received, and has never returned or offered to return it to the defendant.

The witnesses all agree that during the negotiations between the plaintiff and the claim agent something was said with respect to plaintiff being continued in defendant's employ, but they differ as to what was said. They agree that plaintiff stated that he wanted employment, and objected to the clause in the release, which stated that no promise of future employment had been made to him by the railway company. They also agree that the claim agent stated that he could not permit this clause to be stricken out, as the company would not accept the release unless it contained this clause. The plaintiff, however, claim that the claim agent promised that notwithstanding such

clause the defendant would give plaintiff a steady, light job as long as he could work; that it was by reason of and in reliance upon this promise and representation that he signed the release; and that he would not have signed it unless such representation had been made. The claim agent, on the other hand, contends that he made no promise that defendant would retain plaintiff in its employ, but merely stated that he (the claim agent) would use his personal influence to procure such job for the plaintiff.

The court submitted to the jury, among others, the question whether the defendant, with intent to deceive the plaintiff, induced him to execute the release by: (1) A promise made without any intention of performing it; or (2) any other act fitted to deceive. Comp. Laws 1913, § 5849. The jury returned a verdict in favor of the plaintiff for \$1,284. Judgment was entered pursuant to the verdict, and defendant appeals.

The record shows that the defendant, at the close of the testimony, moved for a directed verdict of dismissal, on the ground, among others, that plaintiff had failed to return or tender a return of the consideration received, and consequently could not maintain the action. Error is predicated upon the denial of this motion. Defendant contends that plaintiff cannot maintain the present action without first having restored or tendered to the defendant the moneys received from the defendant as consideration for the execution of the release.

In our opinion defendant's contention is correct, and must be sustained. It is elementary that parties not under any disability to contract may enter into a valid agreement for the settlement of a controversy between them. The right to compromise controversies is recognized by the laws of this state. The only restriction placed on such right is that certain public offenses cannot be compromised. Comp. Laws 1913, § 11,077. A compromise and settlement, when full and complete and fairly made, operates as a merger of and bars all right to recovery on the claim or cause of action included therein. 8 Cyc. 516. In other words, the compromise agreement is substituted for the pre-existing claim or right. The rights of the parties are measured and limited by the agreement. A compromise stands upon the same footing as other contracts. Either party may maintain suit to enforce it, and if procured by fraud the defrauded party may rescind it, if he elects to do so.

Under the laws of this state, a party to

a contract may extinguish the same by rescission in the following cases only:

"1. If the consent of the party rescinding, or of any party jointly contracting with him was given by mistake or obtained through duress, menace, fraud or undue influence exercised by or with the connivance of the party as to whom he rescinds or of any other party to the contract jointly interested with such party. 2. If through the fault of the party as to whom he rescinds the consideration for his obligation fails in whole or in part. 3. If such consideration becomes entirely void from any cause. 4. If such consideration before it is rendered to him fails in a material respect from any cause; or, 5. By consent of all of the other parties." Comp. Laws 1913, § 5934.

But "rescission when not effected by consent can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules: 1. He must rescind promptly upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence or disability and is aware of his right to rescind; and, 2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so." Comp. Laws 1913, § 5936.

These statutory provisions seem to be decisive of this case. The rules announced are plain and specific. They apply to all contracts. They permit a person who has been defrauded to rescind the contract to which his consent was obtained by fraud; but in order to rescind he must restore or offer to restore the consideration received on the condition that the other party shall do likewise, unless the latter is unable or positively refuses to do so. These rules are largely codifications of the common-law rules, and are founded upon elementary principles of justice. "One who has been led into a contract upon which he has received something of value cannot ignore the contract, however induced, and proceed in a court of law as if the relations of the parties were wholly unaffected thereby. He cannot, while retaining its benefits, and thus affirming the contract, treat it as as though it did not exist. 'He cannot treat it as good in part and void in part, but must affirm or avoid it as a whole.'" Home Ins. Co. v. Howard, 111 Ind. 544, 13 N. E. 104. A contract induced by fraud is voidable at the option of the defrauded party. He has, upon discovery of the deceit, the option of either rescinding or affirming

the transaction. He must do one or the other. He cannot do both. He cannot rescind in part and affirm the remainder. *Guild v. More*, 22 N. D. 432, 455, 155 N. W. 44. He cannot at the same time be permitted to abrogate the contract and retain the benefits he has received under it. *Beare v. Wright*, 14 N. D. 26, 31, 69 L.R.A. 409, 103 N. W. 632, 8 Ann. Cas. 1057; *Black*, Rescission & Cancellation, §§ 561 et seq. If he desires to rescind, he must comply with the provisions of the statute, and restore or tender what he has received as consideration for the contract, on the condition that the other party shall do likewise, unless the latter is unable or positively refuses to do so.

To "rescind" is to abrogate, annul, avoid, or cancel—in other words, to undo—a contract. "The term (rescission)," says Bishop (*Bishop*, Contr. § 879), "denotes the avoiding of a voidable contract." The word "rescission" has a well-defined meaning in law, and includes the idea of restoration of both parties to their status quo, and return by each to the other of the consideration given and received. 4 Words & Phrases, 2d Series, 328. As was said by this court in *Raymond v. Edelbrock*, 15 N. D. 231, 107 N. W. 194: "Rescission of a contract is the act of canceling it by restoring the conditions existing immediately before it was made. Rescission is effected by each party returning to the other what has been received pursuant to the contract, or its equivalent."

Not only is the party who seeks to be relieved from a contract voidable for fraud required to put the other party back in his original position, but, ordinarily, "the contract can only be rescinded where it is possible to put the parties back in their original position and with their original rights." 9 Cyc. 437, 438. A contract induced by fraud "is voidable, not because of any supposed pecuniary damage done to the defrauded party, but because the consent of the latter was not free." *Beare v. Wright*, 14 N. D. 26, 69 L.R.A. 409, 103 N. W. 632, 8 Ann. Cas. 1057; *Crane & O. Co. v. Sykeston School Dist.* 36 N. D. 254, 259, 162 N. W. 413. And such voidable contract does not become binding upon the defrauded party unless, with knowledge of the fraud, he ratifies or affirms it. In case of rescission, "the contract ceases to exist for any purpose, and the parties stand in the same position as though it had never been made, and hence it is necessary that they be placed in the same position in which they were before the transaction took place. Therefore the party defrauded, in such case, is entitled to recover back whatever consideration he parted with; but he must

also return or offer to return to the other party whatever he received. In case of affirmance, he retains what he received, and is entitled to be compensated for the damages he sustained by reason of the false representation. That is, the wrongdoer will be compelled to pay damages equal to the difference in value between what he gave and what he represented he would give. . . . The transaction may be affirmed either expressly or by implication." And "a person who retains as his own the property which he received in the transaction will necessarily be deemed the owner thereof, and, having elected to assume the position of owner, will be compelled to abide by the election made, and to be not only invested with the rights and prerogatives, but also burdened with the duties and liabilities, incident to such ownership. Hence, in such case the measure of damages for the fraud and deceit practised upon him is very properly predicated upon the basis that the defrauded party is the owner of the property, and therefore his damage is equal to the difference in value between the property he received and what he would have received if the representations had been true." *Guild v. More*, 32 N. D. 432, 454, 455, 155 N. W. 49.

"It is well settled by repeated decisions of this court," said the Supreme Court of the United States (*Shappirio v. Goldberg*, 192 U. S. 232, 48 L. ed. 419, 24 Sup. Ct. Rep. 250, "that, where a party desires to rescind upon the ground of misrepresentation or fraud, he must, upon the discovery of the fraud, announce his purpose and adhere to it. If he continues to treat the property as his own, the right of rescission is gone, and the party will be held bound by the contract. *Grymes v. Sanders*, 93 U. S. 55, 23 L. ed. 798, 10 Mor. Min. Rep. 446; *McLean v. Clapp*, 141 U. S. 429, 35 L. ed. 804, 12 Sup. Ct. Rep. 29. In other words, when a party discovers that he has been deceived in a transaction of this character, he may resort to an action at law to recover damages, or he may have the transaction set aside in which he has been wronged by the rescission of the contract. If he choose the latter remedy, he must act promptly, 'announce his purpose and adhere to it,' and not by acts of ownership continue to assert right and title over the property as though it belonged to him."

We are aware of no rule or reason which would justify us in refusing to apply these rules in dealing with compromises and releases. We believe that they are fully as applicable to these as to other contracts. See *Urtz v. New York C. & H. R. R. Co.* 137 App. Div. 404, 121 N. Y. Supp. 879; *Duquette v. New York C. & H. R. R. Co.*

137 App. Div. 412, 121 N. Y. Supp. 876; *Strong v. Strong*, 102 N. Y. 69, 5 N. E. 799; *Home Ins. Co. v. Howard*, *supra*.

Respondent has cited several cases in support of the general proposition that it is unnecessary to return or tender the consideration received for a release obtained by fraud, as a condition precedent to the maintenance of a suit for damages, but that the amount received may be deducted from the verdict, if one is obtained against the defendant. The decisions cited by the respondent are by no means the only judicial expressions upon the subject. On the contrary, there is a square conflict in the decisions. A large, and probably the larger, number of modern decisions announce a doctrine contrary to that contended for by respondent, and support a rule in harmony with the conclusions we have reached in applying the provisions of our statute. See 34 Cyc. 1071; *Charron v. Northwestern Fuel Co.* 149 Wis. 240, 49 L.R.A.(N.S.) 162, 134 N. W. 1048, Ann. Cas. 1913C, 939; *Burns v. Reading*, 188 Mich. 591, 155 N. W. 479.

As already stated, a release is a contract, and where a person with full understanding of the character and nature of the instrument executes a release, and receives a consideration therefor, there is no more reason why he should be excused from returning or tendering a return of the consideration received, than in other cases where a rescission is sought.

"It is elementary," said Corliss, Ch. J. (*McGlynn v. Scott*, 4 N. D. 18, 21, 58 N. W. 462), "that the courts look with the highest favor upon every honest adjustment of private differences." For compromises and settlements tend to diminish litigation and promote the repose of society. And "the law loves peace, and hates dissensions and turmoils, . . . and all its policy and maxims are against their being revived or unnecessarily prolonged." *Kercheval v. Doty*, 31 Wis. 476, 484.

The doctrine, announced by some of the courts, and for which respondent contends, would distinctly tend to discourage and prevent the compromise of controversies, and to increase litigation. Under the rule contended for, a party who has compromised a disputed, unliquidated claim may retain the money received under the compromise agreement and prosecute an action upon the claim which formed the subject of the compromise agreement. In fact, he may use the very moneys which he received as a consideration for the compromise, to prosecute the subsequent action. He is permitted to deny the validity of a contract, and at the same time retain the benefits

which he has received under it. The rule contended for seems illogical and unsound.

As was well said by the supreme court of Kentucky in *Louisville & N. R. Co. v. McElroy*, 100 Ky. 153, 37 S. W. 844: "Either the company paid the money to avoid the risk of a greater damage being awarded against it in the event of litigation, or it paid the money in the belief that the expense of the litigation, though it defeated a recovery, would amount to as much or more than the sum paid. It sought to buy its immunity from damages and expense of having the question of its liability determined. It is not reasonable to suppose that the company would have paid the money if the right of the plaintiff still existed to maintain his action upon the original cause of action. There is no pretense that the company paid its money as a credit on its supposed liability. It paid it to extinguish its liability, if such existed. If, upon the trial of the case, the verdict had been for the company, because the injury was not the result of the gross negligence of the foreman or the party operating the engine, then the plaintiff would have the money and the company the expense of the litigation which it sought to avoid, and the court powerless to enforce a return of the money. This statement illustrates the correctness of the well-recognized rule which requires a repayment or a tender of the money before bringing the action."

Some courts, while recognizing the correctness of the general rule that, in order to effect rescission, the rescinding party must place the other party in statu quo by returning or tendering a return of whatever consideration he has received under the agreement, and the applicability of this rule, to compromises and releases, have also recognized certain exceptions to the rule.

Thus, it has been held that the consideration need not be returned in order to effect a rescission and entitle the defrauded party to maintain an action upon the original claim: (1) Where a tender would have been useless, or where the thing is utterly worthless; (2) where there may be a severance of one part of the contract, in which event a partial rescission is sometimes allowed in the interests of justice; (3) where the plaintiff was entitled to receive the consideration, irrespective of the assent got by its delivery to him, as where the liability of the debtor and the amount of the claim are conceded, and the creditor agrees to release upon receiving payment of an amount less than what is conceded to be due; (4) where the very existence of the

compromise or release is denied, and there was in fact no contract created, as where a release is misread to the releasor, or where there is a substitution of one paper for another, or where a party is tricked into signing an instrument which he did not intend to execute.

The cases which fall within the fourth exception proceed upon the theory that the effect of fraud upon a contract and the rights and obligations arising thereunder, including the necessity of returning the consideration, depend upon the nature of the fraud. These cases divide fraud into classes: (1) One class of fraud goes to the very existence of the contract, as where a release is misread to the releasor, or where one paper is surreptitiously substituted for another, or where a party is tricked into signing an instrument which he did not intend to execute. In such cases the minds of the parties did not meet upon, and there was no consent whatever by the defrauded party to, the ultimate propositions purported to be covered by the contract, and the consideration received by the defrauded party was not received for consenting to the terms of the alleged contract, but for his consent to entirely different propositions. In such cases, it is not a question of a contract voidable because the consent to its terms was not free and mutual, but there was no consent whatever. In other words, it is held that it is not a question of a contract voidable for fraud, but a question of no contract at all. (2) Another species of fraud goes to the representations or means used to induce a party to enter into the contract. In such cases the party knows the character of the instrument which he signs, and intends when he signs and delivers it that it shall have the purpose and effect which the law imputes to it. In such cases, the minds of the parties have actually met upon the ultimate propositions contemplated by them and evidenced by the contract, but the contract is voidable for the reason that the consent of the defrauded party to its provisions was obtained by false and fraudulent representations, such as false statements as to the nature and value of the consideration, or as to the extent of his injuries, or other material matters. The cases referred to, which recognize and discuss this distinction between the two classes of fraud, hold that, with respect to the first class, it is not necessary to return or offer to return the consideration before maintaining an action upon the original claim, but that, in cases involving fraud of the second class, the consideration must be returned or tendered in order to maintain an action upon the original claim.

One of the foremost courts in the country which has recognized this distinction is the supreme court of Massachusetts, and this distinction was pointed out by that court in the case of *Mullen v. Old Colony R. Co.* 127 Mass. 86, 34 Am. Rep. 349. In that case, the court, after recognizing the rule that it was necessary to return the consideration received for a release before the releasor might institute an action on the original demand, says: "The principle on which these decisions rest is just; but it applies to those cases only where that which was received, and which must be returned, was the consideration of the contract or settlement which the receiver intended to make, and understood that he was making, and which he seeks to avoid by reason of fraudulent practices of the other party, which led him to agree to its terms. It does not apply to cases where a party holds out that he gives the consideration for one thing, and by fraud obtains an agreement that it was given for another thing."

The correctness of this distinction has been questioned by other courts. See *Rockwell v. Capital Traction Co.* 25 App. D. C. 98, 4 Ann. Cas. 648. It is unnecessary for us in this case to either approve or disapprove of these holdings, for the instant case does not fall within any of these exceptions.

The defendant raised the question of the necessity of a tender or restoration of the consideration at the earliest opportunity upon the trial, and continued to urge it until the last. There is nothing to indicate that an offer to restore the consideration would have been refused. It cannot be said that a tender would have been useless.

In this case the compromise affected the right of action only; there was no room for severance. The claim involved was an unliquidated one. The liability of the defendant was by no means conceded. The evidence shows that during the negotiations between the claim agent and the plaintiff different offers and counter offers were made. The plaintiff demanded a larger cash consideration than was finally paid, and the claim agent offered a lesser one. They finally agreed upon the terms of the settlement, and, while there is a dispute as to some of the terms, there is no dispute as to the amount of cash consideration agreed upon. It is undisputed that this was fixed at \$375, and that it was paid to the plaintiff, and that he has retained it ever since, and has at no time restored or offered to restore it to defendant.

It is undisputed that at the time plaintiff received the money he executed the written release. It is further undisputed that this release was carefully read over to the

plaintiff before he signed it. He was not deceived as to its contents or its purpose. He knew that its purpose and effect was to release and discharge his right of action against the defendant. He signed the very instrument which he intended to sign. If his signature to the release was obtained by means of fraud and deceit, the law affords him ample remedy. However, he has no right to retain that which he received as consideration, and repudiate the remainder of the contract.

The judgment appealed from is reversed, and the cause remanded for further proceedings in conformity with this opinion.

Grace, J.:

I concur in the result.

**Robinson, J., concurring:**

This is a personal injury case. Defendant appeals from a judgment for \$1,284. As a section hand in the employ of defendant, plaintiff was on a gasoline motor which ran into an open switch, so he was thrown to the ground and severely injured. Some two months after the injury, a settlement was made with defendant, and he signed a release for \$375, which he received and retained. It is claimed that in part consideration for the release the company contracted to retain the plaintiff in its services at some easy job, and then in six weeks discharged him without cause. If that be true, of course the plaintiff may recover damages for the discharge, and his right of action is not barred by a sharp clause in the release that the company made no promises of future employment. Defendant did not read and he would not read the lease, and it does not bar him from recovering damages in case he was wrongfully discharged.

However, it is certain the plaintiff received \$375, and for that sum and such promises, if any, as the company made to him, he knowingly signed the release of any claim for the injury and he received and retained \$375. Were he at liberty to do that and then to sue for damages in the same manner as if he had never made a contract of release, then no force or effect may be given to any such contract, for a settlement and release amounts to nothing if it has no validity, and the right to make a valid settlement is a valuable privilege. A bird in the hand is worth two or three in the bush. A dollar without a damage suit is worth several dollars at the end of the suit.

The release is a contract, and, under the plain words of the statute, the plaintiff was not at liberty to repudiate it without returning or offering to return the consider-

ation. Were it otherwise, a party injured might accept any offer as a settlement, and then bring suit for damages without any risk of losing the money received. Then no person of common sense would pay out good money for a settlement which would only put him at a sure and certain disadvantage in a suit for damages. To every man the right to make a valid contract is of great value. The right should not be denied to the poor and illiterate by treating them as children, and giving no force or effect to their contracts.

The questions arising in regard to the pleadings are of minor importance. If the \$375 had been returned to and received by the company, the complaint might well have ignored the settlement. Otherwise, the complaint should have stated the contract of release and the grounds of rescission and a proper offer to rescind and to return the purchase money with payment of the same into court.

Judgment should be reversed and case dismissed.

A petition for rehearing having been filed, Christianson, J., on July 30, 1918, handed down the following additional opinion:

Plaintiff has filed a petition for a rehearing. In such petition he contends that "the statutory provisions referred to in the opinion as to the necessity of returning the consideration before suit do not apply in this case, but apply particularly to actions for rescission and cancelation of contracts."

We are unable to agree with this contention. These statutory provisions, by their express terms, apply to all contracts. They are provisions of substantive and not of adjective law. They relate to the right, and to the remedy. They apply not only in suits for rescission or cancelation of contracts, but in any suit wherein the question arises whether a contract has been rescinded or remains effective. It seems self-evident that, when a cause of action has been settled, it is extinguished and merged in the contract of settlement. If such contract is valid, it concludes the right of the parties for all times; and, if it is voidable for fraud, there is no reason why the party who seeks to avoid it should not do what the law requires to be done by one who seeks to avoid a fraudulent contract.

Plaintiff again argues that this court ought to adopt the rule that a party who seeks to repudiate a settlement for personal injuries may be permitted to sue upon the original cause of action without returning or tendering the consideration received,

and that by allowing credit upon the verdict the same purpose is accomplished. In this connection, he argues that the payment of a consideration for a release constitutes an implied admission of liability by the party who makes the payment; and, in the instant case, it is asserted that "there was an implied admission of liability to the extent of \$375," and that "the amount so paid is conceded to be due, whatever the result of the litigation." While the theory just advanced has been suggested in one of the cases dealing with this subject, it is, in our opinion, entirely unsound. The law favors settlements and compromises, and an offer of compromise by a party who attempts to purchase peace in a controversy is privileged, and does not constitute an admission against the party who makes the offer. 1 Enc. Ev. 596, 599. It is well known to every practising attorney that compromises and settlements are by no means limited to cases wherein liability is unquestioned, but they are at least as, and probably more, frequently effected in cases where liability is doubtful or nonexistent. The cases are by no means infrequent wherein a party deems it better and less expensive to buy his peace than to be put to the trouble and expense of a lawsuit, even though no liability exists. Clearly, the fact that a compromise has been effected and one party has paid a consideration to the other should not be deemed an admission of liability on the part of the one who paid the consideration, where the party who received it seeks to repudiate the contract of settlement under which the consideration was paid.

It is next contended that, inasmuch as the defendant pleaded the release as a defense, an offer to return the consideration received by the plaintiff for the release would have been useless. In other words, it is asserted that the defendant, by pleading the release, waived the necessity of a tender. This contention is without merit. Under the Code, a release is an affirmative defense of new matter, which must be specially pleaded in order to be available. 18 Enc. Pl. & Pr. 89, 90; 34 Cyc. 1094; Comp. Laws 1913, § 7448: If plaintiff's contention is sustained, it will lead to this result: A defendant who is sued upon a cause of action which has been released must plead the release, or he will be precluded from introducing the release in evidence; but, if he pleads the release in defense, he waives a return of the consideration on the part of the party who executed and seeks to avoid the release. A bare statement of the contention demonstrates its unsoundness.

The plaintiff also contends that we were

in error when we stated in the former opinion that "this release was carefully read over to the plaintiff before he signed it. He was not deceived as to its contents or its purpose. He knew that its purpose and effect was to release and discharge his right of action against the defendant. He signed the very instrument which he intended to sign."

It is true, plaintiff, in answer to leading questions put to him by his counsel, stated that he did not know the contents or meaning of the instrument which he signed.

But while examined by his own counsel he also testified:

Q. Mr. Swan, who called you down to the doctor's office at the time you made this settlement with the company?

A. Claim agent. . . .

Q. Did you have any talk about the settlement in Dr. Watson's office before Rodenberg came in? On the day the settlement was made?

A. Yes, sir. . . .

Q. Now, that was the same day of the settlement, or the same day the settlement was made, at the time you signed the papers?

A. Yes, sir.

The plaintiff thereupon testifies to the effect that the claim agent called Rodenberg, the interpreter.

He further testified:

Q. The claim agent first talked to Rodenberg, and then what did Rodenberg say to you?

A. I wanted more money than the claim agent would give to me. . . .

Q. What did Rodenberg then tell you?

A. There was \$50 between us, and the claim agent said, "Let's split that \$50;" and I said, "All right."

During the course of plaintiff's cross-examination, the court propounded this question: "How did you happen to be talking about that (the matter of a job)?" Plaintiff answered: "I wanted to get \$600 and a light job, and they just jewed me down to \$375, and a light job."

He further testified:

Q. At the time that you got this \$375 and signed this release you knew you were settling with the company?

A. Yes.

Q. You knew at the time you settled you had the rupture, didn't you?

A. Yes, sir.

Some reference is also made in plaintiff's testimony to the effect that he wanted the claim agent to give "it on black and white," and that in reply the claim agent "knocked

on his breast" and said, "I am standing good for it, that you get a light job."

The claim agent, Mulcahy, testified:

I think I went to Mr. Swan's house and he came to doctor's office with me, or we telephoned, either one of those. We had had some previous conversation regarding a settlement, and he wanted on that day \$500, but I told him I couldn't pay him that. I offered \$300 and to pay the doctor's bill and buy him a truss, and also for an operation if he wanted it. He stated he didn't want an operation, so we finally got down to business and he accepted \$375.

Q. Was Mr. Rodenberg present?

A. Yes, sir.

Q. Were you talking to Mr. Rodenberg in English, and then he would translate it to Swan, then Swan talk to him, and Mr. Rodenberg translate back to you?

A. Yes.

Q. And as you talked, about all the conversation took place between you and Mr. Rodenberg, the interpreter?

A. Yes, he was acting as interpreter for Swan.

Q. Do you recollect the testimony of Mr. Rodenberg as to a light job?

A. Yes, sir.

Q. Do you recollect just what the conversation was about the job; how it came up?

A. When Mr. Rodenberg was reading the release to him and explaining it to him, and when he came to where it states there is no promise for future employment to have been made as a part consideration of the release, Swan objected to that part and asked if I couldn't leave that out, and I told him no, the company wouldn't make any promises of any future employment whatever; that it had to be just as the release was, but I, myself, would use my influence to see he got a job.

Rodenberg who acted as interpreter between the claim agent and the plaintiff at the time the release was executed, testified as follows:

Q. Was there anything said, Mr. Rodenberg, by Mr. Mulcahy and interpreted by you to Mr. Swan, as to whether or not the company would put any provisions in this settlement as to a job?

A. Yes, there was something said.

Q. What was said?

A. The claim agent said he couldn't put it in the release. He couldn't put anything in the release about the job.

Q. Did he say why he couldn't?

A. He said the company wouldn't accept the release.

Q. What did Mr. Mulcahy say to Mr. Swan, and what did Mr. Swan say back?

A. Swan said he wouldn't sign the release if no job was put in.

Q. What did the claim agent say?

A. He couldn't put it in the release, but he would get him a job.

Q. What was said next?

A. Swan he doubted it, he would like to have it in black and white, and the agent says he couldn't do it, as the railway company wouldn't accept the release, and he promised him a job again absolutely.

Q. What did he say that made you think that?

A. He said, knocking his breast, "I will see you get a job."

Q. Did you interpret that to Swan?

A. I did.

When all this testimony is considered and the most favorable construction placed upon plaintiff's testimony, it seems clear that reasonable men can reach only one conclusion, namely, that he was well aware of the transaction in which he was engaged. He knew that he was making a settlement for his personal injuries. Offers and counter offers were made. He signed an instrument, the purpose and effect of which was to complete the settlement. He knowingly received \$375, stipulated as a consideration, and this he has kept and never offered to return. We are entirely satisfied that the instant case falls within the rule announced in our former opinion, that a party who repudiates a settlement for personal injuries because of fraud, and sues upon the original cause of action, must return or tender a return of the consideration received. And "it is no answer to the objection that the money has not been returned, or offered to be returned, that the amount received by the plaintiff under the release has been discounted from the verdict. Suppose the verdict had been found for the defendants, because of insufficient proof of negligence on their part, or because of contributory negligence on the part of the plaintiff, what would have been the predicament of the defendants in respect to the money paid under the release? Clearly they could have no recourse to recover it back from the plaintiff. The plaintiff cannot be allowed both to affirm and disaffirm, according as the case may terminate; he cannot affirm for what he has received, and disaffirm and repudiate the release as to the difference between that amount and what he might expect to recover by the verdict of the jury. He must disaffirm and rescind the release in toto, if the facts justify him in so doing, and return or offer to return what he has received under it." *Lynons v. Allen*, 11 App. D. C. 543, 552.

It is suggested that the decision deprives plaintiff of all remedy for the fraud al-



leged to have been practised upon him by the defendant. The suggestion, while not material, is incorrect. Even though it be true (as plaintiff assumes) that it is now too late to tender or return the consideration and sue upon the original cause of action (and upon this question we express no opinion), the plaintiff still has the right

to maintain an action for the deceit which he claims was practised upon him, and, if he prevails in such action, he will receive all the relief to which he is justly entitled. A rehearing is denied.

Grace, J.:

I concur in the result.

**Annotation—Return or tender of consideration for release of claim for personal injuries set aside on the ground of fraud.**

For the earlier cases upon this question, see *Pattison v. Seattle, R. & S. R. Co.* 35 L.R.A.(N.S.) 660, and the note thereto.

While there is still some real conflict in the cases as to the necessity for a return or tender of the consideration given for a release of a claim for personal injuries, when it is sought to set such release aside on the ground of fraud, and sue upon the original liability, most of the cases may be reconciled by observing the distinction, which is pointed out in the earlier note, between fraud which merely goes to inducing the injured party to sign a release, the effect of which he understands, and fraud in inducing him to sign a release under the belief that he was signing something else, such as a mere receipt or a release of part of a claim only.

So, it has been held that it was not necessary to return or tender the consideration received, as a prerequisite to bringing suit, where the injured party was induced to sign a release under a belief that it was a mere receipt for some other purpose, or under such circumstances that he was incapable of understanding that he was executing a release:

—where, at the time of signing the release, plaintiff, because of her ignorance, illiteracy, and suffering, was incapable of understanding its contents when read to her. *Beardon v. St. Louis, I. M. & S. R. Co.* (1912) 103 Ark. 341, 146 S. W. 851;

—where one who could not read English was induced to sign a blank release under a belief that she was merely giving her name for information, or to show how it was spelled. *Atlantic Coast Line R. Co. v. Adeeb* (1914) 15 Ga. App. 842, 84 S. E. 316;

—where a widow signed a contract she could not read, but which was fraudulently represented to be an agreement to pay the amount she received, with a provision for further payment if a settlement was made for a larger amount

with any other widows for the death of their husbands in a common accident. *Monahan v. St. Paul Coal Co.* (1915) 193 Ill. App. 308;

—where a release was procured from one known by defendant to be incapable, at the time, of executing a release. See *v. Carbon Block Coal Co.* (1912) 159 Iowa, 413, 138 N. W. 825, 141 N. W. 1048;

—where plaintiff was led to believe the release was merely an agreement to pay his medical expenses. *Ross v. Oliver* (1913) 152 Ky. 437, 153 S. W. 756;

—where plaintiff, while in defendant's hospital, surrounded by its agents, and in a weakened condition, was, by the practice of gross fraud, induced to sign a release, upon an assurance that it related only to a minor injury. *St. Louis & S. F. R. Co. v. Ault* (1912) 101 Miss. 341, 58 So. 102;

—where the paper was represented and read to plaintiff as merely a receipt for a small sum, given to assist him because of his enforced idleness. *Malkmus v. St. Louis Portland Cement Co.* (1910) 150 Mo. App. 446, 131 S. W. 148;

—where the release was signed under a misrepresentation that it was a receipt for wages paid. *Loveless v. Cunard Min. Co.* (1918) — Mo. App. —, 201 S. W. 375;

—where plaintiff claimed that, if he signed the release, it was while suffering great pain from his injuries, and while under the influence of opiates, and without any understanding or appreciation of what was going on, and that he had no knowledge of the release until after it was set up in defendant's answer. *Michalsky v. Centennial Brewing Co.* (1913) 48 Mont. 1, 134 Pac. 307.

—where the release was represented as merely a receipt for money expended for medicine. *Scully v. Brooklyn Heights R. Co.* (1913) 155 App. Div. 382, 140 N. Y. Supp. 260;

—where the release was represented to be merely a receipt for money paid as wages while plaintiff was disabled.

Robinson v. Easton (1911) 33 Ohio C. C. 451;

—where the release was represented to be a receipt for a small sum, paid to enable plaintiff, who was a passenger on defendant's train, to reach her destination. Bissett v. Portland R. Light & P. Co. (1914) 72 Or. 441, 143 Pac. 991;

—where the plaintiff was in a feeble condition mentally when he signed the release, which was represented merely as a receipt. Gordon v. Great A. & P. Tea Co. (1914) 243 Pa. 330, 90 Atl. 78;

—where plaintiff was deceived, by falsehood and fraud, into accepting the money, under the belief that it was a present to help him until he could go to work. Hogarth v. William H. Grumpy & Co. (1917) 256 Pa. 451, 100 Atl. 1001;

—where plaintiff could not understand or speak English, and understood that he was signing a receipt for money paid as wages for the time lost. Miller v. Spokane International R. Co. (1914) 82 Wash. 170, 143 Pac. 981;

—where the release was signed by plaintiff's wife, and his mark affixed, when he was incompetent, and the money was turned over to the wife and used for family expenses without plaintiff's knowledge or consent, and he has been unable to obtain money to make a tender. Charron v. Northwestern Fuel Co. (1912) 149 Wis. 240, 49 L.R.A.(N.S.) 162, 134 N. W. 1048, Ann. Cas. 1913C, 939;

—where plaintiff signed the instrument at a time when she was unaware that she was making a contract of any kind, and received the money paid without supposing it to be in consideration of the execution of any contract. Georgia Southern & F. R. Co. v. Adeeb (1914) 15 Ga. App. 831, 84 S. E. 323.

In Malkmus v. St. Louis Portland Cement Co. (1910) 150 Mo. App. 446, 131 S. W. 148, the court said that, when a case is such that a court of law would be authorized to declare the release void, return of the consideration was not necessary, but that, when the releasor would have to go into equity to have it set aside or annulled, return was necessary.

In Tweeten v. Tacoma R. & Power Co. (1914) 127 C. C. A. 378, 210 Fed. 828, it was held that where defendant customarily paid the doctor's bill of injured employees, and plaintiff signed the release under a representation that it was a receipt for such payment, he was not required to return the money so paid, as he had a right to expect such payment

as part of his contract of employment, and by way of compensation for services.

In Porth v. Cadillac Motor Car Co. (1917) — Mich. —, 165 N. W. 698, it was held that if the contract was, as plaintiff claimed, to pay damages for one year, further damages to be determined at the end of that time, and he was fraudulently induced to sign a complete release, believing it to be merely a receipt for the money paid for the year, so that he affirms the contract which he claims was made, there was no obligation to return the money paid, as would be the case in repudiating a contract admittedly made on the ground that it was induced by fraud.

In Johnson v. Chicago, M. & St. P. R. Co. (1915) 224 Fed. 196, where plaintiff was placed in defendant's hospital and treated by its physicians, and a release was made in consideration of the payment of these expenses and of wages for the time lost, which payments had been voluntarily furnished, without creating any obligation on the part of the plaintiff to repay them, so that defendant could not be injured in any event, whatever the ultimate recovery might be, it was held that plaintiff was not required to return or tender the amount before commencing a suit in equity to have the release set aside, on the ground that injuries developed which were unknown to plaintiff when the release was made, and either unknown to defendant's physicians or fraudulently concealed by them.

In British Columbia Electric R. Co. v. Turner (1914) 49 Can. S. C. 470, Ann. Cas. 1914D, 490, in which it was held that it was not necessary to return the consideration for a release executed by deceased, where such release was executed under a fraudulent representation. The judges apparently take the view that in such case the consideration could be credited upon any judgment; but that if the release was signed under a representation that it was not a complete release, but only for damages up to the time of the signing, such payment would not need to be taken into consideration in arriving at the amount of damages.

In Vanormer v. Osborn Mach. Co. (1916) 255 Pa. 47, 99 Atl. 161, where the release was secured by fraudulent representations that an eye specialist, who had just examined plaintiff, was communicated with by phone and said that one of plaintiff's eyes would soon be well, when in fact no conversation by phone was had with the specialist, and

no such statement was made by him, and both eyes were lost, it was held that tender was not necessary.

In *Rase v. Minneapolis, St. P. & S. Ste. M. R. Co.* (1912) 118 Minn. 437, 137 N. W. 176, it was held that where plaintiff, as a result of deception practised by defendant's agent, who represented that plaintiff's attorney was dishonest, and secured a settlement without the knowledge of plaintiff's attorney, and plaintiff, before becoming aware of the fraud, had spent a large part of the amount received, he should be required to restore only such amount as he was able to restore, the balance left to be applied in reduction of the verdict. The court points out that to require plaintiff to return all of the consideration would prevent him from pursuing his remedy, and although the possibility of the jury finding that there was no cause of action or that the settlement was not inadequate, in which case the expense of the trial would fall on defendant unjustly, is recognized, the court says: "But it appears to us that this expense to the one found guilty of deception is not of sufficient consequence to warrant a court of equity in denying the defrauded one his day in court."

In *Ingram v. Carlton Lumber Co.* (1915) 77 Or. 633, 152 Pac. 256, in which it appears that the trial court instructed the jury that they were not to take into consideration the amount which had been paid for the release, and in which there seems to have been a difference of opinion in the appellate court as to the necessity for returning or tendering the amount before bringing suit, the court says that the most ultra of the authorities which lean toward allowing a plaintiff to retain the consideration paid for the alleged release, and yet sue for damages in a greater amount, do not hold that no account must be taken of the money thus paid, but that it should be deducted from any greater amount in which the plaintiff is found to be injured.

*Conrad v. Keller Brick Co.* (1907) 31 Ohio C. C. 700, affirmed without opinion in (1909) 79 Ohio St. 461, 87 N. E. 1134, which holds that where plaintiff signed a release, under fraudulent representations that it was a receipt for insurance money due him, the release was voidable, and not void, and tender of the consideration was necessary, seems to be out of line with the other cases involving similar circumstances.

In some of the cases holding that re-

turn or tender of the consideration is necessary, the facts bring them within the first class of cases mentioned above, in which the party understood the nature of the instrument he was executing, but was induced to execute it by some fraudulent means.

Thus, where plaintiff signed a release upon being promised that he would be employed as before, it was held that a return of the money consideration was necessary before bringing suit. *St. Louis & S. F. R. Co. v. McCrory* (1911) 2 Ala. App. 531, 56 So. 822.

And in *Western & A. R. Co. v. Atkins* (1914) 141 Ga. 743, 82 S. E. 139, it was held that a return of the consideration was necessary, where plaintiff signed a release for all damages under a belief that he was releasing only his claim for damages to his mule and wagon, the court distinguishing cases where plaintiff did not know that he was signing any release.

And in *South Bend & M. Gas Co. v. Jensen* (1914) 182 Ind. 557, 105 N. E. 774, in which the court says that, where a release is induced by fraud, the consideration must be returned or tendered before bringing suit, the case turns upon the sufficiency of the pleadings, and it is inferred that it would not be necessary to return or tender the consideration before bringing suit, if plaintiff had been fraudulently led to believe that he was signing merely a voucher for wages due him instead of a release.

While in *Bailey v. Indianapolis Abattoir Co.* (1918) — Ind. App. —, 118 N. E. 374, it was held that there was no averment of fraud in procuring the execution of the release, or that defendant fraudulently represented its contents, or that plaintiff could not or did not read it, but only that fraudulent representations were made as to plaintiff's physical condition, it was held that tender was necessary, the court recognizing and distinguishing the class of cases where plaintiff was led to believe he was signing something other than a release.

*SWAN v. GREAT NORTHERN R. Co.* ante, 1063, comes clearly within this class of cases, inasmuch as plaintiff fully understood the terms and nature of the release when he executed it, but was induced to sign it by an oral promise of employment, though the court expressly refuses to indicate whether it would recognize the distinction made, if a case should come before it involving

fraud as to the nature of the instrument.

In other cases holding that return or tender is necessary, it appears that no fraud was established.

Thus, a return or tender of the consideration was held to be necessary, where plaintiff claimed the settlement was made while he was mentally incompetent, but no charge of fraud, mistake, or trick was made or proven. *Mahr v. Union P. R. Co.* (1909) 96 C. C. A. 19, 170 Fed. 699.

And in *Reid v. St. Louis & S. F. R. Co.* (1916) — Mo. —, 187 S. W. 15, it was held that, where there was no substantial evidence that defendant's agent used either guile or force to prevent plaintiff from reading the release before signing it, the consideration should be returned or tendered before attacking the release for fraud.

In *Reddington v. Blue* (1914) 168 Iowa, 34, 149 N. W. 933, the court said that where, by mutual mistake, the release covered injuries not contemplated by either party because they were not known at the time, return or tender of the consideration was not necessary. But in the later case of *Seymour v. Chicago & N. W. R. Co.* (1917) — Iowa, —, 164 N. W. 352, the court held that the statement in *Reddington v. Blue* was pure dictum, and that, in case of mistake, failure to restore what was received is fatal to relief.

When it is evident that a tender will not be accepted, it need not be made. *St. Louis & S. F. R. Co. v. McCrory* (1911) 2 Ala. App. 531, 56 So. 822; *Butler v. Gleason* (1913) 214 Mass. 248, 101 N. E. 371; *Woods v. Wikstrom* (1913) 67 Or. 581, 135 Pac. 192.

The right to insist upon payment or tender may be waived by failure of defendant to insist upon payment into

court. *Hubbard v. Lusk* (1916) — Mo. App. —, 181 S. W. 1028.

The rescission of a release, and tender or restitution, must be made promptly upon discovery of the fraud. *Burns v. Reading* (1915) 188 Mich. 591, 155 N. W. 479.

While no tender is necessary when, because of mental incapacity at the time a release was executed, the injured party did not know of the settlement before bringing suit, nevertheless, if the consideration has reached him after he has been restored to mental capacity, and before bringing suit, it must be returned or tendered. See *v. Carbon Block Coal Co.* (1912) 159 Iowa, 413, 138 N. W. 825, 141 N. W. 1048.

Where a release was signed while plaintiff was mentally incapacitated, a tender, as soon as it could reasonably be made after discovery of the fraud, is sufficient. *Beatty v. Palmer* (1916) 196 Ala. 67, 71 So. 422.

In *Western & A. R. Co. v. Atkins* (1914) 141 Ga. 743, 82 S. E. 139, it was held that a tender to a local station agent, having nothing to do with the settlement of claims, was insufficient, as likewise was an offer by plaintiff's counsel, during the trial, to local counsel trying the case for defendant, but who had nothing to do with claims before suit, and no authority to accept tender.

In *Drobney v. Lukens Iron & Steel Co.* (1913) 122 C. C. A. 325, 204 Fed. 11, it was held that where the rules of an insurance association connected with defendant provided for benefits which were to be in lieu of all damages against defendant, and plaintiff accepted the indemnity provided for her husband's death, she was bound to tender it to the association before suing defendant, and tender to defendant was insufficient.

R. L. S.

#### IOWA SUPREME COURT.

J. G. SPRINGSTEIN, Appt.,

v.

J. C. SANDERS.

(— Iowa, —, 164 N. W. 622.)

**Habeas corpus — to release convict — perjured testimony.**

Habeas corpus will not lie to release from custody one convicted of crime, upon

Note. — As to habeas corpus to secure release of one convicted on perjured evidence, see annotation following this case, post, 1078.

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affidavit of the prosecuting witness that his testimony was false and given under duress. For other cases, see *Habeas Corpus*, I. c, in Dig. 1-52 N. S.

(October 20, 1917.)

**A** PPEAL by plaintiff from a judgment of the District Court for Dickinson County sustaining a demurrer to and denying a petition for a writ of habeas corpus to secure his release from custody to which he had been committed for the crime of rape. Affirmed.

Statement by Weaver, J.:

The plaintiff, a prisoner in the state penitentiary at Ft. Madison, Iowa, petitioned for a writ of habeas corpus directed to the warden of that institution, to test the legality of the restraint exercised over him. The substance of the complaint will be set out more fully in the opinion. The district court denied the relief asked, and the petitioner appeals.

Mr. Liston McMillen for appellant.

Messrs. H. M. Havner, Attorney General, and F. C. Davidson, Assistant Attorney General, for appellee:

The only question that could have been raised is the question of jurisdiction of the district court to enter the judgment of conviction.

Ex parte Holman, 28 Iowa, 88, 4 Am. Rep. 159; Zelle v. McHenry, 51 Iowa, 572, 2 N. W. 264; State v. Orton, 67 Iowa, 554, 25 N. W. 775; Lockard v. Clark, 166 Iowa, 558, 147 N. W. 900.

The attack by habeas corpus upon the validity of this judgment is of a collateral character, and cannot be permitted.

Turney v. Barr, 75 Iowa, 758, 38 N. W. 550.

It is not competent for the petitioner thus to question the regularity and propriety of his conviction.

Lockard v. Clark, 166 Iowa, 556, 147 N. W. 900; Lockard v. Sanders, 167 Iowa, 533, 149 N. W. 597.

Weaver, J., delivered the opinion of the court:

The plaintiff's petition which bears date of January 11, 1917, discloses that on March 21, 1913, in the district court of Dickinson county, Iowa, he was convicted of the crime of rape, committed upon one Ora Lombard, and sentenced to confinement in the penitentiary at Ft. Madison; that a warrant of commitment was issued by said court to carry the sentence into effect; and that under and by virtue thereof plaintiff has since been kept and restrained in the penitentiary, of which the respondent herein is warden in charge. No complaint is made that plaintiff was not indicted and tried in the manner required by law, or that said district court did not act strictly within its jurisdiction in entering said judgment, or in issuing said warrant of commitment; but the sole ground upon which he demands his release upon habeas corpus is that, although convicted in due form of law, he is in fact innocent of the crime charged against him, and that his conviction was obtained by intimidation and perjury. That we may not err in the statement of his claim, we quote literally from the petition as follows:

"That said restraint is illegal and wherein it is illegal is as follows: (1) Said conviction was procured by intimidation and perjury as shown by the affidavit of Ora Lombard, the prosecuting witness, and her mother, hereto attached, marked Exhibit B and made part hereof; and plaintiff is in fact innocent of this alleged crime.

"That in the trial of said cause there was no question as to the corpus delicti; but there was no evidence connecting the said Springstein with the crime, except the testimony of said Ora Lombard, then aged fourteen years, and opportunity arising from the fact that he boarded in her family and on some few occasions they were alone together. She now, however, is in her eightieth year and endowed with conscience, and, being so, she made said affidavit, at a date more than three years after said verdict and judgment were rendered, in which she states that her testimony was false, and was given by intimidation, under a threat that she would be set to the Reform School, if she did not testify that said Springstein had carnal knowledge of her.

"Your petitioner further states that said testimony at the trial was false, and was given by intimidation, and the verdict, and judgment were the result of said intimidation, and therefore void, or at least voidable in habeas corpus; and there is no way, by due legal process, that your petitioner can avail himself of this newly discovered evidence and intimidation and duress, except by the writ of habeas corpus."

These allegations are supported by an affidavit as follows:

#### Exhibit B.

State of Iowa, }  
Calhoun County } ss.:

Ora Lombard and her mother, Mrs. Lillie Lombard, now residing at Rockwell City, in said county, being first duly sworn, state as follows:

The said Ora Lombard states J. C. Springstein, who was sentenced about March 1, 1913, from Dickinson county district court of Iowa, for carnal knowledge of herself, is not guilty of said crime. She states that said Springstein never had carnal knowledge of her, and she gave her testimony at the trial against him through duress, under threats and fear of being sent to the Reform School if she did not testify against him. Mrs. Lillie Lombard states that she does not believe said Springstein is guilty of said crime, and that she never observed any improper conduct by him.

(Duly copied and sworn to.)

The foregoing is the entire showing on which counsel for plaintiff rests his case.

In his brief he argues that illegality in a conviction on a criminal charge must present itself in one of three phases: (1) Patent illegality; that is, errors apparent in the record which may be reviewed on appeal; (2) quasi patent illegality, not appearing on the record, but known to the accused in time for presentation in a motion for new trial; and (3) latent illegality, the facts of which were unknown to the accused in time to direct the court's attention thereto on the trial or on motion for new trial. Illegality of the latter kind, he says, "goes to the question of the jurisdiction of the court to render any judgment whatever; for the principle of estoppel cannot apply where the facts are not known, and hence the illegality can never ripen into legality, and the judgment is consequently void *ab initio*." This seems to mean—if, indeed, it means anything—that if a judgment of a court of general jurisdiction, duly rendered in accordance with all the forms and requirements of law, shall result in hardship or injustice to the party against whom it is rendered, a hardship or injustice which might have been avoided had certain hidden or unknown facts been revealed at the trial of the case, the discovery of such evidence at any time in the near or remote future is sufficient ground for declaring the judgment void *ab initio*. We are cited to no authorities in support of this proposition, which is novel, if not startling. Counsel mentions *Lockard v. Clark*, 166 Iowa, 556, 147 N. W. 900, and *Lockard v. Sanders*, 167 Iowa, 533, 149 N. W. 597, as having some bearing upon it; but a careful reading of those cases discloses no similarity with the one at bar, or, if the principles there approved have any application to the facts here presented, they are to be regarded as opposed to the conclusion which counsel asks at our hands. Aside from these cases, the brief cites no authority, and counsel concedes his inability to find any, on which he can rely.

Failing in this, he calmly casts all responsibility upon the court as follows: "If this statement is fallacious, the court will see it. As at present advised, the belief of the writer is that it is a true analysis; and he will await the court's decision with great interest, to see if it be so, wherein he missed the truth. We claim that the common law, as modified by our Constitution and statutes, is the law of the land. It is the stream 'pure and clear as crystal,' pictured in the Apocalypse as proceeding out of the throne of God, and the Golden Rule is of its essence and deep channel and current."

It may be true—and, indeed, is true—that if an innocent person be convicted of crime, and, after the time for appeal or for review of his case is long passed, convincing evidence of his innocence is discovered, there ought to be some way in which he may be relieved from unjust punishment and the stigma of his conviction removed, other than by the expedient of an executive pardon for an offense which he has never committed. In an ideal state of the law, such remedy would necessarily have a place, but nothing is better established than that in the law as we have it no such remedy is provided. Counsel practically concedes that habeas corpus has never been recognized as a means to that desired end; but he makes this effort experimentally, rather than otherwise, in the hope that the court may be induced to establish a new and revolutionary precedent. We can only say we are not yet ready to make so radical a venture.

The plaintiff's case is without legal merit, and his petition was properly dismissed.  
Affirmed.

Gaynor, Ch. J., and Preston and Stevens, JJ., concur.

Petition for rehearing denied.

### Annotation—Habeas corpus to secure release of one convicted on perjured evidence.

The conclusion reached in *SPRINGSTEIN v. SANDERS*, ante, 1076, that one convicted of a criminal offense cannot obtain release on habeas corpus on the ground merely that he was convicted on perjured evidence appears sound. Any other conclusion would seemingly violate fundamental principles underlying the writ of habeas corpus, for the mere fact that the testimony which led to the conviction was perjured is obviously not a matter affecting the jurisdiction of

the court. And in 21 Cyc. 294, it is stated: "The judgment of a court of competent jurisdiction, although erroneous, is binding until reversed; and it is the general rule that another court cannot, by means of the writ of habeas corpus, look beyond the judgment and re-examine the charges and proceedings on which it was based; in other words, the writ challenges the jurisdiction alone."

Research has disclosed no case similar

to *SPRINGSTEIN v. SANDERS*. A perusal of the cases, however, in the notes in 10 L.R.A.(N.S.) 216; 23 L.R.A.(N.S.) 564; 25 L.R.A.(N.S.) 574; and L.R.A. 1916B, 890, on the question of perjury as ground for relief against a judgment, will disclose more clearly, when considered in connection with the principles underlying the writ of habeas corpus, the corrections of the decision in that case.

Attention is called to *Bleakley v. Barclay* (1907) 75 Kan. 462, 10 L.R.A. (N.S.) 230, 89 Pac. 906, although the case is not strictly in point herein, as

the writ of habeas corpus was not sought by one convicted of a crime. But the principles on which the decision rests seem applicable to the question under consideration. In that case it was held that a party to a judgment could not impeach or set it aside in a habeas corpus proceeding on the ground that the judgment was obtained by perjured testimony.

As to habeas corpus to secure release of one convicted while insane, see *Myers v. Halligan*, L.R.A.1918B, 80, and note thereto. R. E. H.

### TEXAS SUPREME COURT.

STATE OF TEXAS EX REL. W. B. WALTON, Tax Collector, Plff. in Err.,  
v.

DANIEL YTURRIA et al.

(— Tex. —, 204 S. W. 315.)

#### Tax — inheritance — adopted child.

1. Adopted children are not within the provisions of a statute exempting from an inheritance tax direct lineal descendants of a property owner, but they are exempt under a statutory provision giving them all the rights and privileges of a legal heir. For other cases, see *Taxes*, V. b, in *Dig.* 1-52 N. S.

#### Same — right of children of adopted child.

2. Children of an adopted child, to whom the adopting parent has bequeathed property, are not entitled to exemption from the inheritance tax under a statute giving adopted children all the rights and privileges of a legal heir. For other cases, see *Taxes*, V. c, in *Dig.* 1-52 N. S.

(June 28, 1918.)

**E**RROR to the Court of Civil Appeals for the Fourth Supreme Judicial District to review a judgment affirming a judgment of the District Court for Cameron County in defendant's favor in an action brought to enforce payment of an inheritance tax. Reversed.

The facts are stated in the opinion.

Messrs. A. M. Kent and Harbertavenport for the State.

**Note.** — As to whether the terms "child," "children," "issue," etc., in statute governing distribution of decedent's estate include adopted children, see annotation following this case, post, 1082; and references therein to annotations on related questions.

L.R.A.1918F.

Messrs. R. B. Creager, F. W. Seabury and Denman, Franklin, & McGown, for appellees:

Inheritance Tax Statutes are in *pari materia* with the Statute of Wills, the Statute of Descent and Distribution, and the Statutes of Adoption and of Legitimation, and must be construed with special reference to same.

*Neill v. Keese*, 5 Tex. 23; 51 Am. Rep. 746; *Cannon v. Vaughan*, 12 Tex. 399; *Cain v. State*, 20 Tex. 355; *Selman v. Wolfe*, 27 Tex. 68; *Cooper v. Yoakum*, 91 Tex. 391, 43 S. W. 871; *Bonner v. Hearne*, 75 Tex. 242, 12 S. W. 38; *Taylor v. Hall*, 71 Tex. 213, 9 S. W. 141; *Scoby v. Sweatt*, 28 Tex. 713; 36 Cyc. 1147; *Mager v. Grima*, 8 How. 490, 12 L. ed. 1168; *United States v. Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; *Wallace v. Myers*, 4 L.R.A. 171, 38 Fed. 148; *Plummer v. Coler*, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Re Swift*, 137 N. Y. 77, 18 L.R.A. 709, 32 N. E. 1096; *Nunnemacher v. State*, 129 Wis. 190, 9 L.R.A.(N.S.) 121, 108 N. W. 627, 9 Ann. Cas. 711; 37 Cyc. 1555.

The relation created by statutory adoption is a status, and is not a personal or contractual relation.

*Harle v. Harle*, — Tex. Civ. App. —, 166 S. W. 679; *Eckford v. Knox*, 67 Tex. 204, 2 S. W. 372; *McColpin v. McColpin*. — Tex. Civ. App. —, 77 S. W. 238; *Logan v. Lennix*, 40 Tex. Civ. App. 62, 88 S. W. 364; *Bernero v. Goodwin*, 267 Mo. 427, 184 S. W. 74; *Gray v. Holmes*, 57 Kan. 217, 33 L.R.A. 207, 45 Pac. 596; *Power v. Hafley*, 85 Ky. 671, 4 S. W. 683; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Finley v. Brown*, 25 L.R.A.(N.S.) 1285, note; 1 O. J. p. 1370.

The status created by the statutory adoption is that of a legitimate child, so

far as concerns the right of inheritance and all privileges pertaining thereto, subject to the statutory limitations.

Eckford v. Knox, 67 Tex. 200, 2 S. W. 372; Taylor v. Deseve, 81 Tex. 249, 16 S. W. 1008; Harle v. Harle, — Tex. Civ. App. —, 166 S. W. 677; White v. Holman, 25 Tex. Civ. App. 152, 60 S. W. 437; Logan v. Lennix, 40 Tex. Civ. App. 62, 88 S. W. 364; Hartwell v. Tefft, 19 R. I. 644, 34 L.R.A. 500, 35 Atl. 882; Power v. Hafley, 85 Ky. 671, 4 S. W. 683; Thomas v. Maloney, 142 Mo. App. 193, 126 S. W. 522; Bernero v. Goodwin, 267 Mo. 427, 184 S. W. 74; Warren v. Prescott, 84 Me. 483, 17 L.R.A. 435, 30 Am. St. Rep. 370, 24 Atl. 948; Ryan v. Foreman, 181 Ill. App. 262; Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455.

The Adoption Statute, like the Legitimation Statute, operates as an enlargement, and to that extent a definition, of the words "children and their descendants," contained in the Statutes of Descent and Distribution.

Harle v. Harle, — Tex. Civ. App. —, 166 S. W. 674; Eckford v. Knox, 67 Tex. 200, 2 S. W. 372; Fosburgh v. Rogers, 114 Mo. 122, 19 L.R.A. 201, 21 S. W. 82; Moran v. Stewart, 122 Mo. 295, 26 S. W. 962; Bernero v. Goodwin, 267 Mo. 427, 184 S. W. 74; Power v. Hafley, 85 Ky. 671, 4 S. W. 683; Gray v. Holmes, 57 Kan. 217, 33 L.R.A. 207, 45 Pac. 596; Pace v. Klink, 51 Ga. 220; Re Newman, 75 Cal. 219, 7 Am. St. Rep. 146, 16 Pac. 887; Re Winchester, 140 Cal. 468, 74 Pac. 10; Webb's Estate, 250 Pa. 179, 95 Atl. 419; Re Walworth, 85 Vt. 322, 37 L.R.A.(N.S.) 849, 82 Atl. 7, Ann. Cas. 1914C, 1223; 1 R. C. L. 614; 1 C. J. 1402.

The Inheritance Tax Law having been passed after Eckford v. Knox and subsequent cases had firmly fixed the heritable status of adopted persons as children, it will be presumed that the legislature in exempting children, without express words of exclusion, intended to include adopted children in the exemption.

Cooper v. Yoakum, 91 Tex. 391, 43 S. W. 871; Bonner v. Hearne, 75 Tex. 242, 12 S. W. 38; Overstreet v. Manning, 67 Tex. 657, 4 S. W. 248; Rowe v. Spencer, 70 Tex. 78, 8 S. W. 60; 36 Cyc. 1142-1144, 1146-1150.

#### Per Curiam:

This case presents two questions, viz: First. Was property within this state subject to an inheritance tax, under article 7487, Rev. Stat. upon passing by will to persons adopted by the testator? Second. Was property within this state subject to said tax, under said article, upon passing by will to children of persons adopted by the testator?

The facts show that Francisco Yturria died, without issue of his body, on June 15, 1912, having his domicil in Cameron county, Texas, and leaving a will, duly probated in said county, whereby he devised all of his property as follows:

To his surviving wife Felicitas Trevino de Yturria, an estate for her life in one undivided half of same.

To Daniel Yturria, who was duly adopted under the laws of Texas, on January 8, 1897, by Francisco Yturria and Felicitas Trevino de Yturria his wife, an estate for the term of the life of Daniel Yturria in an undivided one fourth of same.

To Ysabel Garcia, who was duly adopted under the laws of Texas, on January 8, 1897, by Francisco Yturria and Felicitas Trevino de Yturria his wife, an estate for the term of the life of Ysabel Garcia in an undivided one fourth of same.

To Hermino Yturria and Fausto Yturria, children of said Daniel Yturria, the remainder of the property devised for his life to Daniel Yturria.

To Miguel Francisco Garcia, Juan Antonio Garcia, Jose Alejandro Garcia, and Maria del Rasario Garcia, children of said Ysabel Garcia, the remainder of the property devised for her life to Ysabel Garcia.

To the above-named children of Daniel Yturria and Ysabel Garcia the remainder of the property devised for her life to Felicitas Trevino de Yturria.

It was also shown that if the property devised to the children of the persons adopted by Francisco Yturria was subject to the inheritance tax, then \$4,003.11, with 6 per cent per annum interest from June 15, 1912, would be the amount of the tax on the property in Texas devised to each of the defendants in error Hermino Yturria, and Fausto Yturria, and \$2,450.85, with 6 per cent per annum interest from June 15, 1912, would be the amount of the tax on the property in Texas devised to each of the defendants in error Miguel Francisco Garcia, Juan Antonio Garcia, Jose Alejandro Garcia and Maria del Rosario Garcia.

In so far as it applies to the questions presented by this record, article 7487, Rev. Stat. subjects to a tax all property within the jurisdiction of the state upon its passing by will or by descent to or for the use of any person, "except the father, mother, wife or direct lineal descendants of the testator."

The contention for defendants in error is that our Adoption Statute gives to adopted persons and their legitimate children the status of natural children and grandchildren of the adopter, and that hence adopted persons and the legitimate



children of adopted persons come within the meaning of the term "direct lineal descendants," as used in article 7487, Rev. Stat.

As has often been stated, adoption was unknown to the common law, but was recognized from the earliest days in the jurisprudence of the civil law. Under the civil law adoption created the relationship of parent and child, with the resultant rights and duties. Had our statute declared the effect of adoption to be what it was under the civil law, or had it been silent with respect to such effect, after merely providing for adoption, the conclusion would seem correct that adopted persons and their children should be given the same legal status as natural children and grandchildren. Our statute, however, defines with precision the rights and privileges to which a party shall be entitled by virtue of adoption. These rights and privileges are, under article 2, Rev. Stat: "All the rights and privileges, both in law and equity of a legal heir of the party so adopting him: Provided, however, that if the party adopting such heir have at the time of such adoption, or shall thereafter have, a child begotten in lawful wedlock, such adopted heir shall in no case inherit more than one fourth of the estate of the party adopting him."

The opinion of Chief Justice Willie in *Eckford v. Knox*, 67 Tex. 202, 203, 2 S. W. 372, leaves little basis for controversy as to what are "all the rights and privileges, both in law and equity, of a legal heir" of the adopter. In that opinion it is declared: "When the statute says that one person may adopt another as his heir, and that the latter thereupon becomes entitled to all the rights and privileges of a legal heir of the party so adopting him, it means that, upon the death of the adopting party, the other shall, if living, become entitled to an interest in all his property of which he shall die intestate, and shall not be wholly excluded by any class of persons whatsoever. . . . Aware that the effect of the law was to give him a child's share of the property, the legislature confined his inheritance under certain circumstances to one fourth of the estate, thereby saying that in all other respects he should be entitled to all the rights and privileges of a child so far as the inheritance is concerned." 67 Tex. 202, 204.

The quoted language plainly rejects the civil-law rule "that the person adopted stood not only himself in relation of child to him adopting, but his children become grandchildren of such person," as announced in the leading case of *Vidal v. Commagere*, 13 La. Ann. 516, and interprets our stat-

ute as substituting therefor the rule that the adopted person shall acquire only rights and privileges in the inheritance, that is, in that which passes from the adopter upon his death, and, as to such inheritance, the rights and privileges of the adopted person are made the same as would be those of a natural child, save as restricted by the closing proviso of article 2. That the statute thus wrought an important modification of the civil law is expressly pointed out by Chief Justice Willie, 67 Tex. 204.

It is clear to our minds that, had the legislative intent been otherwise than as interpreted in *Eckford v. Knox*, we would not find in our Adoption Statute such deliberate avoidance of the word "child" nor such discriminating use of the term "legal heir."

On the authority of *Eckford v. Knox*, it was determined in *Taylor v. Deseve*, 81 Tex. 249, 16 S. W. 1008, that adoption in Texas did not have the same effect as paternity and filiation, and did not make the adopted person a constituent of the family of the adopter.

The case of *Cochran v. Cochran*, 43 Tex. Civ. App. 259, 95 S. W. 732, presented the question as to whether a person died without "lawful children," within the meaning of a will, when he died leaving one whom he had adopted surviving him, but leaving no natural children, and it was held that the party adopted was not a lawful child, the court saying that "an adopted heir is not in fact the child of the person adopting him."

Adhering to the decisions cited, we conclude that in this state neither an adopted person nor a child of an adopted person is a "direct lineal descendant" of the adopter.

No other conclusion could be reached without disapproving *Eckford v. Knox* and without disregard of the established rule requiring us to give to words in common use, when found in a statute, the sense in which they are ordinarily used. *Texas & P. R. Co. v. Railroad Commission*, 105 Tex. 393, 150 S. W. 878. Given ordinary significance, as shown by Webster's Dictionary, "direct" means "in the line of descent," "lineal" means "in the line of succession through lineage," and "descendant" means "one who descends as offspring, however remotely;" and hence, as each of these three nearly synonymous words carries the concept of offspring in the line of generation, their combined use precludes our declaring others than natural offspring to be within the class of direct lineal descendants.

Section 2 of article 2462 Rev. Stat. for-

merly article 1689, was held to govern the distribution of the estate of one who died leaving surviving him both a widow and also one whom he had adopted, § 2 reading: "If the deceased have no child or children, or their descendants, then the surviving husband or wife shall be entitled to all the personal estate, and to one half of the lands of the intestate, without remainder to any person, and the other half shall pass and be inherited according to the rules of descent and distribution."

See *White v. Holman*, 25 Tex. Civ. App. 152, 60 S. W. 438.

Although the adopted person whose rights were discussed in that case would seem to have been really entitled to the half of the land awarded her, not under § 2 of former article 1689, but under a correct construction of article 2469, then article 1696 and the Adoption Statute as announced in *Eckford v. Knox*, because the land in controversy belonged to the community estate of the adopter and his widow, nevertheless the opinion in *White v. Holman* shows that the court interpreted the words "child," "children," and "their descendants" as not including an adopted heir. That interpretation of these words, as used throughout our Statutes of Descent, is believed to be sound. Having set out our reasons for this conclusion in an opinion filed to-day, reversing the contrary holding of the court of civil appeals in the case of *Harle v. Harle*, — Tex. Civ. App. —, 166 S. W. 674, it is not necessary to repeat them. When an adopted person acquires property by descent from his adopter, it is not because he is a child of the adopter, but it is because the Adoption Statute puts him in the position of a child with respect to the inheritance.

While neither those adopted by Daniel Yturria nor their children were his direct lineal descendants, yet, as already pointed out, those adopted by him became entitled to the same rights and privileges as children, with respect to that which passed to them upon his death without issue of his body.

The exemption of property passing to certain specified classes from the payment of an inheritance tax and from the lien securing same, under our statutes, clearly confers on such classes a privilege. For "the term 'privilege' includes in its ordinary definition an exemption from such bur-

thens as others are subjected to, as the privilege of being exempt from arrest or from taxation." *State, Morris Canal & Bkg. Co., Prosecutors, v. Betts*, 24 N. J. L. 557.

The supreme court of Pennsylvania decided in the case of *Com. v. Henderson*, 172 Pa. 135, 33 Atl. 368, that the title to an act, entitled An Act to Confer upon a Party the Privileges of a Son, gave notice of the purpose to confer on the party exemption from payment of any further inheritance tax than would be payable by a natural son, for the reason that "the grant of all the privileges of a son necessarily included this privilege of exemption."

As it was the privilege of a child of Daniel Yturria, under article 7487, to have property within the jurisdiction of this state pass to him, by will or descent, without payment of an inheritance tax, and as the persons adopted by Daniel Yturria were entitled, by the plain terms of article 2, to the same privilege, it follows that Daniel Yturria and Ysabel Garcia were privileged to take the property devised to them by their adopter, without payment of the inheritance tax, and the judgments of the trial court and of the court of civil appeals were correct with regard to the devises to them. But we do not feel warranted in extending to others the rights and privileges which are confined by the Adoption Statute to the adopted persons, and therefore conclude that the property devised to the children of the persons adopted by Francisco Yturria was subject to the payment of the inheritance tax.

The judgments of the Court of Civil Appeals and the District Court are accordingly reversed. It is ordered that judgment be entered denying plaintiff in error, the state of Texas, any recovery as to the taxes sued for on the property devised to Daniel Yturria and Ysabel Garcia, adopted children of the testator Francisco Yturria, and that judgment be entered in favor of the plaintiff in error, the state of Texas, against the executor and the respective devisees for the amounts of inheritance taxes and interest shown above on the property in Texas devised by the will of Francisco Yturria to the children hereinbefore named of Daniel Yturria and Ysabel Garcia, with foreclosure of the lien securing said amounts.

**Annotation—Do terms "child," "children," "issue," etc., in statute governing distribution of decedent's estate, include adopted children.**

The present annotation supplements that to *Morse v. Osborne*, 30 L.R.A. (N.S.) 914, wherein a discussion of the rules and principles will be found.

L.R.A.1918F.

The notes on the question of the right of a child adopted in another state to take under local Statutes of Descent and Distribution, which are referred to

in the note in 30 L.R.A.(N.S.) 914, are supplemented in the annotation to *Anderson v. French*, L.R.A.1916A, 660 (many of the cases in these notes determine the question whether or not a child adopted in a foreign state is included within the terms "child," "children," "issue," etc., as used in local Statutes of Descent and Distribution, and reference should be made thereto for such cases).

And for the late cases upon the question whether the terms "child," "children," "issue," etc., in a will include adopted children, see annotation to *Wilder v. Butler*, L.R.A.1918B, 119.

#### **As affecting kindred of foster parent.**

In Kentucky, where an adopted child is, "as such, capable of inheriting as though such person were the child of" the foster parent, and where the statute regulating the descent of real estate provides that when a person shall die intestate his real estate shall descend "first to his children and their descendants," and that when an infant dies without issue, having title to real estate derived from one of his parents, the whole shall descend to that parent and his or her kindred, etc., it has been held (*Lanferman v. Vanzile* (1912) 150 Ky. 751, 150 S. W. 1008, Ann. Cas. 1914D, 563) that an adopted child is within the meaning of the term "children," as used in the general Statutes of Distribution, and that, when an adopted child dies in infancy without issue, real estate inherited from his foster parents descends to the kindred of such parents, and not to his natural kindred, the court saying that the words "parent and child," as used in the Statute of Descent and Distribution, do not exclude adopted children, and that the word "children" is not necessarily confined to children born in lawful wedlock, and that the word "parent" includes a foster parent. (Generally, as to descent and distribution of property of adopted child, see note to *Baker v. Clowser*, 43 L.R.A.(N.S.) 1056, which cites the *Lanferman Case*.)

#### **As affecting revocation of will.**

Supplementing note in 30 L.R.A.(N.S.) p. 916.

In Pennsylvania, it has been held that the adoption of a child subsequent to the execution of a will by the adopting parent does not revoke the will as to it, under a statute applying to "after-born children." *Goldstein v. Hammell* (1912) 236 Pa. 305, 84 Atl. 772.

L.R.A.1918F.

#### **As determining right of adopted child or its issue to inherit.**

Supplementing note in 30 L.R.A.(N.S.) p. 917.

The recent authorities, with one exception, are to the effect that adopted children and their issue, for purposes of inheritance, are included within the various terms under consideration.

Thus, in *Batchelder v. Walworth* (1912) 85 Vt. 322, 37 L.R.A.(N.S.) 849, 82 Atl. 7, Ann. Cas. 1914C, 1223, where the Statute of Adoption created the same rights of inheritance between the parties as though the person adopted had been the legitimate child of the person making the adoption, and the Statutes of Descent provided that an intestate's estate should descend to his "children" unless he had married and left no "issue," it was held that the words "children" and "issue" are not limited to natural children born in lawful wedlock, but include adopted children and their legal representatives, so that the child of an adopted daughter, deceased, was entitled to inherit through her by right of representation, and share in the adoptive father's intestate estate.

And, in Missouri, where a child, when adopted, becomes an "heir" and entitled to nurture, treatment, and protection of a child by birth, the rule is that an adopted child is included in the general designation of children, and his or her descendants in the general designations of descendants of children, in the Statutes of Descents and Distributions. *Re Cupples* (1917) 272 Mo. 465, 199 S. W. 556.

And that, under the Kentucky statutes, an adopted child is within the meaning of the word "children," as used in a statute regulating the descent of real estate of one dying intestate, see *Lanferman v. Vanzile* (1912) 150 Ky. 751, 150 S. W. 1008, Ann. Cas. 1914D, 563, as set out supra.

In Idaho, where, by statute, an adopted child and the person adopting it sustain toward each other the relation of parent and child, and have all the rights and are subject to all the duties of that relation, and by statute one-half of the community property, of which no testamentary disposition has been made, shall, upon the death of either husband or wife, descend equally to the "legitimate issue of his, her, or their bodies," it has been held that an adopted child is included in the expression "legitimate issue," etc., so as to enable such a child to inherit an interest in community estate, the mother having

died without making any testamentary disposition thereof. *Scott v. Scott* (1917) 247 Fed. 976. In this case the court maintained that the terms "child" and "issue," as used in the Succession Statutes, both include a child by adoption as well as a child by birth, and that it was manifest that the legislature had intended to give adopted children the legal status of "issue," and that the entire phrase, "legitimate issue of his, her, or their bodies," was used as the equivalent only of the word "issue."

And in *Riley v. Day* (1913) 88 Kan. 503, 44 L.R.A.(N.S.) 296, 129 Pac. 524, where the Adoption Statute rendered an adopting parent subject to all the liabilities of a parent, and gave to the adopted child the same rights of person and property as children or heirs at law of the person adopting, it was held that an adopted daughter of a prior deceased daughter of an intestate was "living issue," within the meaning of a statute providing that property of an intestate, subject to certain exceptions, should descend to "surviving children and the living issue, if any, of prior deceased children," so as to entitle her to inherit through her adopted mother.

And, in Michigan, an adopted child which, by statute, stands in the relation of parent and child with the person adopting it, and is an heir at law of such person, the same as if he were in fact the child of such person, takes as a "lineal descendant," the same as if placed in the line of descent by birth. *Fisher v. Gardiner* (1915) 183 Mich. 660, 150 N. W. 358.

So, in New Hampshire, where an adopted child bears the same relation to his adopted parents, in respect to the inheritance of property, as if he were the natural child of such parents, and, by the Statute of Wills touching lapsed legacies, "the heirs in the descending line of a legatee or devisee, deceased before the testator, shall take the estate bequeathed or devised in the same manner the legatee or devisee would have taken if he had survived," an adopted child is an "heir in the descending line," within the meaning of the act. In so holding, the court approved certain other decisions wherein an adopted child has been held a "lineal descendant." *Clark v. Clark* (1913) 76 N. H. 551, 85 Atl. 758.

Another case of interest in connection with those which sustain the right of an adopted child to inherit is *Ryan v. Foreman* (1914) 262 Ill. 175, 104 N. E. 189, Ann. Cas. 1915B, 780, wherein

it was held that a child adopted under a statute providing that from the date of the decree of adoption the child shall, to all legal intents and purposes, be the child of the petitioner or petitioners, and that, for the purpose of inheritance and other legal consequences and incidents of the natural relation of parent and child, the child shall be deemed the same as if he had been born to them in lawful wedlock, was within the meaning of the words "child or children," as used in the Police Pension Fund Act, which provided that after the death of a person pensioned under the act the widow or child or children under a certain age should be paid the pension provided for the father.

But a contrary conclusion was reached in the recent Texas case of *Harle v. Harle* (1918) — Tex. —, 204 S. W. 317. In that case the Adoption Statute put the adopted person in the same position with respect to succession to the estate of the adopter, on his death, as a child would occupy, except that as against a child born in lawful wedlock the adopted child could not take more than one fourth of the estate, from which it was said necessarily to follow that adoption in Texas did not give the adopted person the legal status of a natural child. It was then held that while the court did not deny an adopted child any of the rights to which the Adoption Statute entitled him, the Statute of Descents and Distributions could not be interpreted to include adopted children and their issue within the words "child" or "children of the deceased or their descendants," so as to permit an extension of the statute which would confer rights and privileges in the estate of the adopter upon others than the persons adopted. And this decision finds support in *STATE EX REL. WALTON V. YTURRIA*, ante, 1079, wherein it was, in effect, held that an adopted person was not a direct lineal descendant of his adopter, and that such a person did not acquire the status of a natural child.

#### As affecting inheritance tax.

Supplementing note in 30 L.R.A.(N.S.) p. 919.

In the Texas case of *STATE EX REL. WALTON V. YTURRIA*, it was ruled that neither an adopted child nor his or her children are "direct lineal descendants" of the person making the adoption, within the meaning of an Inheritance Tax Law, exempting property passing to a father, mother, wife, or direct lineal descendant of the deceased; but that,

since the Adoption Statute extends to the adopted person all the rights and privileges, both in law and equity, of a legal heir of the adopter, property passing to such an adopted child was not subject to an inheritance tax, although property passing to the children of the adopted child from the foster grandparent was taxable, the court not feeling warranted in extending the statutory rights and privileges granted adopted children, to their children.

On the other hand, in Missouri, where the Collateral Inheritance Tax Statute (Rev. Stat. 1909, § 309) expressly exempts property passing by inheritance to "legally adopted children or direct lineal descendants," it has been held that since adopted children are "children" within the meaning of that general term, as used in the Missouri Stat-

ute of Descents and Distributions, and are descendants so that they do not break the course of descent from the ancestor, the children of an adopted child fall within the phrase "direct lineal descendant," and are not required to pay a collateral inheritance tax upon inheriting from the foster grandparent.

And see *Re Benson* (1917) 99 Misc. 222, 163 N. Y. Supp. 670, rehearing denied in (1917) 164 N. Y. Supp. 933, wherein it was held that the words "brother, sister," or any child adopted as such, as used in the New York Transfer Tax Law, do not make a person legally adopted by the natural parents of a deceased son, a "sister of such son," so as to entitle her to exemption and the right prescribed for bequests to natural sisters. G. J. C.

#### NEW YORK COURT OF APPEALS.

ANTHONY & JONES COMPANY, Resp't.,  
v.  
NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Appt.

(223 N. Y. 21, 119 N. E. 90.)

#### Carrier — duty to move shipment after delivery.

A carrier which has delivered a consignment of goods, by placing the car on the team track for unloading, is under no obligation to switch the car at the request of the consignee to the tracks of another carrier so that the shipment may be billed and forwarded over its road.

*For other cases, see Carriers, III. d, 1, in Dig. 1-52 N. S.*

(February 26, 1918.)

**A** PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Oneida County in favor of plaintiff, and from an order denying a new trial, in an action brought to recover damages to fruit alleged to have been sustained by defendant's refusal to transfer cars containing it to the tracks of another carrier. Reversed.

The facts are stated in the opinion.

Messrs. Kernan & Kernan, for appellant:

In the absence of any provision in the

Note. — As to duty of carrier to shift or transfer cars after arrival at destination, see annotation following this case, post, 1087; and references therein to annotations on related questions.

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tariff, as published and filed, relating to the movement of cars from its public team tracks at Utica, New York, to the Delaware, Lackawanna, & Western Railroad Company, defendant was prohibited by the terms of the Public Service Commissions Law from making such movement, and any compliance with plaintiff's request would have been in the nature of an unlawful discrimination.

*New York C. & H. R. R. Co. v. Smith*, 62 Misc. 526, 115 N. Y. Supp. 838; *Wight v. United States*, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822; *United States v. Illinois Terminal R. Co.* 168 Fed. 546; *Standard Oil Co. v. United States*, 103 C. C. A. 172, 179 Fed. 614; *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Pecos River R. Co. v. Reynolds Cattle Co.* — Tex. Civ. App. —, 135 S. W. 162; *Texas & P. R. Co. v. Cisco Oil Mill*, 204 U. S. 449, 51 L. ed. 562, 27 Sup. Ct. Rep. 358; *New York C. & H. R. R. Co. v. United States*, 92 C. C. A. 331, 166 Fed. 267; *Chicago & A. R. Co. v. Kirby*, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501.

Messrs. Dunmore & Ferris, for respondent:

Defendant was in duty bound to transfer to the Delaware, Lackawanna, & Western Railroad yards the car of fruit within reasonable time after it had received notice from the plaintiff to do so; and, if any unreasonable and unnecessary delay occurred in the transfer of said car, defendant is liable for the immediate and proximate damage resulting from such neglect of duty.

*Zinn v. New Jersey St. B. Co.* 49 N. Y.

442, 10 Am. Rep. 402; *Ward v. New York C. R. Co.* 47 N. Y. 29; *Western & A. R. Co. v. Exposition Cotton Mills*, 81 Ga. 522, 2 L.R.A. 102, 7 S. E. 916.

The defendant, in its refusal to transfer the cars in question from its yards to the Delaware, Lackawanna, & Western Railroad, as demanded by plaintiff, was guilty of a breach of its common-law duty.

*Fenner v. Buffalo & S. L. R. Co.* 44 N. Y. 505, 4 Am. Rep. 709; *Crescent Coal Co. v. Louisville & N. R. Co.* (Higon v. Louisville & N. R. Co.) 143 Ky. 73, 33 L.R.A. (N.S.) 442, 135 S. W. 768; *Illinois C. R. Co. v. Mitchell*, 68 Ill. 471, 18 Am. Rep. 564; *Hermann v. Goodrich*, 21 Wis. 537, 94 Am. Dec. 562.

The Public Service Commissions Law did not in any respect alter the common law or release the defendant railroad from its common-law duties, nor deprive the court of its cognizance under the general rules of law.

*Loomis v. Lehigh Valley R. Co.* 208 N. Y. 312, 101 N. E. 907; *United States v. Howell*, 56 Fed. 21, 4 Inters. Com. Rep. 818; *Atlantic, K. & N. R. Co. v. Horn*, 106 Tenn. 73, 59 S. W. 134; *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 101, 39 L. ed. 911, 15 Sup. Ct. Rep. 802; *Interstate Commerce Commission v. Baltimore & O. R. Co.* 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; *United States v. Hanley*, 71 Fed. 672.

*Collin, J.*, delivered the opinion of the court:

The action is to recover the damages sustained by plaintiff, a corporation, through the refusal of defendant, a railroad corporation, to transfer cars from its track to the freight yard of the Delaware, Lackawanna, & Western Railroad Company at Utica, New York. The judgment consequent upon the verdict of the jury at trial term in favor of the plaintiff was unanimously affirmed by the appellate division.

The complaint alleges and the recovery of plaintiff was upon three similar causes of action. The questions for our determination are correctly and adequately presented by the facts proved for the purpose of the establishing one of them, as follows: On September 24, 1909, a car containing 300 crates of peaches, which had been forwarded from Barker, Niagara county, New York, over the railroad of defendant to the plaintiff as consignee at Utica, New York, reached Utica. Evidence of the contents of the bill of lading or contract of shipment was not given. The defendant, complying with the wishes of the plaintiff and in accordance with the custom between them, immediately placed the car upon a public team track in order that the plaintiff should

unload it. Thenceforth the plaintiff had free access to, and from time to time took peaches from, it. On October 2, 1909, the plaintiff, offering to pay the charges, requested the defendant to switch it, containing the peaches not removed, to the railroad of the Delaware, Lackawanna, & Western Railroad Company, about  $\frac{1}{2}$  of a mile from the public team track. A track connected the freight yard of that company with the railroad of the defendant. The plaintiff requested the switching of the car in order that it might ship and bill it by that company over and to a point upon its railroad. The defendant had not a tariff covering the switching, and its freight agent stated that it would not move the car because of that fact. The plaintiff introduced evidence of damages sustained by the refusal of the defendant. The jury were instructed, in effect, that it was the duty of the defendant at common law to have switched the car upon the request and offer of the plaintiff. The defendant excepted. The respondent in its brief and argument here bases the liability of the defendant upon a breach of its common-law duty in refusing to switch the car.

The common law has not a rule which required the defendant to switch or transfer the car. The common carrier, under the common law, was not bound to accept goods for carriage beyond the terminus of its line or to carry except on its own line. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; *Central Stock Yards Co. v. Louisville & N. R. Co.* 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; *Louisville & N. R. Co. v. West Coast Naval Stores Co.* 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. Rep. 745; *Grindle v. Eastern Exp. Co.* 67 Me. 317, 24 Am. Rep. 31; *Pittsburgh, C. & St. L. R. Co. v. Morton*, 61 Ind. 539, 28 Am. Rep. 682; *Post v. Southern R. Co.* 103 Tenn. 184, 202, 55 L.R.A. 481, 52 S. W. 301; *Ireland v. Mobile & O. R. Co.* 105 Ky. 400, 49 S. W. 188, 453. Contract, express or implied, or statutory regulations or authorized regulations of a public board or body may modify or make inapplicable the common-law rule. Under the facts here, the defendant did not violate its common-law duty, and the exception of the defendant to that part of the charge to the jury we have referred to was valid.

At the time the request and offer of the plaintiff was made, the defendant had performed all the duties imposed upon it as a common carrier concerning the car and its contents under its contract of carriage. Those duties were to carry safely and with reasonable despatch, and to deliver to the plaintiff, the consignee, at the destination,

Utica, New York. The facts here do not involve a lack of notice to the consignee of the arrival of the goods, or of diligence in finding or attempting to find the consignee, or a proper place of making the delivery. The placing of the car upon the public team track, in order that the plaintiff should unload it, concurred in and acted upon by the plaintiff was a completed delivery, and terminated the undertaking and obligation of the defendant as a common carrier. *Lewis v. New York, O. & W. R. Co.* 210 N. Y. 429, 104 N. E. 944. Judicial decisions support strongly the conclusions: Thereafter the defendant was not even a warehouseman of the goods. The plaintiff had assumed the actual possession and dominion of them even as though it had removed them from the car to its store, or had left them in the car placed upon a spur track contiguous to and to be unloaded by removing them into its store. The fact that a part of them remained in the car was a matter of convenience to the plaintiff, and did not impose any relation or liability upon the defendant. The goods had passed out of the custody and control of the defendant and into the actual custody and control of the consignee. The duty of caring for, guarding, and protecting the car and contents was the plaintiff's. *State v. Intoxicating Liquors*, 106 Me. 138, 29 L.R.A. (N.S.) 745, 76 Atl. 265, 20 Ann. Cas. 668; *Vaughn v. New York, N. H. & H. R. Co.* 27 R. I. 235, 61 Atl. 695; *Goodwin v. Baltimore & O. R. Co.* 50 N. Y. 154, 10 Am. Rep. 457; *Whitney Mfg. Co. v. Richmond & D. R. Co.* 38 S. C. 365, 37 Am. St. Rep. 767, 17 S. E. 147; *Lewis v. Western R. Corp.* 11 Met. 509; *Anchor Mill Co. v. Burlington, C. R. & N. R. Co.* 102 Iowa, 262, 71 N. W. 255, 3 Am. Neg. Rep. 157; *Rothschild Bros. v. Northern P. R. Co.* 68 Wash. 527, 40 L.R.A. (N.S.) 773, 123 Pac. 1011; *Kenny Co. v. Atlanta & W. P. R. Co.* 122 Ga. 365, 50 S. E. 132; *Chicago, M. & St. P. R. Co. v. Kelm*, 121 Minn. 343, 44 L.R.A. (N.S.) 995, 141 N. W. 295. Our decision in the instant case does not exact a definition of the relation, if any, existing between the parties after the delivery of the goods. Nothing remained thereafter to be done by the defendant in completion of its contract to safely carry and deliver the goods to the consignee at the point of their destination, and its duty and liability as carrier had

ceased. The plaintiff was bound to unload the car within such time as would enable it, having its place of business at Utica, in the usual hours of business with the ordinary instrumentalities.

If the defendant became a warehouseman or a gratuitous depository of the goods, it as such was not under the duty to switch the car and its contents as requested by the plaintiff. The request was not a tender of the goods to the defendant at a station for shipment and transportation to a station on the railroad of itself or another carrier. It was a request to carry to a carrier for shipment, billing, and transportation by that carrier. It was a demand that the defendant carry defendant's car and the goods of plaintiff to the track of the Lackawanna company in order that the plaintiff might ship and forward the car and goods by that company. While it is true that a railroad company in the prosecution of its business as a common carrier, is not permitted to cast aside its character and transmute itself by contract into an ordinary bailee, it is equally true that a consignee cannot, by a mere request to change, for any purpose, the location of delivered goods, reconstitute the delivering company a common carrier as to those goods. *New York C. & H. R. R. Co. v. General Electric Co.* 219 N. Y. 227, 114 N. E. 115. The consignee was entitled to but one delivery. The defendant here might, as a private carrier or ordinary bailee with or without hire, have switched the car, but it was bound so to do. Its refusal did not subject it to damages. *Central Stock Yards Co. v. Louisville & N. R. Co.* 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; *Seaboard Air Line R. Co. v. Dixon*, 140 Ga. 804, 79 S. E. 1118; *Melbourne v. Louisville & N. R. Co.* 88 Ala. 443, 6 So. 762.

Two of the three causes of action are based upon the refusal of the defendant to switch cars. Unreasonable delay in switching is the foundation of another cause. The erroneous charge to the jury applied to each cause.

The judgment should be reversed and a new trial granted, costs to abide the event.

Hiscock, Ch. J., and Cuddeback, Cardozo, Pound, Crane, and Andrews, JJ., concur.

### Annotation—Duty of carrier to shift or transfer cars after arrival at destination.

For duty of carrier to accept freight originating and terminating within city limits, see the note in 33 L.R.A. (N.S.) 443.

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For the question when goods are deemed delivered to the consignee before removal from car, see the note in 40 L.R.A. (N.S.) 773.

Other notes on related questions are cited in the L.R.A. Indexes under the title, "Carriers," subtitle, "Delivery by carrier."

In *ANTHONY & J. Co. v. New York C. & H. R. R. Co.* ante, 1085, it seems clear that the defendant was entitled to have its car free from the plaintiff's goods in order that it might remove the same to its station or elsewhere as the case might be. The real gist of the decision seems to be in the further statement in the opinion that "a consignee cannot, by a mere request to change, for any purpose, the location of delivered goods, reconstitute the delivering company a common carrier as to those goods." We are doubtless to understand that the statement by the court, that the common carrier under the common law was not bound to accept goods for carriage beyond the terminus of its own line, or to carry except on its own line, related to the fact that the goods were in the defendant's car, as the defendant does not seem to have been requested to carry the goods further than to the connecting carrier, but it was the intent of the plaintiff to have the car shipped over the line of the connecting carrier, etc.

The consignee of goods is entitled to but one delivery. The leading case on this subject is *Melbourne v. Louisville & N. R. Co.* (1889) 88 Ala. 443, 6 So. 762. In that case a car was taken to destination by the defendant, and the consignees inspected its contents, ascertained that they were in good condition, paid the freight charges, and asked the defendant's agent to deliver the car to another railroad company. The car was accordingly delivered to the other railroad company, but the defendant gave it no notice of the transfer, nor did it inform such company as to the name of the consignee, and the goods were spoiled in its yards. The court said: "The owner of goods shipped—and prima facie the consignee is the owner—may change his instructions as to their destination, and substitute a different place of delivery; but this, we apprehend, he must do during the transit, and not after their destination has been reached and the terms of the carrier's obligation have been fulfilled." But judgment for the railroad company was reversed on another ground.

In *International Agricultural Corp. v. Southern R. Co.* (1914) 188 Ala. 354, 66 So. 14, the court said: "Mr. Hutchinson states the rule to be that the owner cannot change the destination, and re-

quire delivery somewhere else, except upon the basis of a new contract, after the carrier has completed his undertaking and carried the goods to the destination first agreed upon. 2 Hutchinson, Carr. § 660."

In *Fred Henderson & Walters v. Atlantic Coast Line R. Co.* (1917) — Ala. —, 76 So. 309, an initial carrier of cattle gave a bill of lading stipulating for transportation to New Orleans; after arrival at New Orleans it appeared that, under an alleged custom existing between the final carrier and the consignee, the cattle were delivered to another carrier, who transferred them several miles to the consignee's yard. It was held that there could be no liability upon the initial carrier for any loss occurring during this final transportation from New Orleans to the consignee's yard, particularly as the initial carrier was ignorant of any custom at the time. The court said: "It seems to be well settled that, after the goods have reached their original destination, the undertaking of the carrier, so far as transportation is concerned, is at an end, and any new obligation on its part to deliver at a different point must arise out of a new and different contract, which must be entered into on its own behalf by an agent authorized thereto." 5 Am. & Eng. Enc. Law, 2d ed. 214, 215."

In *Seaboard Air-Line R. Co. v. Dixon* (1913) 140 Ga. 804, 79 S. E. 1118, the plaintiff brought an action to restrain a railway company from collecting and enforcing demurrage on cars of lumber which were consigned to the plaintiff at Savannah, and carried to that place, but which the plaintiff desired to have transported to steamship wharves in another part of the city, which were reached by the tracks of another railroad company. In reversing a judgment granting an injunction against the railway the court said inter alia: "There being no law requiring such delivery by the Seaboard Air-Line Railway, of cars which had reached their destination, to another carrier for more convenient delivery to the same consignee at the steamship wharves, unless it appeared that there was a custom or usage of such generality as to become binding, the Seaboard Air-Line Railway would not be liable for a failure or refusal to make such delivery to the other carrier."

In *Lewis v. Western R. Corp.* (1846) 11 Met. (Mass.) 509, the defendant transmitted for the plaintiff a block of marble to the station in Worcester, the



regular place of delivery; one purporting to be agent of the plaintiff requested the agent of the defendant that the block might be taken to the station of another railway where there were means for unloading, and unloaded there; and these two men took the car containing the block by horse power to the station of the other railroad and there attempted to unload it, and it was damaged. It was held that the general duty of defendant as common carrier was to make due delivery of goods at the usual place in its own depot, and if the plaintiff desired a special delivery to which the agent of the defendant consented, that from and after the time the block had gone from the regular place of delivery it might be considered as having been already constructively delivered, so that the defendant was exempted from the duty of making any other or different delivery.

An interesting case in this connection is *Deatwyler v. Oregon R. & Nav. Co.* (1913) 176 Ill. App. 602. In that case, fruit was shipped by the initial carrier, the defendant, from the state of Washington to Chicago, via the line of the defendant and connecting carriers named, and was taken into Chicago by the Chicago & Northwestern Railroad, and the consignee was notified by the railroad company that the car was then on the company's tracks at Grand avenue, whereupon the consignee directed the railroad to divert the car to Philadelphia; and the fruit reached Philadelphia in bad condition. It was sought to hold the initial carrier under the Carmack Amendment, for the damage, and it was claimed that the track of the Northwestern Railroad at Grand avenue was a "hold track," and not "team or delivery track," of the railroad; but it was held by the court that the car had reached its original

destination, Chicago, before the consignee had ordered its diversion to Philadelphia, and that under those circumstances, the Northwestern Railroad was not the agent of the initial carrier to consent to the diversion.

Similarly, in *Sheehy v. Wabash R. Co.* (1912) 169 Mich. 604, 38 L.R.A. (N.S.) 1126, 135 N. W. 655, where, after the arrival of goods at destination, the shipper, who was also the consignee, instructed the connecting carrier to have the goods reconsigned to another city, there could be no recovery against the initial carrier for any loss unless it was shown that it occurred before the goods reached the place of original destination.

But if it is the regular course of business and the custom of the carrier to receive the directions of shippers and owners of goods to be sent beyond a certain city, and to follow those directions, the carrier will be liable if it does not follow the directions of the owner or shipper as to delivery to another carrier within the city. *Michigan S. & N. I. R. Co. v. Day* (1858) 20 Ill. 375, 71 Am. Dec. 278.

It may be noted that it was held in *Coles v. Central R. & Bkg. Co.* (1890) 86 Ga. 251, 12 S. E. 749, that a statute requiring a railroad company at its terminus or any intermediate point to switch off and deliver to a connecting road having the same gauge all cars containing goods or freight consigned to any point over or beyond such connecting road, does not mean that an initial carrier must contract to send its cars over the entire route, but it means that if a company receives cars from another line consigned to a point beyond its terminus it shall deliver them to the connecting road running to that point.

B. B. B.

## NEW YORK COURT OF APPEALS.

BALDWIN'S BANK OF PENN YAN,  
Respt.,

v.

ALBERT L. SMITH et al., Appts.

(215 N. Y. 76, 109 N. E. 138.)

**Bank — collection — agency.**

1. The holder of a note who sends it to the bank at which it is payable, for collec-

tion and remittance, constitutes such bank his agent for that purpose.

For other cases, see *Banks*, IV. b, 1, in *Dig.* 1-52 N. S.

**Bills and notes — note payable at bank — failure of bank — burden of loss.**

2. The holder, and not the maker, of a note payable at bank, must bear the loss caused by the failure of the bank without remitting or making any record of payment, where the maker had funds on deposit, and the note was sent to the bank for collection

**Note.**—Other cases on the question involved in *BALDWIN'S BANK v. SMITH*, as to whether a bank at which a note is payable

is the agent of the holder or the maker when the note is sent to it for collection, are cited in the note to Virginia Carolina

and remittance on the due day, while the statute makes such a note equivalent to a check; at least, where the bank accepts a verbal order to pay the note and charge it to maker's account.

*For other cases, see Banks, IV. b, 2, in Dig. 1-52 N. 8.*

(Collin and Cuddeback, JJ., dissent.)

(May 25, 1915.)

**A**PPEAL by defendants from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Yates County in plaintiff's favor, in an action brought to recover the amount alleged to be due on a promissory note. Reversed.

The facts are stated in the opinion.

Mr. E. W. Personius with Mr. Lewis H. Watkins, for appellants:

Plaintiff was negligent; its negligence resulted in its failure to receive the money on the note, and in the defendants suffering damage in the amount thereof.

*Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 88, 7 Am. Rep. 314; *Shipsey v. Bowery Nat. Bank*, 69 N. Y. 485; *Smith v. Miller*, 43 N. Y. 171, 3 Am. Rep. 609.

The Watkins bank was the agent of the plaintiff bank to collect the note and remit the proceeds; it was negligent in doing this; such negligence was the negligence of the plaintiff.

5 Cyc. 503B; *National Revere Bank v. National Bank*, 172 N. Y. 102, 64 N. E. 799; *National Butchers' & D. Bank v. Hubbell*, 117 N. Y. 384, 7 L.R.A. 852, 15 Am. St. Rep. 515, 22 N. E. 1031; *Briggs v. Central Nat. Bank*, 89 N. Y. 183, 42 Am. Rep. 285; *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26, 13 L.R.A. 241, 27 N. E. 849.

*Indig v. National City Bank*, 80 N. Y. 100, is not a parallel case with the case at bar, as it decides absolutely nothing upon the question of agency, and involves no question of negligence.

*National Revere Bank v. National Bank*, supra; *Kirkham v. Bank of America*, 26 App. Div. 118, 49 N. Y. Supp. 767; *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 32, 13 L.R.A. 241, 27 N. E. 849; *People ex rel. Port Chester Sav. Bank v. Cromwell*, 102 N. Y. 483, 7 N. E. 413.

Sending negotiable paper direct to the payee bank is negligence.

*Magee, Banks & Banking*, p. 520; *Lazier v. Horan*, 55 Iowa, 75, 39 Am. Rep. 167,

*Chemical Co. v. Steen*, 34 L.R.A.(N.S.) 734; and see also the case of *Schafer v. Olsen*, 43 L.R.A.(N.S.) 762.

The effect on the drawer's liability, of delay in presenting a check, where the

7 N. W. 457; *First Nat. Bank v. Bank of Whittier*, 221 Ill. 326, 77 N. E. 563, 5 Ann. Cas. 653; *Drovers' Nat. Bank v. Anglo-American Packing Provision Co.* 117 Ill. 100, 57 Am. Rep. 855, 7 N. E. 601; *Merchants' Nat. Bank v. Goodman*, 109 Pa. 422, 58 Am. Rep. 728, 2 Atl. 687; *Winchester Mill. Co. v. Bank of Winchester*, 120 Tenn. 225, 18 L.R.A.(N.S.) 441, 111 S. W. 248; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 88, 7 Am. Rep. 314.

*Messrs. Huson & Lincoln*, for respondent:

Defendants, the makers of the note, have not performed their contract, and are, therefore, liable to the plaintiff.

*Indig v. National City Bank*, 80 N. Y. 100; *Caldwell v. Cassidy*, 8 Cow. 271; *Budweiser Brewing Co. v. Capparelli*, 16 Misc. 502, 38 N. Y. Supp. 972; *Locklin v. Moore*, 57 N. Y. 360; *Hills v. Place*, 48 N. Y. 520, 8 Am. Rep. 568; 7 Cyc. 963.

The Farmers' & Merchants' Bank was not the agent of the plaintiff, but was the agent of the defendants.

5 Cyc. 500, 503, 505, 506; *Hills v. Place*, 48 N. Y. 522, 8 Am. Rep. 568; *Indig v. National City Bank*, 80 N. Y. 106; *Locklin v. Moore*, 57 N. Y. 360.

Plaintiff was not negligent to such an extent as to relieve the defendants, the makers of the note, from liability thereon; but the defendants were negligent in the performance of their contract as makers.

*Indig v. National City Bank*, 80 N. Y. 100.

*Miller, J.*, delivered the opinion of the court:

This is an action on a promissory note made by the defendants on the 11th day of August, 1910, payable to the order of W. N. Wise, four months after date, at the Farmers' & Merchants' Bank, Watkins, New York. The plaintiff became the holder of the note in due course, and before maturity sent it to the bank, where it was made payable "for collection and remittance." On the 19th day of December, 1910, seven days after the maturity of the note, said bank suspended without having remitted for the note, although during all of that time defendants had more than sufficient funds to their credit with it to meet the note, and the bank had sufficient funds to pay it. On Monday, December 12th, the due date having fallen on Sunday, the 11th, one of the defendants called the president of the Wat-

drawee remains solvent, is treated in the notes to *Bradley v. Andrus*, 53 L.R.A. 432, and *Rosenbaum v. Hazard*, 38 L.R.A.(N.S.) 255.

kins bank by phone, and inquired if the note was there, and, being informed that it was, instructed the president to charge it to the defendants' account, and was told that that would be done. The plaintiff made no inquiry or effort to ascertain the fate of the note until after the failure of the Watkins bank.

This is a case of first impression. The trial court relied on *Indig v. National City Bank*, 80 N. Y. 100. But that case is plainly distinguishable. The defendant there received a note from the plaintiff for collection, and sent it to the bank where it was payable, which received it the day it fell due, and the next day sent a New York draft for the amount of the note, less exchange, to the defendant, who received it the following day. On the day the draft was forwarded to the defendant the sender closed its doors, and the draft was not paid. The defendant was sought to be made liable for negligence in sending the note to the bank where it was made payable. But it was held that that did not constitute actionable negligence, for the reason that the same result might have ensued if the defendant had employed a subagent, who would have been justified in accepting the draft. Judge Rapallo did say that the defendant did not constitute the bank to which it sent the note, its agent to receive the proceeds. But his opinion received the concurrence of only two of the judges, and on that point has, in effect, been overruled by this court (*National Revere Bank v. National Bank*, 172 N. Y. 102, 64 N. E. 799), and is opposed to the weight of authority (*Smith v. Essex County Bank*, 22 Barb. 627; *Ayrault v. Pacific Bank*, 47 N. Y. 570, 7 Am. Rep. 489; *Bank of Washington v. Triplett*, 1 Pet. 29, 7 L. ed. 37; *Ward v. Smith*, 7 Wall. 447, 19 L. ed. 207; *Cheney v. Libby*, 134 U. S. 68, 82, 33 L. ed. 818, 824, 10 Sup. Ct. Rep. 498). Plainly, by sending the note "for collection and remittance," the plaintiff in this case constituted the Watkins bank its agent to collect the note and remit the proceeds.

It is settled law that the failure to make demand at the time and place of payment agreed upon does not exonerate the debtor, whose readiness to pay at the specified time and place is merely equivalent to a tender. *Hills v. Place*, 48 N. Y. 520, 8 Am. Rep. 568; *Locklin v. Moore*, 57 N. Y. 360. And see cases cited in the opinions in those cases. In that respect a note, which is an absolute promise to pay, is said to differ from a check, which is a mere order.

But it is also the law of this state, although it was early debated, that the fail-

ure to present a check within a reasonable time does not exonerate the drawer, unless there has been a loss. *Little v. Phenix Bank*, 2 Hill, 425; *Carroll v. Sweet*, 128 N. Y. 19, 13 L.R.A. 43, 27 N. E. 763. The *Negotiable Instruments Law* (Consol. Laws, chap. 38) § 147, provides: "Where the instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon."

And this court in *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 88, 7 Am. Rep. 314, said, per Allen, J.: "An acceptance or promissory note thus payable [i. e., at a bank] is, if the party is in funds, that is, has the amount to his credit, equivalent to a check, and is, in effect, an order or draft on the banker in favor of the holder, for the amount of the note or acceptance."

The reason for exonerating the drawer of a check, in case of loss resulting from a failure to present it in a reasonable time, is that the drawing of a check is virtually an appropriation, though not an assignment, pro tanto, of the drawer's funds in the bank. See *Little v. Phenix Bank*, 2 Hill at page 428, supra.

It is incumbent on the holder of the paper to secure payment, and loss resulting from his neglect should fall upon him, not on the drawer, who has no further duty to perform. I am unable to perceive why the same reason does not hold good in the case of a note payable at a bank where the maker has funds to meet it at maturity, especially since such a note is, by statute, made the equivalent of a check. To the extent that he has appropriated his credit, he is not called upon to look after it, but discharges his duty by keeping his account good. None of the cases in this jurisdiction, holding that the maker of a note payable at a bank is not exonerated by the holder's failure to present it for payment, involved the question of a loss resulting from such failure. I find nothing in any of them, except the dictum in the *Indig Case*, to the effect that the loss in such case falls on the maker.

The obligation to present the note, if it existed, bears on the obligation to follow it up, when it is sent by mail to the payee bank "for collection." I shall not discuss the numerous cases in other jurisdictions, holding that it is negligence per se to send a bill for collection to the drawee or payee bank. There may be, in that respect, a distinction between a note and a check or a bill of exchange, and between liability of an agent to its principal and liability of the holder to the maker of a note. At any

rate, the Indig Case has generally been regarded as having settled the law in this state the other way and in accordance with what is believed to be the custom. However, by sending the note to the Watkins bank the plaintiff created a situation likely to, and which in fact did, mislead the defendants and result in loss. Upon being informed that the note was there, they directed that it be charged to their account. That was unnecessary (*Ætna Nat. Bank v. Fourth Nat. Bank* supra, at page 88 of 46 N. Y., 7 Am. Rep. 314), but it indicated a lively interest in caring for their paper. Nothing more remained for them to do, as, of course, they could wait, as business men customarily do, for the return of the note with their canceled vouchers. The plaintiff's act thus led the defendants to suppose that to their credit had been applied pro tanto to the payment of the note, and lulled them into taking no further measures, either to pay the note or to draw upon the credit thus appropriated.

However, it is unnecessary to decide whether the plaintiff owed the defendants the duty, in the first instance, to present the note, or whether its failure to make any inquiry for a week, after sending the note by mail to the payee bank for collection, discharged the makers, loss having resulted. The foregoing are at least cogent reasons for holding that, in making the payee bank an agent to collect, the holder takes the risk of loss resulting from the latter's negligence, and assumes responsibility for its acts within the scope of its authority. That such an agency was created in this case is plain, even though, as was said in the Indig Case, the mere sending of a note, by mail, to the bank where it is payable, be in effect the same as presenting it over the bank's counter. The Watkins bank was the agent of the plaintiff to collect, but not of the defendants to pay.

Although it has sometimes been said that, by making a note payable at a bank where the maker keeps an account, he constitutes the bank his agent to pay it, that statement will not bear analysis. The relation of debtor and creditor, not of agent and principal, exists between a bank and its depositor. *Ætna Nat. Bank v. Fourth Nat. Bank*, supra; *Jordan v. National Shoe & Leather Bank*, 74 N. Y. 467, 30 Am. Rep. 319; *Straus v. Tradesmen's Nat. Bank*, 122 N. Y. 379, 25 N. E. 372; *Shipman v. Bank of New York*, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; *Cassidy v. Uhlmann*, 170 N. Y. 505, 63 N. E. 554.

The money deposited becomes a part of the bank's general funds. The bank im-

plied contracts to pay its depositor's checks, acceptances, notes payable at the bank, and the like, to the amount of his credit. *Citizens' Nat. Bank v. Importers' & T. Bank*, 119 N. Y. 195, 23 N. E. 540. But in discharging its implied obligation it pays its own money as a debtor, not its depositor's money as an agent. As has already been shown, a note payable at a bank where the depositor has an account is, in respect to being an order to pay, the precise equivalent of a check. Plainly, then, the bank bears no relation of trust or agency to its depositor in respect of paying either notes or checks. It is a mere drawee, answerable to the drawer for a breach of its implied contract obligation to honor the draft. It necessarily follows that the transaction between the defendants and the Watkins bank amounted to payment, or that the failure to secure payment was due solely to the negligence of the plaintiff's agent.

The plaintiff knew when it sent the note to its agent that if the makers were in funds it would be paid by charging it to their account. Thus, the subsequent transaction is to be viewed as though it had occurred directly between the plaintiff and the defendants; the latter being depositors of the former. What would constitute payment between the immediate parties should equally constitute payment, though an agent for one intervened. The case in brief is this: A bank, the holder of a note, or the agent of the holder to collect, has funds in its hands upon which the makers are entitled to draw; after the note is due it is directed to charge the note against that credit, and says it will do so. All that is necessary to constitute payment is the intention to make the application, which may be evidenced in a variety of ways, e. g., by bookkeeping entries, by canceling the note and surrendering it to the makers, by the drawing of a check by the makers and its acceptance in payment by the bank. It must be borne in mind that the plaintiff selected an agent to collect, knowing that in the usual course of business payment would be made by a mere transfer of credits. If the makers had actually gone to the bank and passed the necessary currency over its counter to pay the note, with a direction thus to apply it, that would plainly have constituted payment. *Smith v. Essex County Bank*, 22 Barb. 627. If they had sent a check drawn on the bank to pay the note, the acceptance of it would have been, per se, an appropriation of the funds of the drawer, or, to be accurate, of the funds subject to the drawer's order, to the payment of the note. *Pratt v. Foote*, 9 N. Y. 463; *Commercial Bank v. Union Bank*,

11 N. Y. 203; *Oddie v. National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160. The verbal order, with the statement of the president of the bank that it would be acted upon, was the equivalent, in legal effect, of a written order and its acceptance. It is to be noted that, in the second of the cases just cited, the bank to which payment was made was an agent to collect. That mere bookkeeping entries, or even the cancellation and surrender of the paper, is but evidence of and does not constitute payment, is established by the cases holding that, where payment is made by a draft or check which is not paid, the paper can be reclaimed and an action maintained upon it. See *Burkhalter v. Second Nat. Bank*, 42 N. Y. 538, and cases cited. The converse must be true, that payment may be made without that particular evidence of it. A distinction must be noted between cases like the last cited, where the drawee bank, without being constituted an agent to collect, gives its check, which is subsequently dishonored, and cases like this in which the drawee bank is also an agent to collect. In considering the cases on the question of payment, it is essential to keep in mind the precise relation of the parties. The agency of the Watkins bank is the vital fact in this case. If it, in fact, accepted an appropriation of the makers' credit with it in payment of the note, that should constitute payment, in view of the fact that the plaintiff, in sending the note to it for collection, must have expected that payment would be made in exactly that way. That risk, at least, is taken in appointing a bank where a note is payable, agent to collect it. It is not important how the bank evidenced its acceptance of the makers' verbal order, or whether it did anything to remit the proceeds to its principal.

There are many cases in which stress has been laid on the evidences of payment, as, e. g., canceling the note, marking it paid, or charging it on the books to the maker, but none, in this jurisdiction at least, holding that such evidence is necessary to establish the fact of payment. The act and the evidence of it must not be confused. The act in this case was the acceptance of the makers' verbal order to charge the note to their account. Making the bookkeeping entries would merely have created evidence of that act. When that verbal order was accepted the makers' credit was irrevocably appropriated, pro tanto, to the payment of the note, precisely as though a written order in the form of a check had been presented and accepted. It may be that something more than a mere state of mind on the part of the one to make the applica-

tion is necessary to constitute payment, and that the mental determination of the president of the Watkins bank, not accompanied by or resulting in any act, would not have sufficed. However, the acceptance of the makers' verbal order to make the application was an act fully as effective as, e. g., the marking of the note "Paid," as was done by the cashier in *Nineteenth Ward Bank v. First Nat. Bank*, 184 Mass. 49, 67 N. E. 670, a case which, in principle and in the reasoning of the court, strongly supports the view that the transaction under consideration amounted to payment. Thereafter, it was of no concern to the defendants what bookkeeping entries were made by the plaintiff's agent, or whether it remitted the proceeds of the note.

If we lay refinements aside, the truth is that the actual default of the Watkins bank was in not remitting the proceeds of the note to its principal, a cogent reason for adhering to the view that the note was paid. It is not conclusive on the question of payment that the plaintiff might not have been entitled to assert that the assets in the hands of the assignee or receiver of the Watkins bank were impressed with a trust in its favor, because there might be a transfer of credits so as to constitute payment, without actually setting aside a distinct fund which could be impressed with a trust. See *People v. Merchants' & M. Bank*, 78 N. Y. 269, 34 Am. Rep. 532. That point is not involved, and need not be decided.

If, however, we assume that the note was not paid, the failure to secure payment was due to the neglect of the plaintiff's agent, and the loss resulting therefrom should fall on the one responsible for the fault.

For the foregoing reasons, I advise that the judgments be reversed, and, as the facts are undisputed and found, that the complaint be dismissed, with costs.

Willard Bartlett, Ch. J., and Chase and Cardozo, JJ., concur. Seabury, J., concurs in result.

Collin, J., dissenting:

The action to recover upon a promissory note owned by the plaintiff, a corporation, and made by the defendants, as partners under the firm name of A. L. Smith & Son. The note was payable at "Farmers' and Merchants' Bank," which was the firm name of three persons conducting, as partners, a banking business at Watkins, New York, with whom the defendants had then, and through many prior years, a general account as depositors and customers. On or before December 12, 1910, the due date

of the note, the banking firm received by mail from the plaintiff the note for collection and remittance, the plaintiff not having any account with them. They then owed the defendants, and had on hand a sum greater than that due upon the note. On that day the defendant Walter S. Smith talked with Mr. Wait, their president, over the telephone, and, having been told by him that the note was then in the bank, asked him to charge it to the account of the defendants. He said he would, but did not. The note was simply received by the banking firm; they did not remit to the plaintiff, or charge it to the defendants, or credit it to plaintiff, or cancel it, and nothing further than as stated in respect to it was done or said by any of the parties. They ceased doing business on December 17, 1910, and on December 19, 1910, made a general assignment for the benefit of their creditors. Thereafter this action was brought. The judgment of the trial term in favor of the plaintiff was affirmed by the appellate division, without opinion.

The learned and painstaking counsel for the defendants, in brief and argument, concede that the note was not paid, but vigorously assert and argue that the plaintiff was negligent in the two respects: (1) In that it sent the note for collection and remittance to the bank at which it was payable; and (2) in that it made no inquiry prior to December 17th or 19th concerning the note. In our deliberations, however, it is urged that the note was in fact paid. We are to determine whether or not such conclusion is accurate.

Payment is the fulfillment of an agreement to pay money, by giving to the party entitled to receive it the sum agreed to be paid for the purpose of discharging the agreement, which is received by that party for the same purpose. Before there can be a payment of a debt there must have been a complete discharge of it, and before there can be such discharge there must have been a full and complete performance of that which the promisor undertook to do. It is the transfer or delivery of the money promised or its equivalent from the debtor to the creditor. *Kingston Bank v. Gay*, 19 Barb. 459; *Bronson v. Rodes*, 7 Wall. 229, 250, 19 L. ed. 141, 146; *Beals v. Home Ins. Co.* 36 N. Y. 522, 527; *Stokes v. Stokes*, 34 App. Div. 423, 431, 54 N. Y. Supp. 319. Under the facts of this case, if the defendants transferred or delivered to the plaintiff the sum called for by the note, they paid it; otherwise, they did not.

The note was in the possession of the banking firm as the agents of the plaintiff, and they were authorized by it to receive

and remit the money given by the defendants for the purpose of paying the note. The plaintiff, in sending the note to them for collection and remittance, tendered them the agency and authority, which they, in receiving and retaining it, accepted, to demand its payment, to receive the money if paid, and to take the legal measures essential to the continuance of the liability of the parties to it if not paid. *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26, 13 L.R.A. 241, 27 N. E. 849; *Ward v. Smith*, 7 Wall. 447, 19 L. ed. 207; *Phipps v. Millbury Bank*, 8 Met. 79. They became and were the agents of the plaintiff for those purposes, and no other purpose whatsoever.

Inasmuch as they received the deposits of the defendants in the general account with them, and owed therein the defendants a sum greater than that of the note, and the note was payable at their bank, they were under the authority and duty to transfer or deliver to the plaintiff or themselves, as its agents, the sum due upon the note. This conclusion is true, because the relation between them and the defendants was that of debtor and creditor at common law. They owed, at any time, as ordinary debtors, to the defendants, an amount equal to the sum to the credit of the defendants then in the account. In opening the account and in receiving the deposit they agreed with the defendants, through legal implication, that they would repay the loans of the deposits, to the extent of their indebtedness, when and as authorized by the checks or orders of the defendants in the usual course of business. This agreement was with and for the benefit of the defendants alone, and would not support an action by the holders of the unpaid checks or notes drawn or made by the defendants. Between the banking firm and such holders there was no privity of contract. *Cragie v. Hadley*, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; *Crawford v. West Side Bank*, 100 N. Y. 50, 53 Am. Rep. 152, 2 N. E. 861; *Commercial Bank v. Armstrong*, 148 U. S. 50, 37 L. ed. 363, 13 Sup. Ct. Rep. 583. The defendants, by making the note payable at the bank, authorized and ordered the banking firm, as their debtors, to pay, in accordance with the implied contract between them, the note from the funds to the credit of the defendants, and thereby pay the indebtedness of the defendants to the plaintiff, and pro tanto that of the banking firm to the defendants. In the respect of ordering the banking firm to pay the note, it was the equivalent of a check drawn in the account by the defendants to the banking firm for

the purpose of directing them to pay it. Negotiable Instruments Law (Consol. Laws, chap. 38), § 147; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314.

The implied agreement of the banking firm was not self-executing. The facts that the note was presented to them, and that they owed the defendants more than its amount, did not pay it, or apply the moneys due from them to its payment. It required an act or acts upon their part to make it effective. Neither an agreement nor an intention to pay a debt in and of itself pays it. Either must be carried by an act into performance for its accomplishment or execution. Intention may determine whether moneys are delivered in payment or in purchase or other use, but to be operative must be expressed in an act or acts. In order to have paid the note, the banking firm must have applied or appropriated the moneys, in the requisite amount, to its payment by either actually delivering them into their control as agents of the plaintiff, or by transferring in like amount the credit owned by the defendants to the plaintiff, or by other unequivocal act constituting or expressing payment. This conclusion will be sustained, I think, by decisions hereinafter cited. Indisputably they did not do any act tending to apply or appropriate the moneys to its payment. The one act of the banking firm relating to the payment of the note was that of their president in stating to the defendants that the note would be charged to the account of defendants. Obviously, this was a mere repetition of the existing agreement, which was not intensified in obligatory effect or broadened by it. In receiving the loans of the deposits, they had promised that they would repay them as requested by the checks and orders of the defendants; that is, that they would charge the note (and other notes or checks) to the account of the defendants, if good for it. Their duties and powers as agents of the plaintiff and as the debtors of the defendants were as distinct and different as if they had been different individuals. *Costello v. Costello*, 209 N. Y. 252, 103 N. E. 148. The plaintiff had not the power by any act to pay the note. It could not charge the account of the defendants with it. It could only ask for and receive payment if made. It could not impart or invest in its agents authority or power which it had not. The statement that the note would be charged did not place any moneys in the hands of the plaintiff's agents for remittance to it, or any moneys to its credit, or give it any right of action against

its agents for moneys collected and received, or pay any part of the debt of the banking firm to the defendants, or lessen the amount to their credit in the account between them. The conversation was, indeed, an admission and an expression of a realization, by both firms, of the truth that the note had not been paid, but could be paid by debiting the defendants in account with its amount and crediting the plaintiff with and remitting to it the amount.

The defendants did not appropriate any part of the amount due them from the banking firm to the payment of the note by making it payable at the bank. To appropriate money is to set it apart or assign it to a particular use or purpose, and to abnegate the right to use it for another purpose. *Kelley v. Sullivan*, 201 Mass. 34, 87 N. E. 72. Until the banking firm had actually accepted or paid the note, the defendants had the full and legal control of the moneys to their credit. While this note was lying in the bank, the defendants might have withdrawn those moneys or directed the payment of them to others than the plaintiff. *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 88, 7 Am. Rep. 314; *National Bank v. Speight*, 47 N. Y. 668; *Chapman v. White*, 6 N. Y. 412, 57 Am. Dec. 464. The note was never presented for acceptance, and, had it been, the acceptance could have been only by a sufficient writing signed by the banking firm, and creating a privity of contract between the plaintiff and the banking firm. Their verbal promise to the defendants that they would charge it to their account could not be an acceptance. Negotiable Instruments Law, §§ 220, 222; *Risley v. Phenix Bank*, 83 N. Y. 318, 38 Am. Rep. 421. The note was presented, however, not for acceptance, but for payment, and payment alone of it constituted acceptance. Judicial decisions have indicated with clearness and certainty what constitutes the acceptance and payment by a bank of a check drawn upon itself, or a note there payable and presented for payment. *Morse*, in his well-considered work on Banking, said: "A credit given for the amount of a check by the bank upon which it is drawn is equivalent to and will be treated as a payment of the check. It is the same as if the money had been paid over the counter on the check, and then immediately paid back again to the account or for the use for which the credit is given. This rule has been applied where the bank held the check for several days, during which the drawer's account was not good, and then, the account becoming good, made

the application." 2 *Morse, Banks & Bkg.* 4th ed. § 451.

In *Oddie v. National City Bank*, 45 N. Y. 735, 741, 6 Am. Rep. 160, we said: "When a check is presented to a bank for deposit, drawn directly upon itself, it is the same as though payment in any other form was demanded. It is the right of the bank to reject it, or to refuse to pay it, or to receive it conditionally, as in *Pratt v. Foote*, 9 N. Y. 463; but, if it accepts such a check and pays it, either by delivering the currency, or giving the party credit for it, the transaction is closed between the bank and such party, provided the paper is genuine."

This principle was applied in *Consolidated Nat. Bank v. First Nat. Bank*, 129 App. Div. 538, 114 N. Y. Supp. 308, affirmed in 199 N. Y. 516, 92 N. E. 1081. We have held or assumed in many decisions, without elaborate discussion, that a check presented for payment to the bank upon which it is drawn is never paid by the mere receipt, presentation, and retention of it, and is paid only by a transfer of credits, or by the actual delivery of the money, and turning it into a voucher by cancellation. *Mayer v. Heidelberg*, 123 N. Y. 332, 9 L.R.A. 850, 25 N. E. 416; *Pratt v. Foote*, 9 N. Y. 463; *O'Connor v. Mechanics' Bank*, 124 N. Y. 324, 28 N. E. 816; *Briggs v. Central Nat. Bank*, 89 N. Y. 182, 42 Am. Rep. 285. See also *id.*, 61 How. Pr. 250; *National Butchers' & D. Bank v. Hubbell*, 117 N. Y. 384, 7 L.R.A. 852, 15 Am. St. Rep. 515, 22 N. E. 1031; *Atty. Gen. v. Continental L. Ins. Co.* 71 N. Y. 325, 27 Am. Rep. 55; *Commercial Bank v. Union Bank*, 11 N. Y. 203, 214; *Kirkham v. Bank or America*, 165 N. Y. 132, 80 Am. St. Rep. 714, 58 N. E. 753. Other judicial decisions are of like effect. *Nineteenth Ward Bank v. First Nat. Bank*, 184 Mass. 49, 67 N. E. 670; *Exchange Bank v. Sutton*, 78 Md. 577, 23 L.R.A. 173, 28 Atl. 563; *National Bank v. Millard*, 10 Wall. 152, 19 L. ed. 897; *Pollak Bros. v. Niall-Herlin Co.* 137 Ga. 23, 35 L.R.A.(N.S.) 13, 72 S. E. 415; *Moore v. Meyer*, 57 Ala. 20; *Wilkinson v. Bradley*, 54 Ala. 677; *Sutherland v. First Nat. Bank*, 31 Mich. 230; *Pease v. Warren*, 29 Mich. 9, 18 Am. Rep. 58; *Phillips v. Mayer*, 7 Cal. 82; *Moore v. Norman*, 52 Minn. 83, 18 L.R.A. 359, 38 Am. St. Rep. 526, 53 N. W. 809; *Eyles v. Ellis*, 4 Bing. 112, 130 Eng. Reprint, 710, 12 J. B. Moore, 306, 5 L. J. C. P. 110. In *Smith Roofing & Contracting Co. v. Mitchell*, 117 Ga. 772, 97 Am. St. Rep. 217, 45 S. E. 47, the defendant drew and delivered his check upon the Barnesville bank to the plaintiff, which transferred it to the Atlanta bank, from which the

Barnesville bank received it for collection and remittance. The Barnesville bank charged the amount of the check to the account of the defendant, and marked the check "Paid." A few days thereafter it protested the check and returned it to the Atlanta bank, and went into the hands of a receiver. The question considered by the court was whether the giving of the check by the defendant, the presentation of that check at the bank upon which it was drawn, and the action of the bank in charging the amount of the check to the defendant's account, and canceling the check, constituted such a payment by the defendant of his debt to the plaintiff as would discharge him from liability. It held: "The entry on the books of the Barnesville Savings Bank charging the account of its depositor with the amount of the check was the same as if it had paid the money over its counter to itself as agent for the bank which had sent the check for collection; and the fact that it fraudulently withheld the money from that bank and failed to enter the proper credit to its account does not render any less complete the payment by the depositor. That money is now in the hands of the agents of the payee of the check, and the drawer is as completely discharged from any further liability on the debt for which it was given as if he had paid the actual money to one authorized by his creditor to collect it."

In *Nineteenth Ward Bank v. First Nat. Bank*, 184 Mass. 49, 67 N. E. 670, the action was against the defendant for money had and received, through the collection of a note payable at and sent by the plaintiff to it for collection. The drawers of the check had a general deposit account with the defendant. The defense was that the note had not been paid. The other facts are sufficiently indicated by the quotation from the opinion: "The note itself was equivalent to a check. It stood exactly as though the makers owing the bank had delivered to it a check in payment. When the bank, through its cashier, wrote upon the face of the note in its own name as the indorsee and holder that it was paid, and perforated it and put it in the files as a thing paid, nothing more was to be done as to the payment. [At this point in his treatment of the note, the cashier was informed by telephone that the makers had made a general assignment for the benefit of their creditors. The custom of the bank was to make the proper record of the transaction upon the books at the end of the day.] By those acts there had been set apart and appropriated to the payment of the note so much of the deposit then stand-



ing to the credit of the makers as was sufficient for that purpose, just as though the makers had presented to the bank their check in payment of a claim due it from them. It is true that the proper records were to be made upon the books, but the payment is effected by the acts, and not by the record, and was valid even without records. . . . So far as respected the plaintiff, the defendant had received the money for the note, and was bound to remit it to the plaintiff."

The differences between such case and that at bar are neither insignificant nor obscure. In the former the intention of the debtor bank was to pay then and there, and the intention was then and there expressed and executed by a series of acts thus described in the opinion of the court: "With these intentions [to pay then and to then remit] he [the cashier] begins. The note is before him. He first draws on a bank in Boston his check as cashier of the defendant, payable to the order of the plaintiff for the amount of the proceeds of the note. It is to be observed that this is not the check of the makers nor is it made by the cashier as their agent, but in his capacity as agent of the defendant, and in the performance not of a duty owed by the makers, but of a duty owed by the defendant to the plaintiff. It is not the check by which the note was paid, because none was needed, but was the check by which the proceeds were to be transmitted by the defendant to the plaintiff. He then makes a memorandum of this check upon a block, stamps upon the face of the note, 'Paid Oct. —, 1901, First National Bank, South Weymouth, Massachusetts,' and perforates the note in three places. He then puts the note thus stamped and mutilated in the file with his checks, so that the proper record of the transaction may be entered at the end of the day upon the permanent books. So far he has gone when he is called to the telephone and notified that the makers have made an assignment for the benefit of their creditors, and he is requested by the assignee to hold the account. He replies that there is one (meaning this) note which he had paid or 'made a check for it.' Soon afterwards, at the request of the assignee, he withheld the check he had drawn and undertook to retrace his steps."

In the case at bar the banking firm had the intention which they expressed in words to pay at some future time. They did no act; they said nothing except that the note would be charged to the account of the makers. The difference between the two cases, in principle, though not in the facts, is as broad and vigorous as is that between

these suppositious transactions: (1) A creditor by a promissory note presents it on its due date to the maker and asks that he pay it. The maker delivers to the creditor the amount of, and receives, the note, and marks it paid. The maker there had, upon the presentation of the note, the intention to pay it instantly, which he then and there expressed and executed by his acts, as did the cashier in the Nineteenth Ward Bank Case, and the note would be paid as in that case. (2) A creditor by promissory note presents it on its due date to the maker and asks that he pay it. The maker replies that he would do so, and thus ends and completes the transaction. Nothing more said; nothing whatever done. The maker there had, upon the presentation of the note, the intention to pay it at some future time, and expressed that intention in words. Such is the case at bar. His intention or promise to pay—a mere reiteration of that in the note in the suppositious case, and that in receiving the deposits and opening the general account in the case at bar, and not one whit more effective for any purpose—would not constitute payment. Mere words cannot create or constitute the fact that the note was paid. The defendants requested or ordered the banking firm to pay the note at maturity, upon the presentation, by making it payable at their bank, and the banking firm agreed to do so by receiving the deposits, as I have already stated. A second order by the defendants could not be more efficacious in any particular. If the order of the defendants was to be accepted by the banking firm, rather than performed by payment, acceptance could be effected only in the manner and form directed by article 12 of the Negotiable Instruments Law; that is, by writing expressing acceptance, signed by the banking firm. No acceptance was, however, asked or given. Payment alone was asked, and the sole and exclusive response of the banking firm was the statement that the note would be charged to the account of the makers—a mere reiterated promise to pay.

In *First Nat. Bank v. First Nat. Bank*, 127 Tenn. 206, 154 S. W. 965, the action was by the plaintiff bank as holder of checks against the defendant for money had and received as a collecting bank. The defendant sent the checks to the bank upon which they were drawn for collection and remittance. The quotation from the opinion indicates the other facts sufficiently: "We are also of the opinion that there was no acceptance of the checks under the facts of this case. 'Acceptance,' as defined in Negotiable Instruments Law, 'means an acceptance completed by delivery or notifica-

tion.' There was no delivery of the checks after they were marked 'Paid' in this case. The evidence shows that the checks were marked 'Paid' with a stamp provided for that purpose, and placed upon a cancellation hook, . . . on November 1st, in the event remittances were received before then to cover the checks. On November 1st, remittances not being received, the check was taken from the hook, and the cancellation mark erased. This was done, it is true, by the drawee as collecting agent of the holder; but it is also true that the acceptance was not completed by delivery, and, of course, there was no notification. Where the drawee is acting in the dual capacity of collecting agent of the holder and as drawee, there can be no acceptance by delivery until the bills are passed through the books of the bank, charging the account of the drawer and crediting the account of the remitting bank, and making a completed transaction."

The banking firm did no act which created privity of contract between them and the plaintiff. The note was not marked or stamped paid, or canceled, or filed as collected or paid. They apparently did not see or touch it after taking it from the envelop in which it came. They did not segregate the amount due, or in any way appropriate it to the payment of the note, or place it to the credit of the plaintiff. The note was not charged in the account of the defendants. The amount to their credit was not lessened or affected, and was at the disposal and under the legal control of the defendants until the bank closed on December 17, 1910. The money in the bank was to the credit of the defendants, and not to the credit of the plaintiff, and never for a moment was subject to plaintiff's order or control. The bank kept the money as a deposit to defendants' credit, and thereby retained the credit as the property of the defendants. It is, of course, manifestly true that the violation by the banking firm of the implied contract with the defendants, or their negligence as the agents of the plaintiff in failing to protest the note, did not pay it, or sustain an action by the plaintiff against the defendants for money had and received. No more, as I view them, do the facts that the note was received by the banking firm, and the credit in the account with the defendants was greater than its amount.

Neither the facts nor the briefs or arguments of counsel present the question as to whether or not failure to present a note, at its maturity, at the place where payable, the maker's account there being good for the note, subjects the holder to the loss

ensuing through the failure of the bank. In the present case the note was in the bank at its maturity. Without entering upon the discussion of the question, I will state these conclusions, which I understand to exist:

A note is an absolute and unconditional promise to pay, and it need not, as between the holder and maker, be presented at any time at the place where payable. *Parker v. Stroud*, 98 N. Y. 379, 50 Am. Rep. 685; *Ward v. Smith*, 7 Wall, 447, 19 L. ed. 207; *Cheney v. Libby*, 134 U. S. 68, 33 L. ed. 818, 10 Sup. Ct. Rep. 498; *Adams v. Hackensack Improv. Commission*, 44 N. J. L. 638, 43 Am. Rep. 406; *Hills v. Place*, 48 N. Y. 520, 8 Am. Rep. 568; *Wolcott v. Van Santvoord*, 17 Johns. 248, 8 Am. Dec. 396, *Locklin v. Moore*, 57 N. Y. 360.

A check is a convenient means adopted by a debtor and his creditor whereby the debt may be paid, under the agreement, implied by law, that it shall be exercised forthwith, and the debt cannot be enforced until it has been presented and dishonored. If loss ensues by reason of the failure to present as agreed, it falls upon the holder. *Chapman v. White*, 6 N. Y. 412, 57 Am. Dec. 464; *Harker v. Anderson*, 21 Wend. 372; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518; *Martin v. Home Bank*, 160 N. Y. 190, 54 N. E. 717; *Bradford v. Fox*, 38 N. Y. 289.

While there is a marked diversity of judicial opinion in regard to the question whether the holder of a negotiable instrument may send it for collection and remittance to the bank upon which it is drawn, or at which it is made payable, free from the risk of loss through the insolvency of the collecting and paying bank, our opinion, and the wiser one, we think, is that expressed in *Indig v. National City Bank*, 80 N. Y. 100, that the holder is not negligent therein as a matter of law.

The liability of the defendants was not discharged by the failure of the plaintiff to make inquiry of the Farmers' and Merchants' Bank as to the payment of the note. The trial court found as a fact that such failure was "not such negligence on its part as will discharge" the liability of the defendants. There is, in the evidence, support for the finding. A holder of negotiable paper does not, as a matter of law, relieve the obligor from liability by failing through the five or seven days next following its maturity to inquire of the collecting bank concerning its payment.

The judgment should be affirmed, with costs.

Cuddeback, J., concurs.

**CALIFORNIA SUPREME COURT.**  
(Department No. 2.)

D. W. HARE, Respt.,  
v.

A. L. MCGUE, Appt.

(— Cal. —, 174 Pac. 663.)

**Contract — to procure evidence in divorce suit.**

A contract for services in procuring witnesses and evidence for the defense of a divorce suit, and to shadow the plaintiff and ascertain her conduct, habits, and companions, compensation for which is not dependent on the success of the suit or the production of any particular testimony, is not illegal.

*For other cases, see Contracts, III. c, 1, in Dig. 1-52 N. S.*

(August 12, 1918.)

**APPEAL** by defendant from a judgment of the Superior Court for Los Angeles County in favor of plaintiff and from an order denying a new trial, in an action brought to recover the value of personal services rendered to defendant by plaintiff and his assignor. Affirmed.

The facts are stated in the opinion.

Messrs. Valentine & Newby, for appellant:

The contract was illegal and void, and no recovery can be had thereon.

Ball v. Putnam, 123 Cal. 134, 55 Pac. 773; Kreamer v. Earl, 91 Cal. 112, 27 Pac. 735; Union Collection Co. v. Buckman, 150 Cal. 159, 9 L.R.A.(N.S.) 568, 119 Am. St. Rep. 164, 88 Pac. 708, 11 Ann. Cas. 609; Butler v. Agnew, 9 Cal. App. 327, 99 Pac. 395; Martin v. Wade, 37 Cal. 168; Bangs v. Dunn, 66 Cal. 72, 4 Pac. 963; Delbridge v. Beach, 66 Wash. 416, 119 Pac. 856; Rice v. Williams, 32 Fed. 437; Valentine v. Stewart, 15 Cal. 387; Patterson v. Donner, 48 Cal. 369; Lyon v. Hussey, 82 Hun, 15, 31 N. Y. Supp. 281; Quirk v. Muller, 14 Mont. 467, 25 L.R.A. 87, 43 Am. St. Rep. 647, 36 Pac. 1077; Phelps v. Manecke, 119 Mo. App. 139, 96 S. W. 221; Manufacturers & M. Inspection Bureau v. Everwear Hosiery Co. 152 Wis. 73, 42 L.R.A.(N.S.) 847, 138 N. W. 624, Ann. Cas. 1914C, 449; Hughes v. Mullins, 36 Mont. 267, 92 Pac. 758, 13 Ann. Cas. 209; Goodrich v. Tenney, 144 Ill. 422, 19 L.R.A. 371, 36 Am. St. Rep. 459, 33 N. E. 44; 9 Cyc. 519; Beard v. Beard, 65 Cal. 354, 4 Pac. 229; Lovern v. Lovern, 106 Cal. 512, 39 Pac. 801; Pereira v. Pereira, 156 Cal. 5, 23 L.R.A.(N.S.)

**Note.** — As to validity of contract to procure testimony, see annotation following this case, post, 1101; and references therein to annotation on related questions.

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880, 134 Am. St. Rep. 107, 103 Pac. 488; Barngrover v. Pettigrew, 128 Iowa, 533, 2 L.R.A.(N.S.) 260, 111 Am. St. Rep. 206, 104 N. W. 904; Pierce v. Cobb, 161 N. C. 300, 44 L.R.A.(N.S.) 379, 77 S. E. 350; Neece v. Joseph, 95 Ark. 552, 30 L.R.A.(N.S.) 278, 129 S. W. 797, Ann. Cas. 1912A, 655; Schultz v. Frankfort Marine, Acci. & Plate Glass Ins. Co. 161 Wis. 537, 43 L.R.A.(N.S.) 520, 139 N. W. 386; 9 Cyc. 546; Los Angeles v. City Bank, 100 Cal. 24, 34 Pac. 510; Abbe v. Marr, 14 Cal. 210; Davis v. Hinman, 73 Neb. 850, 103 N. W. 668, 11 Ann. Cas. 376; Wolkovisky v. Rapaport, 216 Mass. 48, 102 N. E. 910, Ann. Cas. 1915A, 809.

Messrs. Thomson & Spencer and A. P. Thomson, for respondent:

Both the contract of plaintiff with defendant and that of his assignor are lawful, entitling plaintiff to judgment.

Chitty, Contr. 11th Am. ed. pp. 977, 978; 9 Cyc. 483; Re Garcelon, 104 Cal. 570, 32 L.R.A. 595, 43 Am. St. Rep. 134, 38 Pac. 414; Stephens v. Southern P. Co. 109 Cal. 86, 29 L.R.A. 751, 50 Am. St. Rep. 17, 41 Pac. 783; McCowen v. Pew, 153 Cal. 735, 21 L.R.A.(N.S.) 800, 96 Pac. 893, 15 Ann. Cas. 630; Cox v. Hughes, 10 Cal. App. 553, 102 Pac. 956; Clark, Contr. 1894, ed. pp. 414, 415; 1 Page, Contr. § 422, p. 62; Wilkinson v. Oliveira, 1 Bing. N. C. 490, 131 Eng. Reprint, 1206, 1 Scott. 461; Cobb v. Cowdery, 40 Vt. 25, 94 Am. Dec. 370; Wellington v. Kelly, 84 N. Y. 543; Bank of Minneapolis v. Griffin, 168 Ill. 314, 48 N. E. 154; Lucas v. Pico, 55 Cal. 126; Quirk v. Muller, 14 Mont. 467, 25 L.R.A. 87, 43 Am. St. Rep. 647, 36 Pac. 1077; Manufacturers & M. Inspection Bureau v. Everwear Hosiery Co. 152 Wis. 73, 42 L.R.A.(N.S.) 847, 138 N. W. 624, Ann. Cas. 1914C, 449; Barngrover v. Pettigrew, 128 Iowa, 533, 2 L.R.A.(N.S.) 260, 111 Am. St. Rep. 206, 104 N. W. 904; McCurdy v. Dillon, 135 Mich. 678, 98 N. W. 746; Neece v. Joseph, 95 Ark. 552, 30 L.R.A.(N.S.) 278, 129 S. W. 797, Ann. Cas. 1912A, 655.

Lorigan, J., delivered the opinion of the court:

This action was brought by plaintiff, in his own behalf and as assignee of one John M. Robinson, to recover the value of personal services rendered by both to defendant and for money expended by plaintiff in his behalf. Differences had arisen between defendant and his wife, and, she threatening an action for divorce, he, with a view of making a defense thereto, employed plaintiff and Robinson, the former to look up the acts and conduct and past history of the wife, and her conduct and life during

his employment, and to locate, interview, and secure witnesses to testify on behalf of defendant; also to advise and consult with defendant concerning said action and to direct certain of his business affairs. Robinson was employed and directed to watch and shadow the wife of defendant, to ascertain her conduct, habits and companions, and to secure the names and whereabouts of certain witnesses defendant desired to testify in his behalf in said divorce action. The court made findings of fact as above recited, and entered a judgment in favor of plaintiff, from which, and an order denying his motion for a new trial, defendant appeals.

While in the transcript there are various assignments of error, the sole point urged here by appellant for a reversal is that the contracts made the basis of the cause of action, and as found by the court, are contrary to public policy and void, and no recovery should have been had upon them. In elaboration of this proposition of law appellant asserts that any contract between parties which has for its object the dissolution of the marriage relation, or facilitating that result, is contrary to good morals and void; that, further, any contract having for its object the procurement of testimony for the purpose of securing a divorce is illegal and void.

There can be no question about the legal proposition asserted by appellant. We must accept as clearly established that the law is extremely solicitous about the maintenance of the marriage relation, and will not tolerate or sanction any contract which by its terms or obvious tendency has for its object the securing of a divorce. The further proposition, extending, however, not particularly to divorce suits, but to all kinds of litigation, is equally true, that a contract is void whereby one agrees to obtain or procure testimony of certain facts which will successfully support or defeat a lawsuit, or which provides that payment to the party procuring such testimony is to be contingent upon the result of the action for which he is engaged to procure it. It is the element of payment contingent on the success of the litigation in which the evidence is to be produced, or the fact that the agreement is to procure evidence, not of facts as they exist, but of particular facts necessary to the success of the party litigant, who contracted for their production, which vitiates the contract. It is the contingency on the one hand, and the agreement to furnish a given set of facts essential to a successful litigation on the other, and both of which in their nature are calculated to induce false charges and the production of perjured testimony, to sub-

vert the truth and pervert justice, through fraud, trickery, and chicanery at the hands of unscrupulous private detectives or other conscienceless persons, which has impelled the law, with wisdom, to declare such contracts illegal. *Patterson v. Donner*, 48 Cal. 369; *Lyon v. Hussey*, 82 Hun, 15, 31 N. Y. Supp. 281.

Now, while appellant sets forth quite extensively in his brief cases (in addition to the above) in support of these principles, he does not point out how the particular contracts entered into between the plaintiff and appellant here, and with Robinson, are brought under the ban of the rule; and our examination of the findings and the evidence show no analogy between the facts as recited in the cited cases and the case at bar. Certainly there is no rule of law which precludes a party in a divorce action or in any other action, from employing a person to do detective work, or in a divorce action itself to search for witnesses or to procure existing testimony either to support or defend such an action, or to acquire information of the past conduct or life of either spouse, or to set a watch upon the personal acts or associates of either. Anyone has a right, when threatened with litigation, or desiring himself to sue, to employ assistance with a view of ascertaining facts as they exist, and to hunt up and procure the presence of witnesses who know of facts and will testify to them; and this is true whether the action be one of divorce or of any other character. *Neece v. Joseph*, 95 Ark. 552, 30 L.R.A. (N.S.) 278, 129 S. W. 797, Ann. Cas. 1912A, 655; *Quirk v. Miller*, 14 Mont. 467, 25 L.R.A. 87, 43 Am. St. Rep. 647, 36 Pac. 1077. Any other rule would leave the parties in a divorce suit, and every other suit, restricted to their own individual efforts to obtain existing evidence, which would be absurd.

Examining, now, the contracts by the defendant with plaintiff and Robinson, there was no element in either of them contravening public policy. The compensation of neither was contingent. They were to be paid, whether they ascertained facts or procured witnesses to testify to them or not. There was nothing contingent on the result of the divorce suit. Neither did they agree, nor were they asked by appellant, to procure witnesses to testify to any particular state of facts, but only to obtain from witnesses information of what they knew, and report the matters to the attorneys for appellant. They were not informed on their employment of the names of the witnesses, nor what they were expected to testify to, and only ascertained both these things while working under their employment. Particular stress is

placed by appellant on testimony of plaintiff as to the seeking out and production of a certain witness designated "a red-headed dressmaker." As to this witness, however, all that plaintiff agreed to do was, at the express request of appellant, to attempt to find her. The assumption that plaintiff was to obtain particular evidence of certain things from her is unwarranted. It clearly appeared that plaintiff did not know this person. He did not agree to get her to testify to any particular facts, or in truth to testify at all. His mission was only to find her; the defendant saying that,

if he could find her, he (defendant) could get evidence from her himself. Plaintiff found her, and she was taken in charge by defendant. This is all there was to that matter. Taking the case in its entirety, there was nothing agreed to be done, and nothing actually done, under the contracts of plaintiff and Robinson with defendant, which was not entirely proper and legitimate and the trial court correctly so held.

The judgment and order appealed from are affirmed.

We concur: Wilbur, J.; Melvin, J.

### Annotation—Validity of contract to procure testimony.

The present annotation is supplementary to the notes to Goodrich v. Tenny, 19 L.R.A. 371, and Neece v. Joseph, 30 L.R.A.(N.S.) 278.

Generally as to validity of contract for detection of crime, see annotation in 42 L.R.A.(N.S.) 847.

The statement in the earlier note, that while an agreement to disclose information is not necessarily invalid, contracts to furnish evidence to a particular effect are as a rule condemned by the courts,—is supported also by the cases reported since that note.

#### Contracts for evidence to a particular effect.

Supplementing notes in 19 L.R.A. 372, and 30 L.R.A.(N.S.) 278.

In HARE v. MCGUE, ante, 1099, it was held that, while one has a right to employ assistance with a view of ascertaining facts as they exist, a contract whereby one agrees to obtain or procure testimony of certain facts which will successfully support a lawsuit, or which provides that payment to the party procuring such testimony is contingent upon the result of the action for which he is engaged to procure it, is void, being vitiated by the elements of contingency and as calculated to induce false charges and the production of perjured testimony.

So, in Josephs v. Briant (1913) 108 Ark. 171, 157 S. W. 13, which is expressly followed on subsequent appeal in (1914) 115 Ark. 538, 172 S. W. 1002, Ann. Cas. 1916E, 741, a contract to procure evidence to enable one to win an existing or contemplated suit was held illegal and void as against public policy. This decision was said to be an application of the rule that an undertaking to procure evidence in a given case can be the subject-matter of a valid contract, provided that it does not call for

the procuring of testimony of a certain nature, or to establish a certain issue, it being the latter elements which render such a contract contrary to public policy.

And that a contract to pay one's physician a certain percentage of any sum recovered for personal injuries is against public policy and void, where the agreement contemplated that the physician should be a witness in case of suit, was the holding in Sherman v. Burton (1911) 165 Mich. 293, 33 L.R.A.(N.S.) 87, 130 N. W. 667; the court arguing that the physician's interest in the amount of damages "furnished a powerful motive for exaggeration, suppression, and misrepresentation, a temptation to swell the damages so likely to color his testimony as to be inimical to the pure administration of justice." Generally as to validity of contract to pay attending physician percentage of damages recovered for personal injury, see annotation to this case in 33 L.R.A.(N.S.) 87.

And in Re Schapiro (1911) 144 App. Div. 1, 128 N. Y. Supp. 852, it was said that "a witness who demands and receives compensation or a promise of compensation for giving his testimony is necessarily a discredited witness; and an attorney and counselor at law, who knowingly makes an agreement with a witness by which he agrees to pay [the latter] a sum of money or an interest in the recovery as compensation for the giving of particular testimony rather than other testimony . . . is making an agreement which is plainly contrary to public policy and one which is subversive of the orderly and efficient administration of justice." And to the same effect see dicta in Manufacturers & M. Inspection Bureau v. Everwear Hosiery Co. (1912) 152 Wis. 73, 42

L.R.A.(N.S.) 847, 138 N. W. 624, Ann. Cas. 1914C, 449.

**Agreements for ascertaining facts.**

Supplementing notes in 19 L.R.A. 372, and 30 L.R.A.(N.S.) 279.

In *Haley v. Hollenback* (1917) 53 Mont. 494, 165 Pac. 459, it was held that a suitor may lawfully employ a layman to search for legitimate evidence, and that such a contract is not open to the objection that it contravenes public policy, even though the compensation was contingent upon the success of the litigation, where there was no agreement to furnish evidence that would sustain the suit, nor that the investigator was to have any portion of the possible recovery.

**Agreements to pay witnesses extra compensation.**

Supplementing notes in 19 L.R.A. 372, and 30 L.R.A.(N.S.) 281.

In *Re Schapiro* (N. Y.) supra, it was held that under a statute punishing attempts to procure the giving of false testimony, an agreement between an attorney, employed to prosecute a personal injury action for a contingent fee, and the physician who attended the injured person, to pay the latter for services as a witness a specified sum contingent on the success of the action, which agreement preceded the giving of testimony, was contrary to public policy and void. Here the court distinguished the case from those upholding contracts

for the giving of expert testimony, on the ground that in the latter cases the extra compensation is for time and labor, whereas in the case under consideration the witness was to receive compensation for the giving of testimony which would win the case.

**—agreements with expert witnesses.**

Supplementing notes in 19 L.R.A. 373, and 30 L.R.A.(N.S.) 281.

In *Re Avenue A* (1911) 144 App. Div. 107, 128 N. Y. Supp. 999, affirmed without opinion in (1912) 204 N. Y. 625, 97 N. E. 1103, an agreement to pay a corporation one third of the recovery in a certain action for furnishing expert witnesses was held invalid.

*Hough v. State* (1910) 68 Misc. 26, 124 N. Y. Supp. 878, which is set out on pages 281, 282, of the note in 30 L.R.A.(N.S.) was reversed, both upon the law and the facts in (1911) 145 App. Div. 718, 130 N. Y. Supp. 407; it having been held on the appeal that an agreement to pay an expert witness a specified sum for appraising certain property and testifying thereto, provided the estimate was substantially less than that of the expert produced on the other side, was illegal and against public policy as tending to induce perjured testimony; and that such vice of contract was not eliminated by any express or implied condition that the testimony should be conscientiously given. G. J. C.

**COLORADO SUPREME COURT.**

HENRY PEARCE, Plff. in Err.,  
v.  
MOUNTAIN STATES TELEPHONE &  
TELEGRAPH COMPANY.

(— Colo. —, 173 Pac. 871.)

**Electricity — duty of telephone company to protect against lightning.**

1. A telephone company must use such proper and ordinary care in the installation of its wires as will afford protection against injury likely to occur by lightning which may reasonably be expected to follow the wires into the building.

For other cases, see *Electricity*, III. a, in Dig. 1-52 N. S.

**Trial — jury — proper installation of telephone wires.**

2. In an action to hold a telephone com-

pany liable for destruction of a building by lightning entering over its wires, the jury must determine whether or not the usual and ordinary appliances for protecting property from such casualty were employed, and whether or not failure to employ them was the cause of the loss. For other cases, see *Trial*, II. a, 2, and 8, e, in Dig. 1-52 N. S.

**Electricity — duty to alter installation of wires.**

3. A telephone company must change the installation of its wires when alteration of the buildings makes such change necessary to protect against lightning following them into the buildings, if it knew or by the exercise of reasonable care could have known of the changed condition.

For other cases, see *Electricity*, III. a, in Dig. 1-52 N. S.

(May 6, 1918.)

Note. — The duty of an electric company with respect to wiring or fixtures installed in private property is treated in the notes to *Fish v. Waverly Electric Light & P. Co.*

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13 L.R.A.(N.S.) 226; *Minneapolis General Electric Co. v. Cronon*, 20 L.R.A.(N.S.) 816; and *Columbus R. Co. v. Kitchens*, L.R.A.1915C, 570.

**E**RROR to the District Court for Jefferson County to review a nonsuit in an action brought to recover damages for the destruction of plaintiff's building by fire alleged to have been caused by the negligent installation and maintenance of a telephone and appliances in said building. Reversed.

**Statement by Garrigues, J.:**

This action is to recover damages occasioned by fire alleged to have been caused by the negligent installation and maintenance of a telephone and appliances in plaintiff's store building. The point involved relates to the alleged error of the court in sustaining defendant's motion for a nonsuit at the close of plaintiff's evidence.

The complaint alleges that plaintiff's building and stock of merchandise burned May 13, 1913; that at that time, and long prior thereto, defendant owned, operated, managed, and controlled a telephone line extending from its exchange at Arvada, into plaintiff's building, where it installed, owned, controlled, and operated a telephone instrument and maintained a public pay station at Leyden junction; that the fire was caused by atmospheric electricity induced by lightning conducted over the telephone wires into the building; that the company was negligent in installing, equipping, operating, and maintaining the telephone and appliances in the building, and in failing to install and use well-known and approved appliances and equipment to protect the building from excess currents of electricity induced by lightning.

At the close of plaintiff's evidence, defendant introduced a motion for a nonsuit upon the ground that plaintiff had failed to sustain the allegations of the complaint and had not established any negligence on the part of defendant; that he had failed to connect the destruction of the building with any act of negligence or omission of defendant; and that the testimony disclosed the fire was the result of an act of God.

The court sustained the motion, took the case from the jury, and entered a judgment of nonsuit. Plaintiff brings the case here on error.

The evidence shows that a well-known and approved protector or lightning arrester was installed and in use in the building, and this point will not be further considered. The other acts of negligence relate to faulty installation, equipment, and maintenance.

The witnesses used a blackboard for illustration, and in describing the situation would say, "From here to there," or, "From this point to that point," etc., which has thrown upon us a great amount of labor

in comprehending the testimony. If counsel had used a diagram for purposes of illustration and made it a part of the record for our use here, it would have saved us a great amount of trouble in understanding the evidence.

We have read and studied not only the abstract, but the entire bill of exceptions, with unusual care. There is evidence showing the public highway or road at Leyden junction, where the fire occurred, runs north and south; that originally there was a farm house facing east, which stood a few feet from the road; that there was installed in this residence, in 1904, a telephone, the line of which came from the south, passing the house in the public highway and going north; about 100 feet from the house and a little to the south, there was a telephone pole; that the telephone wires serving the phone came from the Arvada exchange and ended at this pole; that about 2 feet above these wires there was another set of wires going on to the north; that the drop wires extended from the pole in the road to the south side of the building, at which point they were connected with the service wires which entered the residence, and here was a ground wire. In 1896 a storeroom was built onto the rear or west end of the residence, where plaintiff conducted a country store at the time of the fire, and in 1908 the phone instrument was moved by defendant from the residence and installed in the rear or west end of the store building. In making this change, the drop wires were carried from the pole to the southwest corner of the store building at a point under the eaves, where were placed two porcelain knobs, from which point two service wires extended down the west side or end of the store building, on the outside, to a point about 8 feet above the ground and 8 or 9 feet from the south side of the building, where there were two porcelain knobs. The west wall, being the back end of the store, was composed of drop siding, and here a hole was bored or cut into the store building through which the service wires were passed and connected with an arrester, which was attached to the west wall on the inside, immediately over the phone instrument. From the arrester, a ground wire of the same size as the service wire extended through the hole in the wall up to the connection under the eaves at the southwest corner of the store, where it was attached to the old ground wire in use when the phone was in the residence. These three wires—that is, the two service wires and the ground wire—were passed through the same hole in the west wall, twisted together and tacked to the

wall without insulation. They were all of the same size, smaller than the drop wires, and none of them were incased in non-conducting tubes. The ground wire, instead of taking the shortest course to the ground, passed through the hole in the wall, thence along the outside of the building to the point where the service wires were connected with the drop wires, and there hooked up with the old ground wire. After this, and some time prior to 1913, exactly when the evidence does not disclose, plaintiff built a butcher shop onto the west end of the storeroom, which changed the west or rear wall, along which the wires were tacked, from an outside to a partition wall between the butcher shop and store, so that the phone and arrester were no longer on an outside wall. The evidence does not show that during the building of the butcher shop, or afterwards, any change whatever was made in the location of the phone, arrester, or any of the appliances. The shop was simply built onto the back end of the store, and the installation was left as it was. The three wires now passed through a hole under the eaves at the southwest corner of the store building. Who made the hole or put the wires through, the evidence does not disclose; but it was explained in oral argument here that the workmen simply built around the wires and left them as they were.

On the night of May 13, 1913, about 11:30, a thunder storm passed over the locality, which was no unusual occurrence, and not of extraordinary severity. During this storm a flash of lightning either struck the wires going north, immediately above the phone wires at the pole, or came to the ground in the immediate vicinity, or both. About a quarter of an hour later, plaintiff discovered the butcher shop was on fire where the wires were tacked against the wooden wall, and at the hole under the eaves where they entered the building.

Plaintiff claims the phone was negligently installed in the store in 1908, and so remained until the fire; that the service and ground wires where they passed through and were tacked against the wall should have been incased in nonconducting tubes; that the ground wire was too small and should have been as large as the two service wires combined in order to carry away any current they brought in, and should have taken the shortest course to the ground; that the arrester, after the building of the butcher shop, should have been moved to an outside wall; that the stroke of lightning induced an excessive current of electricity, which was conveyed over the service wires into the house and set fire to the building.

The defense contends that the house was struck directly by lightning and set on fire; that, if the bolt struck the wires and entered the house, it was of such force that no installation could have prevented the destruction; that, if an excess current on the wires was induced by lightning, it was an act of God, for which defendant was not responsible; that the phone was properly installed in 1908 without negligence; that plaintiff changed the conditions by building the butcher shop, for which defendant was not responsible; and that it had no knowledge of the changed conditions.

It must not be understood that we find any fact has been established or settled. A nonsuit having been sustained at the close of plaintiff's evidence, we simply assume, for the purpose of the review, that plaintiff's evidence is true.

Messrs. McCall & McCall, for plaintiff in error:

Plaintiff had the right to have the question of the origin of fire submitted to the jury.

*Burlington & M. River R. Co. v. Burch*, 17 Colo. App. 491, 69 Pac. 6; *Union P. R. Co. v. DeBusk*, 12 Colo. 294, 3 L.R.A. 350, 13 Am. St. Rep. 221, 20 Pac. 752; *John Mouat Lumber Co. v. Wilmore*, 15 Colo. 136, 25 Pac. 556; *Hollinger v. Missouri, K. & T. R. Co.* 94 Kan. 316, 146 Pac. 1034, Ann. Cas. 1916D, 802.

Injury to plaintiff's property by excess current of atmospheric electricity or lightning, likely to be conducted over its wires into the building, was reasonably to have been expected by the defendant; and its duty was to have employed and properly installed in connection with the installation of its wires those approved protective appliances and devices which the situation rendered reasonably necessary for the purpose of protection from the injurious effects of such excess current from any source whatever.

*Byrona Teleph. Co. v. Sheets*, 122 Ill. App. 6; *Delahunt v. United Teleph. & Teleg. Co.* 215 Pa. 241, 114 Am. St. Rep. 958, 64 Atl. 515, 20 Am. Neg. Rep. 727; *Walters v. Denver Consol. Electric Light Co.* 17 Colo. App. 192, 68 Pac. 117, 11 Am. Neg. Rep. 574; *Denver Consol. Electric Co. v. Simpson*, 21 Colo. 371, 31 L.R.A. 566, 41 Pac. 499; *Haynes v. Raleigh Gas Co.* 114 N. C. 203, 26 L.R.A. 810, 41 Am. St. Rep. 786, 19 S. E. 344; *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269, 2 Am. Neg. Cas. 248; *Walters v. Denver Consol. Electric Light Co.* 12 Colo. App. 145, 54 Pac. 960, 5 Am. Neg. Rep. 5; *Hebert v. Hudson River Electric Co.* 136 App. Div. 107, 120 N. Y. Supp. 672; *Chicago City*



R. Co. v. Barker, 209 Ill. 321, 70 N. E. 624; Turner v. Southern Power Co. 154 N. C. 131, 32 L.R.A.(N.S.) 848, 69 S. E. 767; Mize v. Rocky Mountain Bell Teleph. Co. 38 Mont. 532, 129 Am. St. Rep. 659, 100 Pac. 971, 16 Ann. Cas. 1189; Southwestern Teleph. & Teleph. Co. v. Abeles, 94 Ark. 254, 140 Am. St. Rep. 115, 126 S. W. 724, 21 Ann. Cas. 1006; Southwestern Teleph. & Teleph. Co. v. Davis, — Tex. Civ. App. —, 156 S. W. 1146; Texas Teleph. & Teleph. Co. v. Scott, 30 Tex. Civ. App. 39, 127 S. W. 587; Lundy v. Southern Bell Teleph. & Teleph. Co. 90 S. C. 25, 72 S. E. 558; Griffith v. New England Teleph. & Teleph. Co. 72 Vt. 441, 52 L.R.A. 919, 48 Atl. 643; Parks v. G. C. Yost Pie Co. 93 Kan. 384, L.R.A.1915C, 179, 144 Pac. 202, 7 N. C. C. A. 100.

Messrs. Milton Smith, Charles R. Brock, William H. Ferguson, Elmer L. Brock, and Floyd F. Walpole, for defendant in error:

There is no device known to science capable of arresting or diverting a direct stroke of lightning, and providing such protection is not one of the obligations of the telephone company.

Wood v. Cumberland Teleph. & Teleph. Co. 151 Ky. 77, 151 S. W. 29; Phoenix Light and Fuel Co. v. Bennett, 8 Ariz. 314, 63 L.R.A. 219, 74 Pac. 48, 15 Am. Rep. 1.

The burden was on the plaintiff to establish the existence of "known and approved appliances" that would be effective in cases of lightning.

Griffith v. New England Teleph. & Teleph. Co. 72 Vt. 441, 52 L.R.A. 919, 48 Atl. 643.

Garrigues, J., delivered the opinion of the court:

There was evidence that an excess current of electricity, induced by lightning, was conveyed over the telephone wires into plaintiff's building, setting it on fire. Defendant was bound to know that its wires might become charged with a dangerous current induced by lightning, which made it the duty of the company to use reasonable precaution to guard against fire. Because such excess current was produced by lightning make no difference in defendant's liability, if it could have avoided the injury by exercising ordinary care and diligence. From the business in which defendant is engaged, it is presumed to possess special knowledge and skill in such matters, not possessed by laymen, which it was its duty to use for the protection of its patrons, no matter whether the current was generated by it or produced by lightning. It was as much its duty to be diligent in affording protection against a current likely to come over the

wires not generated by it, as a current it generated, and it could not escape this responsibility by pleading that the excess current was induced by lightning. No one was responsible for the lightning; but if defendant's faulty installation or management of the phone and its appliances was responsible for the excess current coming over the wires, entering the building and doing the damage, or if by the use of ordinary and reasonable care, precaution, and diligence it could have avoided the injury, it is responsible.

If two efficient causes united in producing the injury and the company brought about one of them, it would be responsible. In other words, if lightning and defendant's negligence concurred as the efficient cause of the fire, defendant would be liable. For plaintiff to recover, the jury would only have to find that the negligence of defendant was an efficient cause, without which the injury would not have happened. We are therefore of the opinion it was defendant's duty to use such proper and ordinary care, in the installation and maintenance of the phone and appliances, as would afford protection against injury likely to occur from an excess current from any source reasonably to be expected.

Applying the rules of law above announced to the evidence showing: That the phone wires were charged with an excess current of electricity induced by lightning conducted over the wires into the building, setting it on fire; that the wires, where they passed through and were tacked against the wooden partition, should have been incased in nonconducting tubes; that the ground wire should have taken the shortest course to the ground and was too small; that, after the butcher shop was built, the arrester should have been removed from the inner wall to an outer one; that the excess current could have been safely conveyed to the earth if proper appliances had been used; that there were in common use well-known, approved, and efficient nonconductive tubes, electrical protective devices and appliances for safeguarding property from injury from lightning passing over telephone wires to buildings in which such wires enter; and that here the installation was defective, improper, and dangerous,—the origin of the fire was a question that should have been submitted to the jury.

Whether defendant adopted the most approved method of construction and maintenance to guard against such a casualty, or whether it was guilty of negligence in this regard, or whether by reasonable precaution it could have prevented the injury, or whether its negligence was an efficient

cause, were questions of fact. It is no defense that an excess current induced by lightning came over the wires, if the negligence of defendant in not properly installing and maintaining the phone and appliances was an efficient cause of the injury, and without which it would not have happened. Whether or not defendant installed and maintained the phone with the usual and ordinary appliances for conducting an excess current likely to occur, caused by lightning to the earth, and whether, had it done so, no injury would have occurred, were questions of fact that should have been submitted to the jury.

As to the changed conditions caused by plaintiff building the butcher shop, if the company had no knowledge of the change, and it was the cause of the injury, defendant would not be liable. But if the building of the addition made the location of the arrester improper and dangerous, and defendant knew, or by the exercise of reasonable care would have known, of the changed conditions, it was its duty to make a proper installation after the change. If

it knew the location of the arrester had been so changed by the addition of the butcher shop that the building was in danger of fire from an excess current caused by lightning coming in over the wires, it was its duty to move the arrester to an outside wall, if that was necessary, no matter if plaintiff brought about the change. There was evidence from which the jury could have found that defendant knew of the changed conditions and had reasonable time within which to move the arrester. All of these matters, including the changed location of the arrester and whether defendant had knowledge thereof and had reasonable time within which to move it from an inside to an outer wall after the butcher shop was constructed, should have been submitted to the jury.

Judgment reversed and cause remanded.

Hill, Ch. J., and Scott, J., concur.

Petition for rehearing denied July 1, 1918.

#### IDAHO SUPREME COURT.

SANDPOINT WATER & LIGHT COMPANY, Limited, Appt.,

v.

CITY OF SANDPOINT, Respnt.

(— Idaho, —, P.U.R.1918F, 737, 173 Pac. 972.)

#### Public service corporation — regulation of rates.

1. Power to supervise and regulate rates or charges for services rendered by public utilities is an inherent function of government, the existence of which does not de-

pend upon its exercise by the state at any particular time.

*For other cases, see Public Service Corporations, in Dig. 1-52 N. 8.*

Same — contract for rates.

2. In the absence of constitutional limitations, the right of the state to regulate rates may be suspended for a limited time by a valid contract authorized by the supreme legislative branch of the government; but when reliance is made upon such a contract it must appear that the authority was granted in clear and unmistakable language free from any doubt as to the delegation of authority.

*For other cases, see Public Service Corporations, in Dig. 1-52 N. 8.*

Same — validity of contract.

3. In this state no authority exists to en-

Headnotes by RICE, J.

Note. — For authorities passing upon the right to raise rates of public service corporation fixed by franchise, see note to State ex rel. Webster v. Superior Ct. L.R.A. 1915C, 287.

For authorities passing upon the right to reduce rates of public service corporation fixed by franchise or charter, see note to Benwood v. Public Service Commission, L.R.A.1915C, 261.

For cases passing upon effect of contract with patrons to preclude regulation of rates of public service corporations, see note to Pinney & B. Co. v. Los Angeles Gas & E. Corp. L.R.A.1915C, 282.

It will be observed that the rights of three parties may be involved in contracts fixing rates for public service.

As to the rights of a corporation under

its charter or its franchise, and as to the rights of a municipality under its charter, it is held that the regulation of rates by the state or the enactment of a statute authorizing a commission to regulate rates, is a valid exercise of the reserved power to alter corporate or municipal charters; and it is also held that it is competent for the state to waive the rights of the public in contracts fixing rates for public service.

As to the rights of patrons and consumers of public service corporations in contracts fixing the rates, it is held that such contracts must be considered as having been made in contemplation of, and with reference to, the power of the state to regulate rates; since the parties could not by contract suspend the power of the state to regulate rates.

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ter into contracts which will in any manner abridge the power of the state to regulate rates of public utilities.

*For other cases, see Public Service Corporations, in Dig. 1-52 N. S.*

**Constitutional law — impairing obligation of contract — right to question.**

4. A municipal corporation of the state cannot question the right of the state to exercise its police power in the regulation of rates, on the ground that by so doing it would impair the obligation of a contract. *For other cases, see Constitutional Law, II, g, 1, a, (2), in Dig. 1-52 N. S.*

(June 29, 1918.)

**A**PPEAL by plaintiff from a judgment of the District Court for Bonner County in favor of defendant in an action brought to recover water hydrant rentals for water service furnished for street sprinkling and fire protection. Reversed.

The facts are stated in the opinion.

Messrs. A. H. Conner and Herman H. Taylor, for appellant:

It is a part of the exercise of the police power of the state to regulate and fix rates for public utilities, and no contract can be made between a public utility and a consumer which will deprive the state of this reserved power.

*Idaho Power & Light Co. v. Blomquist*, 26 Idaho, 222, 141 Pac. 1083, Ann. Cas. 1916E, 282; *State ex rel. Webster v. Superior Ct.* Ann. Cas. 1913D, 78, and note, 67 Wash. 37, L.R.A.1915C, 287, 120 Pac. 861; *Woodburn v. Public Service Commission*, 82 Or. 114, L.R.A.1917C, 98, P.U.R. 1917B, 967, 161 Pac. 391, Ann. Cas. 1917E, 996.

Where the power to regulate the franchise and impose conditions is reserved, no question as to the impairment of the obligation of the contract can arise if the legislative authorities choose to impose additional burdens upon the enjoyment of the franchise.

2 *McQuillin, Mun. Corp.* § 763; *Board of Education v. Phillips*, 67 Kan. 549, 100 Am. St. Rep. 475, 73 Pac. 97; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531; *Chicago, B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, 42 L. ed. 948, 18 Sup. Ct. Rep. 513; *Duluth Street R. Co. v. Railroad Commission*, 161 Wis. 245, P.U.R.1915D, 192, 152 N. W. 887; *People ex rel. New York & N. S. Traction Co. v. Public Service Commission*, 175 App. Div. 869, P.U.R. 1917B, 957, 162 N. Y. Supp. 405.

A judgment of a court having jurisdiction cannot be collaterally impeached by showing that the evidence upon which

that judgment was based was illegal, improperly received, or insufficient to sustain the judgment.

23 Cyc. 1095; *McCornick v. Friedman*, 7 Idaho, 686, 65 Pac. 440; *O'Neill v. Potvin*, 13 Idaho, 721, 93 Pac. 20, 257; *Amestoy Estate Co. v. Los Angeles*, 5 Cal. App. 273, 90 Pac. 42; *Brown v. Whetstone*, 25 Colo. App. 371, 138 Pac. 61; *Taggart v. Fugel*, 46 Colo. 401, 105 Pac. 1090; *Smith v. Schlunk*, 44 Colo. 200, 99 Pac. 566.

The city is estopped from asserting that the Commission had no authority to order the transfer of the hydrants. The city acquiesced in it, and by accepting the credit for the value thereof has estopped itself from now taking a contrary position.

*Twin Falls v. Harlan*, 27 Idaho, 769, 151 Pac. 1191; *Dill. Mun. Corp.* 5th ed. § 1191; *Boise City v. Wilkinson*, 18 Idaho, 150, 102 Pac. 148; *McQuillin, Mun. Corp.* 1159; *Robinson v. Lemp*, 29 Idaho, 661, 161 Pac. 1024.

Messrs. E. W. Wheelan and Peter Johnson, for respondent:

The law in force at the time of the making of a contract, and in any manner affecting it, enters into and becomes a part of the contract, and cannot be repealed or altered so as to affect the obligations of the contract or to impair rights vested under those laws.

*Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162; *Commissioner's Ct. v. Rather*, 48 Ala. 447; *Howard v. Jones*, 50 Ala. 67; *Watson v. Rose*, 51 Ala. 300; *Micou v. Tallassee Bridge Co.* 47 Ala. 656; *English v. Oliver*, 28 Ark. 334; *Columbia County v. King*, 13 Fla. 474; *State ex rel. Ahern v. Walsh*, 31 Neb. 476, 48 N. W. 263; *State ex rel. Munday v. Assessors*, 43 N. J. L. 340; *Moore v. State*, 43 N. J. L. 217, 39 Am. Rep. 558; *Homestead Cases*, 22 Gratt. 287, 12 Am. Rep. 507; *Von Hoffman v. Quincy*, 4 Wall. 549, 18 L. ed. 408; *Pond, Public Utilities*, §§ 91, 92; 2 *McQuillin, Mun. Corp.* § 759; 12 R. C. L. § 6, p. 179; 6 R. C. L. § 333, p. 340; *People ex rel. Metropolitan Street R. Co. v. State Tax Comrs.* 174 N. Y. 417, 63 L.R.A. 884, 105 Am. St. Rep. 674, 67 N. E. 69.

Judgments of courts of general jurisdiction may be collaterally attacked when a want of jurisdiction affirmatively appears from an inspection of the record.

15 R. C. L. § 374.

Messrs. T. A. Walters, Attorney General, and J. P. Pope, Assistant Attorney General, amici curiae.

The Public Utilities Commission of Idaho has the authority in law to fix the rates that defendant city should pay to plaintiff for water furnished to said city for fire purposes, street sprinkling, and

sewer flushing, regardless of the franchise provision in the ordinance providing for such free service.

*Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; *Milwaukee Electric R. & Light Co. v. Railroad Commission*, 238 U. S. 174, 59 L. ed. 1254, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820; *Puget Sound Traction Light & P. Co. v. Reynolds*, 244 U. S. 574, 61 L. ed. 1325, P.U.R.1917F, 57, 37 Sup. Ct. Rep. 705; *State ex rel. Webster v. Superior Ct.* 67 Wash. 37, L.R.A.1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78; *Raymond Lumber Co. v. Raymond Light & Water Co.* 92 Wash. 330, L.R.A.1917C, 574, P.U.R. 1916F, 437, 159 Pac. 133; *Public Service Electric Co. v. Public Utility Comrs.* 87 N. J. L. 128, P.U.R.1915C, 229, 93 Atl. 707; *Woodburn v. Public Service Commission*, 82 Or. 114, L.R.A.1917C, 98, P.U.R.1917B, 967, 161 Pac. 301, Ann. Cas. 1917E, 996; *Benwood v. Public Service Commission*, 75 W. Va. 127, L.R.A.1915C, 261, 83 S. E. 295; *Limonsira Co. v. Railroad Commission*, 174 Cal. 232, P.U.R.1917D, 183, 162 Pac. 1033; *Winfield v. Public Service Commission*, — Ind. —, P.U.R.1918B, 747, 118 N. E. 531; *Re Indianapolis Water Co.* (Ind.) P.U.R.1917E, 556; *Re Kent Water & Light Co.* (Ohio) P.U.R.1917A, 261; *Re United Fuel Gas Co.* (W. Va.) P.U.R. 1917A, 923; *Ben Avon v. Ohio Valley Water Co.* (Pa.) P.U.R.1917C, 390; *Re Mississippi Valley Teleph. Co.* (Ill.) P.U.R. 1917B, 368; *Re City Water Co.* 4 Mo. P. S. C. 140, P.U.R.1917B, 624.

Rice, J., delivered the opinion of the court:

In the month of January, 1904, the respondent city granted appellant's predecessors a franchise for the construction and operation of a water system in the city of Sandpoint. This franchise was subsequently assigned to appellant, and since the assignment appellant has continuously exercised the rights acquired thereunder. A schedule of rates was fixed in the franchise for various classes of private consumers, but a further provision was contained therein whereby the grantee was to furnish water to the city free of charge for street sprinkling and to the extent of its means in case of fire or other great necessity. In February, 1914, the respondent city commenced this proceeding before the Public Utilities Commission for the purpose of readjusting the water rates charged by appellant in the city of Sandpoint. On October 2, 1915, the Commission entered its

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order, which by its terms became effective November 1, 1915. In this order the rates to be charged for services rendered by the water company to private consumers were determined, and it was also ordered that water should no longer be furnished to the city of Sandpoint for street sprinkling or fire protection free of cost; and a rate of \$4.25 per month per hydrant for fire protection and 5 cents per thousand gallons for street sprinkling was fixed. When the water system was constructed, the city furnished and paid for the water hydrants as provided for in the franchise. The Commission by its order directed the city to transfer the fire hydrants to appellant, and directed appellant to credit the city with the value thereof as fixed by the Commission. The appellant furnished the city with water for seventy-four hydrants at all times subsequent to the taking effect of the said order, and credited the city with the value of the hydrants as so established. After the water rentals for the hydrants exceeded the amount which had been credited to the city for hydrants, bills for water were presented to the city and were paid for several months. The city, however, refused to pay the bills for water for the months of October and November, 1916, and thereupon this action was commenced by appellant to recover the same.

The issue raised by the answer relates to the authority of the Utilities Commission to revoke the right of the city to receive water free of charge under the franchise, and to fix a hydrant rental or rate for street sprinkling. A trial was had before the court without a jury, findings of fact and conclusions of law were made, and judgment entered in favor of the city. The appeal is from the judgment.

The court found that the franchise granted by the respondent to appellant's predecessors, with the acceptance thereof, constituted a contract, and that the contract remains in full force and effect; also, that the order of the Public Utilities Commission requiring the city to pay the water company the sum of \$4.25 per each calendar month for water furnished each hydrant, and in attempting and purporting to compel the respondent to pay appellant for street sprinkling and fire protection, was null and void and of no force or effect.

It is held uniformly and universally that the power to supervise and regulate rates or charges for services rendered by public utilities is an inherent function of government, and occupies a large place within the domain of the police powers of the state. The existence of this power does not depend at all upon the question as to whether or not it is being exercised by the

state at any particular time. *Idaho Power & Light Co. v. Blomquist*, 26 Idaho, 222, 141 Pac. 1083, Ann. Cas. 1916E, 282; *Woodburn v. Public Service Commission*, 82 Or. 114, L.R.A.1917C, 98, P.U.R.1917B, 967, 161 Pac. 391, Ann. Cas. 1917E, 996; *State ex rel. Webster v. Superior Ct.* 67 Wash. 37, L.R.A.1915C, 287, 120 Pac. 861, Ann. Cas. 1913D, 78; *Winfield v. Public Service Commission*, — Ind. —, P.U.R. 1918B, 747, 118 N. E. 531; *Manitowoc v. Manitowoc & N. Traction Co.* 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925; *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; *Milwaukee Electric R. & Light Co. v. Railroad Commission*, 238 U. S. 174, 59 L. ed. 1254, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820; *Benwood v. Public Service Commission*, 75 W. Va. 127, L.R.A.1915C, 261, 83 S. E. 295. Such power is properly exercised through a commission created by the legislature. *Idaho Power & Light Co. v. Blomquist*, supra.

In some cases it has been decided that the right of the state to exercise its power for a limited period had been abrogated by a binding contract. See *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; *Vicksburg v. Vicksburg Waterworks Co.* 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762. But when such abrogation is based upon an alleged contract, made through the agency of a municipality of the state, the power of the municipality so to bind the state must appear in clear and unmistakable language. All doubts are resolved against the existence of the authority so to contract and in favor of the reservation of the right to a continued and unhampered exercise of its police power by the state. *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 53 L. ed. 176, 29 Sup. Ct. Rep. 50; *Milwaukee Electric R. & Light Co. v. Railroad Commission*, 238 U. S. 174, 59 L. ed. 1254, P.U.R.1915D, 591, 35 Sup. Ct. Rep. 820; *Winfield v. Public Service Commission*, — Ind. —, P.U.R.1918B, 747, 118 N. E. 531; *Benwood v. Public Service Commission*, 75 W. Va. 127, L.R.A.1915C, 261, 83 S. E. 295; *Woodburn v. Public Service Commission*, 82 Or. 114, L.R.A.1917C, 98, P.U.R.1917B, 967, 161 Pac. 391, Ann. Cas. 1917E, 996; *Manitowoc v. Manitowoc & N. Traction Co.* 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925.

It may be fairly questioned whether article 15, §§ 1 and 2, and article 11, § 8, of the Constitution, are not limitations upon the power of the legislature, or any of its agencies, to contract in any manner or at any time to suspend the right of the state to exercise its police power in the

establishment of reasonable rates for the use of water sold, rented, or distributed by a water company, even for a limited period. *Pocatello v. Murray*, 21 Idaho, 180, 120 Pac. 812; *Tampa v. Tampa Waterworks Co.* 45 Fla. 609, 34 So. 631.

But without considering that question, our attention has not been called to any attempt upon the part of the legislature of this state to authorize municipalities to enter into contracts which will in any manner abridge this power of the state. The franchise must therefore be held to have been granted and accepted subject to the right of the state at any time to exercise its reserved police power in the matter of regulating rates. *Benwood v. Public Service Commission*, 75 W. Va. 127, L.R.A.1915C, 261, 83 S. E. 295; *Woodburn v. Public Service Commission*, 82 Or. 114, L.R.A. 1917C, 98, P.U.R.1917B, 967, 161 Pac. 391, Ann. Cas. 1917E, 996; *Winfield v. Public Service Commission*, — Ind. —, P.U.R. 1918B, 747, 118 N. E. 531; *Manitowoc v. Manitowoc & N. Traction Co.* 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925.

The requirement that the company should furnish water to the city free for sprinkling and fire purposes cannot be regarded either as a condition precedent or subsequent to the grant of the franchise. It does not appear in terms to have made such a condition. In any event, respondent could not be heard to question the right of the state to exercise its police power, on the ground that by so doing the state would impair the obligation of a contract. A municipal corporation is a creature of the law,—a mere governmental agency of the state. Its charter is not a contract with the state, and its inhabitants have no vested interest growing out of the charter, except such as may be granted by the Constitution itself or preserved by constitutional limitations.

In granting a franchise by which rates are fixed or determined, a municipal corporation is not exercising its own powers, but is exercising only such powers as have been conferred upon it by the state. These powers may be withdrawn at any time. A municipality has no vested right to the continued exercise of such powers, nor can it obtain a vested right in any contract entered into or property acquired through the exercise of such powers as against the right of the state, its creator, to assume complete control of its affairs. 19 R. C. L. 730, 731; 28 Cyc. 282 et seq.; *Collingswood Sewerage Co. v. Collingswood*, — N. J. L. —, P.U.R.1918C, 261, 102 Atl. 901.

The order of the Public Utilities Commission referred to having become final and operative, and no question being raised as

to the rendition of the service, judgment should have been rendered for the plaintiff in the court below. We express no opinion as to the validity of the order of the Commission directing the transfer of the hydrants by the city to the appellant, as this question is not within the issues raised by the pleadings.

The judgment is reversed, and the trial court is directed to make findings of fact and conclusions of law, and enter judgment in conformity herewith. Costs awarded to appellant.

Budge, Ch. J., and Morgan, J., concur.

**MISSOURI SUPREME COURT.**  
(Division No. 2.)

CITY OF ST. LOUIS, Resp.,

v.

HUGH ALLEN, Appt.

(— Mo. —, 204 S. W. 1083.)

**Constitutional law — municipal ordinance — regulation of traffic on streets.**

An ordinance requiring drivers of vehicles at all times to comply with any directions of the police force as to stopping, starting, approaching, or departing from any place, and as to the manner of taking up or setting down passengers, is unconstitutional as depriving persons of the equal protection of the laws.

For other cases, see *Constitutional Law, II. a, 1, in Dig. 1-52 N. S.*

(July 16, 1918.)

**A** PPEAL by defendant from a judgment of the Court of Criminal Correction of the City of St. Louis affirming a judgment of the Police Court overruling a motion to quash a complaint filed to recover a fine for alleged violation of an ordinance requiring drivers of vehicles to comply with orders of the police. Reversed.

Statement by Roy, C.:

Appellant was tried and fined in the police court of St. Louis. He appealed to the court of criminal correction and met the same fate. He has appealed to this court, a constitutional question being involved.

The complaint, omitting formal parts, is as follows:

Hugh Allen, to the City of St. Louis, Dr. To \$100 for the violation of an ordinance of said city entitled "An Ordinance in Revision of the General Ordinances of the City of St. Louis, Being Ordinance No. 26,653, §§ 1351, 1357, 1358," approved November 9, 1912.

**Note.**—As to validity of statute or ordinance for direction of street traffic by police officers, see annotation following this case, post, 1113; and references therein to annotations on related questions.

In this to wit: In the city of St. Louis and state of Missouri, on the 9th day of July, 1916, the said Hugh Allen did then and there drive a vehicle over and upon the streets of said city, and did fail to comply with the direction by voice or hand of a member of the police force as to stopping, starting, approaching, or departing from any place, to wit, in front of Metropolitan Building, Grand avenue and Olive street, contrary to the ordinance in such cases made and provided.

Section 1358 of the ordinance has no application to the case. The other two sections mentioned in that complaint are as follows:

"Sec. 1351. *Drivers to Comply with Orders of Police.*—Drivers must at all times comply with any direction by voice or hand, of any member of the police force, as to stopping, starting, approaching or departing from any place; the manner of taking up or setting down passengers or loading or unloading goods in any place."

"Sec. 1357. *Violating Traffic Regulations Misdemeanor; Penalty.*—Any person violating any of the foregoing provisions, rules and regulations shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not to exceed \$100."

In the court of criminal correction, and previous to the trial there, the defendant moved to quash the complaint on the ground that it did not state facts sufficient to constitute an offense under the ordinances of the city, and because said § 1351 of the ordinance is contrary to the 14th Amendment to the Constitution of the United States, in that it deprives the defendant of his liberty and property without due process of law, and deprives him of the equal protection of the law. The motion was overruled.

The affair out of which this prosecution arose occurred on Grand avenue in front of the Metropolitan Building, which fronts west on that avenue about 150 feet, and south on Olive street about the same distance. It is an eight-story office building, almost entirely occupied by professional men. About the middle of the west front

at the curb are two posts 23 feet apart, on each of which is the sign, "Don't stand between these posts." The defendant was the chauffeur of Mr. Leahy, one of his counsel in this case. On July 9, 1915, near 4 o'clock in the afternoon, the defendant drove his car to said entrance. The wife of his employer was in the car on her way to the office of her dentist in that building. The defendant backed his car so that the rear thereof was near the south post and most of the car was in front of the entrance at an angle of about 45 degrees. Backed against the north post was an express wagon extending directly into the street, and to some extent in front of the entrance, engaged in receiving and delivering packages. Cars were parked closely on both sides of the street at that point for a distance not definitely shown here. Nat B. Clark, the traffic officer at that point, testified that, after defendant had occupied that position fifteen or twenty minutes, the elevator starter in the Metropolitan Building asked him to make defendant move his car from the entrance. The officer testified:

"I went out and said: 'You will have to move your machine from the building here; you can't block this entrance.' He said, 'Where will I go?' I said, 'I don't know where you will go, but you will have to move.' And he said, 'Where will I park this car?' I said, 'You may have to go up to Washington or down on Lindell, but you can't stop here.' He said, 'Huh, the madam was in the building, and I will stay here until she comes down,' and I immediately placed him under arrest."

The elevator boy testified that, after defendant had been there fifteen or twenty minutes, he (witness) asked defendant to move, and that defendant said there was no other place to go, and that witness asked the officer to compel defendant to move.

The defendant, on the stand, said that, after he had been there about fifteen or twenty minutes, the elevator boy asked him to move, and that he (witness) told the boy to make the express wagons move then he would move, and that he told the officer the same thing. The arrest followed.

Messrs. Leahy, Saunders, & Barth, for appellant:

An automobile has, subject to valid statutory regulations, the same rights on the streets of a city as any other vehicle.

2 Elliott, Roads & Streets, 3d ed. § 1107, p. 647; 2 Dill. Mun. Corp. 5th ed. § 714, p. 1086; State v. Swagerty, 203 Mo. 517, 10 L.R.A.(N.S.) 601, 120 Am. St. Rep. 671, 102 S. W. 483, 11 Ann. Cas. 725; Hall v. Compton, 130 Mo. App. 675, 108 S. W.

1122; Daily v. Maxwell, 152 Mo. App. 415, 133 S. W. 351.

Travelers, whether on foot or in vehicles, have a right to stop along the ways, roads, or streets, for a reasonable time, for their own convenience in the ordinary course of business or social life; and they do not thereby lose their rights as travelers to the protection of constitutional guaranties to person and property.

2 Elliott, Roads & Streets, 3d ed. § 1100, p. 640; Smethurst v. Independent Cong. Church, 148 Mass. 261, 2 L.R.A. 695, 12 Am. St. Rep. 550, 19 N. E. 387; Odom v. Schmidt, 52 La. Ann. 2129, 28 So. 350; Lacey v. Winn, 3 Pa. Dist. R. 811; Mark v. Fritsch, 195 N. Y. 282, 22 L.R.A.(N.S.) 632, 133 Am. St. Rep. 800, 88 N. E. 380.

The ordinance in question attempts to confer upon the police officer the power to make traffic rules and regulations, and is void because a delegation of legislative power.

Seibel-Suessdorf Copper & I. Mfg. Co. v. Manufacturers' R. Co. 230 Mo. 59, 130 S. W. 288; St. Louis v. Howard, 119 Mo. 41, 41 Am. St. Rep. 630, 24 S. W. 770; State v. Williams (State v. Thompson) 160 Mo. 333, 54 L.R.A. 950, 83 Am. St. Rep. 468, 60 S. W. 1077.

The city neither has, nor could the legislature confer upon it, the right to delegate to its police officers the unlimited and unregulated power to improvise, make, or declare rules and regulations governing the use of its streets by owners or drivers of vehicles, or pedestrians.

2 Dill. Mun. Corp. 5th ed. § 665, p. 1000; St. Louis v. Edward Heitzberg Packing & Provision Co. 141 Mo. 375, 39 L.R.A. 551, 64 Am. St. Rep. 516, 42 S. W. 954; Elkhart v. Murray, 165 Ind. 304, 1 L.R.A.(N.S.) 940, 112 Am. St. Rep. 228, 75 N. E. 593, 6 Ann. Cas. 748; Hays v. Poplar Bluff, 263 Mo. 516, L.R.A.1915D, 595, 173 S. W. 676; Com. v. Roy, 140 Mass. 432, 4 N. E. 814; Cicero Lumber Co. v. Cicero, 176 Ill. 9, 42 L.R.A. 696, 68 Am. St. Rep. 155, 51 N. E. 758.

Sections 1351 and 1357 of the ordinance are in conflict with the Constitution of the state and the United States, because the liberty and property of the citizen are thereby subjected to deprivation and loss in an arbitrary manner, without notice, by arrest and fine, and are not due process, and deny the equal protection of the laws.

Freund, Pol. Power, 1st ed. § 611, p. 632; Clark v. Mitchell, 64 Mo. 564; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350.

Messrs. Charles H. Daues and H. A. Hamilton for respondent.

**Roy, C.**, filed the following opinion:

A building such as the Metropolitan must have an entrance from the street as well as from the sidewalk. It must have a mouth as all live creatures must have. That mouth must, as far as practically possible, be kept open and unobstructed. In this case 23 feet along the curb at the entrance was marked off between posts, and the placards on those posts warned all persons not to stand there. That space was an entrance, but not a place for parking vehicles. The express wagon was using a small part of it, not as standing ground, but for its entrance purposes. So far as appears, everyone but the defendant respected the rights of other people in respect to that entrance. The defendant appeared on the scene and claimed a right which no one else claimed or received, the right to stop at that entrance in spite of the remonstrance of its spokesman, the elevator boy, and in spite of the police. It is as if he should say: "It is so nice for the owners of this building, the city authorities, and all other persons to leave and keep this entrance open, leaving me as the only one entitled to close it and hold it ad libitum. I claim the special privilege under the Constitution which guarantees to me the equal protection of the laws. I even claim the right to tell the police to move other people and then come to me."

However meritorious the city's rights may be if properly presented, the ordinance relied on by the city in its complaint is invalid.

In *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239, the city ordinance provided that no one should erect a steam engine without the previous sanction of the mayor and council, and that any such engine so erected should be removed within six months after such permit should be revoked and notice given by the mayor. It was there held that the city by ordinance could prescribe regulations for the use of steam engines, but that it could not commit to the unrestrained will of a single officer the power arbitrarily to favor one individual in that respect and to impose his will on another. It was there said: "In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void."

That case is cited with approval in 1 Dill. Mun. Corp. 4th ed. § 321.

In *Richmond v. Dudley*, 129 Ind. 112, 13 L.R.A. 587, 28 Am. St. Rep. 180, 28

N. E. 312, it was held that city ordinances must specify rules and conditions to be observed in the conduct of business, and must allow all citizens the same privileges under those rules, and must not empower an officer to arbitrarily discriminate between individuals in that respect. That case is cited with approval in *Elkhart v. Murray*, 165 Ind. 304, 1 L.R.A.(N.S.) 940, 112 Am. St. Rep. 228, 75 N. E. 593, 6 Ann. Cas. 748. That rule is affirmed in *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 42 L.R.A. 696, 68 Am. St. Rep. 155, 51 N. E. 758, and the long list of cases there cited.

In *Hays v. Poplar Bluff*, 263 Mo. 516, L.R.A.1915D, 595, 173 S. W. 676, it was held in banc that, though a city can prescribe "fire limits," yet it has no power to ordain that no building shall be constructed of the prescribed materials without the permission of the mayor and council, and that such permission shall not be given without the written consent of all persons holding property in the block. It was there said that in such matters the ordinance must make rules applicable to all alike, and that such matters cannot be left to the arbitrary will of any one. That case cites with approval the Indiana cases above mentioned.

The ordinance here involved puts the citizen in the arbitrary power of the officer, regardless of the circumstances of the case. Its invalidity is so glaring that the respondent has not cited any authority to uphold it. In *Bessones v. Indianapolis*, 71 Ind. 189, and in *Elkhart v. Murray*, 165 Ind. 304, 1 L.R.A.(N.S.) 940, 112 Am. St. Rep. 228, 75 N. E. 593, 6 Ann. Cas. 748, supra, it was held that such ordinances are violative of the constitutional provision which guarantees the equal protection of the laws. It was there said that what the legislature cannot do, it cannot authorize a municipal corporation to do.

In our opinion the ordinance in question is subject to the objection that it may deprive persons of the equal protection of the laws; and that, though the city may have a most meritorious case, it cannot be based on that invalid ordinance.

The judgment is reversed.

**White, C.**, concurs.

**Per Curiam:**

The foregoing opinion of **Roy, C.**, is adopted as the opinion of the court.

All the judges concur.



**Annotation—Validity of statute or ordinance for direction of street traffic by police officers.**

Although the decision in *St. Louis v. Allen*, ante, 1110, holding the traffic ordinance invalid because it vests in police officers the power to discriminate between individuals, purports to rest upon constitutional principles that have been applied in cases somewhat analogous, it may be questioned whether those principles are not misapplied to a subject which, like the direction of street traffic, does not admit of rigid regulations that will operate automatically and with entire impartiality without the intervention of a directing intelligence. Perhaps as applied to the facts of the particular case, involving, as it did, the right to keep automobiles standing at a given point in the street, the ordinance vested an unnecessary discretion and power of discrimination in the police officers, but as applied to the flow of traffic at street corners and other congested points, it seems to confer upon police officers no greater discretion or power of discrimination than the necessities of the situation require.

The regulation of street traffic being undoubtedly a proper subject for the exercise of the police power, it would seem that an individual must forego some of the strict technical rights under general constitutional guaranties which are inconsistent with the effec-

tive operation of that power. While, as shown in the opinion and some of the notes subsequently referred to, the courts have frequently denounced statutes or ordinances because they unnecessarily vested too extensive a power of discretion or discrimination in the administering officers, it will be seen that, from the nature of the subject-matter of the statutes or ordinances involved in those cases, there was not the same necessity that exists in the case of traffic ordinances for the vesting of such discretion and power of discrimination in police officers.

As to right of municipal corporation to prohibit loitering on public streets, see note in *St. Louis v. Gloner*, 15 L.R.A. (N.S.) 973.

As to validity and effect of regulation as to parking or leaving automobiles standing in street, see annotation to *Pugh v. Crawford*, L.R.A.1917F, 345.

For signal of traffic officer as affecting duty of travelers to exercise care, see annotation to *Melville v. Rollwage*, L.R.A.1917B, 133.

As to violation of statute or ordinance giving one vehicle right of way as against another as affecting liability for injury, see annotation to *Erwin v. Traud*, L.R.A.1917D, 690. J. H. B.

**NEBRASKA SUPREME COURT.**

**STATE OF NEBRASKA EX REL. SOPHIA RENGSTORF**

**v.**

**GEORGE R. WEBER, Appt.**

(— Neb. —, 166 N. W. 120.)

**Bastardy — contract not to prosecute.**

The mother of an illegitimate child may, by a fair contract of settlement providing for the support of said child, executed before any complaint is filed in court, exclude herself from instituting bastardy proceedings against the putative father, who performs the contract on his part. For other cases, see *Bastardy*, in *Dig. 1-52 N. S.*

(January 5, 1918.)

Headnote by **PARRIOTT, C.**

**Note.**—The right of the parties to compromise or settle bastardy proceedings is discussed in the annotation following *Burr v. Phares*, L.R.A.1918D, 291.

L.R.A.1918F.

**A** PPEAL by defendant from an order of the District Court for Douglas County in favor of plaintiff in a bastardy proceeding. Reversed.

The facts are stated in the Commissioner's opinion.

**Mr. Arthur F. Mullen, for appellant:**

A fair settlement by the mother with the alleged father, founded upon sufficient consideration, precludes her from subsequently maintaining a proceeding against him.

5 Cyc. 647; *Spalding v. Welch*, 1 Root, 319; *Hendrix v. People*, 9 Ill. App. 42; *Black Hawk County v. Cotter*, 32 Iowa, 125; *Burgen v. Straughan*, 7 J. J. Marsh. 583; *Ingwaldson v. Skrivseth*, 7 N. D. 388, 75 N. W. 772; *Rohrheimer v. Winters*, 126 Pa. 253, 17 Atl. 603; *Humphrey v. Kasson*, 26 Vt. 760; *Sherman v. Johnson*, 20 Vt. 567; *State ex rel. Mundt v. Meier*, 140 Iowa, 540, 118 N. W. 792.

The state cannot, under the guise of a police power, prevent capable persons from entering into lawful contracts.

Cooley, Const. Lim. 6th ed. p. 484; State v. Loomis, 115 Mo. 307, 21 L.R.A. 789, 22 S. W. 350; State ex rel. Hartigan v. Sperry & H. Co. 94 Neb. 785, 49 L.R.A. (N.S.) 1123, 144 N. W. 795.

Defendant is liable on the contract for the amount that he agreed to pay. If he had given a promissory note, recovery could be had on the note, and it follows as a matter of course, that he is liable for the amount stipulated in the contract.

Hays v. McFarland, 32 Ga. 699, 79 Am. Dec. 317; Harter v. Johnson, 16 Ind. 271; Burgen v. Straughen, 7 J. J. Marsh. 583; Self v. Clark, 55 N. C. (2 Jones, Eq.) 309; Griffin v. Chriswesser, 84 Neb. 196, 120 N. W. 909.

Messrs. Bigelow & Schrempp and Hugh La Master, for appellee:

A private agreement of the parties, even though made prior to the institution of statutory proceedings, is wholly futile as a bar to said proceedings.

Peters v. Killian, 63 Neb. 57, 87 N. W. 1049; State ex rel. Peters v. McBride, 64 Neb. 547, 90 N. W. 209; Perkins v. Mobley, 4 Ohio St. 669.

The sole object and purpose of the statute is to provide for the care and maintenance of the child.

Cottrell v. State Bank, 9 Neb. 125, 1 N. W. 1008; Jones v. State, 14 Neb. 210, 14 N. W. 901; Munro v. Callahan, 41 Neb. 849, 60 N. W. 97; Stopper v. Nierle, 45 Neb. 105, 63 N. W. 382; Re Walker, 61 Neb. 803, 86 N. W. 510, 12 Am. Crim. Rep. 343; Parker v. Nothomb, 65 Neb. 315, 60 L.R.A. 699, 91 N. W. 395, 93 N. W. 851; Griffin v. Chriswesser, 84 Neb. 196, 120 N. W. 909; State ex rel. Peters v. McBride, 64 Neb. 547, 90 N. W. 209.

Parriott, C., filed the following opinion:

The plaintiff filed her complaint in Douglas county charging the defendant with being the father of her bastard child. The case was tried to a jury, which found the defendant guilty. The court entered an order requiring the defendant to pay the sum of \$100 per year for a period of fifteen years for the support of the child. Defendant appeals.

The defendant, at the time of the trial in the district court, introduced a written contract entered into between himself and the plaintiff prior to the time of his arrest, which is as follows:

Signed in Duplicate.

This agreement made and entered into by and between Sophia Rengstorf and George Weber, to wit: Whereas the said Sophia Rengstorf believes she is now pregnant with a child, and when born will be a bastard,

and that George Weber, she believes, is the father of said child, in consideration of the alleged state of facts, the said George Weber hereby agrees to pay the said Sophia Rengstorf, in full of all claims or demands of whatsoever kind she may have, the following amounts, to wit: Twenty-five dollars cash, in thirty days, \$100 at the birth of the child, and \$8 per month for the period of three years, payable on the 1st day of each and every month during said time.

In witness whereof, we have hereunto set our hands this \_\_\_\_\_ day of June, A. D. 1914.

George Weber.

Sophia Rengstorf.

The defendant relies for reversal upon several assignments of error, all of which depend upon the one question: Can the parents of an illegitimate child enter into a valid contract for the support of said child, and is such a contract a bar against bastardy proceedings under our statute by a party to such contract? The plaintiff cites the cases of Peters v. Killian, 63 Neb. 57, 87 N. W. 1049, and State ex rel. Peters v. McBride, 64 Neb. 547, 90 N. W. 209, in support of the contention that the contract between the parties is illegal. In these cases this court did not pass upon the exact question presented in the case at bar. In the case of Peters v. Killian, supra, the court held: "Proceedings in such cases [bastardy] are purely statutory, and the courts can try such issues and make such orders in them as the statute contemplates, and none other. A settlement between the parents of an illegitimate child, in order to be operative as a stay or termination of such proceedings, must be of such nature and made and attested in such manner as the act prescribes, and the district court can take judicial cognizance of none other. In that proceeding the court cannot try the issue whether the father or the mother of the child is the more suitable person to be intrusted with its custody."

The above case is distinguishable from the case at bar in the following particulars: In that case the defendant admitted the paternity of the child. The alleged agreement was only verbal, no part of which had been performed; the consideration alleged was so manifestly inadequate that it could not be considered a reasonable settlement, and in addition to these facts the issue as to the custody of the child was involved,—all of which gave rise to the announcement of the rule of the case as above quoted. The case of State ex rel. Peters v. McBride, supra, is not in point, for the reason that the parties therein attempted to

make a settlement after the cause had been tried and a judgment rendered, which facts prompted the court to announce the following rule: "The complainant has no authority to compromise a judgment rendered in bastardy proceedings."

It seems to be a universal rule that the parties to a bastardy proceeding cannot compromise without the approval of the court after the court has once acquired jurisdiction in the matter. The reason for this rule is obvious. The court having acquired jurisdiction, and especially after judgment as in the above case, if the parties were permitted to compromise the judgment, the matter would stand adjudicated and the defendant could never again be called upon to answer in court, however small the payment he might have made to perfect the settlement; but in a case of settlement out of court, defendant is not relieved of further liability, unless the settlement is a fair and reasonable one. In the case of *Griffin v. Chriswiser*, 84 Neb. 196, 120 N. W. 909, the court recognized a settlement in a bastardy case, and held that such a settlement was a sufficient consideration for a promissory note. It was said in the opinion: "The plaintiff had a right to make an agreement not to prosecute defendant's son under the bastardy act, and to accept in consideration for said promise a reasonable sum for the expenses of her lying-in, and for the maintenance, care and nurture of her illegitimate child."

So, it will be seen by the above decisions that this court is not committed to the rule contended for by the plaintiff and followed by the trial court. The rule announced in 5 Cyc. 647, is as follows: "A fair settlement by the mother with the alleged father, founded upon a sufficient consideration, precludes her from subsequently maintaining a proceeding against him." *Coleman v. Frum*, 4 Ill. 378; *Hendrix v. People*, 9 Ill. App. 42.

It is conceded that the parties in the case at bar were of full legal age and competent. The contract was not obtained by fraud. The defendant had complied therewith by making certain payments thereon. In 7 C. J. 969, the following rule is laid down: "Except when forbidden by statute, the mother of an illegitimate child may, by a fair settlement with the putative father, on a reasonable consideration, preclude herself . . . from the right to maintain a bastardy proceeding."

Our statute cannot be construed as forbidding such settlements. On the contrary, it was evidently the intention of the legislature to encourage them. The primary

object of the statute is to induce the father of the illegitimate child to make settlement which will insure the support of the child, and in § 357, Rev. Stat. 1913, the mother of the child is designated as the one to be satisfied with the agreement.

It would be against public policy and a dangerous rule to announce that settlements made out of court are without merit and legal effect. Until the father of an illegitimate child is known, the mother is liable for its support. When the law makes the mother primarily responsible for its support, why should she be deprived of the right to contract with its father if an opportunity is given her to obtain a good settlement? While the statute provides for a settlement after the court has acquired jurisdiction and before judgment, it is silent as to settlements made between the parties before the arrest. As the proceedings are civil, no reason can be shown why a compromise or settlement should not be made therein the same as in all other civil cases; and such a contract, when made, is not in violation of public policy or against sound morals, as a bastardy proceeding is not a bar against criminal prosecution. *State v. Veres*, 75 Ohio St. 138, 78 N. E. 1005. Where the parents of an illegitimate child are of full age and competent, it is their legal right to enter into a contract of settlement in which they provide for the support of said child. By such a contract the mother excludes herself from instituting bastardy proceedings against the putative father, unless such contract is set aside for good cause in an action brought for that purpose in the proper court.

It has been suggested that the county authorities have an interest that cannot be barred by contract. Section 358, Rev. Stat. 1913, provides that the county board may institute proceedings against the father of the bastard child if the mother fails or refuses to do so, but this is upon the theory that said child might become a public charge; but where the support of the child has been provided for by contract, it would not be necessary for the county to enforce this section. No contract between the parents would exclude the public authorities from instituting proceedings for the child's support if it became a public charge, but such action would not accrue if the child's support were otherwise provided for. For that reason it is not necessary to discuss further this phase of the question in connection with this case.

For the above reasons we recommend that the judgment of the District Court be re-

versed, and the cause remanded for further proceedings.

**Per Curiam:**

For the reasons stated in the foregoing opinion, the judgment of the District Court

is reversed, and the cause remanded for further proceedings, and this opinion is adopted by and made the opinion of the court.

Petition for rehearing denied.

**IOWA SUPREME COURT.**

**NANCY BELL RICHEY**

**v.**

**SOVEREIGN CAMP OF WOODMEN OF  
THE WORLD, Appt.**

(— Iowa, —, 168 N. W. 276.)

**Insurance — change of by-law — death of absentee.**

1. A change of by-law of a mutual benefit society so as to prevent proof of death by seven years' absence is invalid, although the insured has agreed to be bound by by-laws to be adopted.

*For other cases, see Insurance, III. a, in Dig. 1-52 N. S.*

**Estoppel — complying with illegal by-law.**

2. A beneficiary in a mutual benefit certificate who complies for a time with the requirements of an illegal by-law requiring continued payment of dues after disappearance of the member is not thereby estopped from discontinuing payments and recovering the amount due on the certificate.

*For other cases, see Insurance, V. a, in Dig. 1-52 N. S.*

**Same — inducement to make payments — effect.**

3. Inducement by the agent of a mutual benefit society to continue payments of dues after knowledge of both parties that insured had disappeared will estop the society from relying on the payments as a defense to a suit on the certificate prior to

**Note.** — The validity and effect of a by-law of a mutual benefit society refusing to pay benefit upon presumption of death from seven years' absence is discussed in the notes to *Keith v. Modern Woodmen, L.R.A. 1915B, 793*, and *Hannon v. Grand Lodge, A. O. U. W. L.R.A. 1917C, 1032*.

Generally, as to change of by-laws, see *L.R.A. Indexes* under the title "Insurance," subtitle, "Constitution, rules and by-laws."

Generally as to presumption of death from absence, see note in *L.R.A. 1915B, 729*, and other notes cited in the *L.R.A. Indexes* under the title "Evidence," subtitles, "Presumptions and burden of proof;" "Death, survivorship, suicide."

As to who are dependents within statute or rules defining beneficiaries of mutual benefit societies, see notes in 2 *L.R.A. (N.S.) 653*; 36 *L.R.A. (N.S.) 208*; 37 *L.R.A. (N.S.) 1191*; and 51 *L.R.A. (N.S.) 726*.

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the termination of the life expectancy of the member, as provided by an amended by-law of the society.

*For other cases, see Insurance, V. b, 5, a, in Dig. 1-52 N. S.*

**Insurance — proof of loss — sufficiency.**

4. Proof showing disappearance of insured and absence for a period of seven years is sufficient to warrant a recovery under a mutual benefit certificate where insurer took the unequivocal position that it was not liable until actual death was shown or the life expectancy of insured had expired.

*For other cases, see Insurance, VI. a, in Dig. 1-52 N. S.*

**Evidence — death — sufficiency.**

5. Evidence of seven years' absence without communication or notice of continued life is sufficient to support a finding of death of one of good habits who on former absences had written home at frequent intervals.

*For other cases, see Evidence, XII. f, in Dig. 1-52 N. S.*

**Insurance — dependent — aunt.**

6. The aunt of an orphan with whom he lived for a period of ten years is not his dependent within the meaning of a mutual benefit certificate merely because he contributed a portion of his earnings to her.

*For other cases, see Insurance, II. b, in Dig. 1-52 N. S.*

**Same — beneficiary — who may be.**

7. A mutual benefit society may accept a beneficiary authorized by statute although not within the class allowed by its by-laws. *For other cases, see Insurance, II. b, in Dig. 1-52 N. S.*

**Appeal — form of judgment.**

8. A judgment will not be reversed because not of a form the court was authorized to enter, if it was within a prayer not objected to in the trial court.

*For other cases, see Appeal and Error, VII. j, 8, in Dig. 1-52 N. S.*

**Insurance — action on certificate — defense.**

9. That an assessment the proceeds of which a mutual benefit society is entitled to tender in satisfaction of a certificate would produce less than the face of the certificate is a matter of defense in an action on the certificate.

*For other cases, see Insurance, VI. e, in Dig. 1-52 N. S.*

(June 27, 1918.)

**A**PP<sup>EAL</sup> by defendant from a judgment of the District Court for Polk County in favor of plaintiff in an action brought to recover the amount alleged to be due on a benefit certificate. Affirmed.

The facts are stated in the opinion.

Messrs. Frank H. Dewey and Arthur H. Burnett, for appellant:

The evidence submitted does not show facts sufficient to establish the presumption of death on account of absence.

8 R. C. L. 707; Hitz v. Ahlgren, 170 Ill. 60, 48 N. E. 1068; Modern Woodmen v. Gerdorn, 72 Kan. 391, 2 L.R.A.(N.S.) 809; 82 Pac. 1100, 7 Ann. Cas. 570; Seeds v. Grand Lodge, A. O. U. W. 93 Iowa, 175, 61 N. W. 411; Sherod v. Ewell, 104 Iowa, 255, 73 N. W. 493.

The plaintiff does not come within the provisions of the constitution of the defendant association regarding beneficiaries, and is not entitled to benefits as a beneficiary, nor to maintain this action, it being admitted that she was not a blood relative.

Dunbar v. Royal League, 184 Ill. App. 1; Palmer v. Welch, 132 Ill. 141, 23 N. E. 412; Sowersby v. Royal League, 159 Ill. App. 626; Royal League v. Shields, 251 Ill. 250, 36 L.R.A.(N.S.) 208, 96 N. E. 45; Supreme Lodge, N. E. O. P. v. Hine, 82 Conn. 315, 73 Atl. 791; Steele v. Fraternal Tribunes, 215 Ill. 190, 106 Am. St. Rep. 160, 74 N. E. 121; Krause v. Modern Woodmen, 133 Iowa, 199, 110 N. W. 452; 1 Bacon, Ben. Soc. 4th ed. §§ 83, 214.

Nor was the plaintiff a dependent on this member.

Royal League v. Shields, 251 Ill. 250, 36 L.R.A.(N.S.) 208, 96 N. E. 45; McCarthy v. Supreme Lodge, N. E. O. P. 153 Mass. 314, 11 L.R.A. 144, 25 Am. St. Rep. 637, 26 N. E. 866; 1 Bacon, Ben. Soc. 4th ed. § 336.

It is not in the power of the association or a member or any agent of the association to alter the provisions of the charter respecting those who may be beneficiaries.

1 Bacon, Ben. Soc. 4th ed. § 214; Kentucky Masonic Mut. L. Ins. Co. v. Miller, 13 Bush, 489; Supreme Council, A. L. H. v. Perry, 140 Mass. 589, 5 N. E. 634; Dunbar v. Royal League, 184 Ill. App. 1.

The by-laws of the defendant society were and are a part of the contract of membership between Harry A. Richey and the society.

Fitzgerald v. Metropolitan Acci. Asso. 106 Iowa, 457, 76 N. W. 809; Ury v. Modern Woodmen, 149 Iowa, 706, 127 N. W. 665.

Members of a fraternal benefit society are bound to take notice of and be governed by the by-laws.

Fitzgerald v. Metropolitan Acci. Asso.

and, Ury v. Modern Woodmen, supra; Hexon v. Knights of Maccabees, 140 Iowa, 41, 117 N. W. 19; Supreme Lodge, F. B. v. Price, 27 Cal. App. 607, 150 Pac. 803.

Where the contract of insurance provides that by-laws adopted after the making of the contract are a part of that contract the insured is bound to take notice of them and be governed thereby.

Fitzgerald v. Metropolitan Acci. Asso. supra; Hobbs v. Iowa Mut. Ben. Asso. 82 Iowa, 107, 11 L.R.A. 290, 31 Am. St. Rep. 466, 47 N. W. 993; Norton v. Catholic Order of Foresters, 138 Iowa, 464, 24 L.R.A.(N.S.) 1030, 114 N. W. 893.

When the contract so provides, by-laws enacted after the issuance of the certificate of membership become a part of the contract with the same force and effect as if enacted at the time of membership, and are binding upon both insured and the beneficiary.

Norton v. Catholic Order of Foresters, supra; Ross v. Modern Brotherhood, 120 Iowa, 692, 95 N. W. 207; 1 Bacon, Ben. Soc. 4th ed. § 228.

And this is true although other restrictions and provisions are placed upon the member.

House v. Modern Woodmen, 165 Iowa, 607, 146 N. W. 817; Norton v. Catholic Order of Foresters, supra; Ross v. Modern Brotherhood, 120 Iowa, 692, 95 N. W. 207; Ury v. Modern Woodmen, 149 Iowa, 706, 127 N. W. 665.

Where the member agrees to obey and conform to subsequently enacted laws as well as those existing at the time, or the by-laws themselves contain provision for their alteration, a change regularly made and not unfair of itself will be valid and binding, although it may seem to impair vested rights.

Norton v. Catholic Order of Foresters, 138 Iowa, 464, 24 L.R.A.(N.S.) 1030, 114 N. W. 893; Supreme Lodge, K. P. v. Knight, 117 Ind. 489, 3 L.R.A. 409, 26 N. E. 483; Ellerbe v. Faust, 119 Mo. 663, 25 L.R.A. 149, 25 S. W. 390.

A by-law which does not interfere with a vested right, but which relates to procedure or provides a rule of evidence, is reasonable.

Roeh v. Men's Protective Asso. 164 Iowa, 199, 51 L.R.A.(N.S.) 221, 145 N. W. 479; Kelly v. Supreme Council, C. M. B. A. 46 App. Div. 79, 61 N. Y. Supp. 394; McGovern v. Brotherhood of Locomotive F. & E. 31 Ohio C. C. 243; Claudy v. Royal League, 259 Mo. 92, 168 S. W. 593; Apitz v. Supreme Lodge, K. L. H. 274 Ill. 196, L.R.A.1917A, 183, 113 N. E. 63; Royal Arcanum v. Vitathum, 128 Md. 523, L.R.A.1917A, 179, 97

Atl. 923; *Ulman v. Supreme Commandery*, U. O. G. C. 220 Mass. 422, 107 N. E. 960.

The change in the by-law from the one in force at time of Richey's disappearance to that in effect at the expiration of the seven-year period is not material, and such change as there appears is in favor of the member and the beneficiary.

*Ury v. Modern Woodmen*, 140 Iowa, 709, 127 N. W. 665; *Curtis v. Modern Woodmen*, 169 Wis. 303, 150 N. W. 417.

Plaintiff had no vested interest in the benefits provided for in this certificate until after the death of the insured and the payment had become due as provided therein.

*Holden v. Modern Brotherhood*, 151 Iowa, 673, 132 N. W. 329.

After-enacted by-laws, modifying or making reasonable amendments to the contract between the insurer and the member, are sustained in nearly all the courts.

*Fraternal Union v. Zeigler*, 145 Ala. 267, 39 So. 751; *Caldwell v. Grand Lodge*, U. W. 148 Cal. 195, 2 L.R.A.(N.S.) 653, 113 Am. St. Rep. 219, 82 Pac. 781, 7 Ann. Cas. 356; *Head Camp, W. W. v. Irish*, 23 Colo. App. 85, 127 Pac. 918; *Grand Lodge A. O. U. W. v. Burns*, 84 Conn. 356, 80 Atl. 157; *Union Fraternal League v. Johnson*, 124 Ga. 902, 53 S. E. 241; *Fullenwider v. Supreme Council*, R. L. 180 Ill. 621, 72 Am. St. Rep. 239, 54 N. E. 485; *Knights of Macabees v. Nelson*, 77 Kan. 629, 95 Pac. 1052; *Daughtry v. Knights of Pythias*, 48 La. Ann. 1203, 55 Am. St. Rep. 310, 20 So. 712; *Supreme Conclave, I. O. H. v. Rehan*, 119 Md. 92, 46 L.R.A.(N.S.) 308, 85 Atl. 1035, Ann. Cas. 1914D, 58; *Pain v. Société St. Jean Baptiste*, 172 Mass. 321, 70 Am. St. Rep. 287, 52 N. E. 502; *Brown v. Great Camp*, K. M. M. 167 Mich. 123, 132 N. W. 562; *Dornes v. Supreme Lodge*, K. P. 75 Miss. 466, 23 So. 191; *Claudy v. Royal League*, 259 Mo. 92, 168 S. W. 593; *Farmers' Mut. Ins. Co. v. Kinney*, 64 Neb. 808, 90 N. W. 926; *Supreme Council, A. L. H. v. Adams*, 68 N. H. 236, 44 Atl. 380; *Hutchinson v. Supreme Tent*, K. M. 68 Hun, 355, 22 N. Y. Supp. 801; *Green v. Hartford L. Ins. Co.* 139 N. C. 309, 1 L.R.A.(N.S.) 623, 51 S. E. 887, 4 Ann. Cas. 360; *Tisch v. Protected Home Circle*, 72 Ohio St. 233, 74 N. E. 188; *Hinea v. Modern Woodmen*, 41 Okla. 135, L.R.A.1915A, 264, 137 Pac. 675; *Chambers v. Supreme Tent*, K. M. 200 Pa. 244, 86 Am. St. Rep. 716, 49 Atl. 784; *Supreme Lodge, K. P. v. LaMalta*, 95 Tenn. 157, 30 L.R.A. 838, 31 S. W. 493; *Eversberg v. Supreme Tent*, K. M. 33 Tex. Civ. App. 549, 77 S. W. 246; *Fugure v. Mutual Soc.* 46 Vt. 362; *Plunkett v. Supreme Conclave*, I. O. H. 105 Va. 643, 55 S. E. 9; *Klein v. Knights & Ladies of Secur-*

*ity*, 79 Wash. 173, 140 Pac. 72; *Loeffler v. Modern Woodmen*, 100 Wis. 79, 75 N. W. 1012; *Supreme Lodge, F. U. v. Light*, 115 C. C. A. 501, 105 Fed. 903; *Wright v. Minnesota Mut. L. Ins. Co.* 193 U. S. 657, 48 L. ed. 832, 24 Sup. Ct. Rep. 549.

Facts, which if established, show nothing more than a presumption of death, due to absence, are not sufficient to prove actual death.

8 R. C. L. 707; 4 Wigmore, Ev. § 2531; *Davie v. Briggs*, 97 U. S. 628, 24 L. ed. 1086; *Tisdale v. Connecticut Mutual L. Ins. Co.* 26 Iowa, 170, 96 Am. Dec. 136; *Carpenter v. Modern Woodmen*, 160 Iowa, 611, 142 N. W. 411.

Plaintiff having brought her case as an equity action, seeking to compel an assessment for the payment of her claim, had no right to a money judgment, but only for a decree ordering the officers of the defendant association to levy an assessment.

*Sleight v. Supreme Council*, M. T. 121 Iowa, 724, 96 N. W. 1100; *Rambousek v. Supreme Council*, M. T. 119 Iowa, 263, 93 N. W. 277.

Mr. C. S. Cooter, for appellee:

There is evidence to establish presumption of death after disappearance for seven years.

*Tisdale v. Connecticut Mut. L. Ins. Co.* 26 Iowa, 170, 96 Am. Dec. 136, 28 Iowa, 12; *Magness v. Modern Woodmen*, 146 Iowa, 1, 123 N. W. 169; *Larson v. Lund*, 109 Minn. 372, 123 N. W. 1070; *Benton v. Brotherhood of R. Brakemen*, 146 Ill. 570, 34 N. E. 939.

Subsequently enacted by-laws agreed to by the insured at the time of making his contract of insurance are not binding if they affect his material rights, and can only bind him as to form of government, changes in organization, etc.

*Sieverts v. National Benev. Asso.* 95 Iowa, 710, 64 N. W. 671; *Pokrefsky v. Detroit Firemen's Fund Asso.* 121 Mich. 456, 80 N. W. 240; *Tebo v. Supreme Council*, R. A. 89 Mich. 3, 93 N. W. 513; *McLaughlin v. Sovereign Camp*, W. W. 97 Neb. 71, L.R.A. 1915B, 756, 149 N. W. 112, Ann. Cas. 1917A, 79.

A by-law of a fraternal order, providing that the disappearance of a member from his place of residence for any length of time shall not be presumptive evidence of his death, adopted after the issuance of a benefit certificate, is inapplicable to an action on a certificate, based upon the member's death, because he has not been heard of for seven years after his disappearance from his home.

*Samberg v. Knights of Modern Macca-*

bees, 158 Mich. 568, 133 Am. St. Rep. 396, 123 N. W. 25; Knights Templars' & M. Life Indemnity Co. v. Jarman, 44 C. C. A. 93, 104 Fed. 638; Supreme Council, A. L. H. v. Getz, 50 C. C. A. 153, 112 Fed. 119; Spencer v. Grand Lodge, A. O. U. W. 22 Misc. 147, 48 N. Y. Supp. 590; Gaut v. American Legion of Honor, 107 Tenn. 603, 55 L.R.A. 465, 64 S. W. 1070; Bragaw v. Supreme Lodge, K. L. H. 128 N. C. 354, 54 L.R.A. 602, 38 S. E. 905.

The defendant, with knowledge of the relationship of beneficiary to the insured, having accepted all dues and assessments, is estopped from denying liability on the certificate, because of the want of blood relationship.

29 Cyc. 114.

Salinger, J., delivered the opinion of the court:

I. In March, 1895, the defendant issued a benefit certificate to one Harry A. Richey. This certificate was accepted with a provision that the same should be liable to forfeiture if the assured should fail to comply with the "conditions, constitutions, fundamental laws, and such by-laws as are or may be adopted" by the insuring society. Some four years after what is claimed to be the disappearance of Richey the by-laws were made by the society which provide that it shall be a binding condition of the certificate that:

"The absence or disappearance of the member from his last-known place of residence for any length of time shall not be sufficient evidence of the death of such member, and no right shall accrue under his certificate of membership to a beneficiary or beneficiaries, nor shall any benefits be paid until proof has been made of the death of the member while in good standing.

"The absence or disappearance of the member herein named, whether admitted heretofore or hereafter, from his last-known place of residence and unheard of, shall not be regarded as any evidence of the death of such member, nor give or create any right to recover any benefits on any certificate or certificates issued to such member, or on account of such membership, in the absence of the proof of his actual death, aside from and unassisted by any presumption arising by reason of such absence or disappearance, until the full time of his life expectancy at the time he disappears, according to the Carlyle Table of Life Expectancy, as compiled, and then only in case all assessments, dues, special assessments, and all other sums now or hereafter required under the laws of the state, be paid on behalf of such member within the time required until the ex-

piration of the term of such life expectancy. And the conditions of this certificate shall operate and be controlled as a waiver of any statute of any state or country of any rule of the common law or any state or country to the contrary."

The appellant contends that this change in by-law is binding. The trial court held otherwise. Upon the decision of this question depends whether many things urged in argument pro and con need consideration.

There are many decisions, quite a few in our own reports, wherein changes of by-laws made after the insurance first becomes effective are upheld on the ground that the change made is a reasonable one; there having been an advance agreement to be bound by future changes. In the case before us there was such an advance agreement. But all this is not controlling; for here the question is whether, though future changes are authorized by contract, a change which is either unreasonable or violates the public policy of the state can be sustained, and whether the change asserted here is either unreasonable or violative of statute or public policy.

II. There was an advance agreement that the obligation of the society was conditioned upon compliance by the member with the "conditions, constitutions, fundamental laws, and such by-laws as are or may be adopted" by the society. But it remains to be seen what the scope of such an advance agreement is. All by-laws must be reasonable and consistent with the general principles of the law of the land, and these are to be determined by the courts when a case is properly before them. Bacon, Ben. Soc. (1888) § 82. An expressly conferred power to enact by-laws makes a change binding only as to benefits derived from mere membership, and not as to an independent contract made with the association. *Farmers Mut. Hail Ins. Co. v. Slattery*, 115 Iowa, 410, 88 N. W. 949. An amendment of a by-law in a hail insurance policy which exempts the company from liability for loss occasioned by the blowing of snow and hail is not binding. It introduces new terms and conditions into the original contract which will bind the insured only if he assents thereto. *Jordon v. Iowa Mut. Tornado Ins. Co.* 151 Iowa, 73, 130 N. W. 177, Ann. Cas. 1913A, 266. We say in *Fort v. Iowa Legion of Honor*, 146 Iowa, 195, 123 N. W. 224, that: "Many courts have held that, even where there is an agreement on the part of the assured to be bound by subsequent changes, the society cannot make essential amendments affecting the rights

of the insured as the holder of a benefit certificate."

A change which operates to raise an assessment must be a reasonable one. 2 Cooley's Briefs on Ins. 1019. Mere general consent that the constitution and by-laws may be amended will not authorize a change that destroys the vested right of the assured under his contract by subjecting him to a greater rate of assessment than the contract calls for. *Strauss v. Mutual Reserve Fund Life Assn.* 128 N. C. 465, 54 L.R.A. 609, 83 Am. St. Rep. 703, 39 S. E. 55; *Pearson v. Knight Templars & Masons Indemnity Co.* 114 Mo. App. 283, 89 S. W. 588. So of one scaling the certificate material. *Fort v. Iowa Legion of Honor*, supra; *Wuerfler v. Grand Grove*, O. D. 116 Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 433; *Supreme Council, A. L. H. v. Batte*, 34 Tex. Civ. App. 456, 79 S. W. 630. Such advance agreement may not reasonably be construed into an assent in advance to any change which the insurer may see fit to make in its constitution or laws; for instance, such as materially lessen the value of the policy by reducing the amount of the indemnity which its terms promise to pay. *Knights Templars & M. Life Indemnity Co. v. Jarman*, 44 C. C. A. 93, 104 Fed. 638. It does not authorize a reduction of the benefit agreed upon. *Gaut v. American Legion of Honor*, 107 Tenn. 603, 55 L.R.A. 465, 64 S. W. 1070; *Pokrefky v. Detroit Firemen's Fund Assn.* 121 Mich. 456, 80 N. W. 240; *Supreme Council, A. L. H. v. Getz*, 50 C. C. A. 153, 112 Fed. 119. It has been held, notwithstanding advance agreements to be bound by changes, to be an ineffective change, where as to one who had the right to engage in the occupation of a freight brakeman at the time he joined a society an amendment provided he should forfeit his membership certificate if he engaged in that work. *In Olson v. Court of Honor*, 100 Minn. 117, 8 L.R.A.(N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 374, 10 Ann. Cas. 622, the certificate provided that there might be liability where a suicide was committed while the assured was insane if at the time he was under treatment for insanity. It was held that an amendment which limited the benefit in all cases of suicide to 5 per cent of the face of the certificate for each year that the assured had been continuously a member was void for being unreasonable.

The most that appellant may claim is that it is very generally held that a by-law which interferes with no vested right and relates merely to procedure or merely provides a rule of evidence is reasonable. We have held there may be an amplification of

by-laws existing when the insurance is effected, so long as such change does not materially alter the effect of the original provision, such as that there shall be a forfeiture if there be an intemperate use of intoxicants (*Ury v. Modern Woodmen*, 149 Iowa, 706, 127 N. W. 665); and that a by-law which merely and reasonably defines what is to constitute a broken leg for which the association shall be liable is not unreasonable. Wherefore such change in by-law will be sustained where there is an advance agreement to be bound by future enacted by-laws. *Ross v. Modern Brotherhood*, 120 Iowa, 692, 95 N. W. 207. Is the change we are considering such an unreasonable one as that it is not effective despite advance agreement that future changes may be made. It certainly is as much so as the one held ineffective in the cases to which we have referred.

The change which the association asserts to be a binding one ingrafts upon the original agreement a condition that, although the law of the state makes disappearance for a stated time presumptive evidence that the assured has died, such statute shall not be effective; and that, moreover, no payment shall be due no matter how long the disappearance has continued, unless the premiums be paid for the number of years which form the expectancy of the assured. In the instant case this means that, unless proof of actual death becomes available, payments under the certificate sued on by plaintiff would have to continue for nearly forty years yet, and possibly for a time many years longer than there would have been obligation to pay under the conditions of the certificate as it stood originally. It does not seem to be strained to say that such a change is so unreasonable as that it was never intended to be covered by the general advance agreement to be bound by future changes; and that, as plaintiff pleads to be bound by future changes, and to uphold the amendment, it is violative of statute and public policy. It was held in *McLaughlin v. Sovereign Camp*, W. W. 97 Neb. 71, L.R.A.1915B, 756, 149 N. W. 112, Ann. Cas. 1917A, 79 wherein on a similar advance agreement similar change in by-laws was asserted to be valid, that where such by-law is adopted during the unexplained absence of the assured, such by-law may not be asserted without evidence on part of the insurer that the insured was living when such by-law was adopted; and in *Samberg v. Knights of Modern Macca-bees*, 158 Mich. 568, 133 Am. St. Rep. 376, 123 N. W. 25, that a by-law such as the one before us is void for being against pub-



lie policy where the effect of it is to render ineffectual a statute provision providing that a person disappearing and his whereabouts remaining unknown for seven years shall be presumed to be dead, and that the beneficiary proving the disappearance of the member and a failure to hear from him for over seven years is entitled to recover.

In *Olson v. Modern Woodmen*, — Iowa, —, 164 N. W. 346, a change in by-laws was made after the assured had disappeared. The by-law provided that no lapse of time or absence or disappearance on part of any member heretofore or hereafter admitted, without proof of actual death while in good standing, shall entitle the beneficiary to recover except as hereinafter provided, to wit, that the disappearance or long-continued absence of any member unheard of shall not be regarded as evidence of death, or give any right to recover on any benefit certificate heretofore or hereafter issued, until the full term of the member's expectancy of life according to the National Fraternal Congress Table of Mortality has expired within the life of the benefit certificate in question. We held that this by-law could not be sustained because it is unreasonable.

It may be conceded that a provision like the one before us has been upheld in *McGovern v. Brotherhood of Locomotive F. & E.* 31 Ohio C. C. 243, the decision in which was affirmed by the supreme court of Ohio. It may further be conceded that a change similar to the one under consideration here was upheld in *Kelly v. Supreme Council, C. M. B. A.* 46 App. Div. 79, 61 N. Y. Supp. 394. And it is true this case is mentioned in *Roeh v. Business Men's Protective Asso.* 164 Iowa, 199, 51 L.R.A.(N.S.) 221, 145 N. W. 479, Ann. Cas. 1915C, 813, but true as well that it is merely cited, and there is neither approval nor disapproval. We decline to be controlled by these.

We hold that this change in by-law is ineffective.

III. The defendant urges that because the plaintiff continued to pay dues and assessments on the certificate she has elected to comply with the terms of the changed by-law, and is now stopped from making any claim for benefits until the expiration of the expectancy of Harry Richey as shown by his age at the time of his entry. The defendant was either entitled to have these payments made when they were or it was not. If it had the right to receive them, the plaintiff was not estoppel to claim payment of the certificate, because she had done what she was required to do. If the society was not entitled to these payments, the fact that illegal exactions were submitted

to for a time will not create an estoppel to discontinue such exactions, because, as said in *Gibson v. Legion of Honor*, 178 Iowa, 1156, 159 N. W. 639, otherwise the wrongdoer would profit by his own wrong, coupled with the fact that his wrongful demands were acceded to. Moreover, it is held in the same case that such an estoppel cannot exist unless making the payments to the society induced some change of position on its part, and that factor is not present in this case. We hold that the payments constitute neither an acquiescence in the changed by-law nor an estoppel in any form upon the plaintiff.

Be that as it may, the society could estop itself to urge the making of these payments as a defense of its agents induced the making of these payments after both parties knew that the assured had disappeared. The evidence fairly establishes that such payments were so induced.

IV. Our holding that the change in by-law is not effective disposes of the defense that there was a failure to make required proof of loss, or, in other words, a failure to prove actual death. Proof, basing the claim upon disappearance, was made, but in a somewhat loose way. That, however, is not material. The defendant unequivocally took the position that it was under no liability until actual death were shown or until after the payments were made for the full term of the expectancy. We think that the proof was not required to go beyond showing such disappearance as will raise a presumption of death, and that, at all events, different and further proof was waived. See *Behlmer v. Grand Lodge, A. O. U. W.* 109 Minn. 305, 26 L.R.A.(N.S.) 305, 123 N. W. 1071; *Gibson v. Legion of Honor*, 178 Iowa, 1156, 159 N. W. 639; and *Nicholas v. Iowa Merchants Mut. Ins. Co.* 125 Iowa, 268, 101 N. W. 115.

V. We think that the evidence here was sufficient to raise a presumption of death, and are of the opinion that this holding is sustained by *Modern Woodmen v. Gerdom*, 72 Kan. 391, 2 L.R.A.(N.S.) 809, 7 Ann. Cas. 570, 82 Pac. 1100; *Magness v. Modern Woodmen*, 146 Iowa, 1, 123 N. W. 169; *Tisdale v. Connecticut Mut. L. Ins. Co.* 26 Iowa, 170, 96 Am. Dec. 136, and 28 Iowa, 12; 8 R. C. L. pp. 707 et seq. We have no fault to find with the holding of *Hitz v. Ahlgren*, 170 Ill. 60, 48 N. E. 1068. The evidence in that case falls far short of having the weight of that in this record. Fair effect of that here is that during all former absence the assured had established a well-formed habit of writing at frequent intervals to the plaintiff, his aunt, who had

to a great extent taken the place of his mother, but when he left for the last time he failed to advise her of his whereabouts; that inquiry made failed to get any information of him or of his being alive; and that, contrary to said habit, he was not heard from the last time for during more than seven years' absence. No reason appears why he should change his habit of writing to his aunt, or why, if alive, he should not return to his home and hers as he had in the past, and he left his suit case behind. He was of good habits and "straight" and steady.

A presumption of death does arise from the continued and unexplained absence of a person from his home or place of residence for seven years where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him; and in such case the presumption is that the absentee died some time during the first seven years of his unexplained absence. *McLaughlin v. Sovereign Camp*, W. W. 97 Neb. 71, L.R.A.1915B, 756, 149 N. W. 112, Ann. Cas. 1917A, 79. Undisputed evidence that a man has been absent from home and unheard of for seventeen years, although his family have continued to reside in the same place, will warrant the conclusion that he is dead, and his wife is entitled to dower in his lands. *Sherod v. Ewell*, 104 Iowa, 253, 73 N. W. 493. These holdings are not in conflict with *Seeds v. Grand Lodge*, A. O. U. W. 93 Iowa, 175, 61 N. W. 411, which merely holds that, where the circumstances indicate an absconding for an illegal purpose, there is no presumption of death by reason of the fact that the party has not been heard from in seven years; that, at any rate, it will not be presumed he died within two years after disappearance, so as to render valid an insurance policy which lapses at the end of the said two years for nonpayment of dues and assessment.

It may be conceded that continued and unexplained absence for seven years, while sufficient to create the presumption of death, carries with it no presumption as to the time of death in the seven years. But that is not material. If the assured died at any time within the seven years, the death would create liability on the certificate.

Nor can we see how it is material that unexplained absence for seven years does not establish actual death, but merely a presumption of death. If the presumption remains un rebutted, for all practical purposes, actual death is shown.

VI. We hold that plaintiff may not recover because of the contract provision which

authorizes a dependent to be made a beneficiary. We do not think she is made such dependent by the mere fact that the assured lived in her house and made it his home there for many years, that his father and mother are both dead, and that he came to live with plaintiff after the family of his parents was thus broken up, and that he was a member of the family for about ten years, nor by the fact that it was testified to under objection that assured "contributed a part of the money he earned to me." Nor do we think that *Royal League v. Shields*, 251 Ill. 250, 259, 36 L.R.A. (N.S.) 208, 96 N. E. 45, or *McCarthy v. Supreme Lodge*, N. E. O. P. 153 Mass. 314, 11 L. R. A. 144, 25 Am. St. Rep. 637, 26 N. E. 866, run contrary to this, our conclusion. And in our opinion *Palmer v. Welch*, 132 Ill. 141, 23 N. E. 412, supports it.

6a. The constitution of the defendant provides that the beneficiaries shall be wife, child, adopted child, parent, brother, sister, or other blood relation, or person dependent on the member. Section 7 of chapter 65, 21 Gen. Assem. provides that such an association as defendant shall not issue a certificate "unless the beneficiary . . . shall be the husband, wife, relative, legal representative, heir, or legatee of such insured member." It is fairly the holding of *Bush v. Modern Woodmen*, — Iowa, —, 162 N. W. 59, that there is no power to effectively make a beneficiary who is outside of those in the class permitted by statute to be made beneficiaries. Therefore this plaintiff cannot recover so far as the contract is concerned, because she is not a blood relation, being the wife of an uncle of the assured. See *Supreme Lodge, N. E. O. P. v. Hine*, 82 Conn. 315, 73 Atl. 791. It is true that *Simcoke v. Grand Lodge, A. O. U. W.* 84 Iowa, 383, 15 L.R.A. 114, 51 N. W. 8, and *Smith v. Supreme Tent, K. M. W.* 127 Iowa, 115, 69 L.R.A. 174, 102 N. W. 830, and 29 Cyc. 114, hold that the word "relative" in a statute defining who may be a beneficiary includes relatives by affinity where nothing appears to indicate that the word is used in a more restricted sense, and that therefore a stepfather was within the term "relative." The difficulty is that this aunt by affinity was not a blood relation, and the contract expressly limits the relationship to that of blood. But the statute controls, and that does not use the term "blood relation," but the word "relation." Therefore, the contract notwithstanding, this plaintiff might lawfully be accepted by the society as a beneficiary, as she was.

6b. If it was not permitted to make the plaintiff the beneficiary, the society itself

could not waive her lack of capacity to become one. *Supreme Council, A. L. H. v. Perry*, 140 *Mass.* 588, 5 *N. E.* 634; *Steele v. Fraternal Tribunes*, 215 *Ill.* 190, 106 *Am. St. Rep.* 160, 74 *N. E.* 121; *Krause v. Modern Woodmen*, 183 *Iowa*, 199, 110 *N. W.* 452; *Royal League v. Shields*, 251 *Ill.* 250, 36 *L.R.A.(N.S.)* 208, 96 *N. E.* 45. This makes it immaterial to inquire into the claim that there is a waiver by or estoppel on the society.

We are unable to see the force of *Holden v. Modern Brotherhood*, 151 *Iowa*, 673, 132 *N. W.* 320, as an authority in this case. So far as applicable, it merely holds that the beneficiary acquires no vested interest in the policy during the life of the insured, but that on his death the party entitled to the benefits acquires such an interest.

VII. It is a condition of the contract that in case of death in good standing the beneficiary shall receive such sum as may be collected from an assessment upon all members, the sum not to exceed the amount stated on the face of the certificate. It will be noted that up to this point this is not so much a provision that no judgment may be had for any definite sum, but one defining how much shall be paid. And so of a provision which entitles to participation in the beneficiary fund of the defendant to the amount of the sum stated. The appellant contends that the court erred in giving judgment for a stated amount with interest, because under the petition the only relief allowable was an order that an assessment be levied, and that moreover, transferring the cause to equity on the application of the defendant on the ground that it was necessary to order an assessment, and that a court of equity alone could order it, makes it the law of this case that a money judgment was erroneous. We are of opinion that all this takes too narrow a view of the prayer of the petition which asks that defendant be required to levy an assessment to meet the obligation contained in its certificate, "and to pay her the sum of \$1,100, and that she have judgment for that amount." This petition

was never attacked. The point was never made that there was no right to enter such a money judgment as was prayed for. Under familiar rules this objection is made too late, and we will not reverse because a judgment was entered which was authorized by a prayer to which no objection was made in the trial court. In *Sleight v. Supreme Council, M. T.* 121 *Iowa*, 724, 96 *N. W.* 1100, the "principal contention" was whether an action at law would lie for any of the benefits promised. The difficulty is that here there was no contention over the matter, and that it presents the familiar instance of complaining too late that relief was prayed which a court of equity should not give because it was relief at law. The question is not whether the court of equity should have given judgment for a fixed sum, but whether appellant is in any position to complain that such relief was given. This disposes as well of *Rambousek v. Supreme Council, M. T.* 119 *Iowa*, 263, 93 *N. W.* 277. Moreover it has been held that, though there be a promise to pay an indefinite sum not exceeding the amount named in the certificate and though there be an agreement to pay the proceeds of an assessment not to exceed a stated sum, if there is no evidence as to what an assessment would provide, plaintiff is entitled to recover judgment for the full amount of the certificate. And if it be the fact that an assessment would produce less than the face of the certificate, that is a matter of defense. *Makely v. Legion of Honor*, 133 *N. C.* 367, 45 *S. E.* 649; *Covenant Mut. Life Assn. v. Kentner*, 188 *Ill.* 431, 58 *N. E.* 969.

As giving some support to payment of amount fixed, rather than the proceeds of an assessment where there is no proof how much the assessment would realize, see *Hart v. National Masonic Acci. Assn.* 106 *Iowa*, 717, 75 *N. W.* 508.

We find no error, and the judgment stands affirmed.

Preston, Ch. J., and Ladd, Evans, and Gaynor, JJ., concur.

# KANSAS SUPREME COURT.

GILBERT H. FRITH

v.

JAMES THOMSON, Appt.

(103 Kan. 395, 173 Pac. 915.)

Partnership — conversion — remedy.

1. Where parties join in a business adventure of a partnership character, and,

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after they have proceeded for a time and property rights have been acquired, one of the partners, who holds possession of the rights and assets of the firm, wrongfully ousts or excludes the other under a claim of sole ownership, and the dealings between them are not numerous nor difficult of

Note. — As to action at law between partners, based on conversion of firm property, see annotation following this case, post, 1125, and references therein to annotations on related questions.

settlement, the other may maintain an ordinary action at law to recover for the wrongful deprivation and conversion without having an accounting in an equity action.

*For other cases, see Partnership, V. in Dig. 1-52 N. S.*

#### Appeal — exclusion of testimony.

2. The exclusion of testimony, offered with a view of showing the value of oil leases obtained and held by the defendant, to the effect that stipulations had been made when the leases were executed which were not included in the leases and which contradicted their terms, is held not to be error.

*For other cases, see Evidence, VI. c, in Dig. 1-52 N. S.*

#### Same — harmless error.

3. The rejection of testimony tending to show the expenses incurred by defendant in obtaining the leases is held to be without material error under the circumstances of the case.

*For other cases, see Appeal and Error, VII. m, 3, b, in Dig. 1-52 N. S.*

(July 6, 1918.)

**A**PPEAL by defendant from a judgment of the District Court for Lyon County in favor of plaintiff in an action brought to recover the value of his interest in certain oil and gas leases alleged to have been converted by defendant to his own use. Affirmed.

The facts are stated in the opinion.

Mr. Owen S. Samuel, for appellant:

The proper course to have pursued would have been an action for an accounting and a settlement of the partnership.

30 Cyc. 462; Lawrence v. Clark, 9 Dana, 258, 35 Am. Dec. 133; Harris v. Harris, 39 N. H. 45; Smith v. Smith, 33 Mo. 557; Bowzer v. Stoughton, 119 Ill. 47, 9 N. E. 208.

Before an action for trover and conversion will lie, a demand should be first made.

Kennett v. Peters, 54 Kan. 119, 45 Am. St. Rep. 274, 37 Pac. 999; Pettingill v. Jones, 28 Kan. 749.

Being a partnership and engaged in a common enterprise, one partner had authority to bind the partnership and the partners, and to make them responsible for any transactions had or created which were within the scope of the partnership.

Deitz v. Regnier, 27 Kan. 94; Barber v. Van Horn, 54 Kan. 33, 36 Pac. 1070; Blaker v. Sands, 29 Kan. 557; 2 Am. & Eng. Enc. Law, 137; Lemon v. Fox, 21 Kan. 152; Horn v. Newton City Bank, 32 Kan. 518, 4 Pac. 1022; Mills v. Riggle, 83 Kan. 705, 112 Pac. 617, Ann. Cas. 1912A, 616; Brown v. Foster, 137 Mich. 35, 100 N. W. 167; 30 Cyc. 477; Pahlman v. Taylor, 75

Ill. 629; Boardman v. Adams, 5 Iowa, 224; Catlin v. Gilders, 3 Ala. 536; Hoskinson v. Eloit, 62 Pa. 393; Winship v. Bank of United States, 5 Pet. 529, 8 L. ed. 216; Kirby v. Ingersoll, Harr. Ch. (Mich.) 172, Parson Partn. ¶ 45; Moore v. Davis, L. R. 11 Ch. Div. 261, 39 L. T. N. S. 60, 27 Week. Rep. 335.

Messrs. Hamer & Ganse for appellee.

Johnston, Ch. J., delivered the opinion of the court:

Alleging that the defendant had converted to his own use plaintiff's undivided interest in certain oil and gas leases, plaintiff brought this action to recover the value of his interest at the time of conversion. Defendant appeals from the judgment in plaintiff's favor.

There was considerable conflict in the evidence, but the following general statement may be made of the facts tending to uphold plaintiff's claim and recovery: The plaintiff was in touch with certain persons in Wichita who had become interested in the development of oil and gas land. Upon the suggestion of the defendant, the plaintiff, a party named Miller, and the defendant entered into a joint enterprise, the object of which was to obtain leases on lands in Lyon county for the purpose of prospecting and developing the same for oil and gas. It was agreed that when leases upon at least 4,000 acres had been obtained, the plaintiff was to procure the parties in Wichita to form a company for the purpose of drilling, and plaintiff was to perform all necessary legal services in connection with forming such a company, and he was also to obtain the services of a geologist. It was agreed that the plaintiff, Thomson, Miller, and the geologist should each be entitled to a one-fourth interest in the leases in return for their services, or, in case no geologist could be obtained, then the parties should be entitled to a one-third interest, each. Plaintiff made several attempts to obtain a geologist, but without success, and he also endeavored to help secure some of the leases. Eventually leases upon 7,800 acres were obtained, but when plaintiff suggested that it was time to interest the Wichita people in drilling operations Thomson told plaintiff not to procure the Wichita parties for that purpose, as he had others in view, and that plaintiff had no interest in the leases; and he refused to give plaintiff any information about them or concerning the amount of money expended to procure them, although plaintiff offered to pay his share of such expenses. On other occasions, although plaintiff renewed his offer to procure the Wichita people to commence drilling, defendant refused

to recognize plaintiff's interest in the leases or in the contract between them. This action was then brought, and the jury found the value of plaintiff's interest to be \$850, and judgment for that amount was awarded.

The defendant complains of rulings on the petition, evidence, and instructions which permitted the plaintiff to proceed in this action for conversion without first having an accounting between partners. If the suit involved the adjustment of complicated accounts in which an ordinary legal remedy was inadequate, an accounting might have been warranted; but there is no necessity of resorting to an accounting where full inquiry may be made and justice secured through the ordinary legal remedies. Here there was but a single adventure; there was no complexity of accounts; no difficulty for a jury to understand and determine the questions involved; the relationship had been terminated; and hence there was no occasion for employing the methods of investigation peculiar to courts of equity. It has been determined that where a single partnership transaction is involved, an accounting between the parties is not necessary. *Pettingill v. Jones*, 28 Kan. 749. In another case it was ruled that when the dealings between partners embraced but a few items or transactions and were not such as to make an adjustment of their dealings difficult, the ordinary legal remedies were adequate, and resort to equity was unnecessary. *Clarke v. Mills*, 36 Kan. 393, 13 Pac. 569. Here there was a repudiation of the partnership relation and denial that the plaintiff had any interest in the adventure, and a wrongful appropriation of the firm assets, and for such a wrong an appropriate action at law is maintainable. 30 Cyc. 468.

There is complaint of the admission of testimony relating to negotiations between the plaintiff and a geologist, and of the exclusion of testimony offered by defendant to the effect that when the leases were obtained he and Miller represented to the lessors that, if oil and gas wells were not drilled within a year, the leases would be returned to the lessors, and that they would not be transferred or used for speculative or commercial purposes. Since the contract

provided for the obtaining of the co-operation of a geologist by the plaintiff, testimony as to his efforts in that direction was admissible; and, besides, it does not appear that any objection was made to the admission of the testimony. The purpose of the excluded testimony, it is said, was to show the value of the leases, and it is contended that, as to the representations in question, plaintiff was bound by the acts of his partners. There can be no question about the responsibility of one member of a partnership for the acts of his copartners, but the leases herein were in writing, and they contained none of the representations claimed to have been made by the defendant. The instruments themselves refuted the claims of the defendant, and showed that the alleged oral stipulations contradicted the terms of the written lease, and hence were without force. If the leases had been offered for sale their value would not have been affected by any oral representations or secret agreements that defendant may have made. The failure to drill a well within a year, if it had any effect on the value of the leases, cannot avail the defendant, since he prevented the drilling of the wells or the development of the land as plaintiff proposed and the agreement provided. No error was committed in rejecting the testimony.

Objection is further made to a ruling excluding an offer to show the expense incurred by the defendant in securing the leases in question. It does not appear how much of this expense was incurred before the repudiation of the plaintiff as a partner and the denial of his interest in the venture. Some testimony was produced to the effect that plaintiff offered to help procure parties to drill for oil, and that his offers were rejected. According to the contract, the plaintiff was to do the legal work of the enterprise, endeavor to obtain a geologist, and find parties to drill wells, while defendant and Miller were to secure the leases. There is some testimony that the plaintiff performed his part so far as he could or was permitted by the defendant to perform it. As the offer was made, it cannot be said that there was material error in its refusal.

The judgment is affirmed.

### **Annotation—Action at law between partners, based on conversion of firm property.**

As to right of one partner of dissolved firm to maintain action at law against another for fraud practised upon dissolution with respect to assets, see note to *Crockett v. Burleson*, 6 L.R.A. (N.S.) 263. And as to right to arrest

partner in civil action or proceeding, see note to *Ledford v. Emerson*, 4 L.R.A. (N.S.) 130. Generally as to liability of partnership for conversion by individual member, see note in 51 L.R.A. 473.

The general rule, at least under the

earlier decisions, based upon the theory that one partner cannot sue another at law for any matter growing out of the partnership except in an action for an accounting, which theory or rule is in turn founded upon the ground that until all of the affairs of the partnership are adjusted there can be no complete right of the parties as to any single transaction connected therewith,—is that one partner cannot maintain an action for conversion of firm property against a copartner. It has also been said that this conclusion is due to the fact that possession is the foundation of an action for conversion, and that, generally speaking, all partners are equally entitled to possession.

However, as subsequently shown, there are a number of exceptions to the general rule, as, for instance, where the firm property is so used or misused by one partner as to destroy it for partnership purposes and thus constitute an actual conversion and entitle an aggrieved partner to maintain trover for the conversion, or where the partnership venture involves but a single or a few transactions and there are no complicated accounts requiring equitable adjudication.

Thus, in *Smith v. Book* (1837) 5 U. C. Q. B. O. S. 556, it was held that the law was clear that one partner cannot maintain trover against another for converting the partnership property, the court saying that the "remedy must be of another kind."

And in *Robinson v. Gilfillan* (1878) 15 Hun (N. Y.) 267, where one partner converted a part of the partnership machinery, it was held that the other partners could not maintain trover therefor, each partner being entitled to the possession of the firm property, subject only to an accounting between the partners. And that, since the possession of one partner is technically the possession of both, one ordinarily cannot maintain trover against the other for merely retaining possession of the partnership property, see *Rathwell v. Rathwell* (1866) 26 U. C. Q. B. 179, and *Doupe v. Stewart* (1868) 28 U. C. Q. B. 192.

So, in *Dalury v. Rezinaz* (1918) 183 App. Div. 456, 170 N. Y. Supp. 1045, it was again held that where a party converts to his own use partnership property, he incurs the usual liability that one partner incurs to another respecting partnership affairs,—i. e., to be held liable in an accounting, but not to be sued by the other partner for damages in an action for conversion.

And to the effect that one partner cannot maintain an action at law against another partner who has converted firm property, where there is no allegation of an accounting, see also *Riddell v. Ramsey* (1904) 31 Mont. 386, 78 Pac. 597.

And in *Couilliard v. Eaton* (1885) 139 Mass. 105, 28 N. E. 579, where it was alleged that defendant had converted a note belonging to a partnership of which he was a member, it was held that the other partner could not maintain conversion, the affairs of the partnership being still unsettled and the plaintiff having no greater right to the note than the defendant.

And in *Dukes v. Kellogg* (1900) 127 Cal. 563, 60 Pac. 44, where two of three partners converted to their own use moneys belonging to the partnership, it was held that the third partner could not maintain an action at law based on the conversion where no accounting and settlement of the partnership accounts was alleged, especially as it did not appear whether there were outstanding debts against the partnership, or whether the partnership was indebted to the partners converting the money; the court saying that such facts showed that only by an accounting could the partnership matters be apportioned and adjudicated upon.

And in *Mason v. Tipton* (1854) 4 Cal. 276, where one partner took forcible possession of the firm property and ended the partnership, it was held that the other partner could not maintain an action at law for the partnership property and profits, but leave was given him to amend so as to seek an accounting and dissolution of the partnership. And see *Weiss v. Weiss* (1912) 154 App. Div. 890, 138 N. Y. Supp. 1148, reversing on the dissenting opinion below (1912) 75 Misc. 644, 133 N. Y. Supp. 1021, and holding that one partner could not maintain conversion against his copartner although the complaint alleged that the whole partnership property had been conveyed without plaintiff's consent, and that he had been physically ejected from the firm's place of business (the prevailing opinion in the court below is set out *infra*.)

And again, in *Belanger v. Dana* (1889) 52 Hun, 39, 4 N. Y. Supp. 776, it was held that one partner could not maintain an action for wrongful conversion against another partner who had converted partnership property, even though the partnership had been dissolved, where the partnership relation

still existed as to the application of the money in question to partnership obligations, there having been no full accounting between the partners. In this case it was further held that even though the partnership affairs were all settled except the application of the money in question to certain firm notes, the partnership relation was not eliminated so as to render the conversion one by a tenant in common, the court laying down the rule that the partnership relation must have "fully" ceased with respect to the transaction in question before an action at law, as distinguished from an action in equity, can be maintained by one partner against the other.

But, as before stated, a number of cases have arrived at a contrary conclusion, and in effect seem to form exceptions to the general rule that an action for conversion will not lie as between partners.

Thus, in the New York case of *Weiss v. Weiss* (1912) 75 Misc. 644, 133 N. Y. Supp. 1021 (reversed on dissenting opinion below in (1912) 154 App. Div. 890, 138 N. Y. Supp. 1148), the court adopted the rule that there is no distinction between partners and tenants in common or joint tenants so far as the right to maintain trover is concerned, and held that one partner could sue his copartner in conversion where the latter had sold the whole of the partnership property in hostility to and in denial of the partnership. This was upon the theory that while each partner is entitled to the use and possession of the partnership property, and the mere possession of either is rightful and can furnish no ground of action, if such possession develops into a destruction of the property, or into such a hostile appropriation of it as excludes the possibility of beneficial enjoyment by the other, or ends in a sale of the whole property which ignores and denies any other right, a conversion is established and trover may be maintained. This in turn is the reasoning upon which is based the holding that trover will lie between tenants in common, so that the decision in the *Weiss Case* extends that rule to partners. However, the proposition that partners are, or are in the same position as, tenants in common, has been criticized as not based on a sound foundation; and, as above noted the judgment was reversed on appeal. For instance, see *Rowley, Partn.* § 759. So, in *Rathwell v. Rathwell* (1866) 26 U. C. Q. B. 179, the court, in holding that one partner may

maintain trover against another for a sale of the property where such sale is not for the benefit of the partnership, but rather to deprive the other owner of all interest therein, recognized and held inapplicable the rule that ordinarily one partner cannot maintain trover against another who is in possession of the property, which rule is based upon the technical ground that the possession of one partner is the possession of both. And in *Cowan v. Buyers* (1812) Cooke (Tenn.) 53, 5 Am. Dec. 668, the court applied the rule that where one joint owner or partner, without the consent of the other, destroys the other's interest in the property or the very property itself, and by such act the others are deprived of their property, an action of trover may be maintained, holding that recovery could be had by one partner where the other had sold partnership property without the former's consent. The court in this case seems to have used the terms cotenants, joint owners, and copartners indiscriminately. And that where there is a destruction of partnership property by one partner sufficient to constitute a conversion, an action for conversion may be maintained by the other, see *Taylor v. Brown* (1867) 17 U. C. C. P. 387.

And a similar conclusion has been reached where but a single venture and no complicated accounts were involved. Thus in *FRITH v. THOMSON*, ante, 1123, it was held that there is no necessity of resorting to equity for an accounting where full inquiry may be made and justice secured through ordinary legal remedies; as, for instance, where there is but a single venture and no complexity of accounts, and the relationship has been terminated, so that in such a case an action may be maintained by one copartner for conversion of the firm property by the other copartner without first having an accounting.

In *Reis v. Hellman* (1874) 25 Ohio St. 180, it was held that a partner could maintain an action at law against another partner through whose wrongful conduct partnership money had been lost, to account as for money converted to his own use. In this case the court does not disclose the exact nature of the action except that it was to recover the money lost and was tried to a jury. Likewise there is no discussion of the right of one partner to maintain an action at law against another partner for conversion of firm property.

And see the dictum in *Newby v. Har-*

rell (1888) 99 N. O. 149, 6 Am. St. Rep. 503, 5 S. E. 284, to the effect that one partner may maintain an action against

another for the destruction of the joint property, or its wrongful conversion.

G. J. C.

## KENTUCKY COURT OF APPEALS.

ALEX SEVIER, Appt.,

v.

CITY OF BARBOURVILLE et al.

(180 Ky. 553, 204 S. W. 294.)

### Injunction — against enforcement of ordinance.

1. Injunction does not lie against enforcement of a resolution of a city council declaring a building to be a nuisance and ordering its abatement, where the only penalty provided for its violation is fine of a certain amount for each day's failure to comply with its terms since there is an adequate remedy at law in an action for malicious prosecution against the officer issuing the warrant for its enforcement.

*For other cases see Injunction, I. j, in Dig. 1-52 N. S.*

### Prohibition — remedy by appeal — effect.

2. Prohibition does not lie to prevent a police judge from trying a prosecution for violation of a void city ordinance where a remedy by appeal is provided in case of conviction.

*For other cases, see Prohibition, II. in Dig. 1-52 N. S.*

(May 14, 1918.)

**A**PPEAL by the plaintiff from a judgment of the Circuit Court for Knox County in favor of defendants in an action brought to enjoin them from enforcing an alleged void ordinance, and also for a writ of prohibition to prevent the police judge from proceeding with the trial of plaintiff upon a warrant charging violation of said ordinance. Affirmed.

The facts are stated in the opinion.

**Note.** — The right to enjoin a prosecution under a city ordinance is treated in notes in 21 L.R.A. 84; 2 L.R.A. (N.S.) 631; 25 L.R.A. (N.S.) 194; 34 L.R.A. (N.S.) 454; and L.R.A. 1916C, 263.

On the question whether a violation of a municipal ordinance is a public offense or crime, see note in 48 L.R.A. (N.S.) 156. As to the character of a prosecution for violation of a municipal ordinance as civil or criminal, see, in addition to the note last referred to, notes in 33 L.R.A. 33, and 4 L.R.A. (N.S.) 782.

Upon the question whether a writ of prohibition may be invoked to prevent numerous unfounded prosecutions for an alleged violation of a statute or an ordinance, see note in 37 L.R.A. (N.S.) 448.

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Messrs. John H. Welch, John H. Wilson, and Dishman & Dishman for appellant.

Messrs. V. C. McDonald and Black & Owens for appellees.

Clarke, J., delivered the opinion of the court:

Appellant, who was plaintiff below, filed this action, seeking to enjoin the city of Barbourville, its mayor and members of its board of council, from "causing any further warrants to issue against this plaintiff" upon the charge of maintaining a nuisance within the city, or "from any further proceedings against this plaintiff by reason of an order or resolution of the city council declaring his building a nuisance, and for a writ of prohibition against the police judge of the city, prohibiting him" from proceeding further against this plaintiff under the warrant already issued "against him, and from issuing any further warrants against this plaintiff under said charge, or from trying this plaintiff on any of said warrants, and that on final hearing it be adjudged that the order or resolution of the city council, declaring his building a nuisance, is void, and that the judge in issuing the warrant against him was acting beyond his jurisdiction." From the judgment denying him any part of the relief prayed for, this appeal is prosecuted, but there is no appeal from another and separate judgment rendered herein upon the counterclaim filed by defendants, which does not, in any way, affect the judgment appealed from, and which resulted from another controversy between the same parties about the same property. Hence we will not notice the arguments of counsel for appellant with reference to that matter; nor do we decide as we are not asked to consider, the propriety of plaintiff seeking in one action an injunction against the mayor and members of the board of council, and a writ of prohibition against the police judge.

Although the warrant upon which appellant was arrested and about which he complains is not in the record and is not clearly defined, it is clear that it was issued under city ordinance No. 120, which is as follows:

"The city council of Barbourville, Ky., do ordain as follows:

"Nuisance defined—Anything which is calculated to be injurious to the health, or



is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free use or passage, in the customary manner, of any stream of water, ditch, or drainage, or any public square, street or highway in said city, is declared to be a nuisance. Any person guilty of maintaining a nuisance after having twenty-four hours' notice in writing from the chief of police or from the local board of health, to abate same, shall be fined not less than \$10 and not more than \$25, and each day said nuisance is maintained or allowed to remain, after said notice, shall be deemed a separate offense."

It will be noticed the penalty, a fine of not less than \$10 nor more than \$25, is not enforceable until the guilty party has failed, after twenty-four hours' notice, to abate the nuisance for which he is responsible. Evidently upon the theory that it was its right and duty under this ordinance to decide whether or not plaintiff's one-story frame building, which had stood some twenty-five or thirty years upon his lot opposite the courthouse square, was a nuisance, the city council, at its meeting held May 19, 1917, upon the complaint of an adjoining property owner who represented that plaintiff had violated his contract to remove the building, that it was unsightly, and that it increased his insurance rate, summarily and without notice to plaintiff, adopted the following order or resolution:

"Motion was made by T. J. Moore and seconded by W. C. Lockhart that the house of Alex Sevier, located on the north side of Public square, next to the building of J. F. Hawn, same is a nuisance and hereby ordered condemned, and he is directed and ordered to tear down and remove same by June 1, 1917."

Plaintiff having been served with a copy of this order by the town marshal, and not having complied therewith within the time specified, was arrested upon a warrant issued by the police judge, whereupon he instituted this action, denying that his house was then, or liable to become, a nuisance under the city ordinance defining a nuisance, and alleging that the mayor and members of the city council, actuated solely by a spirit of malice and hatred toward him, had corruptly, unlawfully, and maliciously conspired together in declaring his building a nuisance and ordering its destruction, and that, unless restrained, the mayor and members of the city council would cause the police judge to issue warrants for his arrest for each day he failed

to obey the order to tear the building down, and that, unless a writ of prohibition was issued against the police judge, he would, under the ordinance and resolution set out above, convict plaintiff and enter a fine and judgment against him for not less than \$10 nor more than \$25 for each and every day that he failed to comply with the order to tear his building down; that the order or resolution declaring his building a nuisance and ordering its removal was void; and that the police judge was without jurisdiction to try him upon the warrant under which he had been arrested, or any warrant that might be issued for the same offense. The material allegations of the petition were traversed by an answer. There is no proof to sustain any of the allegations of the petition, except the fact that the city council adopted the resolution declaring the building a nuisance and ordering its removal, and that two warrants were issued against plaintiff under Ordinance No. 120, upon one of which he had been arrested and was about to be tried.

That plaintiff could not be deprived of his property without due process of law is, of course, true, but the order or resolution of the city council, declaring his building to be a nuisance, and ordering him to destroy it, could not, by itself, deprive him of that right or of his property; and there is no proof that the city, or any of its officials, had done or was threatening to do anything to destroy or harm his premises. Certainly, the city had no right to decide whether or not plaintiff's property was a nuisance, and the order so declaring is void, but all plaintiff had to do to escape injury to his property was to ignore the order as he has done, so this order gave him no right to an injunction. Neither could he be granted an injunction against the city officials if, as a result of his refusal to comply with this void order, they procured the issuance of the warrant charging him with maintaining a nuisance in violation of Ordinance No. 120, because, if the city officials or any of them did cause the warrant to issue, it was the act of the individual or individuals, and, if maliciously done, he had an adequate remedy at law.

There remains only his right to a writ of prohibition against the police judge to prevent a trial by him of plaintiff upon the warrant, which is the only threatened or impending action against him or his property shown by the proof. This writ is authorized by a circuit court to control the action of an inferior court only when the latter is acting, or about to act, without jurisdiction, and only then when there

is no adequate remedy by appeal or otherwise. Crim. Code, § 25; *Western Oil Ref. Co. v. Wells*, 180 Ky. 32, 201 S. W. 473. That the police judge had jurisdiction in this matter and plaintiff a right to a review of any judgment therein by appeal to the circuit court and thence to the court of appeals is apparent from the following sections of Kentucky Statutes, which are portions of the charter of cities of the fourth class, to which Barbourville belongs. Section 3490, subsection 7, Kentucky Statutes, grants to the board of council of cities of the fourth class the power to "define and declare by ordinance what shall be a nuisance within the limits of the city, and to punish by fine any person for causing or permitting a nuisance." This power is not, however, a power to declare a given thing or a particular piece of property a nuisance as was attempted in the order or resolution adopted May 19, 1917, but is authority to define in general terms, applicable to all, what shall constitute a nuisance, as attempted at least in Ordinance 120. Section 3513 grants to the police judge of such cities "exclusive jurisdiction of all offenses or causes arising out of ordinances enacted by the council for the enforcement of the powers granted

them by law." Section 3519, provides in part, "in cases where fines of \$20 or less are imposed or authorized under ordinances, the legality of such ordinances may be tested by either party by an appeal to the circuit court of the county," and thence to the court of appeals. Clearly, under these statutory provisions, which, it should be noted, afford a radically different method for testing an ordinance from that prescribed in cities of other classes, plaintiff had an adequate remedy at law to test the validity of these ordinances upon a trial under the warrants upon which he was arrested; and it is equally clear that the police judge had jurisdiction to try the plaintiff under the warrants, and plaintiff, being given the right to have any judgment against him reviewed upon appeal, was not entitled to a writ of prohibition against the police judge.

It is apparent, therefore, that whether Ordinance No. 120 is valid and whether the condition of appellant's property is such as to amount to a violation of that ordinance, if valid, are questions that are not now before us, and about which we express no opinion.

Wherefore the judgment is affirmed.

#### WEST VIRGINIA SUPREME COURT OF APPEALS.

MARY FINNEY, Plff. in Err.,  
v.

JAMES ZINGALE.

(— W. Va. —, 95 S. E. 1046.)

#### False imprisonment — gist of action.

1. The gist of an action of false imprison-

ment or false arrest is the illegal detention of a person without lawful process, or by an unlawful execution of such process.

*For other cases, see False Imprisonment, I. in Dig. 1-52 N. S.*

Same — innocent person.

2. An arrest is not necessarily unlawful so as to afford ground for an action of false imprisonment because the plaintiff was

Headnotes by LYNCH, J.

**Note.** — The opinion in *FINNEY v. ZINGALE* contains a very clear statement of the distinction between an action for false arrest or imprisonment, and an action for malicious prosecution and of the requisites of the respective actions. The distinction has often been ignored, or at least obscured, in statements by the courts and text-writers. The difference between the two is thus stated in 11 R. C. L. 792: "In false imprisonment, the essence of the tort consists in depriving the plaintiff of his liberty without lawful justification, and the good or evil intention of the defendant does not excuse or create the tort. The plaintiff's grievance is the use against him of force, actual or threatened. Consequently, in the common-law procedure, the action must be brought in trespass. But, in the case of malicious prosecution or abuse of process, the process is valid and, in itself, justifies the restraint or imprisonment. To deprive the defendant of its protection, it

is necessary to show malice, want of probable cause to institute the proceeding, or some oppressive or fraudulent use of the machinery of the law. Consequently, the malice or evil intent is the gist of the tort, the injury suffered by the plaintiff results only indirectly from the wrongful act, that is, the evil intent of the defendant and the common-law action to be used is trespass on the case. Of course, the common-law classification of the different causes of action has ceased to be important in itself, but it illustrates the entirely different legal nature of the two classes of torts." The two classes of actions are also clearly differentiated, in the opinion in *Brinkman v. Drolesbaugh*, post, 1132.

Various aspects of the actions for false imprisonment and malicious prosecution are discussed in notes cited in the L.R.A. Indexes, under the respective titles, "False Imprisonment," and "Malicious Prosecution."

innocent of the offense for which the arrest was made, if the forms of law were observed, as where the warrant was issued, upon proper complaint, by an official clothed with authority to issue it and was executed by the arrest of the plaintiff by a proper officer in a lawful manner.

*For other cases, see False Imprisonment, I. in Dig. 1-52 N. 8.*

**Malicious prosecution — Liability.**

3. To maintain an action for malicious prosecution, it is essential to prove: (1) That the prosecution was malicious; (2) that it was without reasonable or probable cause; and (3) that it terminated favorably to plaintiff.

*For other cases, see Malicious Prosecution, in Dig. 1-52 N. 8.*

(May 7, 1918.)

**E**RROR to the Circuit Court for McDowell County to review a judgment in favor of defendant in an action for malicious prosecution and false imprisonment. Affirmed.

The facts are stated in the opinion.

Messrs. Anderson, Strother, Hughes, & Curd for plaintiff in error.

Messrs. A. G. Froe, H. J. Capehart, and Litz & Harman for defendant in error.

Lynch, J., delivered the opinion of the court:

In the first of the two counts of the declaration, a count for malicious prosecution, the plaintiff averred, among other things necessary to show the cause of action, that the defendant appeared before W. E. Stuart, mayor of the city of Keystone, authorized by law to issue warrants in criminal cases, and falsely and maliciously, and without any reasonable and probable cause whatsoever, charged plaintiff "with some such offense as aiding and abetting one Nannie Spinello and Joe Zingale in lewd, lascivious, and unlawful cohabitation, or some other charge of a similar nature, the purport of which is to plaintiff unknown," and upon such charge, falsely and maliciously and without any reasonable or probable cause, procured the said Stuart, as such mayor, to make and grant a certain warrant in due form of law for the apprehension of plaintiff, and for bringing her before the said mayor to answer the said charge, and to be further dealt with according to law; and, by virtue of such warrant, defendant caused her, wrongfully and unjustly and without any reasonable or probable cause, to be arrested, detained, and kept in the custody of the law, and carried before the said mayor, who, having considered all the defendant could say, allege, or prove against her, concerning the

said offense, adjudged her not to be guilty thereof, and acquitted her.

In the second count, a count for false arrest, the averments differ from those of the first only in the following respects: That the charges were not in writing, and no warrant was issued; yet, at the instance of the defendant, and without any reasonable or probable cause, he induced the mayor to have the plaintiff arrested and brought before him, and to be held by the officer making the arrest until her guilt or innocence upon such charge could be determined by a trial, and that said trial was had, and she was acquitted and discharged from custody.

The evidence adduced by the plaintiff in support of the causes so averred being excluded from consideration by the jury, upon the motion of the defendant, they found for him, and the court entered the judgment to which she prosecutes this writ.

Though it appears from the testimony of Stuart, the mayor, who was called as a witness for plaintiff, that one or two complaints were made by Police Officer Downs, and a warrant was issued on each complaint, the nature and character of the offense charged is not revealed, either by a complaint or warrant produced or filed, or otherwise than by the testimony of the plaintiff that she was informed by Downs that her house was "pulled," and by memoranda on the mayor's docket, placed thereon probably by Downs. So far as the memoranda concern the plaintiff, they are: "May 22, 1917. Mary Finney; charge, violating city ordinance. Warrant issued on complaint of W. M. Downs. The officer was Bernard. Prisoner brought before W. E. Stuart, Mayor, for trial. Dismissed."

While not formally offered or admitted in evidence, the entries, however, were withdrawn from the jury over the objection of the defendant, and thereby was eliminated the only record evidence or documentary proof of what evidence occurred as regards the arrest and discharge of the accused, and, so far as material to defendant's liability, left only the oral testimony of his participation in procuring plaintiff's apprehension and arraignment, the sufficiency of which constitutes the only ground upon which he is chargeable.

Stated as strongly as it possibly can be in favor of the plaintiff, this testimony clearly is insufficient to sustain a verdict, if one had been rendered in favor of the plaintiff upon the first count, because there is not the slightest showing of malice or want of probable cause, both of which are necessary in an action for malicious prosecution. *Lyons v. Davy-Pocahontas Coal Co.* 75 W. Va. 739 84 S. E. 744. A declara-

tion for malicious prosecution which omits these essential ingredients necessarily would be bad, and subject to challenge by demurrer (*Tavener v. Morehead*, 41 W. Va. 116, 23 S. E. 673); and, if they are necessary to constitute a cause of action in such a case, the plaintiff could not ultimately succeed upon the trial without showing, by proof, these essential elements of the cause averred.

The next question, then, is whether the proof is sufficient to sustain the averment of the second count of the declaration. Assuming a charge of false arrest or false imprisonment is made out, the two designations importing the same form of action, the plaintiff cannot prevail, "for the gist of such action is the illegal detention of a person without lawful process, or by an unlawful execution of such process." *Tavener v. Morehead*, supra; *Roberts v. Thomas*, 135 Ky. 63, 121 S. W. 961, 21 Ann. Cas. 457, note. As said in *Polonsky v. Pennsylvania R. Co.* (C. C.) 184 Fed. 558: "The gist of an action for false imprisonment is a trespass committed either personally or by procurement upon the body of the plaintiff. It is essential to the successful maintenance of the action that the act alleged to constitute the trespass is unlawful. That the trespass aforesaid consists in the arrest, incarceration, or detention of an innocent man is not of itself material. That the arrest of one who is innocent must be unlawful is naturally an attractive statement; but, if the forms of law be observed, such statement is not necessarily true. An arrest and consequent imprisonment may be unjust and mistaken, but, if it be lawful (i. e., in compliance with the technical requirements of statute or common law, as the case may be), then no trespass was committed, and resort must be had to an action of trespass on the case." (i. e., for malicious prosecution).

Warrants were issued by Stuart, who, as mayor, was clothed with ample authority to issue them, upon complaints made by Officer Downs, and were executed by the arrest of the plaintiff by a proper officer, in a lawful manner. This cannot be gainsaid, and is not controverted; indeed, plaintiff admits Downs informed her when she was taken into custody that he had a warrant for her arrest, and exhibited in her presence a paper which she supposed was such a process. She, then, certainly was apprehended lawfully, and her detention was not illegal, even if it be true, as testified to by the witness Wright, that the defendant said he had caused plaintiff to be taken into custody for the protection of his brother Joe. These characteristics readily differentiate the case from *Ruffner v. Williams*,

3 W. Va. 243, and *Cole v. Radcliff*, 4 W. Va. 332, where the acts complained of were done without the semblance of lawful authority, by roving bands of raiders, acting in aid of the Confederate cause during the Civil War, and where there were all the elements of false or unlawful imprisonment. Had plaintiff been taken and detained in custody without the authority of a legal process, or, as in *Williamson v. Glen Alum Coal Co.* 72 W. Va. 288, 78 S. E. 94, and *Comisky v. Norfolk & W. R. Co.* 79 W. Va. 148, L.R.A.1917D, 220, 90 S. E. 385, where the warrant did not charge a legally cognizable offense, indeed no offense at all, or, as in *Howell v. Wysor*, 74 W. Va. 589, 82 S. E. 503, Ann. Cas. 1916C, 519, where the warrant was wholly void, or, as in *Turk v. Norfolk & W. R. Co.* 75 W. Va. 623, L.R.A.1915E, 145, 84 S. E. 569, where arrests were made without warrants, and had defendant instigated the arrest, without pursuing the formality of a complaint and warrant, and given aid, comfort, counsel, direction, and encouragement to the officers engaged in effecting the apprehension, he would be chargeable with the wrong and injury done, as held in *Ruffner v. Williams* and *Cole v. Radcliff*, supra. Nor must this case be confused with cases where an arrest is made without a warrant, for a misdemeanor not committed in the presence of an officer.

Having failed to show malice and want of probable cause, plaintiff properly was refused relief upon the first count of the declaration, and, there being a variance between the averments of the second and the proof offered to support them, it results that the judgment under review must be affirmed.

#### OHIO SUPREME COURT.

WILLIAM F. BRINKMAN, Impleaded, etc.,  
Plff. in Err.,  
v.

THOMAS DROLESBAUGH.

(— Ohio St. —, 119 N. E. 451.)

**False imprisonment — what is.**

1. "False imprisonment" is a legal term defining a legal status known in law as an unlawful detention or illegal deprivation of one's liberty.

For other cases, see *False Imprisonment*, I. in *Dig.* 1-52 N. 8.

#### Headnotes by the Court.

Note. — The liability of an officer for making an arrest is discussed in the notes to *Leger v. Warren*, 51 L.R.A. 193; *Lawton v. Harkins*, 42 L.R.A. (N.S.) 69, and *Brown*

**Same — effect of bad faith.**

2. False imprisonment per se is not concerned with good or bad faith, malicious motive, or want of probable cause on the part of the prosecuting witness, or the officer causing the imprisonment. If the imprisonment was lawful, it is not the less lawful that any or all of the foregoing elements existed. These elements relate to an action of malicious prosecution, but are not essential to an action in false imprisonment.

*For other cases, see False Imprisonment, I. in Dig. 1-52 N. S.*

**Same — false complaint.**

3. Whether or not the complaint is true or false is of no concern in an action for false imprisonment. Such inquiry may be essential to an action in malicious prosecution. Whether or not the complaint in the form of affidavit, information, or indictment is or is not sufficient in law to charge an offense is likewise per se insufficient to furnish the basis of an action in false imprisonment.

*For other cases, see False Imprisonment, I. in Dig. 1-52 N. S.*

**Same — void information.**

4. The law relating to false imprisonment classifies affidavits, informations, and indictments into "void" and "voidable." The "void" class includes those setting forth facts which in no conceivable form can constitute a criminal offense; or, if they might constitute an offense, the court issuing the process had no jurisdiction over such offense or the person charged with the offense. The "voidable" class includes those where a bona fide attempt has been made to charge a possible offense under the statute, but by reason of some defect or irregularity such charge is per se insufficient in law. As to such "voidable" complaint or "voidable" processes issued thereon, there can be no false imprisonment per se.

*For other cases, see False Imprisonment, I. in Dig. 1-52 N. S.*

**Judge — liability for false imprisonment.**

5. Judges and magistrates whose courts have jurisdiction of an offense, sought to be charged in a complaint by affidavit, information, or indictment, but which complaint is insufficient in law, are, on grounds of public policy, exempt from liability for false imprisonment by virtue of any criminal process issued on such complaint.

*For other cases, see False Imprisonment, II. b, in Dig. 1-52 N. S.*

**Officer — liability for false imprisonment.**

6. By the same public policy the administrative or executive officer, whether he be constable, policeman, game warden, sheriff, or any other authorized officer of the state,

whose duty it is, under the law, to serve the process of such court, is likewise exempt from any liability arising from an imprisonment by virtue of such process, which is prima facie regular.

*For other cases, see False Imprisonment, II. b, in Dig. 1-52 N. S.*

**Judgment — conclusiveness on officer.**

7. An adjudication in a criminal cause to the effect that the complaint was insufficient in law to charge an offense is not conclusive upon the officer serving the process, in an action of false imprisonment against such officer. The question of the sufficiency or insufficiency of the complaint may be inquired of anew, and if such complaint be found sufficient in law, that is an end to the controversy in the officer's favor, providing the process upon which the false imprisonment was based was prima facie regular.

*For other cases, see Judgment, II. e, 1, in Dig. 1-52 N. S.*

**False imprisonment — sufficiency of complaint.**

8. In this case, the court finds that the affidavit which led to the imprisonment of defendant in error was sufficient in law. The absence of the negative matter complained of by the defendant in error was not essential to the legal sufficiency of the charge, nor to advise him of the "nature of the accusation against him."

*For other cases, see Indictment, etc., II. e, 3, in Dig. 1-52 N. S.*

(January 22, 1918.)

**E**RROR to the Court of Appeals for Crawford County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for alleged false imprisonment. Reversed.

Statement by Wanamaker, J.:

Brinkman was deputy state fish and game warden. He presented an affidavit to Frank E. Lamb, a justice of the peace, charging as follows: "That on or about the 21st day of January, A. D. 1913, one Thomas Drolesbaugh did unlawfully, purposely, and willfully have in his possession a device for catching fish other than a hook and line with bait or lure, to wit, a seine, in the inland fishing district of the state of Ohio, and that such offense was not committed in the presence of the undersigned deponent, and further deponent sayeth not, contrary to the statutes in such case made and provided and against the peace and dignity of the state of Ohio.

William F. Brinkman, Game Warden."

Upon this affidavit said justice of the

v. Hadwin, L.R.A.1915B, 505; and see later case, Greenius v. American Surety Co. L.R.A.1917F, 1134.

For a clear statement of the distinction

L.R.A.1918F.

between an action for false imprisonment and an action for malicious prosecution, see opinion in Finney v. Zingale, ante, 1130, and footnote appended to that case.

peace issued a warrant and delivered the same to said Brinkman, who made his return thereon as follows: "I have arrested the within-named Thomas Drolesbaugh and have his body now before the justice of the peace, this 7th day of July, 1913."

After some continuances the case was transferred to another justice of the peace, who heard the cause and found the defendant guilty as charged. Thereupon error was prosecuted to the court of common pleas, which affirmed the judgment below. Error was prosecuted to the court of appeals, which reversed the judgment of the court of common pleas, upon the ground that the affidavit did not state an offense against the laws of the state of Ohio.

Thereupon Drolesbaugh filed his petition in the court of common pleas of Crawford county against said William F. Brinkman and Frank E. Lamb, as justice of the peace, praying for damages against them for false imprisonment. Upon trial had in the court of common pleas, verdict and judgment were rendered against the defendant Brinkman; the defendant Frank E. Lamb, on motion, being discharged.

Upon error to the court of appeals the judgment of the court of common pleas was affirmed, and by leave of the court error is now prosecuted here to reverse the judgments below.

Messrs. Joseph McGhee, Attorney General, L. D. Johnson, O. W. Kennedy, and W. J. McLaughlin for plaintiff in error.

Mr. Edward J. Myers for defendant in error.

Wanamaker, J., delivered the opinion of the court:

This is not an action for false arrest or malicious prosecution. It is an action for false imprisonment. What is false imprisonment? "False imprisonment" is a legal term, and means just what the words themselves imply, a wrongful or unlawful detention or restraint of one's liberty. The question always is: Was he deprived of his liberty unlawfully? Under the facts of the case, he may have been entitled to his liberty. One may be acquitted upon the merits of the case, or discharged upon some question of law, but that does not, in and of itself, constitute false imprisonment. Under the law, was he entitled to his liberty as against the act of the person charged with false imprisonment? This is the question to be determined by a court, under due process of law. No system of jurisprudence has yet been invented that will be infallible when administered by fallible man. Mistake and injustice will occur to

the individual under any judicial system, in the application of either civil or criminal jurisprudence.

The sole question here is: Was Drolesbaugh legally deprived of his liberty by Brinkman? The points in dispute are therefore purely legal, and do not involve probable cause or malice. The mental attitude of Brinkman, the game warden, is wholly irrelevant.

It is admitted that the justice of the peace had jurisdiction of the class of offenses sought to be charged against Drolesbaugh. That there was a bona fide attempt to charge an offense under the laws of Ohio against Drolesbaugh is not denied. Neither is it claimed that there was any unnecessary force used in the execution of the process. The whole contention in this case is based upon the claim that the affidavit filed before the justice of the peace, upon which he issued his process, did not charge an offense against Drolesbaugh, by reason of the fact that it did not expressly negative certain matters found in the statute.

The original charge in this case was brought under favor of § 1426, General Code, which reads as follows: "No person shall draw, set, place, locate, maintain or have in possession a pound net, trammel net, fyke net, set net, seine, fish trap, throw or hand line, . . . or any other device for catching fish, except a hook and line with bait or lure, in the inland fishing district of this state, . . . but nothing herein shall prohibit an owner or person having the owner's consent from taking or catching a fish by a trot line, bob line, or by spearing, in that part of the stream bordering on or running through his own lands."

No claim seems to be made that there was anything in this statute ipso facto that needed to be negatived in order to state an offense. Reliance, however, is put upon § 1433, General Code, which reads: "No person shall take, catch, buy or sell minnows, except for bait or ship 'white bait,' except alive, out of the state. In the inland waters of the state no minnows shall be taken or caught with a minnow seine exceeding four feet in depth and eight feet in length, and in Lake Erie fishing district no minnows shall be taken or caught with a minnow seine exceeding thirty feet in length."

In the criminal case against Drolesbaugh, the court of common pleas and the court of appeals both held that the affidavit was insufficient, and in the trial of the civil case that adjudication was adhered to. But in the case at bar, this is not conclusive as against Brinkman. He was not a party in

the criminal cause, and therefore said action does not stand as *res adjudicata* against him, but is open here for full review.

If the affidavit did state an offense under the laws of Ohio, then there is an end to the entire controversy in favor of Brinkman. Numerous cases have been decided by this court as to the sufficiency of affidavits and indictments, in cases involving statutes containing negative matter. One of the best-considered cases of this character is that of *Hale v. State*, 58 Ohio St. 676, 51 N. E. 154, which was an indictment under the so-called Medical Act, which failed to aver that the defendant "was not a graduate of a medical college, or that he was not a legal practitioner of medicine when the statute was enacted." These two classes were made exceptions to the provisions of the act, and it was contended most strenuously in the lower courts that the indictment should have negated these two classes. This court very wisely held to the contrary. The language of the fourth paragraph of the syllabus is especially apropos here: "Where an exception or proviso in a criminal statute is a part of the description of the offense, it must be negated by averment in the indictment in order to fully state the offense; but when its effect is merely to except specified acts or persons from the operation of the general prohibitory words of the statute, the negative averment is unnecessary."

In later years courts are not making a mockery of the ancient technical rules of pleading, with regard to strictness and particularity. They follow and safeguard the constitutional rights of an accused to know "the nature of the accusation against him," and that is sufficient.

If the acts complained of in this case were within the exception, the defendant's rights were fully protected by permitting him to set them up in defense. These were matters as to which he had particular and special knowledge, and no harm can come to him nor to the state by imposing upon him the duty of bringing himself within such exceptions. Had the legislature intended the exceptions mentioned to be made a part of the description of the offense, the presumption certainly is that it would have included them in the statute that created the offense. The affidavit filed before the justice of the peace did state an offense, and therefore the process issued and served, by virtue of which Drolesbaugh was imprisoned, does not furnish any ground whatsoever for complaint by him in the nature of false imprisonment. But we are not disposed to determine this case solely upon the affidavit, though that is decisive.

Suppose the affidavit did not state an offense, and therefore was actually demurrable, or subject to motion; would the game warden then have been liable for false imprisonment? This is a matter so vital to the state at large and all its political subdivisions, so vital to all of the police officers of township, city, county, and state, that it deserves special consideration in this case. Must the officer, when he receives a process from a court of competent jurisdiction, said process to be served and returned agreeable to the orders thereof, go back of the process and inquire, at his own peril, as to whether or not there was sufficient affidavit, or sufficient legal steps taken, preliminary to the issuing of the process; and if he judges wrong in that respect, or fails to make the inquiry, shall he be penalized by an action at law for damages for false imprisonment? If that be sound law, then it is time that the people of Ohio and every police officer of the state should know the fact; and yet that is the holding of the courts below. That such a holding would absolutely paralyze the police administration of the state in the enforcement of its law is so obvious as to leave no argument.

Primarily, government is instituted to preserve law and order. A government without law and order is already upon the shoals of anarchy. Law and order are impossible without the hearty, vigilant, and efficient co-operation of the administrative and executive officers of the state—its police authorities. It is expressly made the duty of these police officers to serve and enforce the processes of the various courts.

In discharging this public duty can it be consistently claimed that the officer of the law, in this case a game warden, shall be held to have violated some other duty that he owed to the defendant Drolesbaugh, in this case? Shall, in short, this private duty, which may be conveniently so called, be held of a higher order or paramount to the public duty that he owes to the community, to the state, or any of its political subdivisions, in the enforcement of the processes of its courts? Public policy forbids such a holding.

If the acts complained of be made an offense under the law, and the court have jurisdiction of such offense, and the process be regular upon its face, it becomes the officer's sworn duty to serve the same and make a return thereon; and, though someone may be wronged thereby, the law has uniformly protected the magistrate in the issuing of the process against an action for false imprisonment. If the magistrate shall be protected, who is responsible for the issuing of the process, how can it be con-

sistently claimed that his subordinate, the process server of his court, shall be held liable for false imprisonment when he has done nothing more nor less than discharged his simple duty under the law?

There is no "unlawful detention," where the law specially warrants the proceedings taken, though they may be irregular. Of course, if a magistrate issued a criminal warrant on an ordinary charge of slander against some man, which is not made an offense under the laws of the state of Ohio, and the officer served it and imprisoned someone, that would doubtless serve as a basis of action for false imprisonment, because there is no such offense; or, if a magistrate issued a criminal warrant in a simple action for debt, and caused the police officer to serve the same. In both such cases it would be most obvious that the magistrate acted entirely beyond his jurisdiction. The magistrate is not protected in such case. Neither is the officer serving his process.

One of the earliest cases in Ohio dealing with the subject of false imprisonment is *Taylor v. Alexander*, 6 Ohio, 144. The syllabus reads as follows: "(2) In trespass against a constable and one of his posse, irregular process from a court having jurisdiction of the person and the subject is a justification, notwithstanding the preliminary steps to the process are irregular."

Judge Wright, in delivering the opinion of the court, observes (6 Ohio at page 147): "The principle is well established that executive officers, being obliged to execute process, are protected in the rightful discharge of their duty, provided the process issued from a court or magistrate having jurisdiction of the subject-matter. And, if the magistrate proceed unlawfully in issuing the process, he, and not the executive officer, will be liable for the injury. . . . The executive officer is justified, even when the process under which he acts is voidable for irregularity or mistake in issuing it."

A later and well-considered case is *Diehl v. Friester*, 37 Ohio St. 473, 475, where an action of false imprisonment is discussed in these words: "In trespass for false imprisonment, the gravamen is the unlawful act of the defendant. Case for malicious prosecution may be maintained, where a proceeding is carried on maliciously and without probable cause. While an action for malicious prosecution may be maintained, notwithstanding the plaintiff was imprisoned upon a perfectly valid judgment or order, an action for false imprisonment cannot be maintained, where the wrong complained of is imprisonment in accordance

with the judgment or order of a court, unless it appear that such judgment or order is void. And this distinction is as important now as under the former practice. *Spice v. Steinruck*, 14 Ohio St. 213."

Throughout, the courts make the distinction between a void and voidable process. If the proceedings upon which the process is issued are merely irregular, or defective for want of some allegation, but do constitute a bona fide attempt at regularity and validity, the mere fact of some defect does not make the affidavit and process void.

An examination of the cases of the various states discloses some confusion between the words "void" and "voidable," as applied to the processes of a court. Of course, a process issued beyond the jurisdiction of the court is clearly void. It is incurable, and any process not curable, that is, amendable, is not merely irregular, but absolutely void, and, as against such processes and the imprisonment resulting therefrom, the officer of course is not protected.

It may be urged that courts must not concern themselves with the consequences resulting from the application of the law. This doctrine is doubtless true, as to a clear and complete legislative act. The question of the wisdom of the act resides solely in the judgment of the legislature, providing always that it is within their constitutional right to enact. But the doctrine of this case does not depend upon a legislative act, but upon a judicial act, or holding. and courts, in declaring the law applicable to any given state of facts, must, of necessity, consider the consequences to the public at large as well as to the private individual involved in such holding. Sir Edward Coke has well said: "Reason is the life of the law; nay, the common law itself is nothing else but reason, . . . the law which is perfection of reason."

Results from the operation of the law are therefore of the highest consequence, in determining whether or not the rule of law is supported by reason. The presumption is that a reasonable law will produce reasonable results, and that, if the results are unreasonable, the rule of law must be unreasonable, and therefore that the so-called law should be abrogated, or amended so as to make it accord with reason. If the law complained of be legislative, it is the duty of the legislature to make the needed change. If, however, the law complained of be judicial, then it is up to the judiciary to make the needed change.

It is impossible to refute or reconcile all the holdings of the different courts upon these questions. Suffice it to say that what is here set forth is thoroughly in accord



with the wholesome and sound public policy in favor of law and law enforcement, and is absolutely essential to a proper encouragement and protection of all officers of the law, and the general public, who are the beneficiaries of its enforcement.

The judgments of the courts below are reversed.

Nichols, Ch. J., and Newman, Jones, Matthias, Johnson, and Donahoe, JJ., concur.

# OKLAHOMA SUPREME COURT.

AMERICAN NATIONAL BANK OF  
STIGLER, Plff. in Err.,  
v.

MRS. MARGARET B. FUNK, Admrx., etc.,  
of H. H. Funk, Deceased.

(— Okla. —, 172 Pac. 1078.)

## Bank — effect of deposit slip.

1. A deposit slip issued by a bank is but prima facie evidence that the bank received the amount of the deposit on the date shown by the deposit slip. It has the same force and effect as that of any other form of receipt, and is open to explanation as to the conditions surrounding the deposit, and the circumstances under which it was given may be inquired into.

For other cases, see *Evidence*, VI. a, in *Dig.* 1-52 N. S.

## Attorney — lien.

2. An attorney at law has a general possessory or retaining lien on property or money of his client in his hands, for his fees or for any general balance due him from his client, and such a lien is not lost while the money is still under the control of the attorney's agent.

For other cases, see *Attorneys*, II. c, 2, in *Dig.* 1-52 N. S.

## Bank — character of deposit.

3. Evidence in this case examined, and held: (1) That the deposit made by a third person to the credit of the plaintiff was a conditional deposit; (2) that she and the bank had knowledge of the conditions under which the deposit was made; and (3) that the bank was not liable to the plaintiff for charging to her account the sum of \$398.50 paid by it to the person lawfully entitled to the possession of such sum of money.

For other cases, see *Banks*, IV. a, 1, in *Dig.* 1-52 N. S.

## Appeal — review of findings.

4. Where there is any evidence reasonably tending to support the findings of the trial court, they should not be disturbed by the supreme court; but where, after a careful examination of all the evidence in

Headnotes by RAINEY, J.

Note. — For deposit slips and deposit entries in pass books as contracts within the rule against parol evidence to vary or contradict written contracts, see annotation following *American Home L. Ins. Co. v. Citizens' State Bank*, L.R.A.1918B, 298.

L.R.A.1918F.

the case, it is found that there is not any competent evidence to sustain the findings, the cause will be reversed.

For other cases, see *Appeal and Error*, VII. 1, 3, a, in *Dig.* 1-52 N. S.

(May 14, 1918.)

ERROR to the Haskell County Court to review a judgment in favor of plaintiff in an action brought to recover a balance alleged to be due from a sum of money deposited in the defendant bank to her credit as administratrix. Reversed.

The facts are stated in the opinion.

Messrs. J. B. Furry and E. C. Motter for plaintiff in error.

Mr. T. T. Varner for defendant in error.

Rainey, J., delivered the opinion of the court:

Mrs. Margaret B. Funk, as administratrix of the estate of H. H. Funk, deceased, instituted this action in the county court of Haskell county, Oklahoma, against the American National Bank of Stigler, Oklahoma for the recovery of the sum of \$398.50, claimed by her as a balance due from a sum of money deposited in said bank to her credit, as administratrix. The defendant pleaded that it had made payment in full to the plaintiff of all sums due her by virtue of said deposit. A jury was waived, and the cause was tried to the court, which resulted in a verdict for the plaintiff, to reverse which judgment the defendant has brought the case to this court. The parties will hereinafter be referred to as they appeared in the county court.

The circumstances out of which the controversy arose are substantially as follows: During the year 1912, H. H. Funk, deceased, employed J. B. Furry and Robert A. Zebold, as his attorneys, to institute suit to foreclose a mortgage on the property of the Stigler Light & Power Company, which resulted in a judgment for the plaintiff and a decree of foreclosure of the mortgage. The property was sold under the mortgage, and after a stubborn contest the same was confirmed by the district court, and sheriff's deed issued on March 1, 1913. The property was sold for more than enough to satisfy the judgment, and Mrs. Funk's claim was paid in full, together with the sum

of \$250 attorneys' fees, the amount provided for in the mortgage. Upon confirmation of the sale the sheriff of Haskell county, James Keese, gave his check for the full amount of the judgment, payable to J. B. Furry and R. A. Zebold, in the sum of \$14,959.93. Before the sale was confirmed, Mr. Funk died, and his wife Margaret B. Funk, was appointed administratrix of his estate. Mr. R. A. Zebold, one of the attorneys originally employed, resided in Muskogee, Oklahoma, at the time of his employment, but in June, 1912, moved to Stigler, where he became connected with the American National Bank in the capacity of cashier. While his name appears of record as one of counsel until the case was concluded, he testified that he was not connected with the case after June, 1912. Mr. Furry charged an additional attorney's fee of \$250 to that named in the mortgage, and expenses incurred on various trips to Stigler, in the sum of \$23.50, and so notified Mr. Roy Funk, a son of the plaintiff. The sale was confirmed after banking hours on March 1, 1913; and Mr. Furry, being anxious to catch a train back to Muskogee, Oklahoma, gave positive instructions to Mr. Zebold to collect the money on the sheriff's sale, to remit him \$398.50, the balance due on his fee in the case, \$125 having been paid during the lifetime of Mr. Funk. It seems, however, that Mr. Zebold, being anxious to secure the deposit for the American National Bank of the full amount of the sum collected on the judgment, which deposit had been promised to him by the representatives of the Funk estate, on the suggestion of Roy Funk deposited the entire sum to the credit of Mrs. Funk, as administratrix of the estate, and delivered the deposit slip to Roy Funk. However, he explained to Roy Funk at the time the deposit was made that it was subject to Furry's claim in the sum of \$398.50; that said amount would have to be paid Mr. Furry by Mrs. Funk by check, or that he would pay the same and charge it to her account.

With reference to the instructions given Mr. Zebold, Mr. Furry's testimony is as follows:

"I instructed him to get the check from the sheriff, James Keese, for the amount of the judgment and costs the plaintiff was entitled to in that action. The amount was \$14,959.93. I believe that amount included \$250 for attorney's fee collected from the defendants in that case as a part of the costs. I told Mr. Zebold to collect the money on the sheriff's check and remit to me \$398.50, which was the balance of the attorney's fee which I charged in the

case. There had previously been paid \$125 by Mr. Funk to apply on attorney's fee, and my fee in the case would be \$500, and that my expenses from the number of trips that I had made to Stigler and back in attending court in that case. I never at any time authorized the bank to deposit that money to Mrs. Funk's credit or any part of it to her credit. I didn't at any time know that Mrs. Funk intended to carry any deposit in the American National Bank. My instructions were to collect the money on the check and remit to Mrs. Funk the amount of the judgment after deducting the amount of the fee I charged in the case and my expenses. I told Roy Funk the day, on March 1st, that the fee, right herein the court room, in the presence of Mr. Curry, that the fee would be \$500."

Mr. Zebold, one of the witnesses placed on the stand by plaintiff as her witness, with reference to how the deposit was made, testified as follows:

Upon the evening of March 1, 1913, after banking hours, approximately 6 o'clock, you (Judge Furry) delivered a check by James Keese for \$14,959.93, and this check was payable to yourself and myself. Your instructions to me were to take the check, collect and remit you \$398.50, and to pay the balance to Margaret B. Funk, administratrix of the estate of H. H. Funk, deceased. I took the check, went over to the bank, went in some time between 6 o'clock and 7 o'clock, made a deposit ticket in the name of Margaret B. Funk, administratrix of the estate of H. H. Funk, deceased, and entered the check for \$14,959.93, made a duplicate of that deposit ticket, and delivered the duplicate to Roy B. Funk, and told him that his mother was to send Judge Furry a check for \$398.50; and, in the event that she did not do so, that the sum would be charged against this account and remitted to Judge Furry, because I had received those instructions from him when he delivered to me the check for deposit. . . .

Q. Didn't you deposit the check in the name of this plaintiff in the way you did at the suggestion of Mr. Funk, after some protesting on your part?

A. I did.

Q. Just state to the court what was said.

A. I told Roy what my instructions were to deduct the \$398.50 from it, and from him I received authority to give his mother a deposit for this judgment, or rather it had been, the understanding between us that I was to have the benefit of the deposit or until they sought new fields of investment. Roy said his mother would feel better about it if she could issue check for that amount, \$398.50, to you. Under those conditions

I issued this deposit ticket, of which this copy introduced here is a duplicate, and delivered this duplicate to Roy Funk with that understanding, and told him that his mother was to send me a check, and if she did not I would charge it to her account; that I had received the check from you with those instructions.

Q. Did you notify Mrs. Funk of the conditions or instructions under which the deposit was made?

A. I did.

Q. When?

A. I dictated a letter on March 3d. This deposit was made after banking hours on Saturday,—showed on Monday's business. I dictated a letter to Mrs. Funk, which was written on March 4th, the next day or the day after, and explained to her just how the case had been terminated, and gave her all the details relative to your charge for attorney's fee and the conditions surrounding this deposit. I was to write a letter to his mother explaining this deposit, and he was to do the same verbally.

Q. At the time you had this conversation with Roy B. Funk at the bank about depositing this sum in his mother's name, I will ask you whether he didn't state at that time he would see that his mother sent a check for the amount due me for the sum of \$398.50?

A. That is my recollection of the conversation.

There was introduced in evidence the letter written by Mr. Zebold to Mrs. Funk. In this letter, which is quite long, Mr. Zebold gave the history of the case in some detail, explaining the arduous and valuable services rendered by Mr. Furry in the case; stated that the writer was not entitled to and did not claim any part of the fee, but that the fee charge by Mr. Furry was very reasonable. Relative to the condition of the deposit the letter reads as follows:

"Knowing you quite well, I deviated from the line of instructions received from the judge, and gave you credit in the bank for the \$14,959.93, subject, of course, to the conditions surrounding the deposit, and I am awaiting a check from you for the attorney fees and expenses in the matter."

Mrs. Funk did not send the check as requested by Mr. Zebold, but instead sent only \$135, which was refused. Mr. Furry then drew on Mr. Zebold, personally, for \$398.50, which draft was paid by Mr. Zebold and charged to the account of Mrs. Funk. The record further shows that Roy Funk made no objection at any time to the fee charged, but suggested to Mr. Zebold that he was without authority to allow it. He further testified that he had

no authority in the premises other than to receive the deposit slip.

Under the above state of facts, the trial court found for the plaintiff, doubtless on the theory that the bank was bound by and could not dispute the deposit slip.

Counsel for defendant contend that on the undisputed testimony in this case and the conceded facts that the judgment of the court is wrong as a matter of law, and counsel for plaintiff say that the sole question is whether the defendant was legally justified in paying the draft drawn on Mr. Zebold by Mr. Furry and charging the amount thereof to the account of the plaintiff.

A deposit slip is but prima facie evidence that the bank received the amount of the deposit on the date therein stated. It has the same force and effect as that of any other form of receipt, and is open to explanation as to the conditions surrounding the deposit; and the circumstances under which it was given may be inquired into. *Hough v. First Nat. Bank*, 173 Iowa, 48, 155 N. W. 163; *Keen v. Beckman Bros.* 66 Iowa, 672, 24 N. W. 270; *First Nat. Bank v. Clark*, 134 N. Y. 368, 17 L.R.A. 580, 32 N. E. 38; *Davis v. Lenawee County Sav. Bank*, 53 Mich. 163, 18 N. W. 629; *Stair v. York Nat. Bank*, 55 Pa. 364, 93 Am. Dec. 759.

This is especially so where the deposit is made by the depositor in the name of a third person. The applicable principle is well stated by Tiffany in his work on Banks and Banking, ¶ 15, p. 42, as follows: "Where a deposit is made in the name of a third person, the bank must make payment to such person, in the absence of an adverse claim by the actual depositor or another. The actual depositor has a right to demand payment from the bank if the money deposited was his own, and he did not intend to transfer the beneficial ownership of the deposit to the person in whose name it was made."

We understand from the brief of counsel for plaintiff that he concedes that the bank may show that the deposit was a conditional deposit, but counsel contend that the question as to whether the deposit in this case was a conditional deposit was a question of fact, that the trial court determined against the defendant, and for that reason the judgment should not be disturbed. This position is obviously correct if the evidence in the record reasonably tends to support the judgment. We have carefully read and considered all of the evidence in the record, and have concluded that the judgment is not reasonably supported by the evidence.

It is a well-settled proposition of law

that an attorney has a general possessory or retaining lien on property or money of his client in his hands for the fees or for any general balance due him from his client. 6 C. J. 770; 2 R. C. L. §§ 150-152, inc. pp. 1063, 1064. While such a lien depends upon the attorney's possession, and is lost if possession is voluntarily relinquished to the client, we do not think, under the facts of this case, that such possession was voluntarily relinquished, but, on the contrary, was retained. As we have read the record, the uncontradicted and undisputed evidence in the case shows that Mr. Zebold was not acting in the capacity of an attorney for Mrs. Funk when he received the check from the sheriff in payment of the judgment, but was acting as the agent of Mr. Furry, who had the retaining lien on the funds represented by the sheriff's check. The possession of Mr. Zebold was that of Mr. Furry, and control over that part of the proceeds of the judgment claimed as a fee, to wit, \$398.50, and the possession of the same, was never voluntarily surrendered by Mr. Zebold to Mrs. Funk. So far as the bank was concerned, Mr. Furry, through his agent, still retained control and constructive possession of this part of the fund. This control and possession did not in anywise preclude Mrs.

Funk from litigating with Mr. Furry the reasonableness of the fee charged by him. The record discloses that the fee charged was very reasonable for the services performed, and no other claim is made. It seems that Mrs. Funk has brought suit against the bank on what she assumes to be her technical legal rights. But since the bank, through Mr. Zebold, its cashier, had recognized the claim of Mr. Furry to the amount of the fund claimed by him, and issued the deposit slip on this understanding, and with notice to Mrs. Funk as to the conditions surrounding the deposit, the bank not only had the right, but it was its duty, to pay the amount due Mr. Furry upon his demand, and to charge the same to the account of Mrs. Funk, to whose account it had been erroneously deposited, in violation of the specific instructions given by Mr. Furry. The deposit was not, in fact, made by Mrs. Funk, and she was only entitled to have deposited to her credit as much of the proceeds of the judgment as were released to her by Mr. Furry through Mr. Zebold.

The cause is therefore reversed and remanded, with instructions to grant a new trial.

All the Justices concur.

#### KANSAS SUPREME COURT.

W. R. BUCK

v.

BOARD OF COMMISSIONERS OF MIAMI COUNTY et al., Appts.

(103 Kan. 270, 173 Pac. 344.)

#### Tax — securities out of state.

A resident of this state, having sold a business in Wyoming, placed the proceeds with an investment company in Missouri, with full power to invest in notes and mortgages, record, release, collect, and reinvest; the securities being at all times in the possession of the agency, the profits only being

Headnote by WEST, J.

Note. — The decision in *BUCK v. MIAMI COUNTY*, that the credits in question were not subject to taxation in Kansas, the domicile of the owner involves two propositions: (1) That, in the circumstances, the credits had a business situs in Missouri for purposes of property taxation; and (2) that, having such a business situs in another state, they were not taxable at the domicile of the owner in Kansas. The first question, namely, as to when credits have a "business situs" other than the domicile of the owner for purposes of property tax-

remitted to the principal. Held, that such securities, being thus dealt with for a number of years, acquired a business situs for the purposes of taxation where the agency is located, and are not taxable at the residence of the owner.

For other cases, see *Taxes*, II. in *Dig. 1-52 N. S.*

(June 8, 1918.)

**A**PPEAL by defendants from a judgment of the District Court for Miami County in favor of plaintiff in a suit to enjoin the assessment of certain notes and mortgages. **Affirmed.**

The facts are stated in the opinion.

Mr. Karl V. Shawver for appellants.

tion, is treated at pages 923 et seq., of the note to *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, L.R.A.1915C, 903, on the general subject of the situs, as between different states or countries, of personal property for purposes of property taxation. The second question, namely, whether the fact that personal property has a situs for taxation elsewhere will relieve it from taxation in the state of the owner's domicile, is considered in the note to *Com. v. West India Oil Ref. Co.* 36 L.R.A.(N.S.) 295.

Messrs. Alpheus Lane and M. A. Lane, for appellee:

Notes secured by mortgage are taxable at the place of residence of the owner unless they have a business situs at some other place, when they are taxable at that place.

Kingman County v. Leonard, 57 Kan. 531, 34 L.R.A. 810, 57 Am. St. Rep. 347, 46 Pac. 960; Mecartney v. Caskey, 66 Kan. 412, 71 Pac. 832; Johnson County v. Hewitt, 76 Kan. 816, 14 L.R.A.(N.S.) 493, 93 Pac. 181; W. W. Kimball Co. v. Shawnee County, 99 Kan. 302, L.R.A.1917B, 1282, 161 Pac. 644; 38 Cyc. 830; 27 Am. & Eng. Enc. Law, 2d ed. 656; Matzenbaugh v. People, 194 Ill. 108, 88 Am. St. Rep. 134, 62 N. E. 546; Buck v. Miller, 147 Ind. 586, 37 L.R.A. 384, 62 Am. St. Rep. 436, 45 N. E. 647, 47 N. E. 8; New Orleans v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; People ex rel. Jefferson v. Smith, 88 N. Y. 576; State Assessors v. Comptoir National D'Escompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109; Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732.

West, J., delivered the opinion of the court:

The plaintiff, a resident of Miami county, brought this suit to enjoin the assessment of certain notes and mortgages owned by him, but kept in Kansas City, Missouri. The proceeds of a business sold by the plaintiff in Wyoming were forwarded to the Maxwell Investment Company at Kansas City, Missouri, and later a power of attorney was executed by the terms of which the company was authorized: "To engage for me in my behalf in the investment of all funds in its hands or that may come into its hands belonging to me in loaning the same on notes secured by first real estate mortgages in any state where it is engaged in business or by purchasing notes secured by first real estate mortgages, with full authority to take such notes and mortgages and to assign same to me and to keep and hold all such notes and mortgages and to ask, demand, sue for, collect, and receipt for all moneys due to me on any note now or hereafter so held, with full power and authority to release any and all mortgages of record now or hereafter held when same shall have been paid, and to reinvest in its discretion any and all collections in manner above designated, and I authorize and empower my agent and attorney, the Maxwell Investment Company, to hold and keep for my use all of the

securities that may be taken for reinvestment of funds as paid in."

The terms of this authority were followed; notes and mortgages were purchased; some of the mortgages being on Oklahoma lands, some in Texas, and some in Arkansas, but probably none in Kansas. The general course of business was for the Maxwell Investment Company to select certain mortgages written to itself, charge them up to the plaintiff's account, place them in a package in a box in a safety deposit vault; the notes never going out of the office of the investment company. When they were paid off the company released them; the proceeds being reinvested for the plaintiff, the entire business being transacted by the company. It also appears that in some way satisfactory to the comptroller these securities were regarded as assessed to the Maxwell Investment Company as a part of its capital and surplus. The trial court found that the securities attempted to be assessed in Miami county had a business situs in the state of Missouri, and were not properly assessable in Kansas.

The defendants appeal, and contend that the rule should apply that personal property follows the domicile of the owner. It is conceded that this is the general rule in regard to intangible personal property, the situs of which has not been fixed by the legislature, but the plaintiff contends that the facts in this case present an exception and bring the securities in controversy under the rule that such property is assessable elsewhere when it has there acquired a business situs. Ordinary tangible personal property may easily be located and used in another state so as to effect and localize a business situs. Notes and mortgages are sufficiently practical and tangible to become the subject of exclusively local business use, and that such property may acquire such situs is recognized by the courts and by the State Tax Commission. Counsel for the plaintiff quote a letter sent out by the Commission under the date of December, 1915, containing the following language:

"Intangibles, however, may acquire what it known as a business situs. In other words, if a nonresident of Kansas which sent into the state moneys for investment, and these moneys were administered by an agent, or an attorney in fact, who exercised all the powers of ownership, such as making the investments upon his own election, collections of interest and principal, satisfaction of mortgages of record, and all such powers which the owner has the right to exercise, merely sending to the real owner in another state income from time to time, then the Commission has held that such

property has a business situs in the state, and is taxable in the state. Contrariwise, property of the kind sent to another state under exactly similar conditions would be nontaxable in Kansas, although the owner lived here, but the business must be transacted in a bona fide manner."

Counsel also quote from the revised instructions sent out by the Tax Commission the following: "An investment business may be so conducted as to give rise to the right of taxation to the property involved in the state where the business is transacted. Such situs is commonly called a 'business situs.' This means simply that if a person in one state sends into another state moneys to be handled by an agent or an attorney in fact, who has and exercises all the powers of investment which the owner has and would exercise were he in the state where the business is being transacted,—that is to say, who invests the money, takes and records mortgages, collects the notes when due, releases record obligations and reinvests money realized from the collection of such obligations, and handles the business exactly as the owner would handle it, transmitting to the owner occasionally amounts of income as agreed upon,—then such property would have a business situs in the state where the business is being transacted and would be there taxable."

In *Johnson County v. Hewitt*, 76 Kan. 816, 14 L.R.A.(N.S.) 493, 93 Pac. 181, it was said: "Notes, mortgages, tax sale certificates, and the like, might be brought into the state for something more than a temporary purpose, be devoted to some business use here, and thus become incorporated with the property of this state for revenue purposes. Such a situs has aptly been termed a 'business situs.'" 76 Kan. 822.

Also: "It is not necessary to determine precisely what facts will be sufficient in every case to establish an independent business situs for notes and mortgages, but generally the element of separation from the domicile of the owner and fairly permanent attachment to some foreign locality should appear, together with some business use of them, or some power of managing, controlling, or dealing with them in a business way." 76 Kan. 823.

The same rule is found announced in many decisions:

"If we look to the decisions of other states we find the frequent ruling that when an indebtedness has taken a concrete form and become evidenced by note, bill, mortgage, or other written instrument, and that written instrument evi-

dencing the indebtedness is left within the state in the hands of an agent of the non-resident owner, to be by him used for the purpose of collection and deposit or reinvestment within the state, its taxable situs is in the state." *New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110.

"A credit which cannot be regarded as situated in a place merely because the debtor resides there, must usually be considered as having its situs where it is owned, at the domicile of the creditor. The creditor, however, may give it a business situs elsewhere, as where he places it in the hands of an agent for collection or renewal, with a view of relending the money and keeping it invested as a permanent business." *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585.

Also *State Assessors v. Comptoir National D'Escompte*, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; *Buck v. Beach*, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712, 11 Ann. Cas. 732; *Buck v. Miller*, 147 Ind. 586, 37 L.R.A. 384, 62 Am. St. Rep. 436, 45 N. E. 647, 47 N. E. 8; 38 Cyc. 830; 27 Am. & Eng. Enc. Law, 2d ed. 656; *Goldgart v. People*, 106 Ill. 25; *Matzenbaugh v. People*, 194 Ill. 108, 88 Am. St. Rep. 134, 62 N. E. 546; *People ex rel. Jefferson v. Smith*, 88 N. Y. 576; *Catlin v. Hull*, 21 Vt. 152.

Under these authorities it is beyond question that if the plaintiff lived in Kansas City, Missouri, and dealt with the fund in question in the same way, through an agency at Paola, his securities would be taxable here. The controlling principle is no less plain because the geography of the situation is reversed. The precise case before us (and our decision goes no further) is one in which the plaintiff, a resident of this state, took the proceeds of a business owned by him in another state and placed them as a sort of revolving fund with an agency in a third state, with full power to invest in notes and mortgages, record, release, collect, and reinvest; the securities being at all times in the possession of the agency, the profits only being remitted to the plaintiff. This course of dealing for a number of years has given such securities a business situs for the purposes of taxation in the state where the agency is located.

Counsel for the defendants inquires whether, on the facts here shown, "a resident of Kansas can escape his obligations to the

municipal bodies, . . . or can by this method a citizen of this state shirk his obligations as a taxpayer, and thereby impose a greater obligation on the other citizens living around him, an unjust and an unequal obligation."

In *Fisher v. Rush County*, 19 Kan. 414, Horton, Ch. J., said: "It may by some be considered unjust and unequal that a citizen of this state should be allowed to possess notes and debts in another state secured by mortgages, and not pay taxes upon them here. . . . Taxation and protection are correlative terms. Protection to that portion of property not taken or absorbed by the tax is the consideration or compensation for all legitimate taxation. Without this protection, or some benefit to be returned therefor, taxation would be but another form for spoliation, or confiscation." 19 Kan. 416.

It was also said that "the power of taxation, however vast in its character and searching in its extent, is necessarily lim-

ited to subjects within the jurisdiction of the state." 19 Kan. 416.

In deciding *Kingman v. Leonard*, 57 Kan. 531, 34 L.R.A. 810, 57 Am. St. Rep. 347, 46 Pac. 960, it was declared that "the ground on which all taxation is justified is that it is a burden necessarily imposed by the sovereignty in order to enable it to perform its duty in protecting persons and property. . . . We think it now quite well settled that choses in an action belonging to a non-resident, in the hands of a managing agent within the state, are taxable." 57 Kan. 534.

In *Mecartney v. Caskey*, 66 Kan. 412, 71 Pac. 832, in speaking of another kind of property, it was said: "An owner may separate his certificates from himself, attach them to some locality apart from his residence, and employ them there in such manner as to effect a permanent submission of them to the latter jurisdiction." 66 Kan. 414.

The result reached by the trial court was in line with these decisions and expressions, and the judgment is affirmed.

#### NEBRASKA SUPREME COURT.

CHITTENDEN & EASTMAN COMPANY,  
Appt.,  
v.  
SAUNDERS COUNTY NATIONAL BANK.

(— Neb. —, 188 N. W. 100.)

#### Bank — recommendation of credit — liability.

When a bank writes a jobber that a third party has made arrangements with it to remit in payment of a bill of goods "upon arrival of the goods, subject to inspection," and the letter is treated as a "recommendation" only, and the goods are shipped and delivered to the third party without acknowledgment of receipt of the letter or notice of shipment, within a reasonable time, no liability for payment of the goods arises against the bank.

For other cases, see *Guaranty, I. in Dig.* 1-52 N. S.

(June 15, 1918.)

Headnote by MORRISSEY, Ch. J.

Note. — The question whether the recommendation of another as a proper subject for credit is a ground of liability is considered in the notes to *Hedin v. Minneapolis Medical & Surgical Institute*, 35 L.R.A. at page 421, and *Yates Center Nat. Bank v. Allen*, L.R.A.1915A, 100; and see later case, *Farmers' Sav. Bank v. Jameson*, L.R.A. 1916E, 362.

L.R.A.1918F.

**A**PPEAL by plaintiff from a judgment of the District Court for Saunders County in favor of defendant in an action brought to hold it liable for the amount of a bill of goods shipped by plaintiff to a third party, upon receipt of a letter to plaintiff by defendant, sent at the request of said party. Affirmed.

The facts are stated in the opinion.

Messrs. Fawcett & Mockett, E. E. Placek and E. S. Schiefelbein, for appellant:

Defendant's letter of June 21, 1911, was a binding contract between the parties.

2 Elliott, Contr. § 1233; *Fullam v. Adams*, 37 Vt. 391.

Defendant's letter of June 21, 1911, was an original promise, and it was in duty bound to remit when the plaintiff had fulfilled its part of the agreement.

*Nelson v. Boynton*, 3 Met. 396, 37 Am. Dec. 148; *Stone v. Walker*, 13 Gray, 613; *Gibbs v. Blanchard*, 15 Mich. 292; *Baldwin v. Hiers*, 73 Ga. 739; *Morris v. Osterhout*, 55 Mich. 262, 21 N. W. 339; 2 Elliott, Contr. § 1232; *Clopper v. Poland*, 12 Neb. 69, 10 N. W. 538; *Treholm v. Kloepper*, 88 Neb. 236, 129 N. W. 436; 20 Cyc. 167, § 6; *Palmer v. Witcherly*, 15 Neb. 98, 17 N. W. 364; *Williams v. Auten*, 62 Neb. 832, 87 N. W. 1061; *Lindsey v. Heaton*, 27 Neb. 662, 43 N. W. 420.

Delivery of the goods to Iverson by the plaintiff was a consideration for defendant's promise.

Carlile v. Dauchy, 26 Neb. 337, 41 N. W. 1119; Allen v. Chouteau, 102 Mo. 309, 14 S. W. 869; Atchison & N. R. Co. v. Miller, 16 Neb. 661, 21 N. W. 451.

The prescribed form and conditions of acceptance by defendant were fully complied with by plaintiff.

1 Elliott, Contr. § 29.

Mr. F. A. Peterson also for appellant.

Mr. Charles H. Slania for appellee.

Morrissey, Ch. J., delivered the opinion of the court:

Plaintiff appeals from a judgment of the district court for Saunders county in favor of defendant. A jury was waived, and the cause tried to the court on a stipulation of facts.

Plaintiff as a manufacturer and jobber of furniture, with its principal place of business at Burlington, Iowa. Defendant is in the banking business at Wahoo, Nebraska.

One Iverson was desirous of purchasing a bill of goods from plaintiff, but plaintiff would not extend credit to Iverson. Iverson had on deposit with defendant \$206. He made arrangements with defendant to borrow enough to bring his deposit up to \$262.32, the amount of the bill of goods, and defendant, at his solicitation, wrote plaintiff as follows:

Saunders County National Bank.

Wahoo, Nebraska, June 21, 1911.

Chittenden Eastman Co.,

Burlington, Iowa.

Gentlemen:—

Mr. G. S. Iverson, of this city, has made arrangements with us to remit to you the sum of \$262.32 upon arrival of goods, subject to inspection as listed on your memorandum dated April 8, 1911, addressed to Morrow & Iverson, Dalton, Neb.

Yours truly,

J. J. Johnson, Cashier.

Upon receipt of this letter plaintiff shipped the goods to Iverson, but did not acknowledge receipt of defendant's letter, or notify it of the shipment of the goods. September 21st following, plaintiff drew a sight draft on Iverson through defendant bank for \$267.91. No letter accompanied the draft, nor was there anything to indicate that this draft was an account of the goods mentioned in defendant's letter of June 21st. Iverson had no money on deposit with defendant at that time, and the draft was dishonored. October 3d, plaintiff wrote defendant, enclosing statement of Iverson's account, explaining that they had not therefore called defendant's attention to it, because its letter of June 21st had been mis-

laid, but stating that the shipment had been made, relying upon defendant's letter. Defendant replied that they supposed the Iverson account had been closed long ago, as plaintiff had allowed more than three months to go by without acknowledging receipt of the letter, or giving notice that the goods had been shipped; that Iverson had withdrawn his deposit, and defendant denied liability. Other letters were exchanged in one of which plaintiff said: "We extended this man a credit of \$267.91 purely upon the recommendation of the cashier of your bank. It is true that legally the letter you wrote us was not a guaranty, but in every other sense of the word it was."

Plaintiff complains that the judgment is not sustained by the evidence, and is contrary to law. Iverson had part of the fund necessary to pay for this bill of goods, on deposit with defendant, and had arranged to borrow the necessary balance. Defendant stated the situation correctly when it wrote that Iverson had made arrangements to remit upon arrival of the goods, subject to inspection. The letter could not be construed to mean that the bank was assuming personal liability for the debt, nor could it be expected to hold indefinitely the fund provided to pay for the goods, without any notice of the acceptance of the offer or the shipment of the goods. Impliedly, at least, this letter called for an immediate acceptance. It was not made. The account was permitted to run beyond the time usual in business transactions, before the bank was notified that any action whatever had been taken, relying upon its letter.

It is argued that shipment of the goods was a sufficient acceptance, but the shipment was made without the knowledge of the bank, and without notice to it. The account was charged not to the bank, but to Iverson, and the draft was drawn for a greater amount than that which defendant indicated it would honor. Finally, plaintiff states in its correspondence that no legal liability exists. This statement may have no bearing, other than to show the construction placed upon the correspondence by the parties; that, originally, both parties gave it the construction now insisted upon by defendant. The conduct of plaintiff shows that it did not regard defendant as primarily liable for the debt, but regarded its letter as "a recommendation."

The judgment of the district court is amply sustained by the evidence, and is affirmed.

Hamer, J., not sitting.



## MICHIGAN SUPREME COURT.

FRED L. STEVENS, Plff. in Err.,  
v.  
HERMAN VENEMA.

(— Mich. —, 168 N. W. 531.)

**Bills and notes — bona fide purchaser — notice of fraud.**

1. One buying commercial paper from a corporation after handling thousands of dollars' worth of it and knowing of trouble in collections is chargeable with notice of any fraud which may have been perpetrated in securing the paper.

*For other cases, see Bills and Notes, V. b, 2, in Dig. 1-52 N. S.*

**Same — fraud — presumption.**

2. Incorporating a detachable promissory note in an elaborate and ingeniously enticing order for merchandise which is printed in fine type, with blanks for signatures in several places, is presumptively fraudulent.

*For other cases, see Evidence, II. c, 7, in Dig. 1-52 N. S.*

**Alteration of instruments — detaching note from contract.**

3. Detaching from a conditional order for merchandise a note incorporated therein is an alteration of the instrument which avoids it in the hands of the payee and purchaser with notice, although the contract authorizes its detachment.

*For other cases, see Alteration of Instruments, II. b, in Dig. 1-52 N. S.*

(July 18, 1918.)

**ERROR** to the Circuit Court for Kent County to review a judgment in favor of defendant in an action on a promissory note. **Affirmed.**

The facts are stated in the opinion.

Mr. William J. Gillett for plaintiff in error.

Messrs. Wicks, Fuller, & Starr, for defendant in error.

Plaintiff did not make even a prima facie showing of the execution and delivery of the alleged note, and until such showing was made there was no note and no evidence whatever to form a basis for the comparison of signatures by the jury.

Tiffany, Justice's Guide, 10th ed. § 698; New York Iron Mine v. Citizen's Bank, 44 Mich. 344, 6 N. W. 823, 2 Mor. Min. Rep. 171; Apache County v. Barth, 177 U. S. 538, 44 L. ed. 878, 20 Sup. Ct. Rep. 718; Brown v. Tourtelotte, 24 Colo. 204, 50 Pac. 195; Shepherd v. Royce, 71 Ill.

**Note.** — As to what circumstances are sufficient to put a purchaser of negotiable paper on inquiry, see annotation following this case, post, 1148, and references therein to annotations on related questions.

App. 321; Fudge v. Marquell, 164 Ind. 447, 72 N. E. 565, rehearing denied 164 Ind. 454, 73 N. E. 895; Richardson v. Fellner, 9 Okla. 513, 60 Pac. 270; Sears v. Daly, 43 Or. 346, 73 Pac. 5; Roy v. First Nat. Bank, — Miss —, 33 So. 411; Simpson v. Davis, 119 Mass. 269, 20 Am. Rep. 324; Mills v. Bank of United States, 11 Wheat. 431, 6 L. ed. 512; Huddleston v. Coyle, 21 La. Ann. 148; Matteson v. Morris, 40 Mich. 52; Nelson v. Dutton, 51 Mich. 416, 16 N. W. 791; Vinton v. Peck, 14 Mich. 287; Mynning v. Detroit, L. & N. R. Co. 64 Mich. 93, 8 Am. St. Rep. 804, 31 N. W. 147.

There was a material alteration of the original instrument by reason of which plaintiff is not entitled to maintain this action.

Richardson v. Fellner, 9 Okla. 513, 60 Pac. 270; Bothwell v. Schweitzer, 84 Neb. 271, 22 L.R.A.(N.S.) 265, 133 Am. St. Rep. 623, 120 N. W. 1129; Bigelow, Bills & Notes, 2d ed. p. 221; Wait v. Pomeroy, 20 Mich. 425, 4 Am. Rep. 395; Toledo Scale Co. v. Gogo, 186 Mich. 442, 152 N. W. 1046, Ann. Cas. 1917E, 601; First Nat. Bank v. Carter, 138 Mich. 421, 101 N. W. 585; Mace v. Kennedy, 68 Mich. 400, 36 N. W. 187; Sutton v. Beckwith, 68 Mich. 310, 13 Am. St. Rep. 344, 36 N. W. 79; Stevens v. Pearson, 138 Minn. 72, 163 N. W. 769; Gibbs v. Linabury, 22 Mich. 479, 7 Am. Rep. 675; Anderson v. Walter, 34 Mich. 113; First Nat. Bank v. Deal, 55 Mich. 592, 22 N. W. 53; Beard v. Hill, 131 Mich. 246, 90 N. W. 1065; Hulett v. Marine Sav. Bank, 143 Mich. 219, 4 L.R.A.(N.S.) 1042, 106 N. W. 879.

Steere, J., delivered the opinion of the court:

This case was begun and first tried in a justice court of Kent county, where defendant had verdict and judgment, from which plaintiff took an appeal to the circuit court.

The justice's return shows that plaintiff declared orally upon all the common counts in assumpsit, and especially upon a certain promissory note. Defendant filed a written plea with notice of special defense and affidavit denying execution of the alleged note, the special defenses of which notice was given being as follows:

"(1) Defendant denies that he signed, executed, or delivered the alleged promissory note on which the claim herein is based, or that he signed, executed, or delivered any promissory note on which the claim herein is based, or that he signed, executed, or delivered any promissory note whatever.

"(2) That the paper which defendant

actually did sign has been materially altered by the Donald-Richard Company, or by plaintiff, or by some other persons, and that it is therefore void.

"(3) That defendant was induced to sign the paper which he did sign through the fraud and misrepresentation of an agent of the Donald-Richard Company, of Iowa City, Iowa.

"(4) That plaintiff is not a bona fide holder for value of the alleged note, and that he had notice and knowledge of all the circumstances hereinbefore set forth before the said plaintiff took the said alleged note.

"(5) That the paper signed by this defendant was a contract, and not a negotiable instrument, and that plaintiff does not claim to hold the same by assignment; wherefore plaintiff has not shown any right to maintain any action on said contract."

Upon trial of the case in circuit court defendant introduced no testimony, but at conclusion of plaintiff's testimony, moved for a directed verdict in his favor, which was granted and judgment rendered thereon.

Plaintiff's assignments of error are directed to the rulings of the court upon questions of law which center to and resulted in the charge directing a verdict for defendant. At conclusion of the brief charge directing a verdict because "no question of fact will be left to you for your consideration" the court said, in answer to inquiry by plaintiff's counsel if the stenographer had taken down the motion, "Oh yes; he took it in detail, and I directed the verdict upon all the grounds he presented." The grounds presented ran through the argument of counsel, the material points made and grounds urged for a directed verdict being that there was no competent proof of execution of the note in question by defendant, that the note claimed to have been executed by him and denied under oath, if signed at all, was a part of a conditional order or agreement, and its detachment for separate use as negotiable paper constituted a plain alteration of the agreement, rendering it void as a promissory note. The detached note reads as follows:

Iowa City, Iowa, March 29, 1916.

For value received, the undersigned promises to pay at Iowa City, Iowa, to the order of Donald-Richard Company, \$148 as follows: \$37 three months after date, \$37 five months after date, \$37 seven months after date, \$37 nine months after date. Nonpayment of any instalment for more than thirty days after maturity renders

remaining instalments due at holder's option.

[Signed] Herman Venema,  
P. O. Grand Rapids, Michigan.

Indorsed: "May 31, 1916. Donald-Richard Company, M. H. Taylor."

Defendant was engaged in the grocery business at Grand Rapids, Michigan, and on March 29, 1916, a salesman of the Donald-Richard Company, of Iowa City, Iowa, procured from him a so-called "order" for some of its goods, consisting of perfumery and toilet articles, to which plaintiff claims was attached the note in question which he also signed, and which he denies.

The lengthy "order," or "paper," which defendant admitted signing is of the same character and apparently, so far as described and quoted from, of like form as that used by the Donald-Richard Company in *Stevens v. Pearson*, 138 Minn. 72, 163 N. W. 769, of which the court there said: "The whole framework of the document presented to defendant to sign was manifestly designed to enable agents to perpetrate the very fraud which Hussey in fact committed. The contract is long, on a large yellow sheet, and in fine print. Conspicuous at the start is this 'special agreement' of the seller: 'We hereby agree to buy back at the purchase price all of the goods in this order remaining on hand at the termination of this agreement, if purchaser so desires.' . . . Just above the 'perforation' in fine print is the language, 'The attached note is tendered in settlement of this order and the company is authorized to detach same when this order is approved and shipped.' The places intended for signatures are such as to confuse."

We are not favored with the original document in this case, but aside from the physical features of color of paper and size of type that description is applicable. This "order" is headed: "Donald-Richard Co., Incorporated, Chicago, Ill., General Office and Laboratory at Iowa City, Iowa, and Winnipeg, Canada. Special Agreement."

The subject is introduced by the following attractive provision: "We hereby agree to buy back at the purchase price all of the goods in this order remaining on hand at the termination of this agreement, if the purchaser so desires, and if net profits are less than 50 per cent each year for two years, will pay the difference in cash, provided purchaser has kept the goods tastefully displayed for sale in his store, used the advertising system as provided on the reverse side hereof, made pay-

ments as agreed, and used reasonable diligence in promoting the sale of the goods."

A variety of provisions follow, such as warranty of the goods as to quality, provision for exchange of goods, notice that its agents are "soliciting salesmen," whose orders are subject to "approval or disapproval at laboratory," terms of discount, etc. A sentence provides that "privileges herein granted are conditional on purchaser complying with all the conditions of this order."

Another sentence states that "the attached note is tendered in settlement of this order, and the company is authorized to detach same when this order is approved and shipped."

Above this sentence appears: "Owner of store, Herman Venema. Salesman, H. E. Collins. Order signed by Herman Venema."

A provision appears written across the face of the paper that "the company will send its bond to Kent State Bank of Grand Rapids, Michigan, in the sum of this order to protect the purchaser in all of the conditions of this sale. Ship with this order \$9 worth of free goods to apply on freight charge. Ship with this order one-half gross empty bottles free."

On June 28, 1916, defendant wrote the Donald-Richard Company: "Having tried my best to sell some of your goods, and failing to do so, I wish to return the goods as your salesman said I could when I bought the goods. I think I must have sold about \$1.50 or \$2 worth of these goods. Am very much disappointed. Please let me know how to send them or if I can leave them in Grand Rapids, Michigan, some place."

On June 30, 1916, the company replied reminding him the "terms and conditions" under which the goods were shipped to him were "a very fair and just purchasing method;" that "your order provides that you are to send in a list of names for advertising to be sent out direct to us. This you have not done," etc., and concluding: "We were obliged to discount your note some time ago as we have to raise cash funds. It is not now our property and we are not in a position to comply with your request to take the goods off your hands at this time."

The order in this record contains no provision relative to sending a list of names for advertising, although it may have been embodied in the "advertising system as provided on the reverse side hereof," which we are not furnished.

On October 31, 1916, this action was begun. The salesman who procured the order was not produced. The only witness

called was defendant, for cross-examination under the statute; shown the order (exhibit A) he replied, "I have seen the order, and it is my signature." Shown the note (exhibit B) in question he replied, "That is not my signature; . . . I will swear that I never signed a note to my knowledge." Told to compare that signature with the one on the other paper he said, "It looks like it." Cross-examined further he denied knowing exhibit A was attached to exhibit B when he signed in the three places, and said in part: "I signed my name in three places on the order, but did not see that there was anything attached to it. . . . I will swear I did not sign a note. . . . That is not my signature. . . . I received all the goods mentioned in the order and still have them."

No other witnesses were sworn. His counsel then produced and offered in evidence the depositions of plaintiff, Fred L. Stevens, and M. H. Taylor, both of Iowa City, Iowa, taken on notice before a justice of the peace of that city. Neither knew anything of what occurred when the order was taken in Grand Rapids, or could identify exhibits A and B back of their receipt by mail in Iowa City. As their depositions were read objections were made to their identification and the admission of those papers in evidence on their testimony. M. H. Taylor, who figured prominently in the records of *Harrison v. Grier*, — Mich. —, 165 N. W. 854, cited in *Loveland v. Bump*, — Mich. —, 165 N. W. 855, testified that he was assistant manager of the Donald-Richard Company and identified exhibits A (the note) and B (the order) as having been received through the mail from one of its salesmen; that exhibit A was attached to exhibit B when received and he accepted the order; that he detached the note, indorsed it for the company, and delivered it to plaintiff, on May 31, 1916, who paid 90 per cent of the face value for it. Plaintiff testified that he was a practising attorney, interested in banking and investments, had lived in Iowa City twenty years, and had known the Donald-Richard Company for five years or more; that he had taken many thousand dollars of its paper since February, 1915; knew there was some litigation over collection of the paper it had taken from its various customers, and had given depositions similar to those he was then giving twenty or twenty-five times since February, 1915; that he bought the note in question which was delivered to him by Taylor on May 31, 1916, prior to which time he knew of no defense or claim defendant might have against the Donald-Richard

Company, and he had exercised his option in declaring all remaining instalments due; that the note bore evidence of having been detached from some other paper, but Mr. Taylor did not show him the contract between defendant and the company, and did not know whether the latter had fulfilled on its part. In *Stevens v. Pearson*, supra, decided by the supreme court of Minnesota July 20, 1917, in which plaintiff's depositions are stated to have been taken October 3, 1916, about a month before this suit was begun, his knowledge of and relations with the Donald-Richard Company are taken note of and discussed. We are well satisfied in this case, as there held, that "the evidence presents facts abundantly sufficient to put plaintiff on inquiry and to charge him with notice of the fraud perpetrated on defendant." The procuring of defendant's signature to a promissory note made a part of an elaborate and ingeniously enticing so-called "order" for merchandise, prepared on a printed form so as to be signed in several places, was presumptively deceptive and fraudulent, and when so shown shifts the burden of proof to the party claiming under it chargeable with notice. The natural inference to be drawn from incorporating a detachable promissory note in such an instrument in a transaction of this nature is a purpose to deceive.

Beyond this, the order, or "special agreement," was a conditional order. The note, though out of harmony, was made a part of it. When detached it took an independent character and increased value as negotiable paper, and as a whole changed the contract or conditional agreement of which the party who prepared and used that form of order made it a part. The device for procuring negotiable paper by cunningly inserting it as an obscured part of an order for merchandise, but easily detached, is not new. In the early case of *Wait v. Pomeroy*, 20 Mich. 425, 4 Am.

Rep. 395, it was held that the destruction of a memorandum written under and qualifying the obligations of a promissory note invalidated it. In the recent case of *Toledo Scale Co. v. Gogo*, 186 Mich. 442, 152 N. W. 1046, Ann. Cas. 1917E, 601, where the subject is fully discussed in an opinion by Justice Kuhn, it was held that where a conditional contract for the sale of a set of computing scales was so drafted that a portion of the instrument signed could readily be detached from the remainder, and, standing alone, would constitute a promissory note, detaching such negotiable part of the instrument operated as an alteration of the contract and avoided the same in the hands of the original payee, which would be equally true if in the hands of a party charged with knowledge.

To sustain the validity of this detached note, dependence is placed upon the provision in the order "that the company is authorized to detach the same when this order is approved and shipped." This sentence appears in the order just above the perforation for detaching the note and below the signature in the order. Such expedient only emphasizes the sinister purpose of the combination. In *Toledo Scale Co. v. Gogo*, supra, it appears from the original record that an unsuccessful attempt was made to validate the note for detachment by two provisions, in separate places, one stating, "You are authorized to date above-mentioned note at such time as you may elect to insert such date either prior to or after the execution of such note," and the other, nearer the close of the instrument, that "the signing and delivering of instalment note shall not be deemed nor considered a payment or waiver of any term, provision, or condition of this contract."

We regard the decision in that case as well in point and controlling here. The judgment is affirmed.

### **Annotation—What circumstances are sufficient to put a purchaser of negotiable paper on inquiry.**

#### ***I. Introduction, 1149.***

#### ***II. General principles, 1149.***

#### ***III. Application:***

- a. In general, 1150.***
- b. Knowledge of other transactions of indorser, 1151.***
- c. Overdue interest, 1151.***
- d. Knowledge of consideration or collateral agreement, 1152.***
- e. Indorsement without recourse, 1152.***

#### ***III.—continued.***

- f. Words indicating representative or fiduciary character, 1153.***
- g. Reputation or business of indorser, 1153.***
- h. Maker a stranger to purchaser, 1153.***
- i. Corporation of partnership paper, 1153.***
- j. Amount of consideration paid by purchaser, 1154.***

*III.—continued.*

- k. Postdated checks, 1155.*
- l. Date of offering for sale, 1155.*
- m. Dealing with agent, 1155.*
- n. Insolvency or small means of prior parties, 1155.*
- o. Defects, erasures, etc., 1155.*
- p. Miscellaneous, 1157.*

*I. Introduction.*

This note is supplemental to the notes to *Mee v. Carlson*, 29 L.R.A.(N.S.) 351, and *McPherrin v. Tittle*, 44 L.R.A.(N.S.) 395, where the earlier cases are collected.

For the question whether the fact that a draft or check is payable to the order of a bank is sufficient to put it upon inquiry as to right or title of holder, see the note in L.R.A.1915B, 287; for notice imported to holders by commercial paper payable to a public body or officer thereof, see the note in L.R.A.1915B, 725; for failure of executory consideration for bill or note as affecting purchaser with knowledge of the character of the consideration, see the notes to *Flood v. Petry*, 46 L.R.A.(N.S.) 862, and to *Producers' Nat. Bank v. Elrod*, ante, 1016.

As to the right of one who takes commercial paper of corporation in payment of or security for an individual debt of an officer, see the notes to *Kenyon Realty Co. v. National Deposit Bank*, 31 L.R.A.(N.S.) 164, and to *Burnham Loan & Invest. Co. v. Sethman*, post, 1158.

This note does not include cases where the notice is actual. Cases of checks drawn on government depositories are excluded.

Some general matters may be here referred to.

When an inquiry would not have disclosed the facts, the purchaser is not required to make it. *Morehead v. Harris* (1916) 121 Ark. 634, 182 S. W. 521.

Notice, to affect the holder of a draft, must exist at the time he acquires the paper (*Mt. Vernon Nat. Bank v. Kelling-Karel Co.* (1914) 189 Ill. App. 375); and subsequent notice is immaterial (*Elmore County Bank v. Avant* (1914) 189 Ala. 418, 66 So. 509).

The fact that a note was made in one state and offered for sale before maturity in another is not in any sense a badge of fraud or ground of suspicion. *Bison State Bank v. Billington* (1915) 142 C. C. A. 522, 228 Fed. 116.

One who never had possession of a promissory note cannot claim the rights of an innocent purchaser. *Green v. Edgings* (1914) — *Tex. Civ. App.* —, 167 S. W. 196.

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Where notes are issued in a series, each note reciting that the failure to pay one shall mature all, the purchaser of the series after the maturity of one of them purchases all after maturity. *National State Bank v. Ricketts* (1912) — *Tex. Civ. App.* —, 152 S. W. 646.

One who purchases a draft before its acceptance, in the ordinary course of business, in good faith, for value, is as clearly a holder for value as if he had purchased the draft after acceptance. *Mt. Vernon Nat. Bank v. Kelling-Karel Co.* (Ill.) supra.

"Where a promissory note payable 'to the order of A or B' is indorsed by A only, to one who takes it in good faith, for value, and without any notice of infirmity in the instrument or defect in the title, the indorsee is a holder in due course, under the provisions of the Negotiable Instruments Law." *Voris v. Schoonover* (1914) 91 Kan. 530, 50 L.R.A.(N.S.) 1097, 138 Pac. 607.

Under the Negotiable Instruments Law the payee may become a holder of the paper in due course. *Redfield v. Wells* (1918) — *Idaho*, —, 173 Pac. 640.

*II. General principles.*

Supplementing note in 44 L.R.A.(N.S.) 397.

Under the Negotiable Instruments Law, to put a purchaser of negotiable paper on inquiry there must be bad faith. *Sample v. Tennessee Valley Bank* (1917) — *Ala.* —, 76 So. 936; *Ellis v. First Nat. Bank* (1918) — *Ariz.* —, 172 Pac. 281; *Bank of Montreal v. Beecher*, 133 Minn. 81, 157 N. W. 1070.

The same rule obtains in Texas. *First Nat. Bank v. Chapman* (1914) — *Tex. Civ. App.* —, 164 S. W. 900; *Daniel v. Spaeth* (1914) — *Tex. Civ. App.* —, 168 S. W. 509; *Forster v. Enid, O. & W. R. Co.* (1915) — *Tex. Civ. App.* —, 176 S. W. 788.

A charge that, to justify a finding of bad faith, circumstances must be such as to show "wilful neglect" or such gross carelessness as fairly tends to the conclusion of bad faith, is in harmony with the statute the purpose of which is to uphold honest and fair business transactions with commercial paper, but not to afford a refuge for fraud. *Farmers' & M. State Bank v. Shaffer* (1914) — *Iowa*, —, 147 N. W. 851.

Mere suspicion is not enough. *Pratt v. Rounds* (1914) 160 Ky. 358, 169 S. W. 848; *Citizens Trust & G. Co. v. Hays* (1915) 167 Ky. 560, 180 S. W. 811; *Central Bank v. Lyda* (1917) — *Mo.* App. —, 191 S. W. 245 (obiter); *Davis*

v. Clark (1914) 85 N. J. L. 696, 90 Atl. 303; Interboro Brewing Co. v. Doyle (1915) 165 App. Div. 646, 151 N. Y. Supp. 225; Oliner v. Goldenberg (1915) 168 App. Div. 874, 154 N. Y. Supp. 612; City Bank v. Bryan (1913) 72 W. Va. 29, 78 S. E. 400; Pope v. Beauchamp (1913) — Tex. Civ. App. —, 159 S. W. 867.

Suspicion, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, will not put the purchaser of negotiable paper on inquiry. Citizens' Sav. Bank v. Landis (1913) 57 Okla. 530; Security Trust & Sav. Bank v. Gleichmann (1915) 50 Okla. 441, L.R.A.1915F, 1203, 150 Pac. 908.

(The same rule was in force in Oklahoma prior to the adoption of the Negotiable Instruments Law. Voris v. Birdsall (1917) — Okla. —, 162 Pac. 951.)

It is reversible error to charge the jury to the effect that persons for whom notes were negotiated would be put on inquiry if they had notice of any facts or circumstances which ought to have put a reasonably prudent man upon inquiry, and if, had they made such inquiry, they would have discovered the fraud in question, or the facts and circumstances constituting the same. Smathers v. Toxaway Hotel Co. (1913) 162 N. C. 346, 78 S. E. 224.

Negligence or suspicious circumstances are not sufficient to defeat the right of action of the indorsee. Fleshman v. Bibb (1916) 118 Va. 582, 88 S. E. 64.

It is "the settled rule in favor of holders for value before maturity, adopted by the Federal courts, that actual knowledge or wilful abstention from inquiry, where inquiry would have disclosed the infirmity, is essential, and that mere negligence, or a failure to inquire where a reasonably prudent man would have inquired, will not suffice." Brent v. Simpson (1916) 151 C. C. A. 301, 238 Fed. 285.

It is not enough to impeach the good faith of the purchaser that he may have been negligent, or may have failed to take precautions that a prudent man would have taken. His rights are to be measured by the simple test of honesty and good faith, not by mere speculation as to his diligence or negligence. Citizens' Bank v. Limpricht (1916) 93 Wash. 361, 160 Pac. 1046; National City Bank v. Shelton Electric Co. (1917) 96 Wash. 74, 164 Pac. 933.

But before the Negotiable Instruments Law of 1913, in Indiana, became effec-

tive, it was held that "whatever the law may be elsewhere it is well settled in this state that one who purchases such a note with knowledge of facts or circumstances which would raise a suspicion of defects or defenses in the mind of a man of ordinary prudence will be charged with notice of all facts which a reasonable inquiry would have disclosed." Boxell v. Bright Nat. Bank (1916) — Ind. —, 112 N. E. 3.

As to Georgia, see Fidelity Trust Co. v. Mays (1914) 142 Ga. 821, 83 S. E. 961, *infra*, III. c.

### III. Application.

#### a. In general.

Supplementing note in 44 L.R.A. (N.S.) p. 398.

The fact that at the time plaintiff bought the note in question, he bought other similar notes the amount of which was unusual in his business would not support an inference of bad faith. Sample v. Tennessee Valley Bank (1917) — Ala. —, 76 So. 936.

The fact that the purchaser gives the acceptor the right to inspect goods for the price of which the draft is drawn does not prove notice or knowledge on the part of the purchaser of any infirmity in the draft. Mt. Vernon Nat. Bank v. Kelling-Karel Co. (1914) 189 Ill. App. 375.

Where the question of bad faith was submitted to the jury in a case where an employee, having forged drafts on his employer, deposited them in a bank, it was held that it was not error to omit to instruct the jury that if the circumstances were suspicious, the bank was put upon notice and was charged with the duty of inquiry; the statute distinctly provides to the contrary, and is in harmony with the former rule. Postal Teleg.-Cable Co. v. Citizens' Nat. Bank (1916) 143 C. C. A. 601, 228 Fed. 601 (New Jersey).

The purchase by a corporation from its president of paper payable to his order, where the corporation is represented in the transaction by other persons, does not charge the corporation with the knowledge of its president. Reed v. West Loan & T. Co. (1918) — Ga. App. —, 95 S. E. 1002.

Purchasing from the maker indorsed paper before maturity raises no presumption that the paper has been paid. Howell v. Commercial Nat. Bank (1913) 40 App. D. C. 370.

That a note was not indorsed by the seller, and that the buyer took it in

part on account of a prior indebtedness, and for the other part gave, at the seller's request a check to the order of the maker, did not show that he was not a holder in due course. *A. E. McBee Co. v. Shoemaker* (1916) 174 App. Div. 291, 160 N. Y. Supp. 251.

But the rule is established in Texas (not under the Negotiable Instruments Law) that where one acquires negotiable paper from the maker thereof which bears the indorsement in blank of the payee, the note is not acquired in due course of trade, and such person is not a bona fide holder, but is subject to all equities. *Southern Commercial & Sav. Bank v. Combs* (1918) — *Tex. Civ. App.* —, 203 S. W. 1169.

Indorsements of payments upon a note on the day of its date do not put the purchaser on notice. *Burdell v. Nereon* (1915) 28 Idaho, 129, 152 Pac. 576.

Thus, knowledge afforded by mere indorsements of partial payments on a negotiable note as of the date of its issue, some of them being made by persons not parties to the note, does not make the purchase of the note amount to bad faith. *Bland v. Fidelity Trust Co.* (1916) 71 Fla. 499, L.R.A.1916F, 209, 71 So. 630.

For indorsement of payment on bill or note as material alteration, see the notes in 46 L.R.A.(N.S.) 1043, and L.R.A.1916F, 215.

**b. Knowledge of other transactions of indorser.**

Supplementing note in 44 L.R.A.(N.S.) 400. See also 29 L.R.A.(N.S.) 373.

That the purchaser had bought thousands of dollars' worth of the maker's paper within a recent time, and knew that in a number of the cases there had been litigation, and that the note bore evidence of having been detached from another paper, put him on inquiry as to fraud on the part of the payee. *STEVENS v. VENEMA*, ante, 1145.

In an earlier case by the same plaintiff upon paper of the same maker, *Stevens v. Pearson* (1917) 138 Minn. 72, 163 N. W. 769, referred to in *STEVENS v. VENEMA*, the court states: "Plaintiff was a lawyer of many years' experience. He had taken thousands of dollars' worth of these notes before. He knew they were detached from contracts. The taking of these notes was regular business with him, and as they were collected, the proceeds were deposited in a special fund, and this fund he used to take over more notes. He left the

notes in the hands of the company's attorney for collection. There had been a considerable number of suits. The company paid all expense of collection and of the litigation incident to it."

But it has been held that the facts that a bank knew, when taking paper as collateral security from its customer, that such customer in its business took a great many notes, and that in the case of a few former notes taken by it as security from the same customer the defense of fraud was also put up, does not put the bank on inquiry. *Union Invest. Co. v. Grimson* (1916) 9 Alberta L. R. 554, 27 D. L. R. 208. But compare *Vaughan v. Schneider* (1913) — *Alberta*, —, 24 West. L. R. 313, 11 D. L. R. 290, *infra*, c.

**c. Overdue interest,**

Supplementing note in 44 L.R.A. 401.

That the purchaser of a note is not put on inquiry by the fact that interest on it was overdue was probably held in *Higby v. Bahrenfuss* (1917) — *Iowa*, —, 163 N. W. 247, where we are probably to understand that the purchaser knew that the interest was overdue.

Bad faith on the part of one who took a note as collateral security is not shown by the fact that an instalment of interest was some six months overdue, that relations between the indorsee and indorser were intimate and friendly, that the indorser had apparently "other property sufficient to satisfy the note," that there were serious business differences between the indorser and the maker, and that the indorser had credited a certain amount of interest on the note which the maker claimed to be a loan. *Shultz v. Crewdson* (1917) 95 Wash. 266, 163 Pac. 734.

But where the indorsee was an experienced banker and knew that the note of the same payee had been defended on the ground of fraud, and that the interest on the note was over two years in arrears when it was bought, the court came to the conclusion that he had not testified truthfully in regard to his knowledge of the matter, and had failed to show that he was a holder in due course. *Vaughan v. Schneider* (*Alberta*) *supra*.

It has been held in Texas that where a note is purchased when there is overdue interest, the maker can plead his defense to the claim for overdue interest against the indorser the same as against the original payee. *Tuke v. Feagin* (1915) — *Tex. Civ. App.* —, 181 S. W. 805.

Where a note stipulated that the non-payment of interest when due should, at the option of the holder, mature the note, and after the interest became due and the option had not been exercised the note was sold, it was held that the purchaser was in possession of facts which should have led him to a knowledge that, by agreement, the time for payment of interest had been waived; but whether the court deemed that this was so by reason of the facts stated, or whether it intended to refer to other facts, does not appear. *Coffer v. Beverly* (1915) — *Tex. Civ. App.* —, 184 S. W. 608.

In Georgia, where there was a conflict as to whether or not the purchaser of a note took it after an instalment of interest was overdue and the note was indorsed without recourse, it was held that these and some other facts were sufficient to sustain a verdict for the makers of the note against the purchaser, under the Georgia statute providing that "any circumstances which would place a prudent man upon his guard, in purchasing negotiable paper, shall be sufficient to constitute notice to a purchaser of such paper before it is due." *Fidelity Trust Co. v. Mays* (1914) 142 Ga. 821, 83 S. E. 961.

***d. Knowledge of consideration or collateral agreement,***

Supplementing notes in 29 L.R.A. (N.S.) 380, and 44 L.R.A. (N.S.) 402.

For failure of executory consideration for bill or note as affecting purchaser with knowledge of the character of the consideration, see the notes to *Flood v. Petry*, 46 L.R.A. (N.S.) 862, and to *Producers' Nat. Bank v. Elrod*, ante, 1016.

In *Little v. Arkansas Nat. Bank* (1914) 113 Ark. 72, 167 S. W. 75, it was held that the jury were properly instructed to the effect that when notes are offered for sale by the payee before they are due, the party to whom they are offered is not required to investigate as to the consideration, and has the right to assume that they are legal and valid obligations of the party executing the notes unless he has notice or knowledge to the contrary.

Where the purchaser of a note knew that it was made to pay for certain stock food which was subject to the act of Congress as to food and drugs, it was held that there was sufficient to go to the jury to enable them to hold that he was not an innocent purchaser of the note. *Bright Nat. Bank v. Hartman* (1915)

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61 Ind. App. 440, 109 N. E. 846, (decided before the Negotiable Instruments Law).

Where the president of the discounting bank, at the time he discounted the note in suit, knew that the note was given for stock in a mere swindling concern which was financially insolvent, and five days before he discounted it for his bank he was appointed receiver of the said corporation, it was held that the jury properly found that the burden of showing that the note was taken in good faith, for value, with no notice of any infirmity, had not been sustained. *Harford Nat. Bank v. Gardner* (1916) 157 N. Y. Supp. 849.

Where the president of a concern for the stock of which the notes in question were given said to one of the plaintiffs in the presence of the maker, "We could turn you his note," and the maker then said, "you don't turn any notes over, because I haven't got any stock, and I am getting a little sore on this institution anyhow, and I don't propose to pay them," it was held that the jury were justified in finding that this was sufficient to put the plaintiffs who subsequently purchased the notes, on inquiry. *Barnard v. Tidrick* (1915) 35 S. D. 403, 152 N. W. 690.

But that the bank which acquired a note knew that it was given for stock in another bank whose reserve was somewhat low did not put that bank on inquiry. *Citizens' Trust & Sav. Bank v. Empey* (1914) 34 S. D. 361, 148 N. W. 606 (decided before the Negotiable Instruments Law went into effect).

And a note for commission on a sale of corporate stock, given by the purchaser of the stock to the agent who made the sale, is not void ab initio, and notice of such consideration to the purchaser of the note does not make him other than an innocent purchaser. *Scheffel v. Smith* (1914) — *Tex. Civ. App.* —, 169 S. W. 1131.

And the recital in a note that it was one of a series of notes given for stock in a certain company did not put the purchaser on inquiry as to any representations made by the payee of the notes at the time they were given. *Commercial Guaranty State Bank v. Crews* (1915) — *Tex. Civ. App.* —, 196 S. W. 901.

***e. Indorsement without recourse.***

Supplementing notes in 29 L.R.A. (N.S.) 378, and 44 L.R.A. 402.

In general, the fact that negotiable paper is indorsed "without recourse"



does not put the purchaser on inquiry. *Morehead v. Harris* (1916) 121 Ark. 684, 182 S. W. 521; *Judy v. Warne* (1913) 54 Ind. App. 92, 102 N. E. 386, reversing on rehearing (1913) — Ind. App. —, 100 N. E. 483; *Colvert v. Harrington* (1916) 61 Ind. App. 608, 112 N. E. 249 (before Negotiable Instruments Law); *Higby v. Bahrenfuss* (1917) — Iowa, —, 163 N. W. 247; *Hayden, Clinton Nat. Bank v. Dixon* (1916) 9 Alberta, L. R. 303, 26 D. L. R. 694.

But see, under the Georgia statute, *Fidelity Trust Co. v. Mays* (1914) 142 Ga. 821, 83 S. E. 961, *supra*, c.

*f. Words indicating representative or fiduciary character.*

Supplementing note in 44 L.R.A. (N.S.) 403. See also 29 L.R.A. (N.S.) 365.

A note signed "A, administrator of estate of B," does not put the purchaser of the note on inquiry for the purpose of finding out whether the note is a personal obligation of A, or an obligation of A as administrator of B. *Stubbs v. Fourth Nat. Bank* (1913) 12 Ga. App. 539, 77 S. E. 893.

"Where a promissory note payable to the order of named persons, and executed in the name of a corporation by its secretary and treasurer, had indorsed thereon the names of certain persons other than the payees, after whose names were added the words 'majority stockholders,' these words were mere descriptive personarum, and did not alter the import of the indorsement of the individuals so described." Nor was the indorsement sufficient to put the taker on notice of any defense on the part of certain of the indorsers that they did not indorse for the purpose of rendering themselves liable, but for other purposes. *Winnabago Nat. Bank v. Woodliff* (1916) 145 Ga. 239, 88 S. E. 973.

*g. Reputation or business of indorser.*

Supplementing notes in 29 L.R.A. (N.S.) 373, and 44 L.R.A. (N.S.) 403.

Proof of the general bad reputation of the payee is admissible as a circumstance on the issue of the alleged good-faith purchase of a note. *First Nat. Bank v. Chapman* (1914) — Tex. Civ. App. —, 164 S. W. 900.

Where it was shown that a concern was in the business of selling worthless jewelry, and that it sold most of the paper received for the jewelry sold by it to the plaintiff, whose manager showed a considerable familiarity with the business methods of the jewelry seller, it

was held that there was sufficient evidence for the jury to find that the plaintiff was not an innocent purchaser for value. *Metropolitan Discount Co. v. Fondren* (1915) 121 Ark. 250, 180 S. W. 975.

*h. Maker a stranger to purchaser.*

See note in 44 L.R.A. (N.S.) 404.

*i. Corporation or partnership paper.*

Supplementing notes in 29 L.R.A. (N.S.) 356, 359, and 44 L.R.A. (N.S.) 404.

As to right of one who takes commercial paper of corporation in payment of or security for an individual debt of an officer, see the note to *Kenyon Realty Co. v. National Deposit Bank*, 31 L.R.A. (N.S.) 169, and to *Burnham Loan & Invest. Co. v. Sethman*, *post*, 1158.

Where the act of a corporation in issuing its note was absolutely void, and the purchaser of the note, having reason to inquire, made an inquiry of the president of the corporation, it was held that he assumed the risk of the president's statement being true; and, it not being true, he was not protected. *Republican Art Printery v. David* (1916) 173 App. Div. 726, 159 N. Y. Supp. 1010.

In *South Side State Bank v. Fox River Distilling Co.* (1915) 194 Ill. App. 655, it was held that "where commercial paper, both when presented for discount and when discounted, is in the possession of the maker or payee, the indorser for discount is charged with notice that an indorsement [of a corporation] not appearing thereon when presented for discount, but appearing when discounted, was for accommodation only; especially where there is evidence that such indorsement was procured for the express purpose of inducing the acceptance of such paper for discount;" and is "also charged with notice that such indorsement of such corporation is ultra vires, as being an act not within the scope of the ordinary business of such corporation."

In *Standard Bank v. McCullough* (1915) 8 Alberta L. Rep. 320, 25 D. L. R. 813, it was held that one taking a note from a corporation payee must show that the indorsement was that of the payee.

A note payable to the order of a corporation and indorsed by its officer, who is secretary and treasurer, is sufficiently transferred, in the absence of notice by the indorser that the officer signing had not authority to make the transfer. *Stubbs v. Fourth Nat. Bank* (1913) 12

Ga. App. 539, 77 S. E. 893, where the facts are not fully reported.

Where a corporation check to the order of another corporation was delivered to the latter by its debtor, a third person, the payee was not put on inquiry. *National Invest. & Secur. Co. v. Corey* (1916) 222 *Mass.* 453, 111 N. E. 357.

In *Colonial Fur Ranching Co. v. First Nat. Bank* (1917) 227 *Mass.* 12, 116 N. E. 731, a bank (defendant) which received from a corporation in payment of the latter's note which the bank held for collection a certified check of another corporation on a trust company, payable to the bank, was held not to be chargeable with notice, although the check was made by the treasurer of the drawer, who was also the treasurer of the maker of the note, and was secondarily liable as an indorser on that note. The court pointed out that the primary debtor was the maker of the note, and not the treasurer, who was only secondarily liable.

Where the employee of a corporation, having authority to indorse the name of its treasurer on the back of checks for collection in a certain bank, did indorse such checks with the name of its treasurer, and afterwards indorsed the checks in her own individual name, and sold them to purchasers in good faith and for value, who deposited them in the defendant's bank, which collected the checks and paid out the proceeds on the order of its depositors, the original payee of the checks could not collect the amount from such defendant bank. *Standard Steam Specialty Co. v. Corn Exch. Bank* (1914) 163 App. Div. 496, 148 N. Y. Supp. 549.

It was held in *Luden v. Enterprise Lumber Co.* (1916) 146 *Ga.* 284, L.R.A. 1917C, 485, 91 S. E. 102, under the Georgia Statute that a promissory note without consideration, executed in the name of a corporation by one of its officers, and payable to such officer individually, is void as against the corporation, and that a holder of such note takes it with notice, although it was taken from an indorsee as security for a debt.

But where a note made payable to a corporation was indorsed by its president to A, who indorsed it to the plaintiff, and A was the vice-president and treasurer of the corporation at the time, but the plaintiff did not know it, there was nothing to put the plaintiff on inquiry. *Stoller v. Reichgott* (1915) 156 N. Y. Supp. 551.

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#### Partnership paper.

Where a note was signed by a partner, payable to his order, and bore the indorsement of himself and his firm, it was held that these features were sufficient to put a bank taking the note from him on inquiry. *Clement Nat. Bank v. Connolly* (1914) 88 *Vt.* 55, 90 *Atl.* 794 (before the operation in Vermont of the Negotiable Instruments Law).

It is incumbent upon the payee of a copartnership check, handed to him by one of the partners with instructions to apply it upon such partner's personal indebtedness, to make inquiry as to the authority of the partner to use the security for his individual benefit. *Redfield v. Wells* (1918) — *Idaho*, —, 173 *Pac.* 640.

But the fact that one partner, discounting a firm note to a bank, placed the proceeds on deposit with the bank to his own individual credit, did not require the jury to find that the bank had notice of fraudulent intent on the part of the partner in question, particularly where part of such proceeds were paid into the partnership account, and it appeared that he had recently paid off a firm note with his individual check. *Bank of Greenville v. Lowry* (1918) — *W. Va.* —, 94 S. E. 985.

#### j. Amount of consideration paid by purchaser.

Supplementing notes in 29 L.R.A. (N.S.) 378, and 44 L.R.A. (N.S.) 404.

That the purchaser buys notes for 25 per cent discount does not put him upon inquiry. *Pratt v. Rounds* (1914) 160 *Ky.* 358, 169 S. W. 848.

Where the payee corporation of notes by a solvent maker sold them the next day after execution at a discount of 20 per cent, preparatory to leaving the county, and the officer of the corporation who made the sale to the indorsee was a stranger to the indorsee, but was introduced to him by one the assignee knew well, there was nothing to put the purchaser of the notes on inquiry. *Fleishman v. Bibb* (1916) 118 *Va.* 582, 88 S. E. 64.

But the jury was held entitled to consider with other circumstances the fact that the purchaser paid only \$4,000 for a \$5,000 note after he had been informed that one of the indorsers was good for the note. *Everting v. Toft* (1916) 82 *Or.* 6, 160 *Pac.* 1160 (where, however, the case was sent back for new trial).

And where a former director of a

corporation which had its office and place of business where he resided, took from the payee antedated notes of the corporation a considerable time after their issue, and paid for them less than a third of their face, it was held that he was put upon inquiry. *Stanley v. Franco-American Ferment Co.* (1916) 97 Misc. 401, 161 N. Y. Supp. 365.

Where the indorsee of notes paid one half of the consideration and a third person paid the other half, the indorsee was the holder in due course under the Negotiable Instruments Law, where the third person was in no different position in fact than the indorsee. *Fleishman v. Bibb* (Va.) *supra*.

While beyond the scope of this note it may be noted that (prior to the Negotiable Instruments Law) it was held that one who takes a promissory note in the usual course of business before maturity, without notice of any infirmity, as collateral security for pre-existing debts, was an indorsee in due course, the court quoting from the note in 31 L.R.A.(N.S.) page 288, on holder of bill or note as collateral security as a bona fide holder, and saying: "We are further convinced of the wisdom of this decision, in view of §§ 25 and 27 of the Negotiable Instruments (Laws 1913, chap. 279) and the discussion of this subject on page 293 of the volume of L.R.A.(N.S.) previously cited." *Citizens' Trust & Sav. Bank v. Empey* (1914) 34 S. D. 361, 148 N. W. 606.

#### *k. Postdated checks.*

See notes in 29 L.R.A.(N.S.) 375, and 44 L.R.A.(N.S.) 405.

#### *l. Date of offering for sale.*

Supplementing notes in 29 L.R.A.(N.S.) 375, and 44 L.R.A.(N.S.) 405.

See *Stanley v. Franco-American Ferment Co.* (1916) 97 Misc. 401, 161 N. Y. Supp. 365, *supra*, j.

A promissory note payable on demand is considered as overdue and invalid unless demand is made within a reasonable time; and what constitutes a reasonable time is a question of fact for the jury. *Otis Elevator Co. v. Ford* (1913) 4 Boyce (Del.) 286, 88 Atl. 465.

Where a note dated the 24th of August, 1911, payable on demand, was discounted October 31st, 1911, it was held that, under the circumstances of the case, there was no unreasonable delay in negotiating the note. *Colona v. Parksley Nat. Bank* (1917) 120 Va. 812, 92 S. E. 979.

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#### *m. Dealing with agent.*

Supplementing note in 29 L.R.A.(N.S.) 351.

In *Rambaut v. Tevis* (1914) 164 App. Div. 324, 149 N. Y. Supp. 993, where an agent had possession of certain notes and was to have the benefit of part of them on negotiating the balance for his principal, it was held that a person who accepted one of the notes from the agent for services rendered to him, and who knew of the agency, ought to have inquired of the principal as to the right of the agent to negotiate the note.

Where it appeared on the face of a check that it was "submitted with bid on" a certain building, and it was indorsed with words indicating the payee to be agent of the prospective builders of such building, and with a seal indicating the same thing, it was held that one who advanced money to the payee of the check on the check would be put upon inquiry. *Moak v. Twenty-third Ward Bank* (1917) 100 Misc. 488, 165 N. Y. Supp. 1055.

#### *n. Insolvency or small means of prior parties.*

Supplementing note in 29 L.R.A.(N.S.) 372.

It was held in *Ward v. Oklahoma State Bank* (1915) — Okla. —, 151 Pac. 852, that one who acquires a promissory note by purchasing the assets of an insolvent bank from the bank commissioner is not the holder thereof in due course.

But that the purchaser knows that the seller of a note is in debt imports no notice of a fraudulent intent on the part of the seller to defraud a creditor. *Whitney v. Day* (1917) 86 Or. 268, 168 Pac. 295.

And the impecunious circumstances of the indorser are not enough to put the purchaser on inquiry where he is relying upon another good indorser. *Baruch v. Buckley* (1915) 167 App. Div. 113, 141 N. Y. Supp. 853.

#### *o. Defects, erasures, etc.*

Supplementing note in 29 L.R.A.(N.S.) 376.

A bank taking a draft without indorsement of the payee takes it subject to defenses between the parties. *Hooten v. State* (1915) 119 Ark. 334, L.R.A. 1916C, 544, 178 S. W. 310, where there was also knowledge of the bank officer, imputable to the bank. Compare *A. E. McBee Co. v. Shoemaker* (1916) 174 App. Div. 291, 160 N. Y. Supp. 251, *supra*, a.

Where a bank issued a certificate of deposit payable to the order of "ourselves," and did not indorse it, it was held that it was not taken in the usual course of business, where the holder also knew that it was issued without consideration. *National City Bank v. Titlow* (1916) 233 Fed. 838 (Washington).

The drawer of a check had it certified by the bank and delivered to the payee for a conditional purpose; the bank was then garnisheed, and thereafter the payee returned the check to the drawer unindorsed, and the drawer then indorsed it, as did two other indorsers, and it was then cashed by a third party. It was held that the third party was not a holder in due course. *Kasperski v. Karaskiewicz* (1915) 192 Ill. App. 113.

The purchaser of a promissory note must take notice of the rights of a prior indorser who has indorsed the note to the effect that, on the payment of it, she is to receive a certain amount. *Keisel v. Baldock* (1915) — Okla. —, L.R.A.1916D, 632, 154 Pac. 1194.

Where the drawer of a check wrote across it, "To be applied on paper held by B. B. Larson if found correct," the transferee of the check took it with notice of Larson's rights. *Slimmer v. State Bank* (1916) 134 Minn. 349, 159 N. W. 795.

An indorsement by the payee, "pay to the order of A for credit of B," is a restrictive indorsement, and B is not an innocent purchaser for value, inasmuch as he has notice by the restrictive indorsement of any defenses that the makers of the note might have as against the payee. *Werner Piano Co. v. Henderson* (1915) 121 Ark. 165, 180 S. W. 495.

Under the Georgia statute, the purchaser of a note is put upon such inquiry as would lead him to knowledge of the fact that the note had been fully paid off and satisfied, where the note contained the following recital: "This is one of a series of notes of the same tenor and of even date herewith, said series representing the balance of purchase money for a tract of land on No. 82 Rice street, Atlanta, Georgia, as fully described in a bond for title of even date for payee to maker thereof, which bond for title is hereby referred to and made a part hereof; and all makers hereof and indorsers and securities hereon are hereby firmly bound by all the conditions and agreements of said bond." *Glover v. Wesley* (1917) 20 Ga. App. 814, 93 S. E. 513.

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Where, above the indorsement of the defendant, the payee, was written the words "part renewal," it was held that a bank discounting the note was put on inquiry by such words as to what were the circumstances under which defendant gave his indorsement. *Sprout v. Beskin* (1917) 179 App. Div. 279, 166 N. Y. Supp. 606.

But in *Pennoyer Co. v. Williams Machinery Co.* (1915) 34 Ont. L. Rep. 493, 24 D. L. R. 607, it was held that the fact that a bank took a promissory note marked "renewable" does not prevent the transferee from being a holder in due course because it neglected to make inquiries as to the title of the transferrer, but this was probably not necessary to the decision.

It was held in *Landon v. William E. Huston Drug Co.* (1916) — Tex. Civ. App. —, 190 S. W. 534, that the mere fact that the notes have a perforated margin, indicating that they have been detached from something, does not put the purchaser on inquiry. Cited in *Iowa City Bank v. Milford* (1917) — Tex. Civ. App. —, 200 S. W. 883. But compare *STEVENS v. VENEMA*, ante, 1145, and *Stevens v. Pearson* (1917) 138 Minn. 72, 163 N. W. 769, supra, b.

#### — alteration.

Where alterations are plain on the face of the paper, the purchaser will take with knowledge of them. *Mechanics' American Nat. Bank v. Helmbacher* (1918) — Mo. App. —, 201 S. W. 383.

Where the purchaser of paper which was left blank as to the payee filled in his own name as executor, whereas the only authority was for the original payee to fill in his own name, it was held that the purchaser, while a purchaser for value, was not a holder in due course, and that the maker was not bound by the note. *Tower v. Stanley* (1915) 220 Mass. 429, 107 N. E. 1010.

In *W. W. Marshall & Co. v. Kirschbraun* (1917) 100 Neb. 876, L.R.A.1917E, 788, 161 N. W. 577, it was held that one who purchased a draft in which there had been erased the printed words, "This check for cream only. Not good for more than \$15," the draft being for the sum of \$37.98, was put upon inquiry as to the validity and amount of the check as originally issued.

Prior to the Negotiable Instruments Law it was held in Oklahoma that the material alteration of a note by the payee without the consent of the maker voided it against the maker, even in the hands of a holder without notice of such

alteration. *Voris v. Birdsall* (1917) — **Okl.** —, 162 Pac. 951.

Where the printed name of the payee was erased and another's name written in its place, it being done in a different ink from that which had been used to make out and sign the note, it was held that this was sufficient to put a purchaser of the note on inquiry as to its genuineness, and it was not a case, as claimed by the purchaser, for the application of the rule that where one of two innocent parties must suffer, it should be the one who made the wrong possible, the purchaser claiming that the negligence of the maker had enabled the alterer to make the change. *Holbart v. Lauritson* (1914) 34 **S. D.** 267, L.R.A.1915A, 166, 148 N. W. 19.

But in *Blaek v. Collin* (1917) — **Manitoba**, —, 36 D. L. R. 665, it was held that where an alteration was not apparent, an indorsee was a holder in due course under § 145 of the Bills of Exchange Act of 1906, which provides: "Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor."

One who fills up a blank for interest in a note without authority is not a holder in due course. *Bank of British N. A. v. Robinson* (1917) — **Manitoba**, —, 36 D. L. R. 166.

*p. Miscellaneous.*

The purchaser of certain promissory notes, being part of notes secured on land, which notes refer to the deed conveying the land for the purpose of description only, is not put on notice of a statement in the deed that the notes, when paid, are to be credited upon a certain other note mentioned in said deed. *Hassard v. May* (1912) — **Tex.** Civ. App. —, 152 S. W. 665.

Where it appeared on the face of a note that it was secured by mortgage, and it was indorsed without recourse by the original payee, and at the same time, as part of the same transaction of purchase, the purchaser received from the same person both the note in suit and the real estate on which the mortgage referred to in the note was given to secure such note, it was held on demurrer that these facts were not enough to put the purchaser on inquiry which would have disclosed that the person from whom he purchased the note had assumed its payment, and had taken

title to the real estate mortgaged, and that such note in fact had been paid and discharged so far as it represented the liability against the original maker thereof. *Judy v. Warne* (1913) 54 **Ind.** App. 92, 102 N. E. 386, reversing on rehearing (1913) — **Ind.** App. —, 100 N. E. 483 (before the Negotiable Instruments Law).

But it was considered in *Yeomans v. Nachman* (1917) 198 **Mo.** App. 195, 198 S. W. 180, that where a note purporting to be secured by mortgage omitted a privilege of making payments in advance, contained in the mortgage a purchaser of the note who did not notice the omission and did not make inquiries could not claim that she took the note wholly without notice of its infirmity, which was that it was a void duplicate note of a valid original.

In *Buhler v. Loftus* (1917) 53 **Mont.** 546, 165 Pac. 601, it was said where a note secured by a mortgage was transferred by assignment, the seller simply indorsing it without recourse, that the purchaser therefore knew it was a mortgage note, collectable by him only as such under the statute of Montana, and it was held that the note came into his hands as a non-negotiable instrument, and that he took it subject to all the equities.

Probably there will not be general approval of the decision in *Southwest Nat. Bank v. House* (1913) 172 **Mo.** App. 197, 157 S. W. 809, where the court sustained a verdict for the defendant, who had given a check for over \$5,000 to the order of A, who indorsed it in blank to the plaintiff with which he had been a depositor for nine days, his balance before the deposit being about \$1,000, and, immediately on depositing the check, presented his own check for about \$1,600 to the plaintiff, and it was then cashed. It was shown by the plaintiff's officers that large checks drawn on other banks in the same city were always sent, when presented, to the drawee bank to see that they were good and to have them certified; that this check was so sent within fifteen minutes; and that the check with the deposit slip was not turned over to the bookkeeper, but delivered to the "collection teller," to be sent for certification, and was never entered by the bookkeeper as a credit. The court considered that these facts and the inferences therefrom sustained the trial court in finding that the purchase of the check by the plaintiff, if completed at all, was not in the usual course in said business.

**COLORADO SUPREME COURT.**  
(In Banc.)

BURNHAM LOAN & INVESTMENT COMPANY, Plff. in Err.,  
v.

GEORGE H. SETHMAN et al.

(— Colo. —, 171 Pac. 884.)

**Bills and notes — pledge — bad faith — officer of corporation.**

1. Mere knowledge that one pledging a note belonging to a corporation as collateral for a loan to himself was its treasurer is not, where the note is properly indorsed by an officer of the company whose duty it was to make the indorsement, sufficient to warrant an inference of bad faith on the part of the pledgee, which will prevent his enforcing the note against the maker.

*For other cases, see Bills and notes, V. b, 2, 3, in Dig. 1-52 N. S.*

**Same — duty of inquiry.**

2. One to whom negotiable paper belonging to a corporation is offered as collateral security for the debt of an officer of the corporation is not bound to inquire of the maker as to the authority of the officer to make such use of the paper in order to become a holder in good faith.

*For other cases, see Bills and Notes, V. b, 3, in Dig. 1-52 N. S.*

**Same — inquiry of directors.**

3. One is not bound, before taking a properly indorsed note belonging to a corporation as collateral security for a loan to one of its officers, to inquire of the board of directors as to his authority to pledge the note.

*For other cases, see Bills and Notes, V. b, 3, in Dig. 1-52 N. S.*

**Same — where loss should fall.**

4. One giving his negotiable promissory note without restrictions upon it should suffer the loss, rather than a bona fide holder for value, in case the consideration fails.

*For other cases, see Bills and Notes, V. a, 2, in Dig. 1-52 N. S.*

(Hill, Ch. J., dissents.)

(February 4, 1918.)

**E**RROR to the District Court for the City and County of Denver to review a judgment in favor of defendants in an action brought to recover the amount alleged to be due on a promissory note. Reversed.

Statement by Garrigues, J.:

Plaintiff below, the Burnham Loan & Investment Company, plaintiff in error,

**Note.** — As to right of one who takes commercial paper of corporation in payment of or security for an individual debt of an officer, see annotation following this case, post, 1163; and references therein to annotations on related questions.

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brought this suit, as pledgee, against George H. Sethman on his promissory note for \$10,002, given to the German-American Indemnity Company in payment for stock, and negotiated and delivered to plaintiff by one S. N. Mitchell as collateral security to his note for \$3,000. The trial court found that plaintiff was not a holder in due course, basing its finding upon a lack of diligent inquiry, amounting to bad faith, in accepting the note, and rendered judgment in favor of defendant.

Plaintiff's business was loaning money. One R. A. Ramey, who was its secretary, treasurer, and general manager and had entire charge of the business, made the loan to Mitchell which resulted in this litigation. The business of the German-American Indemnity Company, hereinafter called the Indemnity Company, was writing insurance. One E. C. Harrell was its president and general manager, and the by-laws gave him the entire charge and control of all its business. Mitchell was treasurer, but in name only, his duty as such being to pay out money on the order of the president and secretary. He had nothing to do with the books, and had no possession or control of the company's notes and bills receivable. He was under contract as the general stock salesman on commission. The by-laws provide that the notes and bills receivable of the company should be kept by the secretary, which office was held by one Dr. Brown. Defendant Sethman was a civil engineer for companies employing workmen, and one Harry Ramey, son of R. A. Ramey, was an insurance solicitor for the Indemnity Company, but was in no way connected with or identified with plaintiff.

March 5, 1912, Sethman went to the Indemnity Company's office in Denver and bought from Harrell, the president, 3,334 shares of the capital stock of the company at \$3 per share of the par value of \$1 per share, amounting to \$10,002, for which he made, executed, and delivered to the company his promissory note in ordinary form, payable in sixty days. Harry Ramey and one Reid were instrumental in securing Sethman as such purchaser. Harrell as president and general manager promised Sethman, if he would buy the stock and give the company his note for the purchase price, that it would retain possession of the note; that the company would issue him the stock and elect him treasurer at a salary of \$2,500 a year; that the duties of the office would not interfere with his usual occupation; that he would not be required to meet the note at maturity, but the company would renew it from time to time until his salary

paid the amount due thereon; that the company desired the names of the various corporations with which he was associated as engineer, and wanted his influence with their workmen to induce them to take out policies of insurance. The stock was never issued to him, and he was not elected treasurer. His note was indorsed by the payee in blank and delivered by Harrell to Mitchell, who on the 18th applied to plaintiff for a loan of \$3,000, and offered the Sethman note so indorsed and in his possession, together with 3,000 shares of the capital stock of the Indemnity Company, standing in the name of Harrell, also indorsed in blank, as collateral security for the loan. Mitchell told Ramey that the note was assigned to him (Mitchell) on account of commissions the company owed him on stock sales. Ramey went to the company's office and inquired of Harrell regarding his authority as president to make the indorsement, and was shown the following by-law, passed when Harrell was elected president, under which the company had been working some two years: "Duties of President.—It shall be the duty of the president to preside at all meetings of the board of directors, to sign all deeds, bonds, certificates of stock, checks, and documents of any description of the company, and to have general supervision of all meetings, either stockholders' or directors' meetings. It shall be his duty to call all meetings, either regular or special, and the call shall be made in accordance with the by-laws. It shall be his duty to secure the services and fix the remuneration of agents, employees and assistant officers for the general promotion and welfare of the company, and shall have entire charge of the affairs of the company. A suitable compensation, to be determined by the directors, shall be allowed the president for his services. Motion duly seconded by Mr. Probat and unanimously adopted and the by-laws so amended."

Harrell also told Ramey the note was given for stock sold and delivered to Sethman. After making further inquiry, plaintiff made the loan and paid out the money on Mitchell's order, taking his note therefor, payable in ninety days, and Mitchell delivered to plaintiff the Sethman note as collateral. While plaintiff made a personal loan to Mitchell, in fact, the money was borrowed to pay agents' advance commission on the sale of the stock to Sethman for which the note was given, and was used for that purpose. The company agreed to pay its agents 30 per cent commission on the sale of stock, and required them to give 10 per cent of this to Mitchell as general agent, and he under some

agreement was to divide this with Harrell. The commission on the Sethman sale was \$3,000, the amount of the Mitchell loan. Reid and young Ramey were the agents instrumental in producing the purchaser, and on this account each received one third of the proceeds of the Mitchell loan; the remainder, under their agreement, should have been divided between Harrell and Mitchell, but Harrell overlooked this detail, and Mitchell, as a fact, received nothing out of the loan, though it was made in his individual name. So, while ostensibly and in fact, so far as plaintiff knew at the time, it made a personal loan to Mitchell, the company received and used the money to pay these agents.

There is no evidence plaintiff had knowledge of any defense the maker had to the note, and no evidence that it had actual knowledge of any defect in Mitchell's title. After Mitchell failed to pay his note, plaintiff had several interviews with Sethman about the payment of his note, and finally Sethman declared that it had been obtained by fraud, that there was a want of consideration, and that he would pay nothing upon it. Thereupon this action was instituted.

#### The Pleadings.

The complaint alleges that March 5, 1912, Sethman made and delivered his promissory note for \$10,002 to the Indemnity Company, payable sixty days after date; that the indemnity company indorsed in blank, negotiated, and delivered it to Mitchell, and on March 18, 1912, for value, he negotiated and delivered it to plaintiff, who is the holder in due course. The answer pleads failure and want of consideration, of which it is alleged plaintiff had notice, and also alleges a defect in the title of the person negotiating it to plaintiff, of which it is alleged it had notice; that plaintiff did not take the note in good faith and is not a holder in due course; that plaintiff in making the loan advanced the money to the indemnity company to be used in paying obligations to its agents. The replication denies knowledge of any defense the maker had to the note; denies knowledge of any defect in the title of the person negotiating it; denies that plaintiff advanced the money to the indemnity company, and alleges as the transaction: That March 18, 1912, plaintiff loaned Mitchell \$3,000; that he made and delivered to it his promissory note therefor payable in ninety days, and as security deposited with plaintiff the Sethman note, and prays that its recovery be limited to the amount due on the Mitchell note. July 20, 1914, after

judgment entered and after the term of court had expired, without notice to plaintiff and without leave of court first had and obtained, defendant filed an answer, in which it is alleged that Mitchell had no authority to pledge the note; that he pledged it to plaintiff as collateral security for a loan plaintiff, made to him personally, at a time when plaintiff knew he was treasurer of the company, and knew or should have known that he had no authority to pledge company property as security for his personal loan, and that his title was therefore defective.

#### The Statute.

Our Commercial Code, passed in 1897, provides:

"Sec. 34. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery."

"Sec. 52. A holder in due course is a holder who has taken the instrument under the following conditions: . . . 3. That he took it in good faith and for value; 4. That at the time it was negotiated to him he had no notice of any . . . defect in the title of the person negotiating it."

"Sec. 55. The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

"Sec. 56. To constitute notice of . . . defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the . . . defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

"Sec. 57. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

"Sec. 58. In the hands of any holder, other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. . . .

"Sec. 59. Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder

in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title." [Laws 1897, pp. 218, 221, 222.]

Mr. W. E. Richards, for plaintiff in error:

Defendant cannot escape liability on the ground that the indemnity company is entitled to the possession of the note sued on.

Wormer v. Waterloo Agri. Works, 50 Iowa, 262; Chestnut Street Trust & Sav. Fund Co. v. Record Pub. Co. 227 Pa. 235, 136 Am. St. Rep. 874, 75 Atl. 1067; 7 Cyc. 942; Wales-Riggs Plantations v. Caston. 105 Ark. 641, 152 S. W. 282; State ex rel. Carroll v. Corning Sav. Bank, 139 Iowa, 338, 115 N. W. 937; City Nat. Bank v. Thomas, 46 Neb. 861, 65 N. W. 895; Martin v. Webb, 110 U. S. 7, 14, 15, 28 L. ed. 49, 52, 3 Sup. Ct. Rep. 423.

The plaintiff is a holder in due course.

Wedge Mines Co. v. Denver Nat. Bank, 19 Colo. App. 182, 73 Pac. 873; Montvale v. People's Bank, 74 N. J. L. 464, 67 Atl. 67; Fillebrown v. Hayward, 190 Mass. 472, 77 N. E. 45; Rockville Nat. Bank v. Citizens Gaslight Co. 72 Conn. 576, 45 Atl. 361; Kaiser v. United States Nat. Bank, 99 Ga. 258, 25 S. E. 620; Kaiser v. First Nat. Bank, 24 C. C. A. 88, 41 U. S. App. 637, 78 Fed. 281; Doe v. Northwestern Coal & Transp. Co. 78 Fed. 62; Tourtelotte v. Brown, 1 Colo. App. 408, 29 Pac. 130.

Messrs. Milton Smith, Charles R. Brock, William H. Ferguson, and John P. Akolt, for defendant in error Sethman:

Plaintiff was not a holder in due course, and consequently was not entitled to recover against defendant Sethman.

Ward v. City Trust Co. 192 N. Y. 61, 84 N. E. 585; Wilson v. Metropolitan Elev. R. Co. 120 N. Y. 145, 17 Am. St. Rep. 625, 24 N. E. 384; Kenyon Realty Co. v. National Deposit Bank, 140 Ky. 133, 31 L.R.A.(N.S.) 169, 130 S. W. 965; Emmerado Farmers' Elevator Co. v. Farmers' Bank, 20 N. D. 270, 29 L.R.A.(N.S.) 567, 127 N.W. 522; Jenkins v. Planters' & M. Bank, 34 Okla. 607, 126 Pac. 757; Germania Safety-Vault & T. Co. v. Boynton. 19 C. C. A. 118, 37 U. S. App. 602, 71 Fed. 797; 2 Thomp. Corp. ¶ 1700; Manhattan Web Co. v. Aquidneck Nat. Bank, 133 Fed. 76; Wheeler v. Home Sav. & State Bank, 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598; Brown v. Pettit, 178 Pa. 17, 34 L.R.A. 723, 56 Am. St. Rep. 742, 35 Atl. 865; Saylor v. Commonwealth Invest. & Bkg. Co. 38 Or. 204, 62 Pac. 652; El Fresno Irrigated Land Co. v. Bank of Washington,



— Tex. Civ. App. —, 182 S. W. 701; Quincy Mut. F. Ins. Co. v. International Trust Co. 217 Mass. 370, L.R.A.1915B, 725, 104 N. E. 845; Clement Nat. Bank v. Connolly, 88 Vt. 55, 90 Atl. 794; West St. Louis Sav. Bank v. Shawnee County Bank (West St. Louis Sav. Bank v. Paf-malee) 95 U. S. 557, 24 L. ed. 490; Moores v. Citizens' Nat. Bank, 111 U. S. 165, 28 L. ed. 388, 4 Sup. Ct. Rep. 345.

The fact that the German-American Indemnity Company took no steps, before the institution of this action, to recover the Sethman note, in no wise prejudices the position of the defendant.

Quincy Mut. F. Ins. Co. v. International Trust Co. 217 Mass. 370, L.R.A.1915B, 725, 104 N. E. 845; Manhattan Web Co. v. Aquidneck Nat. Bank, 133 Fed. 76.

Garrigues, J., delivered the opinion of the court:

1. It is claimed plaintiff is not a holder in due course because: (a) It took the note with notice of the defense the maker had of want or failure of consideration; (b) it did not take the note in good faith; (c) that plaintiff took the note with notice of defect in the title of the person negotiating it, Mitchell.

The defenses interposed are controlled entirely by the statute. There is not a particle of evidence that plaintiff had notice of want or failure of consideration; neither is there any evidence that it took the note in bad faith in fact. Bad means evil, something vicious. Bad faith in fact, or mala fides, is the opposite of good faith, and consist in guilty knowledge, or wilful ignorance, showing a vicious or evil mind, evidence of which is totally lacking in this case. The evidence shows that plaintiff in making this loan and accepting the collateral acted in the utmost good faith. There is no evidence to the contrary. The court made no finding of actual bad faith or actual knowledge of a defective title, or that plaintiff possessed knowledge of any defense the maker had to the note. If it had, its action in doing so would have been arbitrary, unwarranted, and unsupported by any evidence, or the result of a mistake.

Plaintiff must be a holder in due course, and § 4, § 52, is controlling as to when one is such a holder. If it took the instrument with actual or constructive notice of defect in the title of the person negotiating it, it is not a holder in due course. The statute removes any uncertainty or doubt as to what constitutes a defective title, and also what shall be notice thereof. Section 55 defines a defective title. We will assume, for the purpose of this branch of

the case, that Mitchell negotiated the note under circumstances amounting to a fraud upon the indemnity company which made his title defective. But did plaintiff have notice of such defect? Section 56 provides that, to constitute notice of such defective title, the person to whom the note is negotiated must have actual knowledge of such defect or knowledge of such facts that his action in taking the instrument amounted to bad faith. There is no evidence of actual knowledge, and no such finding was made by the court. If plaintiff had no actual knowledge, but had knowledge of "such facts" that its action in taking the note amounted to bad faith, it had constructive notice of Mitchell's defective title, and, under the statute, would not be a holder in due course, of which defendant could take advantage.

It is claimed by defendant that Mitchell in negotiating the security was appropriating property of the company to his own personal use. If true, this would amount to a fraud on the company, and his title, under § 55, would be defective. Assuming it was defective, it is as necessary that plaintiff should have notice of such defect as it is that the title should be defective. It is claimed plaintiff had knowledge of such facts that its action in taking the instrument amounted to bad faith, which constituted notice of the defective title. What were the facts proven on the trial, of which plaintiff had knowledge, that made its action in taking the note amount to bad faith? The claim is: Because plaintiff knew that Mitchell was treasurer of the indemnity company. Mitchell exercised no function of this office in pledging the note. Bad faith is an inference drawn from the fact that he was treasurer of the company, but the evidence must warrant such an inference. The mere knowledge that Mitchell was treasurer was not knowledge of "such facts," under the undisputed evidence of this case, as would justify the deduction that plaintiff's action in taking the note amounted to bad faith, and the court was not warranted, either as a matter of law or fact, in making such deduction. Whether its action in taking the note with such knowledge would warrant the inference of bad faith, under section 56, is a question of law. Where, as here, there is no conflict in the evidence regarding knowledge of such facts, whether plaintiff's action in accepting the security amounted to bad faith rests upon a legal inference drawn from the knowledge that Mitchell was treasurer. Such knowledge does not constitute bad faith in fact, and it would be idle to contend that it constituted bad faith as a matter of

law, or that it warranted, in this case, the inference of bad faith. The finding of the court was nothing more than a deduction as to the effect of the knowledge of "such facts," and this is a question of law. No doubt an inference of bad faith may be drawn, if warranted, as a deduction by the court or jury, and where there is sufficient evidence to warrant or justify it, the inference, when made, becomes proof as a fact of bad faith, and a court of review would not interfere with the findings; but there must be sufficient legal evidence to warrant such inference. There is no evidence of bad faith in fact, and because plaintiff knew that Mitchell was treasurer of the indemnity company was insufficient in law to warrant the inference of bad faith. *Merchants' Bank v. McClelland*, 9 Colo. 608-611, 13 Pac. 723; *Coors v. German Nat. Bank*, 14 Colo. 202-206, 7 L.R.A. 845, 23 Pac. 328; *Tourtlotte v. Brown*, 1 Colo. App. 408-417, 29 Pac. 130; *Soloman v. Brodie*, 10 Colo. App. 353, 359, 360, 50 Pac. 1045; *Wedge Mines Co. v. Denver Nat. Bank*, 19 Colo. App. 182-189, 73 Pac. 873; *German-American Indemnity Co. v. State Mercantile Bank*, 26 Colo. App. 242, 142 Pac. 189; *Montvale v. People's Bank*, 74 N. J. L. 464, 67 Atl. 67; *Fillebrown v. Hayward*, 190 Mass. 472-480, 77 N. E. 45; *Rockville Nat. Bank v. Citizens' Gaslight Co.* 72 Conn. 576, 582, 583, 45 Atl. 361; *Kaiser v. United States Nat. Bank*, 99 Ga. 258, 25 S. E. 620; *Doe v. Northwestern Coal & Transp. Co. (C. C.)* 78 Fed. 62, 68, 69; *Kaiser v. First Nat. Bank*, 24 C. C. A. 88, 41 U. S. App. 637, 78 Fed. 281-284; *Farmers' Loan & T. Co. v. Madison Mfg. Co. (C. C.)* 153 Fed. 310-319.

2. That the rule of law contended for by defendant does not prevail in this state is shown by the citations. We have adopted and are following the Federal rule in this regard. But even if the rule relied upon by defendant prevailed here, the facts in this case do not bring it within the rule. In the class of cases supporting the rule contended for, the party accepting the security from the company officer for a personal loan could see upon the face of the transaction that the officer by exercising the function of his office was at the same time using the security belonging to the company for his own personal benefit; that is, that it was in connection with or by his act as an officer that he was appropriating company property to his own use. Using this case as an illustration, it would be the same as though Harrell, in his official capacity as president, indorsed the company's name of the Sethman note and offered it to plaintiff, so indorsed, as security in connection with his application for a person-

al loan, in which event plaintiff could see that the president and general manager, with power to indorse the company's name, was exercising a function of his office and at the same time using the security indorsed by him, for his individual purpose. This case is very different. The note had been regularly indorsed by the company by its president, authorized so to do by the by-laws, and delivered to Mitchell. Plaintiff found Mitchell in the possession of such indorsed paper. Mitchell did not exercise any official act in negotiating and delivering the note, and had nothing to do with the indorsement. It had already been indorsed by the company and delivered to him. Upon inquiry as to the president's right to indorse the company's name upon the note, plaintiff was shown the by-laws giving the president entire control of the business affairs and management of the corporation, and was informed that the note had been delivered to Mitchell on account of commissions on the sale of stock. Mitchell exercised no function of his office as treasurer in connection with the loan.

3. The court based plaintiff's knowledge of such facts that its action in taking the note amounted to bad faith, constituting notice of Mitchell's defective title, upon plaintiff's lack of diligence in making inquiry as to Mitchell's right to use the note: that is, that plaintiff was guilty of negligence in not making diligent inquiry, which amounted to bad faith under § 56, constituting such notice. Plaintiff was under no obligation to inquire of the maker of the note; if so, no one could ever purchase negotiable paper and be a holder in due course without first making inquiry of the maker. Inquiry, if necessary here, was as to the title of the person negotiating the instrument. The court found plaintiff failed to use due diligence in making such inquiry. This was, in effect, a finding of knowledge of facts amounting to bad faith in taking the instrument, constituting notice of such defective title. There is no conflict in the evidence in this regard as to what was or was not done. Plaintiff did make inquiry. It went to the office of the company, where it found the president and general manager, and, upon inquiry, was shown the by-law passed by the board, which gave the president the entire charge and management of the affairs of the company. This showed ample authority to indorse the company's name upon the note, and there was evidence that Harrell had been exercising such authority. There is no evidence, or absence of evidence, upon which the court could properly base a finding of lack of diligence, unless it be that plaintiff failed to inquire of the board of

directors. The court seems to have entertained the idea that it was plaintiff's duty to inquire of the board of directors as to Mitchell's right to use the indorsed note. We know of no such duty, and we think, under the evidence in this case, that plaintiff was charged with no such inquiry. Where the evidence is not conflicting in this particular and there is insufficient evidence to warrant a finding of lack of diligence in making such inquiry, a finding that plaintiff's action in taking the note amounted to bad faith cannot be sustained as a matter of law.

4. Defendant thought he was getting 3,334 shares of valuable stock for practically nothing. Instead of protecting himself in such adventure, he gave an ordinary sixty-day negotiable note, with interest from date, and shortly thereafter the payee indorsed it in blank, negotiated and delivered it to Mitchell, who applied to plaintiff for a loan, and negotiated and delivered it to plaintiff as security. The evi-

dence shows, without conflict, that plaintiff took the note in good faith for a valuable consideration before maturity, without notice of any defense the maker had, and without notice of any defect in the title of the person negotiating it. Defendant could easily have protected himself by a proper wording of the note. Instead of this, he made it possible for his negotiable paper to pass into the hands of an innocent purchaser, and he, instead of plaintiff, should suffer the loss.

The judgment is reversed, and the cause remanded to the lower court, with directions to enter a judgment in favor of plaintiff in accordance with the views herein expressed.

Teller, J., not participating. HILL, Ch. J., dissents.

Petition for rehearing denied April 1, 1918.

#### **Annotation—Right of one who takes commercial paper of corporation in payment of or security for an individual debt of an officer.**

This note is supplemental to the note to Kenyon Realty Co. v. National Deposit Bank, 31 L.R.A.(N.S.) 169, where the earlier cases are collected. To fall within the scope of these notes, it must appear that the purchaser knew that the paper was being used for the individual benefit of the officer. It is obvious, however, that cases holding that the form of such paper puts on inquiry a purchaser, though he has no actual knowledge that the paper was used for the benefit of the officer, would a fortiori be authority for charging a purchaser who had such knowledge. For cases where the purchaser had no such knowledge, see the note to Stevens v. Venema, ante, 1145, and the notes to which it is supplemental; or for the general subject as to what circumstances are sufficient to put a purchaser of negotiable paper on inquiry.

It will be seen that it is held in BURNHAM LOAN & INVEST. CO. v. SETHMAN, ante, 1158, that one who takes a note to the order of a corporation, indorsed by it in blank, as collateral security for a loan to such corporation's treasurer, after making inquiries of the president as to the regularity of the indorsement, is not affected with knowledge of defenses of the maker to the note.

Where the secretary of a corporation, without authority, indorsed checks belonging to it to a bank, which collected

the checks and applied the proceeds to matters in which the secretary was interested, it was held that the bank was put on inquiry. Palo Alto Mut. Bldg. & L. Asso. v. First Nat. Bank (1917) 33 Cal. App. 214, 164 Pac. 1124 (not under Neg. Ins. Law).

In Newman v. Newman (1914) 160 App. Div. 331, 145 N. Y. Supp. 325, it was held that a promissory note of a corporation, signed by the treasurer and vice president to the individual order of the vice president, and purchased by the vice president's brother from the vice president, individually, by its form put the purchaser on inquiry as to the consideration of the note.

In Jenkins v. Planters' & M. Bank (1912) 34 Okla. 607, 126 Pac. 757, it was held that a note to the order of a corporation, indorsed by the corporation by its president and secretary, and pledged by the president for his individual debt, was taken by the pledgee at his peril.

In Fensterer v. Pressure Lighting Co. (1914) 85 Misc. 621, 149 N. Y. Supp. 49, it was held that one who cashed a check to a corporation, after hours, on the indorsement of the vice president, was put on inquiry, but that inquiry would have revealed the authority of the vice president to use the check.

In Buckley v. Lincoln Trust Co. (1911) 72 Misc. 218, 131 N. Y. Supp.

105, also, it was held that inquiry would have disclosed the authority of the payee.

It will be observed by reference to the earlier note that the cases in Georgia, which has a peculiar statute, seem to be contradictory. It was held in *Spiller-Beall Co. v. Hirsch* (1916) 18 Ga. App. 450, 89 S. E. 587, that a corporation's note executed by the president to himself does not give notice of any impropriety to one with whom the president negotiated the note for his own personal benefit.

It was held in *De Baca v. Higgins* (1914) 58 Colo. 75, L.R.A.1915B, 1091, 143 Pac. 832, that a creditor of a bank official, who receives from him a draft on or certificate of deposit of the bank, bearing his signature, to be satisfied out of the bank's funds, in satisfaction of the claim, is liable to refund the amount received in case the act proves to be a misappropriation of the bank's funds, and the act was not authorized or ratified by the bank.

But where it was in proof that it was the custom of a corporation, and of many other corporations, to pay their employees by means of checks to those to whom they were indebted, it was held that the issuance of checks by a corporation to the order of an insurance company, to pay premiums on a policy of the employee, having the employee's name in the left-hand corner of the checks, was not notice to the insurance company that the funds of the corporation were being wrongfully used. *Watts v. Gordon* (1913) 127 Tenn. 96, 153 S. W. 483, where, however, the court did not seem to think that any wrongful use of the funds had been made.

In *Johnson & K. Co. v. Longley Luncheon Co.* (1910) 207 Mass. 52, 92 N. E. 1035, the court expressed the opinion that corporation checks signed by its treasurer in favor of his creditor, and given in payment of the treasurer's individual debt, were taken with notice. In this case the court said: "The distinction seems to be this: Where the corporation note or other negotiable instrument is payable to the creditor of the individual, the transaction which, on the face of the note or other instrument, is represented to have taken place, is an appropriation of the corporation's money to the payment of the individual's debts, and is bad unless shown to be good. Since the transaction is bad unless shown to be good, and since the purchaser took with notice (given on the face of the note or other instru-

ment), his rights depend upon the transaction's being or not being in fact what it purports on the face of the note or instrument to be, and no question of a purchase in good faith can arise. See, for example, *Wilson v. Metropolitan Elev. R. Co.* (1890) 120 N. Y. 150, 17 Am. St. Rep. 625, 24 N. E. 384. But on the other hand, where the note or other instrument is payable to the treasurer or to a third person and, after being indorsed by the payee in blank, is used by the treasurer in paying his individual debt, the transaction, which on the face of the instrument is represented to have taken place, is a payment by the corporation to the treasurer (where the note or other instrument was payable to him), and a payment by the corporation to the third person, and another payment by the third person to the treasurer (where the note or other instrument was payable to a third person, as stated above). In each of these last two cases the transaction on its face is good unless it is proved to be bad. In that case, if the corporation proves that the application of the note or other instrument of the corporation was a wrongful one, the rights of the creditor depend upon his having acted in good faith. In this connection, compare *Freeman's Nat. Bank v. Savery* (1879) 127 Mass. 75, 34 Am. Rep. 345, and *National Bank v. Law* (1879) 127 Mass. 72."

A bank, which knew that a note made by the president of an irrigation corporation in its name, and purporting to be secured by a lien on its lands, was in the interest of the president and of another company, to which it was payable, it not being in the ordinary course of the business of the irrigation corporation to give liens to secure loans made to it, was not an innocent purchaser. *El Fresno Irrigated Land Co. v. Bank of Washington* (1916) — Tex. Civ. App. —, 182 S. W. 701. B. B. B.

#### IOWA SUPREME COURT.

GUUVINE OLSON, Appt.,  
v.

MODERN WOODMEN OF AMERICA.

(— Iowa, —, 164 N. W. 346.)

Insurance — benefit — change of by-laws as to presumption of death.  
A change in the by-laws of a mutual bene-

Note. — The validity and effect of a by-law of a mutual benefit society, refusing to pay benefit upon presumption of death

fit society, substituting the life expectancy of a member at time of disappearance, for the seven-year-absence rule, to establish liability of the insurer, is not within a provision in the application binding the member by the laws of the order "now in force or hereafter enacted."

*For other cases, see Insurance, III. a, in Dig. 1-52 N. S.*

(September 20, 1917.)

**A**PPEAL by plaintiff from a judgment of the District Court for Polk County in favor of defendant in an action brought to recover the amount alleged to be due on a benefit certificate, issued on the life of plaintiff's husband. Reversed.

The facts are stated in the opinion.

Messrs. John L. Gillespie and Edwin J. Frisk, for appellant:

By-law No. 66 is invalid, for the reason that it seeks to change the money contract obligation of defendant to the assured and his beneficiary, and defers the time of payment in this case twenty-six years, and attempts to compel the beneficiary, in the meantime, to pay the assessments, thus destroying the value of the insurance.

Fort v. Iowa Legion of Honor, 146 Iowa, 183; Elliott v. Home Mut. Hail Asso. 160 Iowa, 105, 140 N. W. 431; Olson v. Court of Honor, 100 Minn. 117, 8 L.R.A. (N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 374, 10 Ann. Cas. 622; Pokrefky v. Detroit Firemen's Fund Asso. 121 Mich. 456, 80 N. W. 240; Newhall v. Supreme Council, A. L. H. 181 Mass. 111, 63 N. E. 1; O'Neill v. Supreme Council, A. L. H. 70 N. J. L. 410, 57 Atl. 463, 1 Ann. Cas. 422; Langan v. Supreme Council, A. L. H. 174 N. Y. 266, 66 N. E. 932; Wist v. Grand Lodge, A. O. U. W. 22 Or. 271, 29 Am. St. Rep. 603, 29 Pac. 610; Becker v. Berlin Beneficial Soc. 144 Pa. 232, 27 Am. St. Rep. 624, 22 Atl. 699; Wuerfler v. Grand Grove, O. D. 116 Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 433; Knights Templars & M. Life Indemnity Co. v. Jarman, 44 C. C. A. 93, 104 Fed. 638; Supreme Council, A. L. H. v. Getz, 50 C. C. A. 153, 112 Fed. 119; 1 Bacon, Ben. Soc. 3d ed. § 188.

It, in effect, attempted to abrogate and nullify the law of the the state, whereby the absence of a person for seven years, unheard from and unseen, except on the theory of death, raises the presumption of death.

Samberg v. Knights of Modern Macca-bees, 158 Mich. 568, 133 Am. St. Rep. 396, 123 N. W. 25; Supreme Council, A. L. H.

from seven years' absence, are considered in the notes to Keith v. Modern Woodmen, L.R.A.1915B, 793, and Hannon v. Grand Lodge, A. O. U. W. L.R.A.1917C, 1032.

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v. Perry, 140 Mass. 580, 5 N. E. 634; 1 Bacon, Ben. Soc. 3d ed. 164.

Said by-law was unreasonable.

Elliott v. Home Mut. Hail Asso. 160 Iowa, 105, 140 N. W. 431; Olson v. Court of Honor, 100 Minn. 117, 8 L.R.A. (N.S.) 521, 117 Am. St. Rep. 676, 110 N. W. 374, 10 Ann. Cas. 622; Cohen v. Supreme Sitting O. I. H. 105 Mich. 283, 63 N. W. 304; Wheelers v. Supreme Sitting, O. I. H. 110 Mich. 437, 68 N. W. 229; O'Neill v. Supreme Council, A. L. H. 70 N. J. L. 410, 57 Atl. 463, 1 Ann. Cas. 422; Wuerfler v. Grand Grove, O. D. 116 Wis. 19, 96 Am. St. Rep. 940, 92 N. W. 433.

Messrs. Truman Plantz, Jesse A. Miller, and George G. Perrin for appellee.

Gaynor, Ch. J., delivered the opinion of the court:

This action is brought to recover on a certain benefit certificate issued by the Modern Woodmen of America, defendant, on the life of one J. W. Olson. The plaintiff herein is the wife of said J. W. Olson, and the beneficiary named in said certificate. The court below found for the defendant, and dismissed plaintiff's action. The cause was tried upon stipulated facts. From the stipulation it appears: That on the 27th day of September, 1894, J. W. Olson became a member of said association and received the certificate sued on. The certificate provides for the payment of \$2,000 to the beneficiary named therein, upon the death of said Olson. The contract consists of the application, the benefit certificate, and the by-laws of the order. In the application Olson agreed that, if he failed to comply with and conform to any and all laws now in force or hereafter adopted, his certificate should be void, and further agreed to make punctual payment of all dues and assessments for which he should become liable, and to conform in all respects to the laws, rules, and usages of the order now in force, or which may be hereafter adopted by the same. In the application this question was propounded to him: "Do you understand and agree that the laws of the order now in force, or hereafter enacted, enter into and become a part of every contract of indemnity between the members and the order, and govern all rights thereunder?"—and he answered, "Yes." The following agreement appears in the application: "I agree to make punctual payment of all dues and assessments for which I may become liable, and to conform in all respects to the laws, rules, and usages of the order now in force, or

Generally, as to change of by-laws, see L.R.A. Indexes under the title, "Insurance," subtitles, "Constitution, rules and by-laws;" "Change of."

which may hereafter be adopted by the same." That the foregoing answers and agreements, with the preceding declaration, shall form the basis of the contract between me and the Modern Woodmen of America, and are offered by me as a consideration for the contract applied for, and are hereby made a part of any benefit certificate that may be issued on this application, and shall be deemed and taken as a part of such certificate. That this application may be referred to in said benefit certificate as the basis thereof, and that they shall be construed together as one entire contract.

The certificate provided that Olson, while in good standing in the fraternity, is entitled to participate in the benefit fund to the amount of \$2,000, which shall be paid at his death to Guvine Olson, related to him as wife, subject to all the conditions of this certificate and fundamental laws of this order, and liable to forfeit if said member shall not comply with said conditions, laws, and by-laws and rules, as are or may be adopted by the Head Camp of this order from time to time, or the local camp of which he is a member, and provided that the certificate was issued in consideration of the warranties and agreements made by Olson in his application.

The by-laws at the time the certificate was issued, provided that they might be amended at any special or regular session of the Head Camp by a two-thirds affirmative vote of the members present. It was further provided that the beneficiary named in the certificate shall be entitled to participate in the benefit fund to an amount not exceeding the amount stated in the certificate, provided that all the conditions and requirements contained in the certificate and in the by-laws of the society, as the same now exists or may hereafter be modified, amended, or enacted, shall be fully observed and complied with.

As will be noted, the certificate in question was issued on the 27th day of September, 1894.

From the stipulation entered into at the trial it appears: That on the 19th day of May, 1907, Olson left his home at Grinnell, Iowa, and his whereabouts since then have been and are unknown to the members of his family. That Olson, prior to his disappearance, and the plaintiff, since his disappearance, have paid to the clerk of the local camp of which Olson was a member, all assessments and dues levied on account of the benefit certificate sued on, up and until the commencement of this action on the 22d day of April, 1915. There was no proof of the actual death of Olson. The plaintiff relies upon his unexplained absence for seven years from his home and his fami-

ly as proof of death. It was further stipulated and agreed on the trial that if the court found the defense set up by the defendant in its answer is a good and valid defense, then the final judgment shall be entered for the defendant, but if the court finds that such defense so set up by the defendant is not a good and valid defense, then judgment shall be entered for the plaintiff.

The defense proposed is this: The duly and regularly constituted Head Camp of the defendant revised and amended by its by-laws after the issuance of the certificate sued on, and enacted the following: Section 66. Disappearance No Presumption of Death.—No lapse of time or absence or disappearance on the part of any member, heretofore or hereafter admitted into the society, without proof of the actual death of such member, while in good standing in the society, shall entitle his beneficiary to recover the amount of his benefit certificate, except as hereinafter provided. The disappearance or long-continued absence of any member, unheard of, shall not be regarded as evidence of death or give any right to recover on any benefit certificate heretofore or hereafter issued by the society until the full term of the member's expectancy of life, according to the National Fraternal Congress Table of Mortality, has expired within the life of the benefit certificate in question and this law shall be in full force and effect, any statute of any state or country or rule of common law of any state or country to the contrary notwithstanding.

The term "within the life of the benefit certificate," as here used, means that the benefit certificate has not lapsed or been forfeited, and that all payments required by the by-laws of the society have been made.

It is the claim of the defendant that this by-law is binding upon the plaintiff, and that, in the absence of proof of actual death, she is not entitled to recover until the full term of Olson's expectancy of life shall have expired, and then only in the event all assessments have been paid.

It is stipulated that his expectancy, according to the National Fraternal Congress Table of Mortality, is twenty-six years after his disappearance. The question is this, does this by-law defeat recovery, in the absence of proof of actual death? Of course, if binding on the assured, it is binding on the plaintiff. If it is a by-law which the company had a right to make, by reason of the reserve power in the society and the agreement of Olson expressed in the application and contained in the certificate, and, when adopted, bound him, then, of course, it is just as effectual against the plaintiff, whose rights all rest upon the certificate of

which the application, by-laws, and constitution of the order are a part. We may assume, for the purposes of this case, that the society had a right to enact this by-law, and that it bound all who came into the order after its adoption. The question before us is, Is the by-law retroactive? Is it effectual to bind those who became members before its adoption, and can it be urged against one who relies upon a certificate issued at a time when this by-law was not in force?

There can be no question under the authorities that, in this case, the application and by-laws, together with the certificate, constituted the contract between the assured and the society. There is no question that the assured assented and agreed to be bound by subsequent by-laws; but the reserve power in the society and the consent of the assured must not be construed to give to the company the right, after the issuance of the certificate, to amend its by-laws so as to unreasonably affect substantial rights and contractual obligations already entered into. We think it is the general holding of the courts that a reservation of power in a mutual benefit insurance company, or the consent of the assured, to make their future by-laws retroactive in their nature, must be understood to mean the power to make future by-laws which shall be reasonable, and we think it is the general if not the universal holding of the courts that, in construing this reserved power or consent, the reserved power or consent must be construed so as to permit only reasonable by-laws and amendments to be adopted, in furtherance of the contract, and not such as would overthrow or materially alter its terms, or unreasonably affect the substantial rights of the assured under his certificate; that it does not confer upon the society the power to destroy the contractual rights of a member created by the certificate, or to unreasonably impair that obligation or unreasonably reduce the indemnity which it has promised to pay, or unreasonably embarrass the assured's beneficiary in recovering the amount stipulated to be paid in the certificate, upon the happening of the event therein insured against. It cannot be said to be a reasonable interpretation of such reserved power or agreement, on the part of the member, to say that the assured intended to assent in advance to any changes in by-laws which the insurer saw fit to make, nor can it be a reasonable interpretation of the reserve power to say that such power was reserved in the society. It cannot be a reasonable interpretation of the reserved power to say that, after the issuance of the certificate, the society, by virtue of the reserved power, was thereafter per-

mitted to make any amendments to its by-laws, which, in fact, created a new and different contract than that entered into, or in a material way unreasonably changed the contract as to indemnity theretofore entered into, or one which rendered it impossible, under certain circumstances, for the beneficiary to recover on the certificate the amount stipulated in the certificate. Such interpretation would be unreasonable, and such a by-law would be unreasonable, so interpreted, since it would give to the society the power to make any by-law, even to the extent of destroying the contract which it had with the assured.

Of course, the assured sustains a dual relationship. He is a member of the society and interested in its advancement. All laws which relate to its internal regulation he is presumed to have consented to, and even without his consent, generally speaking, that power is reserved in those benefit societies. But he also sustains contractual relationships, and in this his relationship is antagonistic, so to speak, to the society. Or, in other words, the general holding is, that in matters relating to the conduct of members, laws passed after the issuance of a benefit certificate will be valid and binding upon the member, provided they do not go to the extent of injecting new conditions into the contract which will materially change or affect it. It follows, therefore, that any by-law adopted after the issuance of the certificate, which destroys, or materially and unreasonably affects the rights of the member under the certificate, in so far as his rights to recover the indemnity provided in the certificate are concerned, are held to be unreasonable; and this upon the theory that the reserve power and the consent will not be deemed to have included such right, and the assured will not be deemed to have consented to such by-law becoming a part of his contract.

Where one has consented to be bound by after-enacted by-laws, it has been held that an after-enacted by-law with which the assured can comply, and it is not unreasonable to require him to comply, and, by complying, preserve the integrity of his certificate, is valid. So it has been held that adding to the list of prohibited occupations, under certain circumstances, is not unreasonable. *House v. Modern Woodmen*, 165 Iowa, 607, 146 N. W. 817; *Norton v. Catholic Order of Foresters*, 138 Iowa, 464, 24 L.R.A. (N.S.) 1030, 114 N. W. 893. In this class of cases the by-law is enacted for the benefit of the society, for the benefit of its members, and for the purpose of protecting the members from liability for hazards that greatly increase the burden of each member. It is, in its effect, beneficial to each cer-

tificate holder as against all others, and it is said in these cases that adding to the prohibited occupations in certain cases is not unreasonable. It is for the benefit of the member, and he can conform himself to it for the benefit of all the other members, and, by conforming, preserve the integrity of his certificate. Of course, it cannot continue the "scaling down and narrowing process until the field of the member's available activities is unreasonably circumscribed." Even these amendments may be carried to such an extent as to unreasonably impair the rights of the insured under the certificate originally issued.

In *State ex rel. Schremp v. Grand Lodge, A. O. U. W.* 70 Mo. App. 466, it appears that at the time the certificate was issued there was no law prohibiting a saloon keeper or bar-tender from becoming a member of the order, or any law prohibiting any member from engaging in either of these occupations. The appellant agreed to be bound "by all rules, regulations, and by-laws which are or may be hereafter enacted by said order." Thereafter the society adopted a by-law, declaring that any person who is now a member of this order shall forfeit his rights as a certificate holder if he engage in the business of keeping a saloon or dramshop, or attending a bar. After the adoption of this amendment a member began business as a saloon keeper. The court held that, having agreed in advance to any reasonable change in the by-laws, the member was amenable to this by-law. It is apparent that this was not an unreasonable by-law, because it was made for the benefit and protection of the order, and was one with which the assured could comply, and it was not unreasonable for the society to exact compliance with it even after the certificate was issued, and this under penalty of losing his rights under the certificate.

The same rule applies as to forfeitures for intemperance. *Ury v. Modern Woodmen*, 149 Iowa, 706, 127 N. W. 665.

It is true that in *Ross v. Modern Brotherhood*, 120 Iowa, 692, 95 N. W. 207, this court upheld a subsequent by-law defining what should constitute a broken leg. This case can only be sustained on the theory that the original contract was not unreasonably amended; that the amendment simply undertook to define that which was already covered by the policy. The policy, as originally issued, provided for an indemnity for each broken arm or leg resulting from accident. The amendment undertook to define what was meant by a broken leg, and limited the meaning of the original words to the breaking of the shaft of the thigh bone between the hip and the knee

joints, or the breaking of the shaft of both bones between the knee and the ankle joints, and the court said: "But if it be conceded for the purposes of this case that changes in by-laws under such an agreement can only be reasonable, we think the change here should be held valid. . . . There was no previous designation as to what a broken leg meant, and it may have been necessary for the proper protection of the great body of members to certainly define what it did mean under the terms of the certificates, and we think such action was not unreasonable."

This case goes to the limit in preserving to the society the right to amend its by-laws, and we are not inclined to extend it. If under the guise of defining what was meant by the contract, it destroyed a contractual right and prevented recovery for an accident covered by the contract, without power in the assured to comply, and by complying protect himself after the amendment, we would think it an unreasonable interference with the vested rights of the assured.

In *Roeh v. Business Men's Protective Asso.* 164 Iowa, 199, 51 L.R.A.(N.S.) 221, 145 N. W. 479, Ann. Cas. 1915C, 813, the by-law there involved was in force at the time the certificate was issued. This is true also of *Kelly v. Supreme Council, C. M. B. A.* 46 App. Div. 79, 61 N. Y. Supp. 394; *Underwood v. Modern Woodmen*, 141 Iowa, 240, 119 N. W. 610; *Porter v. Home Friendly Soc.* 114 Ga. 937, 41 S. E. 45.

In *Apitz v. Supreme Lodge, K. L. H.* 274 Ill. 196, L.R.A.1917A, 183, 113 N. E. 63, an after-enacted by-law was held not unreasonable which provided: "It shall be the duty of a relief fund member of the order to notify the secretary of his lodge of any permanent change of residence, and . . . to keep the secretary advised of his post-office address. If any such member shall so fail and shall change his residence or usual place of abode, or shall disappear from the place or neighborhood in which he shall have usually resided, and his residence shall not be known to his family or the secretary of his lodge, and cannot be ascertained after reasonably diligent inquiry, and such disappearance shall be continued for one year, such member shall stand suspended as in case of suspension for the nonpayment of assessments or dues. . . . If such member shall reappear and shall make known his place of abode, and shall desire to become reinstated, he may avail himself of the privilege of the reinstatement law of the order by complying with the requirements of the same."

In that case the certificate holder had disappeared. His beneficiary sued on the



policy. The court held that there was a legal presumption from his continued absence for seven years that he was dead and the time he is first to be accounted dead is at the end of the period of seven years. The court said: "In the absence of evidence to the contrary, there is no presumption that death occurred at any particular time; but at the end . . . of seven years' absence, on the grounds of public policy, the law presumes him to be dead."

It is apparent, therefore, from this case, that there was no presumption that the assured was dead at the end of one year. He was presumed to know the by-law enacted after his certificate went into force, and, there being no presumption that he was dead at the end of one year, the presumption of life continued. The presumption, then, is that he was alive at the end of one year. He could have complied with the requirements of this by-law. He could have notified the secretary of his whereabouts and preserved the integrity of his certificate. He neglected to do this, and his membership became forfeited, forfeited by his failure to do that which lay in his power to do, knowing the effect of his failure upon his right. It was therefore held not to be an unreasonable provision because he, as a member of the society, was interested in preserving the integrity of the fund provided for death benefits. The by-law affected every member and was not unreasonable, because it was for the benefit of all the members, and one that any member could reasonably comply with and preserve the integrity of his certificate.

The same is true of *Elliott v. Home Mut. Hail Asso.* 160 Iowa, 107, 140 N. W. 431, in which a subsequent by-law was upheld. The amendment provided that delinquency in payment of an assessment should relieve the association from liability on the certificate while such delinquency existed. This was held a reasonable amendment, because it was one of which the assured had knowledge before the loss, and one with which it was not unreasonable to ask him to comply, and with which he could comply.

The doctrine has been approved by this court that, even when there is an agreement on the part of the assured to be bound by subsequent changes, the society cannot make unreasonable changes by amendment affecting the rights of the insured as the holder of a benefit certificate. *Fort v. Iowa Legion of Honor*, 146 Iowa, 195, 123 N. W. 224. In that case this court approved the rule laid down in *Ayres v. Grand Lodge, A. O. U. W.* 188 N. Y. 280, 80 N. E. 1020, as follows: "An amendment of by-laws which form part of a contract is

an amendment of the contract itself, and, when such a power is reserved in general terms, the parties do not mean, as the courts hold, that the contract is subject to change in any essential particular at the election of the one in whose favor the reservation is made. It would be not reasonable, and hence not within their contemplation, at least in the absence of stipulations clearly specifying the subjects to be affected, that one party should have the right to make a radical change in the contract, or one that would reduce its pecuniary value to the other. A contract which authorizes one party to change it in any respect that he chooses would, in effect, be binding upon the other party only, and would leave him at the mercy of the former, and we have said that human language is not strong enough to place a person in that situation, citing authorities. While the defendant may doubtless so amend its by-laws, for instance, as to make reasonable changes in the methods of administration, the manner of conducting its business and the like, no change can be made which will deprive a member of a substantial right conferred expressly or impliedly by the contract itself. That is beyond the power of the legislature as well as the association, for the obligation of every contract is protected from state interference by the Federal Constitution."

In *Plunkett v. Supreme Conclave, I. O. H.* 105 Va. 643, 55 S. E. 9, the certificate issued did not except death by suicide. It was silent on that subject. Subsequently a by-law was enacted providing that no benefit should be paid the beneficiary of a member committing suicide. The assured had consented to the enactment of subsequent by-laws, and agreed to comply therewith. The amendment was held good, providing he was sane at the time he committed suicide, the court saying: "We have not found it necessary to express any opinion as to whether or not the by-law in question in this case would be binding upon members who afterwards became insane, and, while insane committed suicide."

See also *Tisch v. Protected Home Circle*, 72 Ohio St. 233, 74 N. E. 188.

Those cases rest upon the thought that a man has no vested right to commit suicide, and such amendment invaded no vested rights; that after he received his certificate it was not unreasonable to require him not to commit suicide if he would secure the benefits of his certificate, and it was a condition to which he could conform.

It would consume too much time to run through all the cases holding after-enacted by-laws retroactive in their effect or other-

wise. We think that in nearly every case, in which it is held that the subsequent enacted by-law was retroactive and binding upon the assured and his beneficiary, the requirements related to the conduct of the assured; were made during his lifetime; were for the benefit of the organization, and for the protection of the assured as a member of the organization, and were of such character that the assured could be reasonably required to conform to them; that it was not unreasonable to require him to conform in order to preserve his rights under the certificate. The by-law in question in this case is of a character that neither the assured nor his beneficiary could comply with it. Assuming that it lay in the power of the beneficiary to make proof of death such as the seven year law contemplates, and that it was impossible for her to make proof of actual death, this by-law defeats her.

Appellee makes some question as to the sufficiency of the proof set out in the agreement, to establish a right to recover on the basis of seven years' absence, but we are not considering that question, inasmuch as the stipulation provides that if the by-law, hereinbefore set out, is not binding on the plaintiff, then she is entitled to recover; if binding, she is not. We must assume, therefore that, if the case had gone to trial, the proof was forthcoming to establish a basis for the recovery on the ground of seven years' absence, if this were permissible in the face of the by-law.

In all cases in which reliance is had upon the absence of the assured for seven years, and proof is not sufficient under the law to establish the fact of death, because not sufficient to raise a presumption of death, there is no occasion for invoking this amendment. It is invoked, and can be used, only where the beneficiary is able to make the proof which the law requires. In discussing that rule it is said: "In order that the presumption of life may be overcome by the presumption of death, there must be evidence, not merely of absence from home or residence for a period of seven years, but there must be a lack of information concerning the absentee, on the part of those likely to hear from him, after diligent inquiry. Greenleaf, in discussing this question, says: 'Among the circumstances material to this issue are: The age of the party; his situation, habits, employment, state of health, physical constitution; place or climate of the country whither he went, and whether he went by sea or land; the facilities of communication between the country and his former home; his habits of correspondence with his relatives; the terms of intercourse on which he lived with

them—in short, any circumstances tending to aid the jury in finding the fact of life or death. There must also be evidence of diligent inquiry at the place of the person's last residence in this country and among his relatives, and any others who probably would have heard of him, if living; and also at the place of his fixed foreign residence, if he was known to have any.' 2 Greenl. Ev. § 278."

Of course, the character of the inquiry, the persons to whom the inquiry is addressed, and the places where it must be made, are all to be determined by the circumstances of each particular case, with the obligation on the person to be benefited by the death of the absentee, to exclude, by the best evidence obtainable, with as much certainty as possible, reasonable belief in the continuance of life.

In *Modern Woodmen v. Gerdorn*, 72 Kan. 391, 2 L.R.A. (N.S.) 809, 82 Pac. 1100, 7 Ann. Cas. 570, that court said: "It is true that death may be proved by circumstantial evidence, and that absence for a considerable period of time is not indispensable in order to generate a satisfying conviction of the fact. . . . But in all such instances the death of the absent party must fairly be demonstrated by the circumstances of the disappearance. If, for example, in connection with other facts showing a want of motive for absence, it should appear that the missing person was on a vessel which foundered, or a train which was wrecked, or engaged in some hazardous enterprise, or met with an accident which might be expected to result fatally, or was exposed to perils incompatible with his age, or the state of his health, or was afflicted with a fatal disease, or was mentally infirm, or was suicidally inclined, belief in the fact of death might be forced upon the mind very soon after the disappearance. And in some cases the age, health, dispositional rank, and financial condition of one who suddenly disappears may themselves, without the aid of other circumstances, stifle all doubt that the person is dead. Such, at least, is the view of most of the courts of last resort."

Of course, this proof raises a legal presumption that he is dead, but it is a rebuttable presumption. Now, it is apparent that if this proof could be made, then, recognizing this amendment as binding, recovery could not be had. If this proof were made, it is apparent that it would be impossible to prove the death in any other way. An insurmountable barrier is placed by this amendment in the way of recovery, because the condition on which recovery rests (death) is incapable of proof under

this amendment. Eliminating this seven-year rule, and destroying its efficacy as proof of death, the payment of the policy is postponed until twenty-six years after his disappearance, and the burden placed upon the assured of paying the premium during all these years to secure the benefits of the certificate. There is no presumption as to when he died, arising from the proof of absence. The law steps in at the end of seven years, proper proof attending his absence being disclosed, and says that he is now dead. His policy is mature. His beneficiary has a right to recover. Though this rule has its foundation in reason, and is founded upon a knowledge of the ways of men, yet the amendment says to the plaintiff: "You cannot recover on such proof until twenty-six years have elapsed after the disappearance," thus casting on plaintiff the burden of paying all dues and assessments during that time, and thereby making the certificate practically worthless. The rule of seven years' absence rests upon sound public policy. Those interested in the death are in no position to prove actual death. They must rest their case on the circumstances of absence, if they would prove the death at all. The fact that his whereabouts were unknown for seven years, the fact that by inquiry they could get no trace of him, the fact that they cannot prove that he is actually dead by eyewitnesses, or those who can swear positively to the fact of death, makes it impossible to prove the ultimate fact upon which liability rests, and postpones the payment nineteen years, though proof can be furnished and is offered which would satisfy any reasonable mind that the ultimate fact exists. We think the rule is unreasonable, and ought not to be recognized and enforced by this court.

In *Samberg v. Knights of Modern Macabees*, 158 Mich. 568, 133 Am. St. Rep. 396, 123 N. W. 25, the court had before it the question here under consideration. The beneficiary relied upon absence and disappearance for seven years as proof of death. The defendant interposed as a defense a by-law enacted after the certificate was issued, in effect substantially the same as the one under consideration here. The court said: "This certificate is made payable to the beneficiary named therein upon satisfactory proofs of the death. . . . [The assured had agreed to be bound by all laws, rules, and regulations now or hereafter in force.]"

This certificate is made payable to the beneficiary named therein, "upon satisfactory proof of death." We have already quoted the statute in relation to the presumption arising from seven years' absence without intelligence concerning the person.

It was undoubtedly enacted to meet a necessity growing out of the experience of men. This rule has also been recognized in the absence of a statute. See *Heagany v. National Union*, 143 Mich. 186, 106 N. W. 700. It cannot be said that the insured, in subscribing to his application, contemplated the adoption of a by-law that would have the effect to render the provisions of a wholesome statute nugatory, and to have the further effect of making it practically impossible to make proofs of death in cases within the occasional experience of men. We hold that the by-law, so far as this case is concerned, is an unreasonable one.

The time for the maturity of the certificate was not stated in the original certificate. It was payable upon proof of his death. His death can be proven by circumstances which the law recognizes as sufficient to establish the fact of death, or, at least, to raise a presumption of the fact of death, a presumption that he was dead at the end of the seven years. So we say that this was an unreasonable by-law, and one that placed an obstruction in the way of proving the ultimate fact (the death) by methods known to the law at the time of the issuance of the certificate, and one which the beneficiary of the assured, the one for whose benefit the certificate was taken, could not comply with under the circumstances shown in this case.

The defendant's position is that death, which alone matures a policy, cannot be shown in this case, and that the right of the beneficiary to recover is postponed for nineteen years because of this amendment to the by-laws, and that recovery can be had at the end of nineteen years only upon proof of the fact of the continued absence of the assured during that time, and the payment by the beneficiary of all dues and assessments necessary to keep the certificate alive until the expiration of that time.

It will be noted that this by-law was passed in September, 1908; that the assured disappeared May 19, 1907, more than a year before the by-law was enacted, and about four years after the certificate was issued. This fact emphasizes and makes certain to our minds that the by-law invoked by the defendant as a defense is unreasonable, and ought not to be sustained in this case. It is our judgment, therefore, that this by-law is unreasonable, being enacted after the certificate was issued, after assured had disappeared, and is therefore not binding upon the assured or his beneficiary, and the cause is reversed.

**Ladd, Weaver, Preston, Salinger, and Stevens, JJ., concur.**

Petition for rehearing denied.

## NEW YORK COURT OF APPEALS.

C. BERTRAND RACE, Respt.,

v.

CHARLES B. KRUM, Appt.

(222 N. Y. 410, 118 N. E. 853.)

**Appeal — decision on facts.**

1. The decision of the trial court upon facts which there is evidence to support is final upon the court of appeals.

*For other cases, see Appeal and Error, VII. 1, 3, in Dig. 1-52 N. S.*

**Food — ice cream — warranty.**

2. A druggist selling ice cream for consumption on the premises warrants it to be fit for human consumption.

*For other cases, see Food, in Dig. 1-52 N. S.*

(February 5, 1918.)

**A**PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of a trial term for Albany County in favor of plaintiff, in an action brought to recover damages for personal injuries alleged to have resulted from the consumption by plaintiff of unwholesome and poisonous ice cream, sold to him by defendant. Affirmed.

The facts are stated in the opinion.

Messrs. Walter B. Grant and Walter J. Carlin amici curie.

Mr. Joseph A. Lawson, for appellant:

The admission in the answer of an implied warranty on the sale of the food in question was an admission of a legal proposition, and did not conclude the defendant from asserting a different rule, and was in no way binding upon the trial court, and does not bind this court.

Cutting v. Lincoln, 9 Abb. Pr. N. S. 436; International Trust Co. v. Caroline, 78 Misc. 179, 137 N. Y. Supp. 932; Brewster v. Striker, 2 N. Y. 41.

The charge of the trial judge as to the existence of an implied warranty, not having been excepted to by the defendant, does not estop the defendant from questioning the soundness of the law underlying such

**Note.** — The subject of liability for serving unfit food is considered in the notes to Doyle v. Fuerst & Kraemer, 40 L.R.A.(N.S.) 480, and Merrill v. Hodson, L.R.A.1915B, 481.

Generally, as to implied warranty of fitness upon sale of food, see notes to McQuaid v. Ross, 22 L.R.A. 195; Farrell v. Manhattan Market Co. 15 L.R.A.(N.S.) 884, and Swank v. Battaglia, L.R.A.1917F, 472; and see later case, Walters v. United Grocery Co. L.R.A.1918E, 519. See also references in the last-mentioned note for annotations of analogous questions.

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charge, nor from seeking to review the same in this court.

Crane v. Barron, 115 App. Div. 202, 100 N. Y. Supp. 937; Lesin v. Shapiro, 147 App. Div. 104, 131 N. Y. Supp. 755.

Mr. Edgar T. Brackett, for respondent: There was an implied warranty.

Van Bracklin v. Fonda, 12 Johns. 468, 7 Am. Dec. 330; Moses v. Mead, 5 Denio. 617; Hyland v. Sherman, 2 E. D. Smith, 234; Goldrich v. Ryan, 3 E. D. Smith, 324; Winsor v. Lombard, 18 Pick. 61; Hart v. Wright, 17 Wend. 267; Bailey v. Nichols, 2 Root, 407, 1 Am. Dec. 83; Osgood v. Lewis, 2 Harr. & G. 495, 18 Am. Dec. 317; Moak's Van Santvoord, Pl. 3d ed. 371; Divine v. McCormick, 50 Barb. 116; Miller v. Scherder, 2 N. Y. 267; Burch v. Spencer, 15 Hun, 504; Money v. Fisher, 92 Hun, 347, 36 N. Y. Supp. 862; Rothmiller v. Stein, 143 N. Y. 581, 26 L.R.A. 148, 38 N. E. 718; Kinch v. Hayes, 58 Misc. 501, 111 N. Y. Supp. 618; Davis Provision Co. v. Fowler Bros. 20 App. Div. 630, 47 N. Y. Supp. 205, affirmed in 163 N. Y. 580, 57 N. E. 1108; Swain v. Schieffelin, 134 N. Y. 471, 18 L.R.A. 385, 31 N. E. 1025; Wiedeman v. Keller, 171 Ill. 93, 49 N. E. 210; Sinclair v. Hathaway, 57 Mich. 60, 58 Am. Rep. 327, 23 N. W. 459; Hoover v. Peters, 18 Mich. 51; Gray v. Cox, 4 Barn. & C. 114, 107 Eng. Reprint, 1001, 1 Car. & P. 184, 6 Dowl. & R. 200; Bluett v. Osborne, 1 Starkie, 384; Emerson v. Brigham, 10 Mass. 203, 6 Am. Dec. 109; Howard v. Emerson, 110 Mass. 321, 14 Am. Rep. 608; Ryder v. Neitge, 21 Minn. 70; Nelson v. Armour Packing, 76 Ark. 352, 90 S. W. 288, 6 Ann. Cas. 237; Farrell v. Manhattan Market Co. 198 Mass. 271, 15 L.R.A.(N.S.) 884, 126 Am. St. Rep. 436, 84 N. E. 481, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142; National Cotton Oil Co. v. Young, 74 Ark. 144, 109 Am. St. Rep. 71, 85 S. W. 92, 4 Ann. Cas. 1124; Bark v. Dixon, 115 Minn. 172, 131 N. W. 1078, Ann. Cas. 1912D, 775, 3 N. C. C. A. 106; 1 Parsons, Contr. 9th ed. 626; Burdick, Sales, 2d ed. §§ 187, 188; 3 Wait, Law & Pr. 7th ed. 709, 710; Story, Sales, § 373; Chitty, Contr. 6th ed. 477; Benjamin, Sales, 629, 630; 2 Addison, Contr. 3d ed. § 621; Sutherland, Damages, 3d ed. 1955; Fairbank Canning Co. v. Metzger, 118 N. Y. 267, 16 Am. St. Rep. 753, 23 N. E. 372.

There being an implied warranty, the question of knowledge is not material.

Fowler v. Abrams, 3 E. D. Smith, 1; Sweet v. Bradley, 24 Barb. 549; Winsor v. Lombard, 18 Pick. 62; Reynolds v. Mayor, L. & Co. 39 App. Div. 218, 57 N. Y. Supp. 106; Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Bierman v. City Mills Co. 151 N. Y. 482, 37 L.R.A. 799, 56 Am. St. Rep.

635, 45 N. E. 856; Carleton v. Lombard, A. & Co. 149 N. Y. 137, 43 N. E. 422; Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 116, 28 L. ed. 86, 89, 3 Sup. Ct. Rep. 537; Heath Dry Gas Co. v. Hurd, 193 N. Y. 255, 25 L.R.A.(N.S.) 160, 86 N. E. 18; Seitz v. Brewers' Refrigerating Mach. Co. 141 U. S. 510, 518, 35 L. ed. 837, 840, 12 Sup. Ct. Rep. 46; Stroock Plush Co. v. Talcott, 150 App. Div. 343, 134 N. Y. Supp. 1052.

McLaughlin, J., delivered the opinion of the court:

This action was brought to recover damages for personal injuries alleged to have resulted from the consumption by plaintiff of unwholesome and poisonous ice cream, sold to him by defendant. The complaint contains two causes of action. In the first a recovery is asked on the ground that defendant was negligent in selling the cream, and in the other that he warranted it to be fit for human consumption. A majority of the court is of the opinion that the answer put in issue the material allegations of each. At the conclusion of the evidence, however, plaintiff elected to go to the jury only upon the second cause of action, and the case was submitted to it on that theory. Plaintiff had a verdict, and from the judgment entered thereon an appeal was taken to the appellate division, where the same was affirmed, two of the justices dissenting, and defendant appeals to this court.

On the 22d of June, 1911, defendant conducted a drug store in the city of Albany, and, in connection with and as a part of such business, sold ice cream, to be consumed in the store. Some time during the evening of that day plaintiff, with two companions, entered the store and asked that each be served with ice cream, which was done; the two companions being served from one can and plaintiff from another. Plaintiff complained of the quality of the cream served him, and ate only a part of it, stating it was "not good; there is something the matter with it." He then left the store, and as he did so the clerk who waited upon him examined the cream and he stated "there is something wrong with that." Within a very short time thereafter plaintiff was taken violently ill, and remained so for several days.

The appellant attacks the validity of the judgment on the ground (a) that there was no evidence to establish the cream sold to plaintiff was the cause of his illness; and (b) the trial court erred in instructing the jury that, when defendant sold the cream to plaintiff, he impliedly warranted it was fit for human consumption.

As to the first contention, there certainly was some evidence tending to establish

that plaintiff's illness was caused by the presence of a poison known as tyrotoxin in the ice cream; that such poison is a filth product, found only in milk and milk products, including ice cream. Having ascertained from the record that there is some evidence to support the finding of the jury that there was tyrotoxin in the cream, and that the same was the cause of plaintiff's illness, this court is precluded from making a further examination on that subject. The question whether there is any evidence to support a finding of fact is one of law, which, when the affirmation by the appellate division is not unanimous, is reviewable by this court. When, however, it has found there is such evidence, the question is no longer one of law, and the decision of the court below upon the facts is final. *Ostrom v. Greene*, 161 N. Y. 353, 55 N. E. 919; *Chainless Cycle Mfg. Co. v. Security Ins. Co.* 169 N. Y. 304, 311, 62 N. E. 302; *Hawkins v. Mapes-Reeve Constr. Co.* 178 N. Y. 236, 238, 70 N. E. 783.

As to the second contention, I am of the opinion the trial court did not err in instructing the jury that, when defendant sold the cream to plaintiff, he impliedly warranted it was wholesome and fit to eat. In this connection, however, it must be borne in mind that we are not dealing with the liability of hotel proprietors, restaurant keepers, dining car managers, or people engaged in business of that kind, but are considering solely the liability of a dealer, who makes or prepares the article that he is selling. As to such dealers, we believe the instructions were proper. The general rule, established by the weight of authority in the United States and England, is that, accompanying all sales by a retail dealer of articles of food for immediate use, there is an implied warranty that the same is fit for human consumption. *Hoover v. Peters*, 18 Mich. 51; *Sinclair v. Hathaway*, 57 Mich. 60, 58 Am. Rep. 327, 23 N. W. 459; *Winsor v. Lombard*, 18 Pick. 61; *Farrell v. Manhattan Market Co.* 198 Mass. 271, 15 L.R.A.(N.S.) 884, 126 Am. St. Rep. 436, 84 N. E. 481, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142; *Askam v. Platt*, 85 Conn. 448, 83 Atl. 529; *Tomlinson v. Armour & Co.* 75 N. J. L. 748, 19 L.R.A.(N.S.) 923, 70 Atl. 314; *Wiedeman v. Keller*, 171 Ill. 93, 49 N. E. 210; *Catani v. Swift & Co.* 251 Pa. 52, L.R.A.1917B, 1272, 95 Atl. 931; *Bark v. Dixon*, 115 Minn. 172, 131 N. W. 1078, Ann. Cas. 1912D, 775, 3 N. C. C. A. 106; *Parks v. C. C. Yost Pie Co.* 93 Kan. 334, L.R.A.1916C, 179, 144 Pac. 202, 7 N. C. C. A. 100; *Doyle v. Fuerst & Kraemer*, 129 La. 838, 40 L.R.A.(N.S.) 480, 56 So. 906, Ann. Cas. 1913B, 1110; *Haley v. Swift & Co.* 152 Wis. 570,

140 N. W. 292; *Nelson v. Armour Packing Co.* 76 Ark. 352, 90 S. W. 288, 6 Ann. Cas. 237; *Bigge v. Parkinson*, 7 Hurlst. & N. 955, 158 Eng. Reprint, 758, 31 L. J. Exch. N. S. 301, 8 Jur. N. S. 1014, 7 L. T. N. S. 92, 10 Week. Rep. 349; *Frost v. Aylesbury Dairy Co.* [1905] 1 K. B. 608, 74 L. J. K. B. N. S. 386, 21 Times L. R. 300, 53 Week. Rep. 354, 92 L. T. N. S. 527. See, also, 35 Cyc. 407, and authorities cited; 129 La. 838, 56 South. 906, 40 L.R.A.(N.S.) 480, Ann. Cas. 1913B, 1110, and note.

It is true, as urged by the appellant, that this court, so far as I have been able to discover, has not heretofore expressed its view as to the soundness of the rule above referred to. There are, however, two cases in the appellate division of the supreme court, which, following the decision there made of the present case, have applied such rule. *Leahy v. Essex Co.* 164 App. Div. 903, 148 N. Y. Supp. 1063, and *Rinaldi v. Mohican Co.* 171 App. Div. 814, 157 N. Y. Supp. 561. And there are several authorities in this court and in the supreme court where, in opinions delivered, the statement is made that such rule does exist. While it may be true, as contended, that such statements cannot be considered as settling the law on the subject, inasmuch as the same were not necessary to the decision (*Colonial City Traction Co. v. Kingston City R. Co.* 154 N. Y. 493, 495, 48 N. E. 900; and *Roberson v. Rochester Folding Box Co.* 171 N. Y. 538, 551, 59 L.R.A. 478, 89 Am. St. Rep. 828, 64 N. E. 442, they are, nevertheless, valuable as indicating the view of the writer of the opinion in each case as to what the law is or ought to be. One of the earliest cases of this character is *Van Bracklin v. Fonda*, 12 Johns. 468, 7 Am. Dec. 339, where the statement is made that "in the sale of provisions for domestic use, the vendor is bound to know that they are sound and wholesome, at his peril. This is a principle, not only salutary, but necessary to the preservation of health and life."

This statement was approved, or an equivalent one made, in *Moses v. Mead*, 5 Denio, 617; *Divine v. McCormick*, 50 Barb. 116; *Burch v. Spencer*, 15 Hun, 504; *Money v. Fisher*, 92 Hun, 347, 36 N. Y. Supp. 862; *Miller v. Scherder*, 2 N. Y. 262; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 16 Am. St. Rep. 753, 23 N. E. 372, and *Rothmiller v. Stein*, 143 N. Y. 581, 592, 26 L.R.A. 148, 38 N. E. 718. In the authority last cited, Judge Peckham (subsequently Justice of the Supreme Court of the United States), who delivered the unanimous opinion of this court, said: "So, in regard to the sale of food for . . . human consumption, the law annexes an implied

warranty that the food is not in an unwholesome condition and unfit to be eaten."

This rule is based upon the high regard which the law has for human life. The consequences to the consumer resulting from consumption of articles of food sold for immediate use may be so disastrous that an obligation is placed upon the seller to see to it, at his peril, that the articles sold are fit for the purpose for which they are intended. The rule is an onerous one, but public policy, as well as the public health, demand such obligation should be imposed. The seller has an opportunity, which the purchaser does not, of determining whether the article is in the proper condition to be immediately consumed. If there be any poison in the article sold, or if its condition render it unfit for consumption, and the consumer be thereby made ill, someone must of necessity suffer, and it ought not to be the one who has had no opportunity of determining the condition of the article, but rather the one who has at his command the means of doing so.

The present case is a good illustration. Plaintiff was seriously ill for several days. Serious consequences followed the illness. He had no opportunity of determining when the purchase was made, whether the cream was good or bad. Defendant did have such opportunity. He could have ascertained whether the ingredients which went into the cream contained the poison referred to, or, after it was prepared, he could have so cared for it that it would have been impossible for filth, which it is conceded is the cause of the poison, to have gotten into it.

I am of the opinion, therefore, that the trial court did not err in the instructions given to the jury, and that the judgment appealed from is right, and should be affirmed, with costs.

Hiscock, Ch. J., and Chase, Collin. Cuddeback, Hogan, and Crane, JJ., concur.

## NEW JERSEY COURT OF ERRORS AND APPEALS.

PHILIP HILTON, Respt.,  
v.

JOSEPH HILTON, Appt.

(— N. J. —, 104 Atl. 375.)

Name — right to use.

The right of a man to use his own name in his own business is part of the natural

Headnotes by SWAYZE, J.

and inalienable rights guaranteed by our Constitution, without which the right to acquire, possess, and protect property would be of little worth. Even in a case of unfair competition, the courts go no further than to restrain the use of a name, except when so marked as to distinguish it from a competitor, and this exception amounts to allowing the wrongdoer to continue the use of his own name, when it is so marked.

*For other cases, see Tradename, in Dig. 1-52 N. S.*

#### **Injunction — purpose.**

2. The remedy by injunction in a case of unfair competition is a protective remedy, intended to protect the complainant in his property rights; not punitive to punish wrongdoing.

*For other cases, see Injunction, I. m, in Dig. 1-52 N. S.*

#### **Partnership — dissolution — rights.**

3. When partners dissolve and put their agreement in writing, that writing measures their rights and obligations.

*For other cases, see Partnership, VI. in Dig. 1-52 N. S.*

#### **Same — rival business.**

4. In an agreement of dissolution between partners, there was a sale of the good will of the business, but no agreement by the retiring partner not to engage in business. Held, that the retiring partner might carry on a rival business wherever he chose, and might push his business as any stranger or outsider might, even though this does interfere with the business he has sold.

*For other cases, see Good Will, III. in Dig. 1-52 N. S.*

#### **Good will — sale — effect.**

5. The vendor of the good will of a business who has not covenanted or agreed not to compete may seek for trade by any honest method, including public advertisement, or private advertisement among those who were not customers of the old business, but may not specially solicit the trade of those who were customers of the old business, and he may serve all who come of their own motion.

*For other cases, see Good Will, III. in Dig. 1-52 N. S.*

(June 17, 1918.)

**A**PPEAL by defendant from a decree of the Court of Chancery in favor of complainant in a suit to enjoin defendant from using his own name in the clothing business in any city where plaintiff conducts a retail clothing business. Modified.

The facts are stated in the opinion.

Messrs. Robert H. McCarter and Sellick J. Mindes for appellant.

**Note.** — For sale of business and good will as a limitation upon the right of vendor to engage in competing business, see annotation following this case, post, 1179, and references therein to annotations on related questions.

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Messrs. John R. Hardin and Edward O. Stanley, Jr., for respondent:

The good will of a business establishment will be protected against unfair competition as well as the products sold therein.

*Pearlberg v. Smith*, 70 N. J. Eq. 638, 62 Atl. 442; *Van Horn v. Coogan*, 52 N. J. Eq. 380, 28 Atl. 788, affirmed in 52 N. J. Eq. 588, 33 Atl. 50; *Cape May Yacht Club v. Cape May Yacht & Country Club*, 81 N. J. Eq. 454, 86 Atl. 972, 82 N. J. Eq. 204, 87 Atl. 644; *Wilcoxon v. McCray*, 38 N. J. Eq. 466; *Busch v. Gross*, 71 N. J. Eq. 508, 64 Atl. 754; *O'Grady v. McDonald*, 72 N. J. Eq. 805, 66 Atl. 175; *Rosenthal v. Blatt*, 80 N. J. Eq. 90, 83 Atl. 387; *Howard v. Henriques*, 3 Sandf. 725; *Arnheim v. Arnheim*, 28 Misc. 399, 59 N. Y. Supp. 948; *Church v. Kresner*, 26 App. Div. 349, 49 N. Y. Supp. 742; *Lee v. Haley*, L. R. 5 Ch. 155, 39 L. J. Ch. N. S. 284, 22 L. T. N. S. 251, 18 Week. Rep. 242; *Weinstock, L. & Co. v. Marks*, 109 Cal. 529, 30 L.R.A. 182, 50 Am. St. Rep. 57, 42 Pac. 142; *Nolan Bros. Shoe Co. v. Nolan*, 131 Cal. 271, 53 L.R.A. 384, 82 Am. St. Rep. 346, 63 Pac. 480; *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879; *Samuels v. Spitzer*, 177 Mass. 226, 58 N. E. 603; *Viano v. Baccigalupo*, 183 Mass. 160, 67 N. E. 641; *Allegretti v. Allegretti Chocolate Cream Co.* 177 Ill. 129, 52 N. E. 487; *International Committee Y. W. C. A. v. Y. W. C. A.* 104 Ill. 194, 56 L.R.A. 888, 62 N. E. 551.

No one can use his own name in business in such fashion as to cause its confusion with a prior business.

*L. Martin Co. v. L. Martin & W. Co.* 75 N. J. Eq. 39, 71 Atl. 409, reversed in 75 N. J. Eq. 257, 21 L.R.A.(N.S.) 526, 72 Atl. 294, 20 Ann. Cas. 57; *International Silver Co. v. William H. Rogers Corp.* 66 N. J. Eq. 119, 57 Atl. 1037, 2 Ann. Cas. 407, affirmed in 67 N. J. Eq. 646, 110 Am. St. Rep. 506, 60 Atl. 187, 3 Ann. Cas. 804; *Edison Storage Battery v. Edison Automobile Co.* 67 N. J. Eq. 44, 56 Atl. 861; *Russia Cement Co. v. LePage*, 147 Mass. 206, 9 Am. St. Rep. 685, 17 N. E. 304; *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 41 L. ed. 118, 16 Sup. Ct. Rep. 1002; *Croft v. Day*, 7 Beav. 84, 49 Eng. Reprint, 994; *Meneely v. Meneely*, 62 N. Y. 427, 20 Am. Rep. 489; *Tarrant & Co. v. Johann Hoff*, 22 C. C. A. 644, 45 U. S. App. 143, 76 Fed. 959; *Royal Baking Powder Co. v. Royal*, 58 C. C. A. 409, 122 Fed. 337; *Walter Baker & Co. v. Baker*, 87 Fed. 209; *Walter Baker & Co. v. Sanders*, 26 C. C. A. 220, 51 U. S. App. 421, 80 Fed. 889; *Chickering v. Chickering & Sons*, 131 C. C. A. 538, 215 Fed. 490; *Cash v. Cash*, 19 Rep. Pat. Cas. 181, 86 L. T. N. S. 211; *J. F. Rowley Co. v.*

Rowley, 154 Fed. 744; Van Stan's Stratena Co. v. Van Stan, 209 Pa. 564, 103 Am. St. Rep. 1018, 58 Atl. 1064; Morton v. Morton, 148 Cal. 142, 1 L.R.A.(N.S.) 660, 82 Pac. 664.

Proof of specific fraudulent intent is unnecessary in cases of unfair competition.

International Silver Co. v. William H. Rogers Corp. 66 N. J. Eq. 119, 57 Atl. 1037, 2 Ann. Cas. 407; Wirtz v. Eagle Bottling Co. 50 N. J. Eq. 164, 24 Atl. 658; Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. 69 N. J. Eq. 150, 60 Atl. 561, affirmed in 71 N. J. Eq. 300, 71 Atl. 1134; National Biscuit Co. v. Pacific Coast Biscuit Co. 83 N. J. Eq. 369, 91 Atl. 126; Rubber & Celluloid Harness Trimming Co. v. Rubber-Bound Brush Co. 81 N. J. Eq. 419, 88 Atl. 210, Ann. Cas. 1915B, 365, affirmed in 81 N. J. Eq. 519, 88 Atl. 213, Ann. Cas. 1915B, 365; Cape May Yacht Club v. Cape May & Yacht & Country Club, 81 N. J. Eq. 454, 86 Atl. 972; Viano v. Baccigalupo, 183 Mass. 160, 67 N. E. 641; Millington v. Fox, 3 Myl. & C. 338; Cellular Clothing Co. v. Maxton [1899] A. C. 326, 68 L. J. P. C. N. S. 72, 80 L. T. N. S. 809, 16 R. P. C. 397; Munn & Co. v. Americana Co. 83 N. J. Eq. 309, L.R.A.1916D, 116, 91 Atl. 87.

Any deliberate impairment by the vendor of the good will sold will be enjoined.

Churton v. Douglas, 5 Jur. N. S. 887, 28 L. J. Ch. N. S. 841, Johns. V. C. 174, 70 Eng. Reprint, 385, 7 Week. Rep. 365, 19 Eng. Rul. Cas. 666; Ginesi v. Cooper & Co. L. R. 14 Ch. Div. 596, 49 L. J. Ch. N. S. 601, 42 L. T. N. S. 751; Newark Coal Co. v. Spangler, 54 N. J. Eq. 354, 34 Atl. 982; Smith v. David H. Brand & Co. 67 N. J. Eq. 529, 58 Atl. 1029; Levy v. Walker, L. R. 10 Ch. Div. 436, 48 L. J. Ch. N. S. 273, 39 L. T. N. S. 654, 27 Week. Rep. 370; Snyder Mfg. Co. v. Snyder, 54 Ohio St. 86, 31 L.R.A. 657, 43 N. E. 325; James Van Dyke Co. v. F. V. Reilly Co. 73 Misc. 87, 130 N. Y. Supp. 755; Slater v. Slater, 175 N. Y. 143, 61 L.R.A. 796, 96 Am. St. Rep. 605, 67 N. E. 224; Houston v. Magrane, 212 Mass. 569, 99 N. E. 460; People ex rel. A. J. Johnson Co. v. Roberts, 159 N. Y. 70, 45 L.R.A. 126, 53 N. E. 685; Snyder Pasteurized Milk Co. v. Burton, 80 N. J. Eq. 185, 83 Atl. 907; Trego v. Hunt [1896] L. R. App. Cas. 7, 65 L. J. Ch. N. S. 1, 73 L. T. N. S. 514, 44 Week. Rep. 225, 12 Eng. Rul. Cas. 442; Gordon v. Knott, 109 Mass. 173, 19 L.R.A.(N.S.) 762, 85 N. E. 184; Old Corner Book Store v. Upbam, 194 Mass. 101, 120 Am. St. Rep. 532, 80 N. E. 228; Foss v. Roby, 195 Mass. 292, 10 L.R.A.(N.S.) 1200, 81 N. E. 199, 11 Ann. Cas. 571; Myers v. Kalamazoo Buggy Co. 54 Mich. 215, 52 Am. Rep. 811, 20 N. W. 545,

19 N. W. 961; S. F. Myers Co. v. Tuttle, 188 Fed. 532, 183 Fed. 235; Grow v. Seligman, 47 Mich. 607, 41 Am. Rep. 737, 11 N. W. 404; Knoedler v. Glaenzer, 20 L.R.A. 733, 5 C. C. A. 305, 14 U. S. App. 336, 55 Fed. 895.

The previous use of the tradename in dispute by others does not disentitle complainant to relief.

Clark Thread Co. v. Armitage, 67 Fed. 896, 21 C. C. A. 178, 45 U. S. App. 62, 74 Fed. 936; H. A. Williams Mfg. Co. v. Noera, 158 Mass. 110, 32 N. E. 1037; Pratt's Appeal, 117 Pa. 401, 2 Am. St. Rep. 676, 11 Atl. 878; Cohen v. Nagle, 190 Mass. 4, 2 L.R.A.(N.S.) 964, 76 N. E. 276, 5 Ann. Cas. 553; Lanahan v. Kissel, 135 Fed. 899; Sartor v. Schaden, 125 Iowa, 701, 101 N. W. 511; Nims, Unfair Competition, 2d ed. p. 660.

The decree enjoining the use of the name "Hilton" or "Hilton's" should not be modified.

Cash v. Cash, 10 Rep. Pat. Cas. 181, 86 L. T. N. S. 211; Van Stan's Stratena Co. v. Van Stan, 209 Pa. 564, 103 Am. St. Rep. 1018, 58 Atl. 1064; Waterman Co. v. Modern Pen Co. 235 U. S. 88, 59 L. ed. 142, 35 Sup. Ct. Rep. 91; International Silver Co. v. William H. Rogers Corp. 67 N. J. Eq. 646, 110 Am. St. Rep. 506, 60 Atl. 187, 3 Ann. Cas. 804; Snyder Pasteurized Milk Co. v. Burton, 80 N. J. Eq. 187, 83 Atl. 907; Stone v. Goss, 65 N. J. Eq. 756, 63 L.R.A. 344, 103 Am. St. Rep. 794, 55 Atl. 736; L. Martin Co. v. L. Martin & W. Co. 75 N. J. Eq. 39, 71 Atl. 409, affirmed in 75 N. J. Eq. 257, 21 L.R.A.(N.S.) 526, 72 Atl. 294, 20 Ann. Cas. 57; R. W. Rogers Co. v. Wm. Rogers Mfg. Co. 17 C. C. A. 576, 35 U. S. App. 843, 70 Fed. 1017.

Swayze, J., delivered the opinion of the court:

The bill prays that the defendant be "restrained from using the name 'Hilton's' or 'Hilton' alone or in such manner as to lead or induce the public to believe that the goods manufactured or sold by him are manufactured or sold by complainant, and that the business conducted by defendant is the same as or a part of the business conducted by complainant, from using any emblem or device resembling the trade emblem of complainant in any way in his business, and from conducting his business so as to deceive the public and induce it to believe that the goods manufactured or sold by defendant were manufactured or sold by complainant, and that the business conducted by defendant is the same as or a part of the business conducted by complainant." The evidence entitled the complain-



ant to the relief prayed for. The learned vice chancellor, however, went further, and enjoined the defendant from "using the name 'Hilton,' either alone or in association with other word or words, for any purpose whatsoever, in any clothing business operated or conducted directly or indirectly by the defendant, competitive with the clothing business operated or conducted by the complainant, trading under the name and style of the 'Hilton Company,' and particularly from using the word 'Hilton's' or 'Hilton,' either alone or in association with other word or words, to describe or designate any retail clothing store or stores or the clothing therein sold or the business therein operated or conducted, now or hereafter operated or conducted, directly or indirectly, by the defendant in any city or cities in which the complainant, trading under the name and style of the 'Hilton Clothing Company,' now operates or conducts a retail clothing business."

The effect of this injunction is to preclude the defendant from using his own name in the clothing business in any city where the complainant conducts a retail clothing business. That this was meant to be its scope is shown by the respondent's defense of the decree, both orally and in his brief.

The right of a man to use his own name in his own business is part of the natural and inalienable rights guaranteed by the very first clause of our Constitution, without which the right to acquire, possess, and protect property would be of little worth. Although the right is not safeguarded in England by any constitutional guaranty, it has found careful protection in the courts of justice. Of the numerous cases of unfair competition and fraud to be found in the reports, we doubt if a single case can be found where as broad an injunction as the present has been granted in a case of unfair or fraudulent trade, where, as here, there has been no contract or covenant restraining a man's business activities. Even in the Rogers Case, 71 N. J. Eq. 560, 63 Atl. 977, the injunction only went so far as to restrain the defendant from using his own name unless he stamped upon the goods the words, "not the original Rogers," or "not connected with the original Rogers." This exception, of course, amounted to allowing the defendant in that case, notwithstanding his previous fraudulent conduct, to continue the use of his own name if he would brand the goods as stated.

At least three reasons have moved the courts to this limitation of the restraint upon a man's use of his own name: First the constitutional rights already stated;

second, the public interest in having all citizens free to labor in the vocation to which they have been trained, with which they are familiar, or to which they are adapted,—a consideration which has led the courts so often to declare even contracts void as in restraint of trade; third, the fact that the remedy by injunction is a protective remedy, intended to protect the complainant in his property rights, not a punitive remedy, intended to punish the defendant for his wrongdoing. In this present case there is a fourth reason. The parties, when they dissolved partnership, put their agreement in writing, and that writing measures their rights and obligations. At that time, under such an agreement as they made, the defendant had the right, as had been recently decided by this court in *Snyder Pasteurized Milk Co. v. Burton*, 80 N. J. Eq. 185, 83 Atl. 907, to engage in a competing business. The complainant must be assumed to know the law and to have known that such was the effect of the agreement. He was, moreover, advised by competent counsel. In this situation we cannot do otherwise than hold that the parties contemplated that the defendant might use his own name in the clothing business. He must, of course, refrain from representing his business to be that of the complainant, and from palming off his goods as the goods of the complainant. The present injunction in its full scope cannot be sustained because of defendant's unfair trading. Apparently an injunction exactly in accord with the prayer of this bill would suffice for the complainant's protection.

There we might leave the case but for the fact that, in the dissolution of the partnership, the defendant transferred to the complainant, along with the other assets, "all the name and good will of said business." The only name mentioned in the transfer is the Hilton Company, and the transfer of this name could not enlarge the complainant's right to the name "Hilton" or "Hilton's." If the name only had been transferred the argument would be irresistible that the names "Hilton" and "Hilton's" were omitted advisedly. The name, however, is not all that is transferred; the "good will" is included. We must therefore determine whether the complainant's rights are thereby enlarged. The fact that the bill does not contain any prayer for the protection of the good will, or prayer for general relief, does not shut us off from the inquiry. The bill was filed in 1917. By the new chancery rules (Pamph. Laws 1915, p. 194, Rule 47) relief other than that prayed for may be given without a prayer for general relief. The bill sets up the trans-

fer, and the answer admits it so far as material to the present question. What rights, then, has the complainant by virtue of the transfer to him of the good will of the business? This depends on how good will is defined, and how much the words connote. Probably no one at this day would adopt the narrow definition of Lord Eldon. Business methods change with changing years, and with the expansion of business the meaning of business terms expands. The definition of Vice Chancellor Wood, afterward Lord Hatherly, in *Churton v. Douglas*, 28 L. J. Ch. N. S. 841, is broad enough for our present purpose, and has, in effect, been adopted in later cases, which have been approved and followed by us. *Snyder Pasteurized Milk Co. v. Burton*, supra. "Good will . . . must mean every advantage—affirmative advantage if I may so express it, as contrasted with the negative advantage of the vendor not carrying on the business himself—that has been acquired by the old firm by carrying on its business,—everything connected with the premises, or the name of the firm, and everything connected with or carrying with it the benefit of the business." The distinction drawn by the vice chancellor between affirmative and negative advantage, as he calls it, is important. It was then, and apparently always has been, recognized that the sale of good will without more did not prevent the vendor from engaging in business in competition with the vendee. If the vendee desired to avoid that, he must require a contract not to engage in competition. This rule was so plain that it was taken for granted in this court (*Richardson v. Peacock*, 33 N. J. Eq. 597), and stated by Vice Chancellor Emery with his well-known care and accuracy in *Newark Coal Co. v. Spangler*, 54 N. J. Eq. 354, 34 Atl. 932, as follows: "The vendor of a 'good will' who has not expressly restricted himself against carrying on the business, being permitted by law to carry on a rival business wherever he chooses, may push his business as any stranger or outsider might, even though this does interfere with the business he has sold; and the real question, therefore, is narrowed down to this: In thus pushing his rival business, what acts, if any, must the vendor be restrained from?"

It was always conceded that the vendor, in conducting the rival business, might make his business known by the usual general appeals by public advertisement to the public generally. *Johnson v. Helleley*, 2 De G. J. & S. 446, 34 L. J. Ch. N. S. 179, 10 Jur. N. S. 1041, 11 L. T. N. S. 581, 13 Week. Rep. 220; *Hall v. Barrows*, 33 L. J. Ch. N. S. 204, 4 De G. J. & S. 150, 46 Eng.

Reprint, 873, 3 New Reports, 259, 10 Jur. N. S. 55, 9 L. T. N. S. 561, 12 Week. Rep. 322; *Labouchere v. Dawson*, 41 L. J. Ch. N. S. 427, L. R. 13 Eq. 322, 25 L. T. N. S. 894, 20 Week. Rep. 309. It was at one time contended that the vendor might go farther, and solicit personally or by mail, by traveling men, or any other way. It was finally settled that such special solicitation would be restrained. The English cases are set forth by Vice Chancellor Emery in *Newark Coal Co. v. Spangler*, above cited, and the matter has been put at rest by the decision of this court in *Snyder Pasteurized Milk Co. v. Burton*, supra. We there said: "The defendant, having made no express covenant, may engage in a competing business."

We there restrained the defendant from soliciting customers of the former business, the good will of which he had sold. It is gratifying to know that the English rule adopted by us has the support not only of reason but of the weight of authority in other jurisdictions. The more recent cases are collected in a note to *Von Bremen v. MacMonnies*, 21 Ann. Cas. 423. The New York court of appeals holds to our rule. The supreme court of Massachusetts takes a different view. Cases are collected in a note to *Foss v. Roby*, 11 Ann. Cas. 571, but the cases cited in that note show that the great weight of authority is with our rule. On the one hand, then, the vendor, having the right to conduct a rival business, may, from the necessity of the case, seek for trade by any honest method, including public advertisement or private advertisement among those who were not customers of the old business, but he may not specially solicit the trade of those who were customers of the old business. The question still remains whether he may deal with the old customers, who may perhaps be attracted by their knowledge, from advertisement or otherwise, that he is in business. This question was left in doubt by what Justice Dixon said in *Richardson v. Peacock*. Sir George Jessel, in *Ginesi v. Cooper*, L. R. 14, Ch. Div. 596, 49 L. J. Ch. N. S. 601, 42 L. T. N. S. 751, enjoined a vendor who had sold his good will from dealing with the old customers, and vindicated his action, in his usual vigorous style. Afterward, in *Leggott v. Barrett*, L. R. 15 Ch. Div. 306, an injunction granted by him in accordance with *Ginesi v. Cooper* came before the court of appeals, and his order was reversed. Brett, L. J., said: "The truth is, that to enjoin a man, or to prevent him by means of damages when he does it, against dealing with people whom he has not solicited, is not only to

enjoin him, but to enjoin them, for it prevents them from having the liberty which everybody in the country might have of dealing with whom they like. If they are induced by his solicitations, that is a different thing; but it seems to me that it would be quite wrong to imply any contracts that he will not deal with people who come of their own accord to deal, even though they were former customers."

The judges agreed that there was no authority for the extension of the relief attempted by the master of the rolls. The argument is unanswerable. It cannot be that every customer of a great department store, for instance, must be restricted in his choice of a place in which to trade merely because partners dissolve and one sells the good will to the other. The necessary corollary of the right to do business is the right to serve all who come of their own motion. Moreover, the rules of law must be practical, and it would be quite impossible for the proprietor even of a small business to be personally present in all parts of his establishment, prepared to turn away all the old customers, and of course no clerk can be supposed to know them, even if the proprietor can be.

The right to make known that one is in business by advertising addressed to the public generally is a necessary concomitant of the right to do business, without which that right would be hardly more than nominal. The reason for making a difference between such advertising and special solicitation is that the former is public and open to all; the latter is private and secret in a sense, and the vendor of good will has the advantage of knowing the customers, and, if permitted, could, by reason of that knowledge, detract from the value of the good will he had sold.

No relief is open to the complainant, by reason of his purchase of good will, except an injunction against soliciting customers of the old business. No such solicitation was proved; no issue was made of it. In the present state of the case, at any rate, no relief can be granted on that score.

The decree must be modified, and to that end the record remitted, in order that a decree may be entered according to the prayer of the bill. No costs will be allowed in this court. The respondent is entitled to costs in the Court of Chancery, since he gets the relief he prayed for.

### **Annotation—Sale of business and good will as a limitation upon right of vendor to engage in competing business.**

This note is supplemental to a note on the same question appended to Gordon v. Knott, 19 L.R.A.(N.S.) 762.

The question of the effect upon the right of individual partners of a sale by the firm of the good will of the business, with or without an agreement not to re-engage in the same business, is treated in a note to Southworth v. Davison, 19 L.R.A.(N.S.) 769.

#### **In general.**

It is stated in the earlier note on this question in 19 L.R.A.(N.S.) 762, that, as a general rule, in the absence of an express covenant, the sale of a business together with the good will thereof, does not import an agreement by the vendor not again to engage in a competing business. This proposition is also supported by the following recent cases: *HILTON v. HILTON*, ante, 1175; *Dare v. Foy* (1917) — *Iowa*, —, 164 N. W. 179; *Fairfield v. Lowry* (1911) 207 *Mass.* 352, 93 N. E. 598; *Counts v. Medley* (1912) 163 *Mo. App.* 546, 146 S. W. 465 (recognizing rule on facts not within the scope of the note); *Wessell v. Havens* (1912) 91 *Neb.* 426, 136 N. W. 70, *Ann. Cas.* 1913C, 1877; *Snyder Pas-*  
*L.R.A.*1918F.

*teurized Milk Co. v. Burton* (1912) 80 *N. J. Eq.* 185, 83 *Atl.* 907; *Von Bremen v. Mac Monnies* (1910) 200 *N. Y.* 41, 32 *L.R.A.(N.S.)* 293, 93 *N. E.* 186, 21 *Ann. Cas.* 423; *Crown Overall Mfg. Co. v. Levy Overall Mfg. Co.* (1914) 16 *Ohio N. P.* N. S. 561, modified on another point in (1916) 24 *Ohio C. C.* 556; *Fine v. Lawless* (1918) 139 *Tenn.* 160, *L.R.A.* 1918C, 1045, 201 *S. W.* 160; *Sheehan v. Sheehan-Hackley & Co.* (1917) — *Tex. Civ. App.* —, 196 *S. W.* 665; *Wodehouse Invigorator v. Ideal Stock & Poultry Food Co.* (1917) 39 *Ont. L. Rep.* 302, 135 *D. L. R.* 721.

In *Sheehan v. Sheehan-Hackley & Co.* (1917) — *Tex. Civ. App.* —, 196 *S. W.* 665, *supra*, the rule above indicated was applied by holding that one who, for a number of years, had been engaged in business as a salesman, representing various dealers and manufacturers in certain territory for which he had the exclusive agency, and who assigned such agency, together with the good will of the business, to a corporation of which he became manager, could not, after he was deposed from such position, be enjoined by the assignee from representing the dealers and manufacturers whom

he had previously represented, and from handling their goods in the same territory, so long as he did not solicit their business or attempt to induce them not to do further business with the corporation.

And it was held in *Wodehouse Invigorator v. Ideal Stock & Poultry Food Co.* (1917) 39 Ont. L. Rep. 302, 35 D. L. R. 721, *supra*, that a partner in a food manufacturing company who sold out his interest in the business might engage in the business of manufacturing food-stuffs the ingredients of which were the same as those of the products of the old firm, if they were differently compounded; and that, so long as he did not use the secret formulæ of the old firm, he was not debarred from engaging in a similar business, and from using the usual methods of doing that business, even though it involved the use of the knowledge acquired as a partner.

The vendor of a mail order poultry business and good will was held in *Dare v. Foy* (1917) — *Iowa*, —, 164 N. W. 179, *supra*, not subject to injunction by the purchaser from engaging in a similar business in a city more than 200 miles distant from his former place of business. The court discussed the question whether the seller was liable for damages or unfair business competition because of the similarity of his advertising matter to that which he had formerly used, but reached the conclusion that the evidence did not furnish the necessary data for determining the amount of damages, if any.

And in *Fairfield v. Lowry* (1911) 207 (Mass.) 352, 93 N. E. 598, *supra*, it was held that one who sold all right, title, and interest in a fire and casualty insurance business was not precluded from engaging in the same business, or from using her own name or that of her father, the former owner, in conducting it.

In *Wessell v. Havens* (1912) 91 Neb. 426, 136 N. W. 70, Ann. Cas. 1913C, 1377, *supra*, it was held that a provision in a contract of sale of a stock of general merchandise that the good will of the business was included in the sale did not imply an agreement that the seller would not re-engage in the business in the same town.

Also in *Fine v. Lawless* (1918) 139 Tenn. 160, L.R.A.1918C, 1045, 201 S. W. 160, *supra*, the court stated that on the sale of the good will of a business, without more, the vendor was not precluded from setting up a precisely similar business in the same city, or even in the vicinity; and that, if the purchaser de-

sired to forestall such a step, he must expressly stipulate against it in the contract. But it was held that one who sold the good will of a business, together with the stock of goods, and assigned the leasehold of the premises where the business was conducted, would be enjoined from securing a renewal of the lease at the expiration of the term. See note appended to this case on right of assignor of lease, as against the assignee, to the renewal of the lease upon the expiration of the term.

It was held in *Houston Transfer & Carriage Co. v. Williams* (1918) — *Tex.* Civ. App. —, 201 S. W. 712, that a contract of sale of a transfer and storage business, together with the good will, was not violated by the rental by the vendor's heir and legatee of the stables in which the business had formerly been carried on by the vendor to others who engaged in business in competition with the vendee, and used the telephone number formerly used by the vendor in carrying on the business.

As approving also the general rule above indicated that the vendor may re-engage in a competing business, in the absence of an express agreement to the contrary, see also *Oliver Farrand Co. v. Farrand* (1914) 84 Misc. 234, 147 N. Y. Supp. 89, and *Faust v. Rohr* (1914) 166 N. C. 187, 81 S. E. 1096, — cases in which there were express agreements by the vendor not to resume business.

The Massachusetts cases seem, especially in their discussion of the question, to limit the right of the vendor to re-engage in business more than do the decisions in some other jurisdictions. Thus, the rule has been laid down in that state that a sale of the good will imposes upon the vendor an obligation to refrain from doing anything which deprives the buyer of the benefit and advantages of the purchase; and if a competing business is set up by the vendor, whether an agreement not to compete, where none has been expressed, is to be implied, is a question of fact. *C. H. Batchelder & Co. v. Batchelder* (1914) 220 Mass. 42, 107 N. E. 455. And see Massachusetts cases cited in the note in 19 L.R.A.(N.S:) on pp. 763, 764.

It was held, however, in *C. H. Batchelder & Co. v. Batchelder* (Mass.) *supra*, that one who organized a corporation, using his own name, followed by the word "company," to which he assigned the business formerly conducted by him, including the good will, could not be enjoined from engaging in a competing business in his own name, in the

absence of unfair competition, after the corporation had passed into the hands of a receiver, and its assets, including the good will, had passed by sale to the plaintiff.

And the doctrine that the vendor of a business and good will cannot engage in a competing business in derogation of the good will sold was applied in *Marshall Engine Co. v. New Marshall Engine Co.* (1909) 203 Mass. 410, 89 N. E. 548, where the good will and patent right in an engine known as "Marshall Perfecting Engine" for reducing pulp to paper were assigned to the Marshall Engine Company and Marshall, the assignor, after the insolvency of the company, the appointment of a receiver, and the expiration of the patent rights, organized the "New Marshall Engine Company" which advertised substantially the same engine, with certain unpatented additions and changes. The court called attention to the distinction between the law in Massachusetts and in England, stating that in the latter country a competing business can always be set up by one who has sold the good will of the business, and that the purchaser gets nothing except the right to have the vendor refrain from soliciting business from the customers of the old firm; whereas in Massachusetts no competing business can be set up if it derogates from the grant of the good will of the old business. And the court quoted the rule laid down in an earlier case in that state that in each case where the good will of a business is sold and the vendor sets up a competing business, it is a question of fact, whether, having regard to the character of the business sold and that set up, the new business is in derogation of the sale.

In *Goetz v. Ries* (1907) 123 N. Y. Supp. 433, where a partner sold his interest in the firm business to his copartner and thereafter engaged in a competing business, it was held that he should be restrained from attempting to procure the benefit of patterns, the exclusive use of which by the manufacturers for the old firm was a valuable feature of the business, even if that firm did not have binding agreements with the manufacturers, since the custom or arrangement by which the manufacturers reserved these patterns for the trade of the old firm was an element which entered into its business, with which the retiring partner, by his transfer of his interest in the good will, had bound himself impliedly not to interfere.

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#### Professional business.

In the earlier note on this question in 19 L.R.A.(N.S.) on pages 763, 764, cases are cited making a distinction as to the right of the vendor to resume business between a sale of an ordinary mercantile business and good will, and the sale of a professional business; as, for example, that of a dentist or physician; the position being taken that in the latter case resumption of business by the vendor necessarily impairs the value of the good will sold. This distinction is recognized and applied in *Brown v. Benzinger* (1912) 118 Md. 29, 84 Atl. 79, Ann. Cas. 1914B, 582, where a surgeon chiropodist sold the business conducted by her, including the good will of the business and personal effects, the agreement being that the vendee should assume full charge of the business on a certain date, from which time she was to treat all former customers of the vendor who had paid in advance, and was to receive instruction from the vendor. The court took the position that whether or not the business of a chiropodist could be regarded strictly speaking, as a profession, it came within the principles of the rule above stated distinguishing between professions and ordinary commercial business. And the fact that part of the purchase money was paid for tangible assets was held not to distinguish the case from others where only the practice and good will of the professional vendor were sold.

#### Right to use similar name.

Supplementing 19 L.R.A.(N.S.) 765.

Generally as to limitation of right to use one's name as a tradename, see notes to *Morton v. Morton*, 1 L.R.A.(N.S.) 660; *Ætna Mill & Elevator Co. v. Kramer Mill Co.* 28 L.R.A.(N.S.) 934; and *Wood v. Wood*, L.R.A.1916C, 255.

It should be observed that the present note does not include cases dealing with the right of an individual to use his name as a tradename, except as that question is affected by the sale of his business and good will. For this reason, the note does not cover such questions as that presented in *Deister Concentrator Co. v. Deister Mach. Co.* (1916) — Ind. App. —, 112 N. E. 906, on rehearing in (1916) — Ind. App. —, 114 N. E. 485, in which it was held that an individual by the name of "Deister," after selling his stock in the "Deister Concentrator Company," was not precluded from organizing the "Deister Machine Company," for manufacturing mining

machinery for the same general purpose as that made by the former company, so long as such precautions were taken as would distinguish to purchasers the machinery made by the two companies.

An ordinary business corporation which has become bankrupt cannot, after a sale of its assets, including its corporate name and good will, by order of court, interfere with the business which the purchaser is carrying on under the corporate name by resuming business, after its discharge in bankruptcy, under the same name, but will be enjoined from so doing. *S. F. Myers Co. v. Tuttle* (1911) 188 Fed. 532. The court said that it was well settled that an individual cannot be prevented from carrying on business in his own name, and that a purchase of the good will of a business carried on in the name of an individual will not, as a general rule, prevent that individual from carrying on business in his own name thereafter; but that in such a case the courts usually require that the later business shall be carried on in such a way as not to produce confusion with the business the good will of which has been sold.

In accordance with the doctrine above stated, it was held in earlier proceedings in this case that where the assets, including the good will and corporate name of the "S. F. Myers Company," a bankrupt corporation, were sold by order of court, and the sons of S. F. Myers organized a new corporation, entitled "S. F. Myers Sons Company," and undertook to carry on at the same place a business similar to that which had theretofore been carried on by the bankrupt concern, the purchaser was entitled to an injunction to restrain the new company from soliciting business from the old customers, and from simulating the letter heads, billheads, and papers of the former corporation, and further, it was held that the new company should either change its name, so as not to produce confusion, or change its place of doing business. *S. F. Myers Co. v. Tuttle* (1910) 183 Fed. 235.

Although not directly in point, as it does not appear that there was a sale by the defendant of its business and good will, attention is called to *Twin City Brief Printing Co. v. Review Pub. Co.* (1918) — Minn. —, L.R.A.1918D, 154, 166 N. W. 413, in which it was held that a corporation which had consented to the use of its name by a partnership in conducting a similar business in a nearby city should be restrained from unfairly and wrongfully interfer-

ing in the use of that name by a corporation which had succeeded to the rights of the partnership.

See also *Fairfield v. Lowry*, C. H. Batchelder & Co. v. Batchelder, and *Marshall Engine Co. v. New Marshall Engine Co.* under "In general," supra; and *Brass & Iron Works Co. v. Payne*, under "Vendor's holding himself out as successor of business sold," infra.

#### Involuntary sale.

Supplementing 19 L.R.A.(N.S.) 765, 766.

Although it was held that the sale in question by a member of a partnership of the good will of the business was voluntary, attention is called to the distinction made in *Von Bremen v. MacMonnies* (1910) 200 N. Y. 41, 32 L.R.A.(N.S.) 293, 93 N. E. 186, 21 Ann. Cas. 423, as to the limitation of the right of the vendor to resume business between cases where the sale is voluntary and where it is involuntary, as in bankruptcy or dissolution proceedings. The court said: "The good will which the owner thereof parts with in invitum, as in bankruptcy proceedings or by operation of law, as in the liquidation of a partnership by the lapse of time or its termination pursuant to the articles of co-partnership, is a lesser property than the good will which is the subject of a voluntary sale and transfer by the owner for valuable consideration. In the first class of cases the former owner remains under no legal obligation restricting competition on his part in the slightest degree; in the second class of cases the former owner, by his voluntary act of sale, has excluded himself from competing with the purchaser of the good will to the extent of having impliedly agreed that he will not solicit trade from customers of the old business. To this extent this good will is a more valuable property than the good will of a business which goes to a trustee in bankruptcy, or a receiver or survivor of a partnership in liquidation. The good will which is the subject of a voluntary sale is therefore a different thing from the good will which the owner parts with perforce or under compulsion. . . . The necessity for the distinction which the law thus makes may readily be illustrated. If the sale of the good will upon the ordinary dissolution and liquidation of a partnership imported the same obligation as that which arises upon a voluntary sale, not to solicit trade from customers of the old firm, merchants who had been in

trade as partners of undesirable associates would constantly find themselves, by the mere fact of the dissolution of the firm they desired to leave, disqualified from seeking future business from those who might be their most desirable customers. Such a restriction should be imposed and is imposed only when the transfer of the good will is a free, affirmative act, and is made under such circumstances that it would be bad faith on the part of the vendor to avail himself as against the vendee, of any special knowledge or advantage derived by him from the business whose good will he has voluntarily sold."

The same distinction was recognized in *James Van Dyk Co. v. F. V. Reilly Co.* (1911) 73 Misc. 87, 130 N. Y. Supp. 755, in facts, however, not directly within the scope of the note, the case involving the rights of a purchaser at bankruptcy sale of the assets, including the good will, of a corporation, as against an employee of the corporation who organized a competing company and advertised its products under the old tradename. It was said: "The courts in this state recognize a distinction in the rights obtained by a voluntary conveyance of the good will of a business and those obtained by a forced sale, as in bankruptcy. There is, however, no doubt that the good will of a business in its narrow sense is transferable in bankruptcy proceedings. . . . A

somewhat careful examination of the authorities would seem to show that the real distinction between the rights transferred is that a voluntary transfer of the good will estops the transferor from interfering by his own act with the value of the good will transferred, while in the case of a transfer in invitum the former owner of the good will may compete with the transferee exactly as if he were a stranger. As far as third parties are concerned, a transfer of the good will of a business upon a forced sale confers practically the same rights as a voluntary transfer."

That the rule that the vendor of a business, including the good will, cannot solicit former patrons, does not apply to an involuntary sale, as that made by a trustee to whom the debtor assigns the business and good will in order to avoid bankruptcy proceedings, see *Green & Sons v. Morris*, under "Solicitation of former patrons," *infra*.

See also *S. F. Myers Co. v. Tuttle*, under "Right to use similar name," *supra*, and *C. H. Batchelder & Co. v. Batchelder*, under "In general," *supra*.

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#### **Vendor's holding himself out as successor of business sold.**

Supplementing 19 L.R.A.(N.S.) 766.

The rule that the vendor of the good will of the business may not set up a rival business and hold himself out to the public as the successor to the business sold was applied in *Brass & Iron Works Co. v. Payne* (1893) 50 Ohio St. 115, 19 L.R.A. 82, 33 N. W. 88, where a partner sold his interest in the firm business and assets to his copartners, who, with others, organized a corporation under a different name than the firm name, and, the contract of sale having specified that the vendee should have the use of the firm name for a period of sixty days, the vendor, after the expiration of that time, resumed business at a place three blocks from the old stand, under the old firm name, which consisted of his own name with "& Co." added, and in various ways so advertised his business as to lead the public to believe that he was continuing the business of the old firm.

#### **Solicitation of former partners.**

Supplementing 19 L.R.A.(N.S.) 767.

The rule as stated in the earlier note on this question, that even though the vendor may engage in a competing business, he is not entitled to solicit the patrons of the old business and endeavor to draw their trade from the vendee, is supported by the following recent cases: *HILTON v. HILTON*, ante, 1174; *S. F. Myers v. Tuttle* (1910) 183 Fed. 235; *Brown v. Benzinger* (1912) 118 Md. 29, 84 Atl. 79, Ann. Cas. 1914B, 582; *Fairfield v. Lowry* (1911) 207 Mass. 352, 93 N. E. 598; *Snyder Pasteurized Milk Co. v. Burton* (1912) 80 N. J. Eq. 185, 83 Atl. 907; *Von Bremen v. MacMonnies* (1910) 200 N. Y. 41, 32 L.R.A.(N.S.) 293, 93 N. E. 186, 21 Ann. Cas. 423; *Goetz v. Ries* (1907) 123 N. Y. Supp. 423; *Kates v. Bok* (1910) 141 App. Div. 925, 126 N. Y. Supp. 606, modifying (1910) 139 App. Div. 640, 124 N. Y. Supp. 297; *Levy Overall Mfg. Co. v. Crown Overall Mfg. Co.* (1916) 24 Ohio C. C. N. S. 556, modifying (1914) 16 Ohio N. P. N. S. 561; *Sheehan v. Sheehan-Hackley & Co.* (1917) — Tex. Civ. App. —, 196 S. W. 665; *Wodehouse Invigorator v. Ideal Stock & Poultry Co.* (1917) 39 Ont. L. Rep. 302, 25 D. L. R. 721 (recognizing rule); *Green & Sons v. Morris* [1914] 1 Ch. (Eng.) 562, 82 L. J. Ch. N. S. 559, 110 L. T. N. S. 508, 30 Times L. R. 301, 58 Sol. Jo. 398.

The rule is also approved (*obiter*) in *Faust v. Rohr* (1914) 166 N. C. 187, 81 S. E. 1096,—a case in which there was

an express agreement by the vendor not to resume business.

The rule was held in *Walker v. Mottram* [1881] L. R. 19 Ch. Div. 355, 51 L. J. Ch. N. S. 108, 45 L. T. N. S. 659, 30 Week. Rep. 165, cited in the earlier note on this question in 19 L.R.A.(N.S.) on pp. 766 and 768, not to apply on the sale of a business and good will under a commission in bankruptcy. And on the authority of the *Walker Case*, it was held in *Green & Sons v. Morris (Eng.)* supra, that the rule did not apply where the sale was by a trustee for the benefit of creditors, who required the assignment of the debtor's property and business, including the good will, to the trustee, as the alternative of the institution by them of bankruptcy proceedings against the debtor. The court said: "There is no question as to the general principle that if a man sells the good will of his business to a purchaser and receives the purchase money he cannot afterwards destroy that which he has sold by soliciting his old customers, but that principle has never been extended to any case except that of a sale, or of some contract equivalent to a sale." And, after referring to *Walker v. Mottram (Eng.)* supra, the court observed: "I think that the short answer to this part of the motion is that it is impossible to find any rational distinction between the case of a man who becomes a bankrupt on his own petition and has lost his property, which has become vested in his trustee in bankruptcy, and that of a man who brings about the same result by executing a deed of assignment of his property for the benefit of creditors. The liquidating debtor is a person who is compelled by circumstances to take certain steps in order that his property may be distributed among his creditors in exactly the same way as a bankrupt who presents a petition under the present Bankruptcy Act. . . . In one sense what the debtor does is voluntary; in another sense it is not voluntary at all, as he may have taken the steps he did take in order to avoid other proceedings being taken by the creditors. A man by divesting himself of his property under such circumstances as those in this case does not thereby constitute the relation of vendor and purchaser between himself and the ultimate purchaser of the property."

In *Snyder Pasteurized Milk Co. v. Burton* (1912) 80 N. J. Eq. 185, 83 Atl. 907, supra, although one who sold a milk business, together with the good will, was held not precluded from engaging

in a competing business, he was enjoined from soliciting his old customers, and from serving those he had obtained by such solicitation. And in reply to the argument that such customers might have returned of their own accord, without solicitation, the court referred to the principle that one, by his own inequitable conduct, may practically deprive himself of what otherwise he might rightfully claim.

And it was held in *Von Bremen v. MacMonnies* (1910) 200 N. Y. 41, 32 L.R.A.(N.S.) 293, 93 N. E. 186, 21 Ann. Cas. 423, supra, that a member of a partnership who voluntarily conveyed the good will of the business for a valuable consideration could not, upon establishing a competing business, solicit trade from old customers of the partnership. But it was held also that the vendor was not estopped from dealing with old customers of the partnership whose patronage, apart from that of the general public, he did not solicit, nor with persons mentioned in a trade list which had been compiled by the old firm and abstracted by him.

Also in *Goetz v. Ries* (1907) 123 N. Y. Supp. 423, supra, it was held that a partner who had sold his interest in the firm business to his copartner, and who had engaged in a competing business, would be restrained from soliciting the trade of customers of the old firm, as this was an interference with the value of the good will which he had sold.

So, in *Levy Overall Mfg. Co. v. Crown Overall Mfg. Co.* (1916) 24 Ohio C. C. N. S. 556, supra, modifying (1914) 16 Ohio N. P. N. S. 561, it was held that a partner in a manufacturing concern who sold his interest in the business and the good will to his copartner should be enjoined from soliciting the patronage of former customers of the firm and from continuing to deal with former customers whose business had been secured by such solicitation, also from using printed matter and patterns in imitation of those used by the firm and its successor, and from improperly using the knowledge acquired by him while connected with the partnership for the purpose of securing the patronage of customers of the old firm. The court in this case regarded as obiter the statement in *Brass & Iron Works Co. v. Payne* (1893) 50 Ohio St. 115, 19 L.R.A. 82, 33 N. W. 88, to the effect that the vendor of a business and good will may "solicit the patronage of old customers, both by advertisement and by private solicitation," so long as he does not mislead customers



into the belief that he is carrying on the business as the successor of the old firm.

And it was held in *Sheehan v. Sheehan-Hackley & Co.* (1917) — *Tex. Civ. App.* —, 196 S. W. 665, *supra*, that a salesman who, for a number of years, had represented various dealers and manufacturers in a certain territory, and who had transferred to a corporation his agencies, which were exclusive, together with the good will, would be enjoined from thereafter soliciting the same dealers and manufacturers to cancel the agency of the assignee and the latter's representation of them, and from doing anything to induce them not to do further business with the assignee, although it would be improper to enjoin

the assignor from representing such dealers and manufacturers and handling their goods and products.

If the vendor of a business and good will is permitted to resume the business in competition with the vendee, he will not be permitted to destroy the value of the good will sold by alluring and dissuading, either in person or by agents, his former customers from dealing with the purchaser, and soliciting them to trade with him; or, where a large part of the business depends upon appointments made by telephone, by depriving the vendee of the telephone, the number of which was well known to the customers. *Brown v. Benzinger* (1912) 118 Md. 29, 84 Atl. 79, *Ann. Cas.* 1914B, 582, *supra*. R. E. H.

# MISSISSIPPI SUPREME COURT.

EARL BREWER et al.

v.

AGNES BROWNING et al., Appts.

(115 Miss. 358, 76 So. 267, 519.)

**Appeal — law of case — correction of error in former decision.**

1. The court may, on second appeal, correct an error in the decision of the former appeal that a child adopted in a foreign state was not entitled to inherit as a child under the local law, if there has been no change of conditions or situations which will cause a change in the decision to work wrong and injustice.

*For other cases, see Appeal and Error, VIII. e, in Dig. 1-52 N. S.*

**Conflict of laws — foreign adoption — rights conferred.**

2. The reciprocal rights of inheritance between an adopted child and its foster parents, created by the law of the state of adoption, will be enforced in another state where the parties establish a domicile, if they are not contrary to the laws or policy of that state.

*For other cases, see Conflict of Laws, I. j, in Dig. 1-52 N. S.*

On suggestion of error.

**Appeal — power to change decision on second appeal.**

3. Under constitutional provisions vest-

ing the judicial power in the courts and giving the supreme court such jurisdiction as belongs to courts of appeal, such court has power to change its decision on second appeal.

*For other cases, see Appeal and Error, VIII. e, in Dig. 1-52 N. S.*

**Same — res judicata.**

4. The principle of *res judicata* does not prevent an appellate court from changing its ruling on a second appeal, although former judges have adhered to the rule of the law of the case.

*For other cases, see Appeal and Error, VIII. e, in Dig. 1-52 N. S.*

(Smith, Ch. J., and Sykes, J., dissent.)

(July 2, 1917.)

**A**PPEAL by defendants from a decree of the Chancery Court for Sunflower County in favor of complainants in a suit for the partition of certain lands. Reversed.

The facts are stated in the opinion.

Messrs. D. A. Scott, Flowers, Brown, Chambers, & Cooper, and J. B. Harris, for appellant:

Questions which have been decided on appeal, if manifestly erroneous or unjust, will not control the court on a subsequent appeal.

*H. B. Claffin Co. v. Davis*, 48 La. Ann. 1223, 20 So. 731; *Chambers v. Smith*, 30 Mo. 156; *United States v. Elliot*, 12 Utah,

**Note.** — The right of a child adopted in another state to take under the local Statute of Descent or Distribution is treated in the notes to *Brown v. Finley*, 21 L.R.A.(N.S.) 679; *Finley v. Brown*, 25 L.R.A.(N.S.) 1285, and *Anderson v. French*, L.R.A.1916A, 666. In view of the Mississippi court's change of position on this point by recognizing and giving effect to the foreign adoption, notwithstanding that

its earlier decision to the contrary was pressed upon it as the law of the case, it is interesting to observe that the Alabama supreme court, in *Brown v. Finley*, 21 L.R.A.(N.S.) 679, declined to depart from the earlier decisions in the state, refusing to recognize a foreign adoption, upon the ground that it had established a rule of property.

119, 41 Pac. 720; *Hastings v. Foxworthy*, 45 Neb. 697, 34 L.R.A. 321, 63 N. W. 955; *Messenger v. Anderson*, 225 U. S. 444, 56 L. ed. 1152, 32 Sup. Ct. Rep. 739; *Higgins v. Eaton*, 188 Fed. 938, 4 C. J. 1099, § 78; *Maxwell v. Harkleroad*, 77 Miss. 456, 27 So. 990; 2 R. C. L. § 187, 188, pp. 225, 226; *Missouri, K. & T. R. Co. v. Merrill*, 65 Kan. 436, 59 L.R.A. 711, 93 Am. St. Rep. 287, 70 Pac. 358, 12 Am. Neg. Rep. 275; *Henry v. Atchison, T. & S. F. R. Co.* 83 Kan. 104, 28 L.R.A. (N.S.) 1088, 109 Pac. 1005.

A judgment, to be successfully used to support a plea of estoppel or of *res judicata*, must be of such character as to bind all the parties to it as to the issue claimed to have been finally settled.

*Pfeffer v. King*, 171 N. Y. 668, 64 N. E. 1125; *Allred v. Smith*, 135 N. C. 443, 65 L.R.A. 924, 47 S. E. 597; *Buford v. Adair*, 43 W. Va. 211, 64 Am. St. Rep. 854, 27 S. E. 260; *Davis v. Chamberlain*, 51 Or. 304, 98 Pac. 154; *Myers v. Johnson County*, 14 Iowa, 47; *Atchison, T. S. F. R. Co. v. Jefferson County*, 12 Kan. 127; *McDonald v. Gregory*, 41 Iowa, 513; *Goodnow v. Litchfield*, 63 Iowa, 275, 19 N. W. 226; *Iowa Homestead Co. v. Des Moines Nav. & R. Co.* 63 Iowa, 285, 19 N. W. 231; *Bell v. Hoagland*, 15 Mo. 260; *Chandler's Appeal*, 100 Pa. 262; *Bigelow, Estoppel*, 6th ed. p. 127; *Herman, Estoppel & Res Judicata*, pp. 14, 242, 483, 834, 848, 850, 1011.

The status or condition of a person, the relation in which he stands to another person and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile; and this status and capacity are to be recognized and upheld in every other state, as far as they are not inconsistent with its own laws and policy.

*Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321; *Van Matre v. Sankey*, 148 Ill. 536, 23 L.R.A. 665, 39 Am. St. Rep. 196, 36 N. E. 628; *Re Williams*, 102 Cal. 70, 41 Am. St. Rep. 163, 36 Pac. 407; *Gray v. Holmes*, 57 Kan. 217, 33 L.R.A. 207, 45 Pac. 596; *Caldwell's Succession*, 114 La. 195, 108 Am. St. Rep. 341, 38 So. 140.

Messrs. **D. M. Quinn, S. F. Davis, and J. Holmes Baker** for appellees.

**Ethridge, J.**, delivered the opinion of the court:

On the 15th day of July, 1901, Church W. Rule and his wife Lula A. Rule, who were then living and having their domicile in Sunflower county, Mississippi, and then being without children, and being in the state of Kentucky, presumably on a visit there, on said date signed what is called in

the record "articles of adoption." This adoption was signed jointly by Church W. Rule and his wife on the one part, and the Louisville Baptist Orphans' Home, by its president, on the other part, by which Church W. Rule and his wife Lula A. Rule are said to have adopted a child, then about three years of age, and an inmate of said institution, named Lula May Browning. By said adoption the said Rule and wife obligated themselves to adopt the said infant Lula May Browning, "and do hereby adopt said Lula May Browning, and covenant with said Louisville Baptist Orphans' Home that said Lula May Browning shall bear from this time forward the same legal relation to them as if she had been born unto them, and were their child, especially as to such property as would descend to her were she their child." After signing said articles of adoption, Church W. Rule and his wife took the said infant to their home in Sunflower county, Mississippi, and there it occupied the relation of child to them, and was treated by them as their child, up to the time of their deaths, respectively.

It appears that the Louisville Baptist Orphans' Home was chartered and incorporated by an act of the general assembly of Kentucky, approved January 28, 1870 (Laws 1869-70, chap. 197), and amended by an act approved January 31, 1880 (Laws 1879-80, chap. 108), and that by virtue of its charter it was invested with all the rights of parents and natural guardians of any child committed to its care, and that it was also empowered to permit any suitable persons to adopt any child in its custody and control, as their own child, upon proper covenants in writing being executed by such persons and its president, and acknowledged by such persons and its president, and acknowledged or proven in the clerk's office of Jefferson county, Kentucky, as deeds may be, and by the amendment of 1880 to this charter it was provided that by the articles of adoption, when executed and recorded, "such child shall become the heir at law of such person so adopting him or her, and be as capable of inheriting as though he or she were the child of said person," etc. It appears also that the supreme court of Kentucky has held this act of incorporation constitutional, and that when this contract was executed it amounted there to a complete adoption, and authorized the child adopted to inherit as if it were the natural child of its parents.

On August 9, 1898, Mrs. M. J. Rule, the mother of Church W. Rule, died in Sunflower county, Mississippi, leaving a considerable body of land, which descended upon her

death to her children, one of whom was Church W. Rule. Church W. Rule died February 7, 1903, leaving his wife and the adopted child Lula May Browning, but no children born to himself and wife. In 1903 there was a suit filed in the chancery court of Sunflower county for a partition of the lands left by Mrs. Mary J. Rule, mother of Church W. Rule, among the heirs then surviving, and the widow of Church W. Rule and Lula May Browning Rule were made parties. In this suit in the chancery court the bill of complaint filed contained the following provision with reference to the position or status of Lula May Browning Rule, to wit: "The said minor Lula May Browning Rule was never adopted by any proceedings in court according to the laws of the state of Mississippi, but said Church W. Rule and his wife Lula A. Rule made their certain contract in writing with Louisville Baptist Orphans' Home, bearing date of 15th of July, 1901, executed in triplicate and signed by the said Church W. Rule and Lula A. Rule and the said Louisville Baptist Orphans' Home. By said contract it was agreed that the said Church W. Rule and his wife Lula A. Rule should adopt, and they did thereby adopt, said minor, whose name at that time was Lula May Browning, and that the said Lula May Browning should, from that time forth, bear the same relation to the said Church W. Rule and his wife Lula A. Rule as if she had been born unto them and were their child, especially as to such property as would descend to her if she were their child. Complainants file herewith a copy of this contract as a part of this bill, and mark the same 'Exhibit A.' Complainants allege that from that time up to the time of the death of the said Church W. Rule the said Church W. Rule and his said wife have had the care, custody, and control of the said minor, and the said child is now in the care and custody of said Lula A. Rule. Your complainants advise that by said articles of adoption, although there have been no proceedings in the court, the said child is entitled to have a child's part in the said estate of Church W. Rule, but complainant Lula A. Rule submits this question for decision of this court: "The said Lula A. Rule is now the legally appointed guardian of the said Lula May Browning Rule. . . . It is asked that your honor may adjudicate whether the minor Lula May Browning has an interest in the said estate." This bill of complaint being filed by Lula A. Rule and others in cause No. 1100 of the chancery court docket of Sunflower county, Mississippi."

The prayer of the bill, among other things,

asks that "your honor may adjudicate whether the said Lula May Browning Rule has an interest in the said estate." A guardian ad litem was appointed for the minors in the suit, including Lula May Browning Rule, and the answers of the guardian ad litem submitting the interests of the minors to the protection of the court and praying that the allegations of the bill be required to be substantiated by strictly legal proof. The chancellor rendered a written opinion in which he held that Lula May Rule was in fact adopted by Church W. Rule and his wife, and as such adopted child inherited one half of the estate and lands in Mississippi of Church W. Rule, and in the decree of partition set apart one of the four shares to Lula A. Rule and her adopted child Lula May Rule, and from this decree there was no appeal prosecuted, and the right to an appeal has long since been barred by the Statute of Limitations. After this decree, and on the 29th day of November, 1905, the infant Lula May Browning Rule died. Mrs. Lula A. Rule, after the death of Church W. Rule, married one J. B. Fisher, and after such marriage Lula A. Rule Fisher, formerly the wife of Church W. Rule died, leaving her husband J. B. Fisher, who was one of the parties to the former appeal in this cause, but who, since said appeal, has disposed of his interest and claims to other appellants in this case. Subsequent to the death of Lula A. Rule Fisher, the brothers and sisters by natural blood of Lula May Browning Rule filed their bill in the chancery court, praying for a partition of the lands set apart to Lula A. Rule and Lula May Browning Rule, by the cause No. 1100, jointly to be divided between the brothers and sisters of Lula May Browning Rule by the blood, and the appellants are original defendants in said suit. This bill for a partition came on for hearing in the chancery court of Sunflower county, Mississippi, and the chancellor adjudged that the brothers and sisters of the blood of Lula May Browning Rule would inherit her interest in the said lands to the exclusion of Lula A. Rule Fisher and her heirs, and ordered a partition of the said property in accordance with the prayer of the bill, from which order an interlocutory appeal was allowed to this court, and was decided by this court in the case of Fisher v. Browning, 107 Miss. 729, 66 So. 132, Ann. Cas. 1917C, 466, in which opinion this court, as then constituted, adjudged that the decree of the chancellor in cause No. 1100 in Sunflower county adjudicated that Lula May Browning Rule inherited one half of the estate of Church W. Rule, and that said judgment

constituted *res judicata*, but decided that the chancellor was wrong in holding in that cause that Lula May Browning Rule was entitled to inherit from Church W. Rule as to lands under the laws of the state of Mississippi, and that the public policy of Mississippi with reference to inheritance of lands would be violated by adoption of a rule of comity as applied to adopted children in Kentucky, permitting them to inherit as heirs under the laws of this state. They also held that the property allotted to the said Lula May Browning Rule should go to the sisters and brothers of the blood to the exclusion of the adopting parent, Mrs. Lulu A. Rule Fisher, and her heirs. The cause was remanded for further proceedings, and partition was made in accordance with the former decree reported to the court and confirmed, and final appeal is prosecuted here from that decree.

Several questions are presented now for consideration, among which the following may be stated: Is the opinion of this court on the former appeal conclusive on the court now, under the doctrine of the law of the case? Second. If not, was Lula May Browning entitled to inherit from the adopted parents, Church W. Rule and Lula A. Rule? Third. If she was, would the property inherited at the time of her death go to the brothers and sisters of the blood, or would it go to the adopted mother and her heirs to the exclusion of the sisters and brothers of the blood?

As to the first ground, whether or not the former decision of this court constitutes the law of the case, in such sense as this court on this appeal is bound to follow it, it is not free from difficulty, because of the well-recognized rule that the court, ordinarily, after having laid down principles governing a case on one appeal, will not review its holdings on a subsequent appeal, but will ordinarily adhere to its former decision and not inquire into its correctness. We do not think, however, that this rule is so fixed and binding upon the court that it may not depart from its former decision on a subsequent appeal if the former decision, in its judgment, after mature consideration, is erroneous and wrongful and would lead to unjust results. Where the facts are the same, and where there has been no change of conditions or situations as that a change of decision would work wrong and injustice, the court may, on the subsequent appeal, correct its former decision where it is manifestly wrong. In the present case, there is no such change of condition as would inflict any hardship upon any party or person, and we are satisfied that the court reached the wrong conclusion

in its former opinion. This court has, on more than one occasion, departed from its first announcement on subsequent appeal of the same case, where there had been no change of conditions, or accrual of other rights that would be harmed or prejudiced by the other decision. In *Maxwell v. Harkle-road*, 77 Miss. 456, 27 So. 990, this court said: "It is further, in justice to the learned chancellor below, to be said that the decree rendered by him was induced by the opinion (formerly delivered by the writer hereof) of this court. It is not a duty merely, but a pleasure, to correct error at the earliest possible moment, and we are glad of the opportunity to do this in this case, while it is still pending undetermined."

See also 2 R. C. L. p. 226, § 188, where it is said: "The better rule, and that more in accord with justice, however, is that, though ordinarily a question considered and determined on the first appeal is deemed to be settled and not open to re-examination on a second appeal, it is not an inflexible rule, and if the prior decision is palpably erroneous, it is competent for the court to correct it on the second appeal."

See also *Missouri, K. & T. R. Co. v. Merrill*, 65 Kan. 436, 59 L.R.A. 711, 93 Am. St. Rep. 287, 70 Pac. 358, 12 Am. Neg. Rep. 275, where Justice Smith, speaking for the court, says: "Counsel for defendant in error . . . insist that the former decision must govern on the second appeal. This would come to us with more force if we were not now considering the same case with the same parties before the court. If an erroneous decision has been made, it ought to be corrected speedily, especially when it can be done before the litigation in which the error has been committed has terminated finally."

See also *Ellison v. Georgia, R. & Bkg. Co.* 87 Ga. 691, 13 S. E. 809, 14 Am. Neg. Cas. 167 (where Bleckley, Ch. J., says: "The only treatment for a great and glaring error affecting the current administration of justice in all courts of original jurisdiction is to correct it. When an error of this magnitude, and which moves in so wide an orbit, competes with truth in the struggle for existence, the maxim for a supreme court, supreme in the majesty of duty as well as in the majesty of power, is not *Stare decisis*, but *Fiat justitia, ruat cælum* [Let right be done, though the heavens should fall]"); *Messinger v. Anderson*, 225 U. S. 436, 56 L. ed. 1152, 32 Sup. Ct. Rep. 740. (where the Supreme Court of the United States said: "In the absence of statute, the phrase law of the case, as applied to the effect of previous orders on the later action of the court, rendering them in the same

case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power"); King v. West Virginia, 216 U. S. 101, 54 L. ed. 401, 30 Sup. Ct. Rep. 225; Remington v. Central P. R. Co. 198 U. S. 100, 49 L. ed. 963, 25 Sup. Ct. Rep. 577.

The opinion of Cook, J., in Johnson v. Success Brick Machinery Co. 104 Miss. 217, 61 So. 178, 62 So. 4, is pressed on us as being conclusive on us, on the law of the case as applied to this appeal. We think the language used in that opinion as to the binding effect of a decision on first appeal is too broad. We do not approve of that portion of the opinion which states: "If the decision of the court upon the original appeal was made upon a record which, in all substantial particulars, was the same as now before us, we must decide now as we decided then, however wrong we may believe the court was in the first instance. This is the law, and we do not question its wisdom; nor do we wish to evade rules in order to right a real or imaginary wrong."

We think courts are created and maintained and sworn to administer justice, and not to adhere strictly to arbitrary rules. When a rule of decision defeats justice or seriously impairs it, it should be departed from rather than followed. Rules are made to secure justice, not defeat it. We think the rule of "the law of the case" is a good rule of practice, and should be followed, except in rare cases where the decision is manifestly and palpably erroneous, and to follow it would result in grave injustice being done.

The decree of the chancellor in cause 1100, being *res judicata*, established the status of adoption between parent and child under the laws of Kentucky, and it was by virtue of this status so established by our state court that the child took the one-half interest in the property of the deceased adoptive father; and by virtue of the same status the adoptive mother took the child's interest in the property at its death. If the adjudication of the status by the chancellor in cause 1100 is *res judicata*, as held by Justice Owens in the former decision of this court, then such status should not be followed in part and ignored in part. The relation and status established should be observed throughout with reference to the descent of the property involved.

As to the second proposition as to whether or not Lula May Browning Rule, the adopted child, was entitled, under the facts stated, to inherit from the adoptive parent Church W. Rule, the former opinion held that to permit such inheritance would violate the pub-

lic policy of this state, and while under the law of Kentucky the adoption had the effect of conferring upon the adopted child full capacity to inherit lands or personal property in Kentucky as a natural child, still it was contrary to the public policy of Mississippi for such child to inherit lands in Mississippi, and that the rule of comity would not require the state to adopt the Kentucky law upon that subject, or recognize the status of parent and child created under the laws of Kentucky by reason of the adoption. The court on this subject says: "We recognize that the weight of authority and trend of modern decisions is to the effect that every other state will recognize the status of the state creating it, and will give effect to it just as if that status were created under the law of the state where it is invoked, but provided always that the status and the rights flowing from it are created by laws of the state which are in harmony and consistent with the laws and public policy of the state where it is invoked, and that therefore Mississippi will recognize the status of the child, created in Kentucky, as the adopted child of Church W. Rule, and will enforce all the rights of the child in that situation here, provided the rights flowing from that adoption in Kentucky and the laws of that state on the subject are not inconsistent with or opposed to the laws or public policy of this state on the same subject. . . . We do not believe, however, that this child was capacitated by the adoption in Kentucky to inherit lands in Mississippi, because the laws of Kentucky are inconsistent with and antagonistic to our Constitution and laws on the same subject, and to the public policy of Mississippi on that subject, as such public policy is found in our statutes and Constitution, and for that reason we do not believe that Mississippi is bound to recognize this adoption by contract, as it was made in Kentucky, to be valid and binding in Mississippi as to confer upon the child the capacity to inherit lands in Mississippi." [107 Miss. 736, 66 So. 132, Ann. Cas. 1917C, 466.]

If we understand the opinion in the former case, it holds that it would be inconsistent with the laws and Constitution of Mississippi for an adopted child to inherit lands under the statutes of Mississippi. The court seems to have been of the opinion that it was not possible for an adopted child, adopted under the laws of Mississippi, to inherit as an heir of the adopting parent. We are at loss to understand how the court reached this conclusion, in view of the previous decision of Adams v. Adams, 102 Miss. 259, 59 So.

84, Ann. Cas. 1914D, 235, where this court held that, where a petition was filed under the Code pertaining to the adoption of children, seeking the adoption of a minor, and a decree was entered providing that the custody of the minor be awarded to the adopting father, and that he be clothed with all the rights and bound by all the obligations with reference to said child as that of a parent, and that said child be clothed with all the rights and bound by all the obligations with reference to the adopting father and his estate, real and personal, at his death, as that of a daughter, and that the name of the child be changed to that of the adopting father, holding that such a decree under our laws creates a relationship of heir on the part of the adopted daughter. It is, therefore, not contrary to the Constitution, laws, and public policy of Mississippi for a person to adopt a child so as to make it an heir and capable of inheriting both real and personal property.

In the case of *Finley v. Brown*, 122 Tenn. 316, 25 L.R.A. (N.S.) 1285, 123 S. W. 359, the Tennessee court, in an able opinion, holds that a child adopted in one state under the law of comity has a right to inherit real estate situated in another state, even as to lands. In the report of the L.R.A. there is a case note in which the learned editor of this series says: "As indicated in those notes, the decision of the court in *Finley v. Brown*, giving effect to the foreign adoption for the purposes of inheriting real estate in Tennessee, is sustained by the weight of authority in this country."

See also as supporting this doctrine, 17 L.R.A. 435; 65 L.R.A. 186; 8 L.R.A. 747; 8 L.R.A. (N.S.) 117; 19 L.R.A. 201; 20 L.R.A. 199; 21 L.R.A. 380, 483; 23 L.R.A. 196, 665; 27 L.R.A. 791; 30 L.R.A. 263; 33 L.R.A. 207; 34 L.R.A. 500; *Humphreys v. Davis*, 100 Ind. 369, 50 Am. Rep. 788.

In our view it would be unjust to both parent and child under the adoption, made such by the law of one state in which they are given full right of parent and child, to hold that the mere fact of moving to another state would upset and unsettle this relationship. It is of the utmost importance that the status of this character should be maintained, so far as it is possible to do it without doing violence to the laws and institutions of the state wherein the parties have moved. It was undoubtedly the intention of Church W. Rule and his wife, in adopting this child, to give the child all of the rights of a natural child, and this intention should be carried out to the fullest extent permitted by the laws of this state.

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Under the Kentucky law the adopted child (adopted in the manner this one was), inherits from the adopting parent as a natural child, and is for all legal intents and purposes the real child of the adopting parent, and under the laws of that state the adopting parents are the heirs of the adopted child, in the case of the death of the child without issue, and inherit from the child all property which it had derived from the adopting parents or either of them. According to the construction of courts of Kentucky, the identical contract here involved created the legal status of parent and child between Mr. and Mrs. Rule on the one part and Mary Browning on the other. If this is true in Kentucky, why is it not true also in Mississippi? We are unable to appreciate the idea that this state will not fully and completely recognize and enforce a status thus created in Kentucky. When we apply our laws to the Kentucky status we find no difficulty in defining the reciprocal rights of the parties to the articles of adoption. Lula May Browning inherits the property of her adopting father and mother, and why? Because she is their child in legal contemplation. When the child died intestate Mrs. Rule inherited her property, and why? Because Mrs. Rule, in legal contemplation, is the mother of the deceased child. There is no possible way in which Lula May Browning could have inherited the property in controversy except by reason of her legal status of daughter to her deceased father Church W. Rule. The law of Kentucky has defined the status in a similar case as follows: By the event of adoption the adopted child becomes the lawful child of the adopting parent in the same light as a child born in lawful wedlock. The estate of a natural child, which he inherits from his parent, is defeated by his death in infancy without issue, and the property then goes back to the kindred of that adopting parent. The adopted child, inheriting as though he were the child of his foster parent, takes subject to the same limitation, and if he dies in infancy and without issue the property, under the status, descends to the kindred of that parent from whom he receives it. *Lanferman v. Vanzile*, 150 Ky. 751, 150 S. W. 1008, Ann. Cas. 1914D, 563. See also *Re Jobson*, 164 Cal. 312, 43 L.R.A. (N.S.) 1062, 128 Pac. 938. So, we see that Lula May Browning, by the event of adoption, becomes the legal child of Church W. Rule and wife, the adopting parents, in the same light as a child born in lawful wedlock; and when she dies in infancy without issue, under the inheritance laws of this

state the property descends to her foster mother who survives her. We see no conflict, real or imaginary, between our laws and the laws of Kentucky on this subject. Under our law the adopting parent may adopt the child fully and completely, or it may adopt it and limit its rights by a decree of court. In other words, under our statutes the parent can either adopt partially or totally, conferring or withholding benefits at his option, but if he confers upon the child full benefits as though it were a natural child, there is nothing to prevent his so doing, and there can be no inconsistency between our law and the law of Kentucky as applied to the present adoption. If we treat the adoption in Kentucky as if it had been done in the chancery court of Mississippi, we find there is no greater right conferred there than may be conferred here. This construction appeals to us as natural justice entirely consistent with sound judicial construction. In fact when judicial construction is out of harmony with natural justice, the judicial reasoning should withstand the most careful scrutiny and analysis before it should prevail. The principle of reciprocal relations between parent and child is recognized and enforced by the Kentucky law. A foster child inherits from the foster parent, and when the foster child, inheriting from one of the foster parents, dies without issue, the surviving foster parent takes the property which the foster child received from the intestate foster parent, because the surviving foster parent is, in law, the mother of the deceased.

In *Wagner v. Varner*, 50 Iowa, 532, the court said that, upon the death of an adopted child intestate and without wife or descendant, may its heirs at law be sought in the family under which it was born or in the family of which it became a part by adoption? Has its relationship with its natural parents been disturbed by the act of adoption, by which they relinquish all control over it and consent that it should become in law the child of others? So far as its rights of inheritance are concerned, they probably extend to both families, to the extent of entitling it to inherit from both the adopting and natural parents. If the adopted child inherits property from the person on the theory that it is the legal child of such person, we are unable to see any reason why, upon its death, such property should not descend to the relationship of the child created by the adoption. It is more consistent with justice to hold that the property inherited by Lula May Browning Rule from Church W. Rule should go to that line of legal heirs through which it was derived. It seems to us that it best

harmonizes with the public policy of the state to recognize to the full extent the rights conferred by adoption. Those who have no natural children should be encouraged to adopt some child who has no parents to take care of it and educate it, and as far as possible to make such adopted child the real child of the adopting parents. If the rule should be adopted in this state and adhered to that the property coming to the adopted child from the adopting parents should, on the death of the child, descend to strangers of the blood of the adopting parent, it would have a strong tendency to discourage the good work of the adopting parents in taking some perhaps unfortunate child and make it their very own, conferring upon it all the rights and privileges that could be conferred upon a child, and at the same time, should the child unfortunately die, not to permit them to reinherit from the child that which they had, through motives of kindness and generosity bestowed upon it.

Judge Freeman, the able annotator of the *American State Reports*, in a note to *Van Matre v. Sankey*, 39 Am. St. Rep. 228, 229, in commenting upon decisions holding that the adopting parents could not inherit from the adopting child, said: "The vice of these decisions, in our judgment, lies in the fact that the courts making them gave too strict a construction to statutes of adoption, and were unwilling to concede that such statutes had any other object than to confer the benefit of heirship to the adopting parent upon the child adopted. The purpose of these statutes we conceive to extend further than this, and, in effect, to take the child from its parents by birth, and to give it to the parents by adoption, and to create, as between it and such parents, the reciprocal rights and relations of parent and child, and give to the former both the incidental and the direct advantages of parentage; and we therefore think that, upon the death of such child intestate, and leaving estate which, by statute, vests in its parents, that the word 'parents,' as thus used, should be deemed to designate the adopting parents, rather than the parents by birth; for, under the law, it is the former, rather than the latter, who occupy the relation of parent to the child at the time of its death."

Judge Elliott, speaking for the supreme court of Indiana, in *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788, uses this language: "It is, as we have seen, the legal status of the person respecting the subject that determines his legal rights. To again quote from Austin: 'The law of persons is the law of status or conditions. . . . The rights and duties, capacities and inea-

pacities, which constitute a status or condition, are commonly considerable in number and various in kind. . . . Such are the rights and duties, capacities and incapacities of husband and wife, parent and child, guardian and ward.' 2 Austin, Jur. 709, 711. As the status of the surviving husband and adopted father is that of father, his interest in the land which the deceased child held in virtue of the rights vested in it by adoption is that of a father, since it is of that property, as the subject, that the status of parent and child is predicated. This is a just as well as a logical result. It is not to be presumed that the legislature meant to violate logical rules by creating the legal relation of child without the corresponding one of parent, nor that they meant to thrust out the surviving husband and father for the benefit of a person that was a stranger to the ancestor who was the source of title."

We, therefore, reach the conclusion that if Lula May Browning Rule, having inherited the property in this suit from her adopting father Church W. Rule, and having died without issue, the property descends to that heir of Church W. Rule, to wit, his wife, who bore the relation of adopted mother to said Lula May Browning Rule. It follows that the complainants had no legal right to the property claimed in their bill, and were without right to file the suit for partition, and the case is reversed, bill of complaint dismissed, and judgment entered here for the appellants.

Cook, J., took no part in this decision.

Smith, Ch. J., dissenting:

Every question presented to us for decision by this record was expressly decided against appellants on the former appeal herein, and should not now be open to review, for it is a rule of general application, heretofore announced and acted upon over and over again by this court, that: "the decision of an appellate court in a case is the law of that case on the points presented throughout all the subsequent proceedings in the case, in both the trial and the appellate courts, and no question necessarily involved and decided on that appeal will be considered on a second appeal or writ of error in the same case, provided the facts and issues are substantially the same as those on which the first decision rested."

The res judicata and law of the case rules are very much akin, were formulated to accomplish the same object, and are each based "upon two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes

it to the interest of the state that there should be an end to litigation, 'Interest reipublicæ ut sit finis litium;' the other, the hardship on the individual that he should be vexed twice for the same cause, 'Nemo debet bis vexari pro eadem causa.'" The first of these rules is followed in all jurisdictions where the common law prevails; the second is followed in the great majority of such jurisdictions, and, in the language of the Supreme Court of the United States in *Great Western Teleg. Co. v. Burnham*, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850, "is necessary to enable an appellate court to perform its duties satisfactorily and efficiently, which would be impossible if a question, once considered and decided by it, were to be litigated anew in the same case upon any and every subsequent appeal." One of the objects sought to be accomplished by the rule is to prevent exactly what has happened in this case, that is, the reversal of a former judgment, solemnly rendered, and thereafter acted upon as final, solely because, on the second appeal, the personnel of the court has changed and the new judges differed with their predecessors as to the judgment which ought formerly to have been rendered. As was again said by the Supreme Court of the United States in *Roberts v. Cooper*, 20 How. 467, 15 L. ed. 969: "There would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members."

Among the many cases in which the rule has been followed by this court are: *McDonald v. Green*, 9 Smedes & M. 138; *Green v. McDonald*, 13 Smedes & M. 445; *Smith v. Elder*, 14 Smedes & M. 100; *Bridgeforth v. Gray*, 39 Miss. 136; *Swan v. Smith*, 58 Miss. 875; *Still v. Anderson*, 63 Miss. 545; *Nutt v. Knut*, 84 Miss. 465, 36 So. 689; *New York L. Ins. Co. v. McIntosh*, — Miss. —, 46 So. 401; *Johnson v. Success Brick Machinery Co.* 104 Miss. 217, 61 So. 178. 62 So. 4; *Supreme Lodge. K. P. v. Hines*. 109 Miss. 500, 68 So. 485; *Cochran v. Latimer*, 111 Miss. 192, 71 So. 316.

In the majority opinion the existence of the rule is admitted, but it is said that "we do not think, however, that this rule is so fixed and binding upon the court that it may not depart from its former decision on subsequent appeal, if the former decision, in its judgment, after mature consideration, is erroneous and wrongful and would lead to unjust results."

This statement is in direct conflict with all of the former announcements of this court upon this subject, and it is founded



upon a total misconception of the purpose sought to be accomplished by the rule, which is not to prevent the reversal of former judgments unless such judgments are erroneous and mischievous, but to cut off any inquiry at all into the rightfulness or wrongfulness thereof. On the second appeal in *Swan v. Smith*, 58 Miss. 875, the correctness of the judgment rendered on the first appeal was called in question by the appellant, and in responding thereto this court said: "Even if our former decision on this point was wrong, it must be accepted as the law of this case."

Similar and even more emphatic language was used in *Nutt v. Knut*, 84 Miss. 465, 36 So. 689; *New York L. Ins. Co. v. McIntosh*, — Miss. —, 46 So. 401; *Johnson v. Success Brick & Machinery Co.* 104 Miss. 217, 61 So. 178.

It is said, however, in the majority opinion that "this court has on more than one occasion departed from its first announcement on subsequent appeal of the same case, where there had been no change of conditions, or accrual of other rights that would be harmed or prejudiced by the other decision."

But the only case cited in support of this statement is *Maxwell v. Harkleroad*, 77 Miss. 456, 27 So. 990. The law of the case rule was not involved on the second appeal in that case, and it constitutes no sort of authority for the statement that this court has heretofore departed therefrom. In that case a bill in chancery was filed by Harkleroad, as guardian, against Maxwell, a former chancery clerk, "who had ex officio been the guardian of Harkleroad's estate, . . . to recover excessive commissions retained by Maxwell as compensation for his services" as such guardian. The trial court sustained a demurrer to this bill, and on appeal to this court that decree was reversed, the court holding that on the allegations of the bill complainants were entitled to recover. Afterwards, when the case came on to be heard in the trial court on its merits, the real facts upon which Maxwell predicated his claim to the commissions charged by him were then for the first time brought to the court's attention, from which it appeared that he was entitled to the commissions charged. The trial court having decided otherwise, its decree was again reversed on appeal, this court in so doing, among other things, saying: "When the case was here before it was presented on demurrer, furnishing another of many illustrations of the unsatisfactory nature of such defense, when all the facts set up by answer would make clear the right decision. This guardian is

entitled, as the facts now show, to the highest praise for exceptionally faithful and skilful management of this estate."

It clearly appears, therefore, that on the second appeal the case presented by the evidence was materially different from that presented by the allegations of the bill on the first, and no court, so far as I am aware, has ever held that the law of the case rule applies to such a situation. The simple truth of the matter is that the rule does not meet with the approval of the majority of the judges of this court, as now constituted, and the opinion herein rendered by that majority, while professing not to do so, in fact repudiates the rule, overrules without giving any of them, save one, "even the cold courtesy of a passing glance," the long and unbroken line of decisions of this court announcing and following it, and aligns this court with those courts which determine whether a decision rendered on a former appeal in the same case shall be adhered to solely by the rule of stare decisis, which rule "does not prevent a court from overruling a previous decision which shall appear to it to be plainly and palpably wrong, where this course can be taken without inflicting serious injury on any person, or where greater harm would result from following the erroneous decision than from reversing it." Black, *Judicial Precedents*, p. 199. I do not for a moment question the power of the court to overrule the cases establishing the law of the case rule, but I confidently assert that they ought not to be overruled if the principle of stare decisis is of any binding force, for he would be a bold man indeed who would assert that a rule is manifestly wrong which has met the approval of so many courts, and is supported by so many long and unbroken lines of decisions as this rule has received, and is supported, and who can say that more good will be accomplished by its rejection than by its retention?

Coming now to the former decision in this case, I shall attempt to show that, in so far as it holds that Mrs. Rule did not inherit the land here in controversy upon the death of Lula May Rule, it is not only not manifestly wrong,—and, unless it is, it should not be here departed from, even under the rule announced by the majority opinion,—but, on the contrary, that it is manifestly right.

In the beginning I desire to concede that our former opinion was wrong in so far as it holds that Lula May Rule did not inherit the land in controversy on the death of her adoptive father Church W. Rule, but the ground upon which I shall base this con-

cession is consistent with and supports my further opinion that, upon the death of Lula May Rule, the land was inherited from her not by Mrs. Rule, her adoptive mother, but by her brothers and sisters. The criticism in the majority opinion upon our former decision that Lula May Rule did not inherit this land upon the death of Church W. Rule, her adoptive father, is based upon a total misconception of the ground upon which that decision was based. That criticism is as follows: "The court seems to have been of the opinion that it was not possible for an adopted child, adopted under the laws of Mississippi, to inherit as an heir of the adopting parent. We are at loss to understand how the court reached this conclusion in view of the previous decision of *Adams v. Adams*, 102 Miss. 259, 59 So. 84, Ann. Cas. 1914D, 235, where this court held," etc.

On the former appeal we not only did not intimate that we then entertained such an opinion, but expressly pointed out more than once that a child adopted in Mississippi can inherit property from its adoptive parents, provided the right so to do is conferred by the decree of adoption. The ground upon which we then proceeded was clearly stated in the following language: "We do not believe, however, that this child was capacitated by the adoption in Kentucky to inherit lands in Mississippi, because the laws of Kentucky are inconsistent with and antagonistic to our Constitution and laws on the same subject, and to the public policy of Mississippi on that subject, as such public policy is found in our statutes and Constitution, and for that reason we do not believe that Mississippi is bound to recognize this adoption by contract, as it was made in Kentucky, to be valid and binding in Mississippi as to confer upon the child the capacity to inherit lands in Mississippi. Its status as an adopted child of Mr. and Mrs. Rule may be recognized here without recognizing its capacity to inherit lands, which is a wholly different thing."

The opinion then proceeded to specifically point out wherein we thought that the Kentucky statute was inconsistent with and antagonistic to our Constitution and laws.

The right of inheritance is not a natural, but is a civil, right, conferred by law, and, in so far as real property is concerned, it is universally held that it is determined solely by the law of the place where the property claimed to have been inherited is situated. This is but a branch of that broader universal rule that the title to real property must be determined by the *lex rei sitæ*.

The right of one person to inherit land from another depends upon the relation in which such person stands to that other, or, in other words, upon his status or condition, which status or condition must be determined by the law of the place where it was created (*Smith v. Kelly*, 23 Miss. 167, 55 Am. Dec. 87); and, second, upon whether a right of inheritance is conferred upon persons having such status by the law of the place where the land is situated. The status created in one state will be recognized in all other states, provided it is not such as is inconsistent with the laws and public policy of such other states, but such right of inheritance only will attach thereto in such other states to land there situated as would attach had such status been created by the laws thereof. 1 C. J. 1402; 1 R. C. L. 615; *Ross v. Ross*, 129 Mass. 246, 37 Am. Rep. 321; *Finley v. Brown*, 122 Tenn. 316, 25 L.R.A.(N.S.) 1285, 123 S. W. 359; *Gray v. Holmes*, 57 Kan. 217, 33 L.R.A. 207, 45 Pac. 596; *Van Matre v. Sankey*, 148 Ill. 536, 23 L.R.A. 665, 39 Am. St. Rep. 196, 36 N. E. 628; *McColpin v. McColpin*, — Tex. Civ. App. —, 77 S. W. 238; *Shick v. Howe*, 137 Iowa, 249, 14 L.R.A.(N.S.) 980, 114 N. W. 916; *Melvin v. Martin*, 18 R. I. 650, 30 Atl. 467; *Smith v. Derris*, 34 Pa. 126, 75 Am. Dec. 641; *Lingen v. Lingen*, 45 Ala. 410; *Calhoun v. Bryant*, 28 S. D. 266, 133 N. W. 266.

The status here claimed for Mrs. Rule and her adopted daughter, which status in fact unquestionably existed, was that created by the adoption of Lula May Brown by the Rules in the state of Kentucky. The right to adopt the child of another is, in all common-law jurisdictions, created solely by statutes, which statutes are also the measure of the rights and obligations springing from such an adoption (*Villier v. Watson*, 168 Ky. 637, L.R.A.1918A, 820, 182 S. W. 869); and the courts, under the most elementary principles, are without rightful power to add thereto or detract therefrom.

From these elementary rules, which have heretofore been uniformly acted upon by this court in dealing with the status created by the marital relations, the birth of children, etc., and which are equally binding in a case wherein the status is that created by the adoption of a child, it necessarily follows: First, as is held by the great weight of authority, that Lula May Rule inherited the lands in controversy from her adoptive father Church W. Rule, upon his death, provided the laws of this state permit children adopted under the laws thereof to inherit property from their adoptive parents; and, second, as is held

by all of the courts that have dealt with the question, that Mrs. Rule did not inherit the land in controversy on the death of her adopted daughter Lula May Rule, unless the laws of this state permit an adoptive parent to inherit property from an adopted child.

The statute which regulates the adoption of children in this state is § 542, Code 1906, as amended by chapter 185, Laws of 1910, and by it a child of another may be adopted by means of a proceeding in the chancery court, which, in its decree creating such an adoption, must specify the benefits which the adoptive parent proposes to confer upon the adopted child, to all of which such child shall be thereafter entitled, one of which benefits may be, as has heretofore been held by this court, the right to inherit property from the adoptive parent. This statute, therefore, confers upon adopted children the right to inherit land from the adoptive parent, provided the decree of adoption so adjudges, from which it necessarily follows, under one of the rules hereinbefore set out, that a child adopted in another state in such manner as to give it there the right to inherit property from the adoptive father will be given such right here. In other words, § 542 of the Code provides for the inheriting of land by adopted children, and since Lula May Rule had that right under the laws of Kentucky by which her status as an adopted child was created, she will, under the rules hereinbefore announced, have the same right here, from which it, of course, follows that, upon the death of her adoptive father, she inherited a child's portion of the land of which he then died seised and possessed.

Coming now to the right of Mrs. Rule to inherit the land on the death of Lula May Rule, and turning again to § 542 of the Code, it will be observed that no right of inheritance whatever is there conferred upon adoptive parents, the only right there conferred upon them being that they "shall have and exercise over such infant all such power and control as parents have over their own children," and, under well-settled and most elementary rules, this court has no rightful power to confer such a right upon them. In passing, I will say that our statute in this respect does not stand alone among the statutes of the states, for practically all of them, as originally drawn, confer no such right upon adoptive parents, though some of them now by amendment or new enactment do so. Section 1649 of the Code confers no such right, for the parents and the children there dealt with are natural and not adoptive parents and

children. Since no such right of inheritance is conferred by the laws of this state upon adoptive parents, it necessarily follows, under the rules hereinbefore set forth, that adoptive parents who become such under the laws of another state have no such right here, even if the laws of such other state give them such a right. The majority opinion cites no authority to the contrary, and none, I confidently assert, can be found.

The ground upon which the majority opinion, in this connection, proceeds is: First, under the laws of Kentucky Lula May Browning, because of her adoption by the Rules in that state, became their lawful child "in the same light as a child born in lawful wedlock;" and, second, by reason thereof "when she dies [died] in infancy without issue, under the Inheritance Laws of this state, the property descends [descended] to her foster mother who survives [survived] her." It is said in that opinion that "Lula May Browning inherits the property of her adopting father and mother, and why? Because she is their child in legal contemplation. When the child died intestate Mrs. Rule inherited her property, and why? Because Mrs. Rule, in legal contemplation, is the mother of the deceased child."

No statute of this state or decision of any court is referred to in support of the second of these propositions, and it is based, in so far as I can gather from the opinion, upon the attempt by the majority to administer what they call natural justice, losing sight altogether of the universal rule that the right of inheritance is purely legal, and unless conferred by law does not exist. It may be conceded that in Kentucky the adoption of Lula May Browning created reciprocal rights of inheritance between her and her adoptive parents, but since our statutes recognize no such right in an adoptive parent, such a right created under the Kentucky statutes cannot be given effect to in this state, for, as hereinbefore pointed out, no right to inherit land attaches to a status created in a state other than that in which the land is situated, unless such right would attach thereto had such status been created in the state wherein the land is situated.

It may be that an adoptive parent may have the right to inherit from a child adopted under a statute which provides that the reciprocal relations between the adopted child and its adoptive parents shall be, for all purposes, identical with the relations that would have existed between them had the child been born to such parents in lawful wedlock, as to which I

am not here called upon to express an opinion, for our statute contains no such provision, and no such relation is created by the adoption of a child under it. The contrary view was earnestly pressed upon and rejected by this court in *Beaver v. Crump*, 76 Miss. 34, 23 So. 432. In that case the appellants sought in the court below to establish their claim to an estate left by Seth A. Pool, as his legal heirs, and to have the claim of the appellee thereto canceled as a cloud upon their title. The appellee made her answer a cross bill, and claimed title to the property by inheritance from Pool, because of the fact that she was his adoptive daughter, and prayed that, if this claim should be rejected by the court, it would then decree the specific performance of a promise, made by Pool in the petition by which he procured from the court the decree of adoption, to devise to her the land in controversy. The decree of adoption, after reciting Pool's promise to devise the land, proceeds as follows: "It is therefore considered, and so ordered by the court, that the said petition be allowed, said adoption granted, and the name of said Alice Hulsey is hereby changed to Alice Hulsey Pool, and that she be entitled to all the benefits conferred and imposed by § 1496, Code of 1880, in that behalf made and approved."

In support of their contention that, under our statute, the mere fact of adoption brings about the relation and status of parent and child, the brief of counsel for the appellee, after setting forth that "the law of adoption comes to us from the civil law, and to it we must go in order to give to our statute on the subject its proper construction," and citing the case of *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788, so much relied on here in the majority opinion, proceeded as follows: "By a careful examination of the authorities, fully collated in the two cases above given, it will be found that to adopt a minor means something—it brings about the relation and status of parent and child, with all of the obligations and liabilities, as well as all of the benefits, of such a relation. There cannot be a child without the correlative of a parent; where there is one, there is the other, with all that the relation means."

Had this argument prevailed with the court, the case would necessarily have been decided in the appellee's favor, but it did not prevail, and she lost. All the authorities hold, without conflict in so far as I am aware, that the adoption of a child does not vest any of the parties to the adoption with the right to inherit property from the others, unless the statute under which the

proceeding is had so provides, either expressly or by necessary implication. The assumption here by the majority of the court that the Kentucky statute, under which this child was adopted, made her for all purposes the child of the Rules to the same extent that she would have been had she been born to them in lawful wedlock, so that she on the one side, and her adoptive parents on the other, became vested with reciprocal rights of inheritance, has no foundation in fact, as the supreme court of Kentucky has more than once held. What that court in fact has decided as to the rights of inheritance growing out of the adoption of a child under the statutes of that state is this: That the adopted child and its issue have the same right of inheriting property from the adoptive parents as they would have had had the child adopted been born to the adoptive parents in lawful wedlock, but that the adoptive parents have no right whatever of inheriting property from the adopted child. *Power v. Hafley*, 85 Ky. 671, 4 S. W. 683; *Atchison v. Atchison*, 89 Ky. 488, 12 S. W. 942; *Merritt v. Morton*, 143 Ky. 133, 33 L.R.A. (N.S.) 139, 136 S. W. 133; *Lanferman v. Vanzile*, 150 Ky. 751, 150 S. W. 1008, Ann. Cas. 1914D, 563.

The case last cited, *Lanferman v. Vanzile*, is the one here relied on by the majority of the court, and its conception of what the case held is set forth in a quotation therefrom. This quotation, however, does not appear in the majority opinion in the form in which the language was used by the Kentucky court, and makes the court appear to have decided just the converse of what it in fact did. The first sentence of this quotation, as it appears here in the majority opinion, is only a part of a sentence quoted by the Kentucky court, and set forth in its opinion at page 752 of 150 Ky., from an opinion formerly delivered by it in the case of *Power v. Hafley*, supra, and refers to the Adoption Statute. As formulated by that court, the sentence reads as follows: "That it is the event of adoption that fixes, under the law authorizing the adoption, the legal status of the adopted child; and the child, by the event of adoption, becomes the legal child of the adopting parent, and stands, as to the property of the adopting parent, in the same light as a child born in lawful wedlock, save in so far as the exceptions in the statute authorizing the adoption declare otherwise."

As it appears here in the majority opinion, it reads: "By the event of adoption, the adopted child becomes the lawful child of the adopting parent [and stands, as to the property of the adopting parent], in the

same light as a child born in lawful wedlock."

The next two sentences of the quotation are taken from page 751 of 150 Ky., and were used by the court in referring, not to the Adoption Statute, but to a section of the Kentucky Statutes of Descent and Distribution, which places a limitation upon the estate which an infant receives from a parent by gift, devise, or inheritance, and which I shall presently specifically set out. In that case "Henry Lanferman and his first wife Anna Lanferman, by a proceeding duly had, adopted, on June 12, 1891, Albert Urlage, who was then seventeen months old. His foster parents took him to their house, and reared and educated him as if he was their natural child, he being known as Albert Lanferman. They afterwards had three children of their own. The wife died intestate, and Henry Lanferman married a second time. He then died intestate, leaving property in the city of Covington. After the death of Henry Lanferman, the adopted child Albert Lanferman died unmarried and without issue, in infancy. A partition suit was instituted to divide the estate of Henry Lanferman among his three children. In this proceeding Clara Vanzile, the natural mother of the adopted child Albert Lanferman, filed her petition, claiming that he took, at the death of his foster father, an undivided one fourth of the estate, and that this one fourth descended, at his death, to her. The three children of Henry Lanferman demurred to this pleading. The court overruled their demurrer and, they failing to plead further, judgment was entered in favor of Mary Vanzile for one fourth of the property. They appeal."

The Kentucky statute (Ky. Stat. § 2071) under which the child had there been adopted provides for an adoption by petition to the circuit court, which court shall declare "such person [the child adopted] heir at law of such petitioner and, as such, capable of inheriting as though such person were the child of such petitioner." The statute under which *Lula May Rule* was adopted provides that the child adopted "shall become the heir at law of such person so adopting him or her, and be as capable of inheriting as though he or she were the child of said person," so that everything there said is applicable here. The points made by counsel in the argument of the case do not appear from the report thereof, but it is said in the opinion of one of the justices who dissented from the majority on another proposition, that "it is not argued in the case at bar, anywhere or by anybody, that an adopting father has,

by virtue of the statute, or by virtue of the relationship assumed through the statute, any right of inheritance from the adopted son such as a natural father would have. It is nowhere claimed that the adopting parent has any such right of inheritance as would a natural parent. It is not claimed anywhere that he is a 'parent' in the sense in which we commonly know that word. So far, therefore, it must be admitted by any reasoning mind that the one adopting is not the 'parent' of the adopted child, in the sense that he takes under any statute or any law the right to inherit from the one whom he has adopted."

The majority opinion in that case proceeds on the assumption that this is true, and disposes of the question in the following language: "It is also universally held, under similar statutes, that the person adopting a child does not thereby become capable of inheriting property from the child, unless it is so provided in the statute."

In the Kentucky Statutes of Descent and Distribution appears a section which, as the Kentucky court has expressly held, deals not with the question of inheritance, but limits the estate of an infant in property received by it from a parent by gift, devise, or inheritance, and is as follows: "If an infant dies without issue, having the title to real estate derived by gift, devise or descent from one of his parents, the whole shall descend to that parent and his or her kindred as hereinbefore directed, if there is any; and if none, then in like manner to the other parent and his or her kindred; but the kindred of one shall not be so excluded by the kindred of the other parent, if the latter is more remote than the grandfather, grandmother, uncles and aunts of the intestate and their descendants." Ky. Stat. § 1401.

The court, after holding that an adoptive parent has no right in inheritance in the property of an adopted child by virtue of the Kentucky Adoption Statutes, proceeded to determine what effect this statute limiting the estate received by an infant from its parent had upon the controversy then before it, stating that "the question here is simply, What is the proper construction of the statute [referring to the adoption statute]? Was it intended to put the adopted child on the same footing as the natural child, and does he take his inheritance subject to the same limitations, if he dies in infancy and without issue?"

The court, after giving its reasons therefor, answered these questions by holding that since the Adoption Statutes provide that the adopted child shall inherit prop-

erty from its adoptive parent as though it were the child of such adoptive parent, its estate in the property so inherited is subject to the same limitation as the estate received from its parent by a natural child, and concluded its opinion as follows:

"The statute [referring to the one limiting the estate of an infant in property received from its parent] does not make the foster father the heir of the adopted child. The case does not turn on the question, Who is capable of inheriting from the adopted child? It turns on the question, What estate does the adopted child, who dies in infancy and without issue, take in the estate of his foster parent? The adopted child under the statute is 'capable of inheriting as though such person were the child of the petitioner.' He, therefore, takes under the statute the same estate as the natural child. The estate of the natural child which he inherits from his parent is defeated by his death in infancy without issue, and the property then goes back to the kindred of that parent. The adopted child, inheriting as though he were the child of his foster parent, takes subject to the same limitation, and, when he dies in infancy and without issue, the property, under the statute, descends to the kindred of that parent from whom he received it."

How the majority of this court, in the case at bar, can understand that case to hold that an adoptive parent has the right in Kentucky to inherit property from the adopted child is beyond my comprehension; and that they will admit that the Kentucky statute, limiting the estate of an infant in property received from its parent by gift, devise, or inheritance, can have no operation in Mississippi I take for granted, in view of the two universal rules that title to real property must be determined by the law of the place where it is situated, and that statutes have no extraterritorial force. If the statute is to be applied here, it must also be applied as a limitation upon the estate of a natural child, born in Kentucky, in land situated in this state, received by it from one of its parents by gift, devise, or descent, a thing which I suspect this court would not do. The fact that the supreme court of Kentucky has expressly decided that its Adoption Statutes confer no right of inheritance upon an adoptive father should close this inquiry; for no court has ever held, in so far as I am aware, that the construction placed upon a statute of a state by its own supreme court is not binding on the courts of every other state, wherein rights claimed under such statute are called in question. 36 Cyc. 1104, and authorities there cited in note

4, among which is *McIntyre v. Ingraham*, 35 Miss. 25, in which this court said: "No principle of law is of more universal acceptance, or stands upon sounder reason, than that the construction put by the proper courts upon the statutes of their own jurisdiction is conclusive of their force and effect, and will be so regarded by all foreign judicatures, when they may become the subjects of consideration."

The estate which *Lula May Rule* took in the land inherited by her from her adoptive father was that which she would have taken had she been born to him in lawful wedlock, which, under the law of this state, is a fee simple; consequently, upon her death, the land was inherited under § 1649 of our Code by her brothers and sisters, and should be awarded to them, regardless of whether this court thinks that so to do would be in accord with natural justice or not, for that question is not for its determination, but for the determination of the legislature.

The case of *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788, cited in the majority opinion, is of no value here for three reasons: First, that decision simply construed an Indiana statute, the phraseology of which is different from the Kentucky statute here under consideration; and, second, whether the construction put upon the Kentucky statute by the supreme court of that state is right or wrong, it should be accepted and acted upon here; and, third, the right of an adoptive parent to inherit land situated in a state other than that under the laws of which the child was adopted was not there involved. But since that case is cited with approval in the majority opinion, it may not be out of place for me to give it some consideration.

The statute there under consideration (*Burns's Anno. Stat. 1901, §§ 837, 838*), after providing the method by which children could be adopted, continued as follows: "From and after the adoption of such child, it shall take the name in which it is adopted and be entitled to and receive all the rights and interest in the estate of such adopting father or mother, by descent or otherwise, that such child would if the natural heir of such adopting father or mother. . . . After the adoption of such child, such adopted father or mother shall occupy the same position toward such child that he or she would if the natural father or mother, and be liable for the maintenance, education, and every other way responsible as a natural father or mother."

It came before the supreme court of Indiana for construction in *Barnhizel v. Fer-*

rell, 47 Ind. 335, and the court then held that it conferred no right on an adoptive parent to inherit property from the adopted child. In *Krug v. Davis*, 87 Ind. 590, it was conceded by counsel, and assumed by the court, that the statute conferred no such right, but when that case came again to the court on a second appeal, as *Davis v. Krug*, 95 Ind. 1, the court held that the question was not considered and decided by it on the former appeal, and was therefore not within the law of the case rule; that the statute did confer such right of inheritance on an adoptive parent—and overruled *Barnhizel v. Farrell*. Afterwards, the right of the same adoptive parent to inherit from the same adopted child that was involved in *Krug v. Davis*, and *Davis v. Krug*, supra, came before the court in *Humphries v. Davis*, in which the overruling of *Barnhizel v. Farrell* was approved, the court construing its statute in the light of the civil law, and, as was pointed out by the supreme court of Iowa in *Baker v. Clowser*, 158 Iowa, 156, 43 L.R.A.(N.S.) 1056, 138 N. W. 837, basing its conclusion upon an erroneous premise. The reasoning of that court, from the status of an adopted child under the civil law, was repudiated by this court, as hereinbefore pointed out, in *Beaver v. Crump*, 76 Miss. 34, 23 So. 432, and by the supreme court of Kentucky, in *Villier v. Watson*, 168 Ky. 631, L.R.A. 1918A, 820, 182 S. W. 869. Among the numerous cases in which it has been held that an adoptive parent does not inherit property from the adopted child, unless the right so to do is expressly given by statute, are the following: *Baker v. Clowser*, 158 Iowa, 156, 43 L.R.A.(N.S.) 1056, 138 N. W. 837; *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802; *Heidecamp v. Jersey City, H. & P. Street R. Co.* 69 N. J. L. 284, 101 Am. St. Rep. 707, 55 Atl. 239; *Hole v. Robbins*, 53 Wis. 514, 10 N. W. 617; *White v. Dotter*, 73 Ark. 130, 83 S. W. 1052; *Russell v. Jordan*, 58 Colo. 445, 147 Pac. 693, Ann. Cas. 1916C, 760; *Lathrop v. Young*, 25 Ohio St. 451; *Upson v. Noble*, 35 Ohio St. 655; *Edwards v. Yearby*, 168 N. C. 663, L.R.A. 1915E, 462, 85 S. E. 19; *Daisey's Estate*, 15 W. N. C. 403; *Murphy v. Portrum*, 95 Tenn. 605, 30 L.R.A. 263, 32 S. W. 633.

The California case cited in the majority opinion is of no value here, for the reason, as pointed out in the California court's opinion, the statute of that state there under consideration is materially different from the statutes of other states. The statute (Civ. Code, §§ 228, 229) there construed as was said by that court, does "not in

terms provide for the inheritance by the adopted child from the adopting parent or vice versa," but does provide that "a child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation. The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it,"—and was construed by the court to mean that, when a child is adopted under it, the relations between it and its natural parents are, and for all legal purposes, superseded, and it thereafter becomes, for all such purposes, the child of the adoptive parents. The Kentucky statute expressly gives the child a right to inherit from its adoptive parents. Our statute provides that such right may be conferred upon it in the decree of adoption; but in neither of these statutes is a right in the adoptive parent to inherit from the child referred to, and therefore such a right cannot be held to be included therein without violating one of the most elementary rules of construction. "Expressio unius est exclusio alterius." And, moreover, as hereinbefore pointed out, this court has held that under our statutes—and the Kentucky court has held under the Kentucky statutes—no such relation is created by the adoption of a child.

In conclusion I have only this further to say: That when this case was before us on the former appeal, we held, as has also the supreme court of Kentucky, that, under the Kentucky statute under which *Lula May* Rule was adopted, her adoptive parents were given no right to inherit property from her, which holding, even if this court has the right to construe the Kentucky statute differently from what it has been construed by the Kentucky court, is supported by the decisions of all the courts which have construed statutes the phraseology of which is similar to that of the statute here under consideration; and yet that decision is to be overruled because a majority of this court now say that it is manifestly wrong.

I am requested by my Brother Sykes to say that he concurs in the views herein expressed.

A suggestion of error having been filed, *Ethridge, J.*, on October 8, 1917, handed down the following additional opinion:

The suggestion of error filed in this case challenges the power of the court to change the decision on the first appeal, on the ground of want of power in the court under constitutional grant of jurisdiction to the court; second, if the court had such power, that its exercise would violate the rules of *res judicata*, "for which neither a principle can be stated nor an authority produced;" third, that to make such a decree is to overrule an unbroken line of decisions in this state, recognizing and enforcing the law of the case.

The Constitution, in giving jurisdiction to the supreme court, uses the following language: "The supreme court shall have such jurisdiction as properly belongs to a court of appeals." Section 146 of the Constitution.

In § 144 the general grant of judicial power is in the following language:

"The judicial power of the state shall be vested in a supreme court and such other courts as are provided for in this Constitution."

It will be noted from these provisions that the entire judicial power of the state is vested in the supreme court and such other courts as are provided for in the Constitution. Section 146 has been construed to mean that the supreme court has only appellate jurisdiction, and that original jurisdiction cannot be conferred upon it. There is no limit of the appellate jurisdiction that may be conferred upon it under the Constitution. All power belonging to an appellate court may be conferred upon the supreme court, and there is no limitation in the Constitution on the power of the court to overrule decisions, or change its decision when, in the opinion of the court, a former decision may be erroneous or wrongful. No authority cited in the suggestion of error or brief refers to any constitutional restriction, and the constitutional power of the court to make decisions of the kind challenged in the suggestion of error has not been decided or adjudged in any of the authorities cited. The decisions cited wholly fail to sustain this contention. The court necessarily has power to decide an appeal and enter a final judgment.

On the second proposition, that if the court possesses such power the decision would violate the rule of *res judicata*, "for which neither a principal can be stated nor authority produced," is likewise not well taken. We think we have produced decisions in the former opinion sustaining the power and right of the court to change the decision. Other authorities could be cited, and among the decisions which have accom-

plished the same result, without making the pronouncement in terms, is *Field v. Middlesex Bkg. Co.* 77 Miss. 180, 26 So. 365, which later came before the court on second appeal in 84 Miss. 646, 37 So. 139. On the first appeal, Judge Woods, as the organ of the court, used some strong language and reversed the case. On the second appeal, a majority of the court reversed the lower court, which followed Judge Woods's opinion, and changed the effect of the decision on the first appeal. It is true that Judge Whitfield, one of the members of the court, undertook to show the same result could be accomplished without disturbing Judge Woods's opinion; but the court did change the pronouncement of the law as it had been adjudicated on the first appeal. In Judge Woods's opinion, he stated that the record consists of three large volumes, and it was manifest that the facts were fully presented on the first appeal; but on the second appeal a different conclusion was reached on the facts. In *State v. Louisville & N. R. Co.* 97 Miss. 35, 51 So. 918, 53 So. 454, Ann. Cas. 1912C, 1150, and in the same case in 104 Miss. 413, 61 So. 425, the court declared the law applicable to the case and reversed the chancery court, remanding the matter to be proceeded with in accordance with the opinion therein pronounced. On the first remand the chancellor declined to follow the court, and in reversing him the second time in 104 Miss. 413, 61 So. 425, the law was again announced and reaffirmed as in the first opinion. Thereupon the chancellor entered a decision in conformity with the opinion of the supreme court. The case was thereupon appealed again to this court, and in 107 Miss. 597, 65 So. 881, the court changed its announcement of the law, and reversed the chancellor, and entered judgment dismissing the suit.

Numerous authorities have been cited in the suggestion of error, most of which were referred to in the dissenting opinion in the present case, and in none of them is the precise case here dealt with presented. The only case that seems to sustain the contention of the suggestion of error is *Stewart v. Stebbins*, 30 Miss. 66. That case, however, is distinguishable from this case, because the former decision was not in the same case. But the rights growing out of the suit had been adjudicated in the case of *Stebbins v. Niles*, 25 Miss. 267, and which had, therefore, been finally adjudicated, and constituted *res judicata*, properly speaking, and as distinguished from the law of the case. It is true that the court, in the case reported in 30 Miss. 66,



uses language that would support the contention; but the language used was not applicable to the facts of the case. In other words, it was broader than the case called for. The decision, applied to the facts of the case on which it was decided, was perfectly proper; but the statement of the court in the opinion, "that it is immaterial in this respect whether the case was further proceeded with in the court below or not," was not before the court, and is not authority for the proposition here cited.

The names of great judges of the past, who have adorned this court, have been brought into honored review, in the suggestion of error, as great names in the judicial history of this state. We revere the memory of these judges, and have great respect and deference for their decisions. Able and eminent as these judges were, they were human and fallible, and, while we would not lightly depart from rules laid down by them, still we must, where they have decided cases which operate to effect injustice or lead to wrong results, apply the corrective as though we had rendered the same decisions. We do not intend to depart lightly from precedents. We expect to consider and adhere to them where they are sound in principle; but we refuse to crucify justice on the cross of precedent. We do not think the language used in our opinion: "When judicial construction is out of harmony with natural justice the judicial reasoning should withstand the most careful scrutiny and analysis before it should prevail," and courts are created, maintained, and sworn to administer justice and not to adhere strictly to arbitrary rules. When a rule of decision defeats justice or seriously impairs it, it

should be departed from rather than followed," is such radical language as need frighten the members of the bar. There may be those who love consistency of utterance and of precedent more than they do the administration of justice, but in our opinion the courts were created solely for the purpose of administering justice. We recognize that precedents are valuable guides, and it is not our purpose to throw them aside entirely, and to proceed and blaze a new trial from our personal sense of right and justice. The decisions of the courts are not necessarily unchangeable, and it is the duty of the court to change a decision, if wrong in principle, and which leads to injustice and wrong.

The first appeal, in the present case, was from an interlocutory decree, and not from a final decree. Important as it is for the court to adhere to rulings made in settling the principles of litigation before final decree or judgment, it is more important that justice be done; and where the court reached the conclusion that a decision is manifestly wrong, and ought to be overruled, we see no reason to hold a litigant irrevocably bound to the court's mistake. If a mistake is made, it would be better to correct it at once, while injustice may be prevented. A litigant has no vested interest in a court's mistake, where the mistake is discovered before the final ending of the litigation.

We are satisfied with the pronouncement in our former opinion on the third proposition above laid down in the suggestion of error, without adding to it.

Suggestion of error is overruled.

Smith, Ch. J., and Sykes, J., dissenting.

# KANSAS SUPREME COURT.

JAMES A. BAIRD  
v.

SALINA NORTHERN RAILROAD COMPANY et al., Appts.

(103 Kan. 452, 173 Pac. 1069.)

**Railroad — contract for station — validity.**

A contract made in consideration of the giving of subscription notes whereby a railroad company agrees permanently to estab-

Headnote by BURCH, J.

Note. — The validity of a contract with a railroad company to establish and maintain a station is treated in the annotation following *Grimes v. Minneapolis, St. P. R. & D. Electric Traction Co.* L.R.A.1916F, 691.

L.R.A.1918F.

lish and maintain on the subscriber's land a passenger and freight depot and station, stockyards, sidetracks, and other shipping facilities and to refrain from ever establishing or maintaining similar structures or facilities within competing distance of the subscriber's land, is void as against public policy, and is void as against public policy irrespective of the provision not to establish other stations.

For other cases, see *Contracts*, III. c, 3, in *Dig. 1-52 N. S.*

(July 6, 1918.)

**A**PPEAL by defendants from a judgment of the District Court for Mitchell County overruling a demurrer to a petition filed to recover damages for breach of a contract to locate and maintain a depot and other shipping facilities. Reversed.

The facts are stated in the opinion.

**Mr. David Ritchie, for appellants:**

The contract in question was void as against public policy, and cannot be enforced.

St. Joseph & D. C. R. Co. v. Ryan, 11 Kan. 603, 15 Am. Rep. 357; Williamson v. Chicago, R. I. & P. R. Co. 53 Iowa, 126, 36 Am. Rep. 206, 4 N. W. 870; Mobile & O. R. Co. v. People, 132 Ill. 559, 22 Am. St. Rep. 556, 24 N. E. 643; Pueblo & A. Valley R. Co. v. Taylor, 6 Colo. 1, 43 Am. Rep. 512; Florida C. & P. R. Co. v. State, 31 Fla. 482, 20 L.R.A. 419, 34 Am. St. Rep. 30, 13 So. 103; Atlanta & W. P. R. Co. v. Camp, 130 Ga. 1, 15 L.R.A.(N.S.) 594, 124 Am. St. Rep. 151, 60 S. E. 177, 14 Ann. Cas. 439; Beasley v. Texas & P. R. Co. 53 C. C. A. 434, 115 Fed. 952; St. Louis, J. & C. R. Co. v. Mathers, 71 Ill. 592, 22 Am. Rep. 122; Atchison, T. & S. F. R. Co. v. Jefferson County, 21 Kan. 309; Cole v. Brown-Hurley Hardware Co. 139 Iowa, 487, 18 L.R.A.(N.S.) 1161, 117 N. W. 746, 16 Ann. Cas. 846.

**Mr. R. M. Anderson, for appellee:**

The railway company having failed to comply with the provisions of their contract, in that they did not build the depot or the facilities as agreed upon, are liable under the terms of the contract for such damages as their acts, or failure to act, has caused plaintiff.

Tucker v. Allen, 16 Kan. 312; St. Joseph & D. C. R. Co. v. Ryan, 11 Kan. 603, 15 Am. Rep. 357; Kansas P. R. Co. v. Hopkins, 18 Kan. 494; Louisville N. A. & C. R. Co. v. Sumner, 106 Ind. 55, 55 Am. Rep. 719, 5 N. E. 404; Atchison, T. & S. F. R. Co. v. Jefferson County, 21 Kan. 309; Atlanta & W. P. R. Co. v. Camp, 130 Ga. 1, 15 L.R.A.(N.S.) 594, 124 Am. St. Rep. 151, 60 S. E. 177, 14 Ann. Cas. 439; Grimes v. Minneapolis, St. P. R. & D. Electric Traction Co. 133 Minn. 442, L.R.A.1916F, 687, 158 N. W. 719; Louisville, St. L. & T. R. Co. v. Neafus, 93 Ky. 53, 18 S. W. 1030; Louisville, N. A. & C. R. Co. v. Sumner, 106 Ind. 55, 55 Am. Rep. 719, 5 N. E. 404; Louisville, N. A. & C. R. Co. v. Moore, 106 Ind. 600, 5 N. E. 413; Pittsburg, Ft. W. & C. R. Co. v. Rose, 24 Ohio St. 219; Caldwell v. East Broad Top R. & Coal Co. 169 Pa. 99, 32 Atl. 85; East Line & R. River R. Co. v. Garrett, 52 Tex. 133; First Nat. Bank v. Hendrie, 49 Iowa, 402, 31 Am. Rep. 153; Harris v. Roberts, 12 Neb. 631, 41 Am. Rep. 779, 12 N. W. 89; Baltimore & O. & C. R. Co. v. Ralston, 41 Ohio St. 573.

**Burch, J., delivered the opinion of the court:**

The action was one for damages for breach of a contract to locate and maintain

a depot and other shipping facilities. A demurrer to the petition was overruled, and the defendant appeals.

The contract provided that the railroad company should permanently establish and maintain, on described land of the plaintiff, a passenger and freight depot and station, stockyards, sidetracks, and other shipping facilities, refrain from ever establishing or maintaining a depot, station, or siding facilities between Ash Grove, in Lincoln county, and the proposed station in Mitchell county, or within 10 miles of the proposed station, do all in its power to obtain for the proposed station postoffice and express office facilities, to the end that there might be established on the real estate described a town equipped with the necessary shipping, express, and postal facilities, and, at the time when the proposed station should be completed, run an excursion train for, or assist, in advertising, a sale of town lots, free of cost. The consideration was the execution and delivery to the railroad company of subscription notes in the sum of \$10,000, with an option to give notes to the amount of \$5,000 and subscribe \$10,000 to a bond issue of the railroad company. Should the railroad company default in performing any portion of the contract, it was to pay to the plaintiff the sum of \$5,000 as liquidated damages.

The petition set out the contract, pleaded performance by the plaintiff and breach by the defendant, and prayed for the stipulated damages. The contract was void, because contrary to public policy, and the demurrer to the petition should have been sustained.

The plaintiff argues that it is not per se against public policy to bargain with a railroad company for the location of a station at a particular place; that stations may, of course, always be discontinued when it is proper to do so, and consequently the stipulation for a permanent station may be ignored; and that the admittedly void stipulation not to establish other stations is severable. The plaintiff is not able to point out what part of his subscription was made in consideration of the naked location of a station on his land, with accompanying shipping facilities. On the face of the contract material portions of the consideration on which the plaintiff made his subscription were that the station should not be discontinued as soon as established, or at any later time, but should be permanent, and that no other station should be located within competing distance. To interpret the contract otherwise would be to make a decidedly different engagement between the parties than that expressed by the in-

strument. The supposedly legal and the illegal things to be done by the railroad company constituted a unit of performance on its part, just as the plaintiff's subscription constituted a unit of performance on his part, and the entire contract was void.

The court does not agree that the contract would have been valid if it had contemplated no more than the establishing of the station and shipping facilities described. The public has an interest in the location of stations on a line of railroad, with the accompanying facilities for serving the public. That interest is paramount to the interest of stockholders of the railroad company; and the temptation to gratify private greed, rather than satisfy public need, by selling out railroad facilities, is just great enough that railroad officers and agents ought not to be permitted to expose themselves to it. The authorities on the subject of the validity of station contracts are not in harmony, and it is not strange that this should be so. On one side, transportation by rail is private enterprise; on the other public service; and the supremacy of the public interest was not always clearly visualized. Indeed, it was often difficult to do so in the early days of railroad building through great areas of undeveloped territory. Public policy as an operative legal principle was not always clearly visualized. Sometimes the statutory privileges enjoyed by railroad builders and the statutory privileges permitted municipal and quasi municipal corporations in securing the extension to them of railroad facilities confused the application of the doctrine of public policy to private contracts.

In this state the subject first came up for adjudication in 1872, in the case of McClure v. Missouri River, Ft. S. & G. R. Co. 9 Kan. 373. McClure and many others executed bonds to convey land to the railroad company if it would build its road to Baxter Springs and establish a depot and other buildings there. The railroad company brought suit on McClure's bond. The answer was that the railroad was building in the direction of the south line of the state and toward a terminus in Texas. Two routes, known as the Tar Creek route and the Baxter Springs route, were in contemplation. The Tar Creek route was the more direct; and it would cost about \$100,000 more to build, and \$20,000 more annually to operate, the Baxter Springs route. In consideration of the donations of McClure and others, the Baxter Springs route was adopted. The statute authorized the railroad company to take and hold voluntary grants of real estate made to aid in the construction and maintenance of its road,

and left the railroad company free to choose its route. Building the road to Baxter Springs did not constitute a deviation from any previously designated route; and the court concluded the question presented to the railroad company for decision was simply whether it would build a railroad to Baxter Springs or not. Consequently, it was held that the bond was not void as against public policy. The decision was sound, because the contract sued on belonged to a class of contracts sanctioned by public policy, evidenced by statute, although an unauthorized use, might, on occasion, be made of a particular contract of that character.

In the case of *St. Joseph & D. C. R. Co. v. Ryan*, 11 Kan. 602, 15 Am. Rep. 357, decided in 1873, the syllabus reads as follows:

"It is the duty of a railroad corporation to furnish reasonable depot facilities for the accommodation of the public in the matter of transportation and travel.

"A contract in contravention of this duty of furnishing reasonable depot facilities is against public policy and void; and a contract not to have or use a depot within 3 miles of a given point is such a contract."

The opinion was written by Mr. Justice Brewer, with his characteristic breadth and lucidity of thought and simplicity of expression, and has been used to fortify the decisions of many courts whose attention has been occupied by the same subject. The argument concluded with a quotation from the opinion of Chief Justice Shaw in the case of *Fuller v. Dame*, 18 Pick. 472, holding a note to be void the consideration of which was an agreement to locate a depot, because, if contracts to pay money for the location of great public works or improvements in such a way as to enhance the value of a landowner's estate were indulged, the public interest might be overlooked and sacrificed in a mercenary conflict of separate local and private interests. The convincing reasoning of the principal case applies with equal force to contracts to establish and maintain, and contracts not to establish and maintain, stations.

In the case of *Tucker v. Allen*, 16 Kan. 312, decided in 1876, a deed of land, blank as to the grantee, was delivered to a railroad company, on condition that a depot should be built at a certain place within a stated time, and on the further condition that no depot should be built at another place within a year. The railroad company filled the blank with the name of a person who had performed services for it, and delivered the deed to him. The conditions of the deed were performed. Afterwards the grantors quitclaimed to Allen, who brought suit to recover the land because

the conveyance contravened public policy. The decision was, that, granting the illegal character of the conveyance, the parties to it were in *pari delicto*, and the transaction having been fully executed, the law left them and their assignees where it found them.

The writer of the opinion just referred to assumed that the action was not predicated on invalidity of the agreement to build a depot, and assumed that the contract not to build the other depot was illegal. In the course of the opinion the question was asked, how any court, without knowledge of the facts, could know whether or not a contract not to build a depot at a particular place would be void as against public policy. In the discussion of the question, stress was laid on the uncertainty with respect to the future needs of any community, and a leaning was indicated toward the view that illegality depends on public detriment in fact, which the court can see and estimate in the particular case. In the *Ryan Case* the uncertainty with respect to the future needs of any community was offered as a reason for not allowing the railroad company to tie its hands by a restrictive station contract. The reason applies to contracts to establish stations, because legitimate public service should not be burdened with any improvident construction, maintenance, or operation. The notion that illegality depends on detriment in fact in the particular case is now generally repudiated. Actual public benefit in a particular case will not relieve from the taint of illegality; the true test being the tendency of contracts of that character to injure the public. 13 C. J. 444. The decision in the *Allen Case*, however, was perfectly sound, because it was placed on the ground already stated.

In the case of *Northern Kansas Town Co. v. Oswald*, 18 Kan. 336, Oswald agreed to deed land to the town company when a railroad was completed to Hanover and a depot was erected there. Suit was brought on the agreement, and a demurrer to the petition was sustained. The consideration for the agreement did not appear. So far as the petition disclosed, the agreement bore no relation whatever to the determination of the question whether or not a railroad and depot should be built, and the judgment of the district court sustaining the demurrer was properly reversed.

In the case of *Atchison, T. & S. F. R. Co. v. Jefferson County*, 21 Kan. 309, suit was brought to compel delivery of township bonds in payment of a subscription to the capital stock of the railroad company. The

statute authorized the subscription and bond issue, and further provided that the commissioners should not cause the bonds to be issued until the railroad was completed through the township voting bonds, or to such point in the township as might be conditioned in the bonds. The subscription contained a condition that the railroad company should construct its road through Valley Falls, a city of the township, and build a depot there. The court held that the bonds should be issued. The decision was sound, because the contract belonged to a class which the law expressly authorized the township to make. Public policy, evidenced by the statute, permitted the township to bargain, to its supposed advantage, with the railroad company with respect to the location of the road, and the inclusion of a stipulation to build a depot did not cancel the warrant of authority.

Some state and Federal courts hold that, because municipal and quasi municipal corporations may contract for the location of stations, the general public policy of the state is thereby established, and private individuals have the same right. This reasoning is quite fallacious. In one case a public body, the municipal authorities, acting ordinarily on a vote of the qualified electors, is permitted to contract according to the interest of the locality. In the other, private individuals, in furtherance of their own selfish ends, strive to secure special advantages and privileges without regard to the public welfare.

The decisions noted are all that have been rendered by this court throwing direct light on the subject under consideration. They do not commit the court to a holding that a town-site promoter like the plaintiff may secure a lawful contract binding the railroad company to establish on his land a passenger and freight depot and station, stockyards, and other shipping facilities, and the court declines so to hold. It is a mere quibble to speak of establishing structures and facilities of the character described, as distinct from maintaining them, because to establish is to fix with appropriate permanence. The field was open to rival promoters to offer more alluring inducements to the railroad company to champion their town sites, and in such a contest the public interest is too likely to be found trailing after the successful bidder.

The judgment of the District Court is reversed, and the cause is remanded, with direction to sustain the demurrer to the petition.

## KENTUCKY COURT OF APPEALS.

BALTIMORE &amp; OHIO RAILROAD COMPANY, Appt.,

v.

JAMES H. SMITH.

(169 Ky. 593, 184 S. W. 1108.)

**Evidence — inspection of cars — condition.**

1. The mere fact of the inspection of railroad cars by proper persons without reporting a defect does not show that a hand hold on one of the cars was not in a defective condition, or that the railroad company exercised ordinary care to keep it in a reasonably safe condition.

*For other cases, see Evidence, XII. d, in Dig. 1-52 N. S.*

**Trial — jury — care of railroad.**

2. The jury must determine whether or not a railroad company exercised proper care to keep its cars in a safe condition, in an action by a servant to recover damages for injury through a defective car, where the question of care is made an issuable fact and there is evidence, direct or circumstantial, showing that the accident would not have happened except for such defect. *For other cases, see Trial, II. c, 8, d, in Dig. 1-52 N. S.*

**Master and servant — assumption of risk — boarding moving train.**

3. A telegraph operator of a railroad company who is placed in charge of an office some distance from his home, with the understanding that he is to go to his work by catching a slow moving freight train as best he can, does not assume the risk of defective hand holds on the freight cars.

*For other cases, see Master and Servant, II. b, 3, b, in Dig. 1-52 N. S.*

**Evidence — giving way of hand hold — negligence.**

4. The mere fact that a hand hold on a freight car pulls loose, to the injury of

an employee who attempts to use it, does not show negligence in its inspection which will render the railroad company responsible for the injury.

*For other cases, see Evidence, II. h, 1, e, in Dig. 1-52 N. S.*

**Master and servant — inspection of freight cars — method.**

5. A railroad company does not perform its duty to inspect hand holds on freight cars for the safety of employees, by having its inspectors merely pass by and look at them, but they must be subjected to a test similar to that which they will receive in use.

*For other cases, see Master and Servant, II. a, 4, e, in Dig. 1-52 N. S.*

**Limitation of actions — amendment of petition — Employers' Liability Acts.**

6. The amendment of a petition for damages for injury to a railroad employee, which does not show that the cause of action arises under the Federal Employers' Liability Act, so as to show that fact, does not state a new cause of action so as to come within the operation of the Statute of Limitations if the original petition was filed in time.

*For other cases, see Limitation of Actions, IV. b, in Dig. 1-52 N. S.*

(April 25, 1916.)

**A**PPPEAL by defendant from a judgment of the Common Pleas Branch, Second Division, of the Circuit Court for Jefferson County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Gibson & Crawford for appellant.

Messrs. S. L. Trusty, Eugene Hubbard, A. C. Popham, and Noggle & Graham for appellee.

Note. — The applicability of the rule *res ipsa loquitur* as between master and servant is discussed in the annotation following *Midland Valley R. Co. v. Fulgham*, L.R.A.1917E, 4, and other annotations there referred to.

As plaintiff's evidence in *BALTIMORE & O. R. Co. v. SMITH* showed affirmatively that the method of inspection was not a proper one or at least raised a question in that regard, it is clear that it was unnecessary in order to carry the question of defendant's negligence to the jury, to invoke the rule *res ipsa loquitur* in the strict sense explained in the note above referred to. The question was whether the manner of inspection that was disclosed by the evidence could be properly characterized as a negligent one, and not whether the rule *res ipsa loquitur* in its distinctive sense applied; see especially for this distinction pages 27 et seq. of the note above referred to.

L.R.A.1918F.

The general subject of the relation of new pleadings to the Statute of Limitations is treated in the notes to *Missouri, K. & T. R. Co. v. Bagley*, 3 L.R.A.(N.S.) 259; *Boudreaux v. Tucson Gas, E. L. & P. Co.* 33 L.R.A.(N.S.) 196; and *Philadelphia, B. & W. R. Co. v. Gatta*, 47 L.R.A.(N.S.) 932; and see also the case of *Gadsden v. Crafts & Co.* L.R.A.1918E, 226, and footnote for references to latter cases. The specific phase of the question presented when the effect of the amendment is to change the action from one at common law to statute or vice versa, or from a statute of one jurisdiction to a statute of another is discussed in the note to *Allen v. Tuscarora Valley R. Co.* 30 L.R.A.(N.S.) 1096; and more specifically as to shifting from the state law to the Federal Employers' Liability Acts, or vice versa, see annotation in L.R.A.1915C, 80; and later case, *Curtice v. Chicago & N. W. R. Co.* L.R.A.1916D, 316.

Carroll, J., delivered the opinion of the court:

In this action by the appellee to recover damages for personal injuries sustained, as alleged, by the negligence of the appellant railroad company, there was a judgment in his favor for \$4,000, followed by this appeal.

A somewhat extended statement of the facts is made necessary on account of the grounds relied on for reversal; and so we will set them out before taking up the reasons assigned by counsel for the railroad company why a new trial should be ordered.

The appellee, Smith, was employed by the railroad company as a telegraph operator at a station on its road called Lavenia.

So much of his evidence as it is important to relate in detail is as follows:

Q. Who employed you, Mr. Smith, to work for the Baltimore & Ohio?

A. Mr. George Day, division operator of the Baltimore & Ohio Railroad at Pittsburgh.

Q. What were you employed to do?

A. As telegraph operator.

Q. Mr. Smith, I will get you to state to the jury what he said to you at the time he employed you.

A. He told me I would have to live at Layton; that that was the nearest place, and work at Lavenia. He told me there would be a freight train in there, usually about 10:30, in plenty of time for me to get to my work, and I could catch onto that freight train somewhere along there as I could, and go to my work. . . . He told me I could ride back on a passenger train. He gave me a pass between those two stations.

Q. Between what two stations did he give you a pass, Mr. Smith?

A. Layton and Lavenia. He told me I could catch a train that would come in on the third track along about 10 o'clock every night.

Q. What did he say to you with reference to the third track?

A. He said there would be a freight train usually pull in on the third track to let a passenger train around; the fast passenger train was due about 10:30, and he told me there would be a train in there nearly every night.

Q. What was the distance between Layton and Lavenia?

A. About 4 miles.

Q. When did you go on duty?

A. I went on duty at 12 o'clock, and I had to catch this train, because, if it wouldn't be in there, it was liable to come there.

Q. Was there any other way to get there except on the train? I mean by that was there any road?

A. No, sir.

Q. Did you get the train Mr. Day directed you to get it, at the time he directed you to get it, at the time you got hurt?

A. Yes, sir; I got the freight train that pulled in on that slow track.

Q. On this occasion was it an extra train or a regular train at all times that he told you to get?

A. An extra train.

Q. Was it on time or not?

A. Yes, sir.

Q. Ahead of time?

A. A little bit ahead of time. I got there about the time I usually did, and this train was there.

Q. Prior to the time you were injured, I will get you to state whether or not you had ridden on a freight train, and boarded it at this place for your work.

A. Yes, sir; I had been there thirty days, and I rode nearly every night.

Q. What part of the train?

A. I rode all over it. I rode in the conductor's caboose, and I rode on the engine, and on the box car; anywhere I could catch on. They knew it was customary for the operators to ride.

Q. Did this train stop as it went through there, or go very slowly?

A. It was going very slowly.

Q. Was that instruction given you by Mr. Day, who employed you?

A. Yes, sir; he said I would have to catch on this freight train that come in on that third track.

Q. Mr. Smith, on the occasion that you got hurt, just tell the jury how the accident occurred.

A. Well, I come out about 10:15 at night, and this train was pulling by. I caught hold of the hand hold about five cars from the engine and made two steps, and when I attempted to step down on the stirrup I had hold of the hand hold. The hand hold was fixed something like my cane, and when I caught hold of that handhold and pulled down on it, I aimed to catch the stirrup, and the end of it pulled loose and come down.

Q. What pulled down and came loose?

A. The hand hold pulled loose and came down. I hit the stirrup and missed it, didn't catch it, because this thing let my weight down, and I missed the stirrup.

Q. What became of your foot?

A. It landed right in front of the wheel, the moving wheel, and mashed the front end of my foot off.

Q. Did this hand hold— Did I under-

stand you to say this hand hold pulled loose and came down at the time you threw your weight against it?

A. When the hand hold pulled down—not pulled loose, but pulled down—and caused me to miss my footing.

Q. Was your whole weight thrown against it?

A. Yes, sir.

Q. How fast was this train going?

A. Well, not over 5 miles an hour, I don't think; not over 5 miles; about 5 miles an hour.

Q. About how many cars were in this freight train?

A. Twenty-five or thirty anyway.

Q. Why did you get on that train at this place?

A. Why, because I was instructed to get on where I could, and I thought I had better get on right there.

Q. How far was it, you say, from the engine—about how far?

A. I would judge four cars back from the engine, up next to the engine.

Q. Why couldn't you get the caboose? Why didn't you get the caboose sometimes, or why did you ride on different parts of the train?

A. If I could have got the caboose before the train had been going too fast, I would have did so. This train was going too fast for me. I was afraid it would be before I got down there. There were thirty cars, I guess, and if I waited for the caboose I was afraid I would get hurt.

Q. Had you ridden on different parts of the train before this?

A. Yes, sir; I rode on the engine and the caboose.

Q. You had gotten on the train when it was moving, had you?

A. Yes, sir.

Q. Did the officers and employees of that train see you?

A. Yes, sir; they would see me; I don't know whether they seen me this night or not, but usually they seen me.

Q. Is this the track Mr. Day told you to get the train on?

A. Yes, sir; the third track—the slow track.

Q. Now, Mr. Smith, would they stop the train for you at Lavenia?

A. Yes, sir; they would have to stop the train, the freight train, to get out, because, before they could pull off of the third track onto the double track or the single track, they would have to get permission from the operator at Lavenia to pull out.

Q. You had no trouble getting off of the train when you got to Lavenia?

A. No, sir.

On his cross-examination he testified as follows:

Q. You gave your deposition in this case on the 22d of December, 1911, at my office, didn't you?

A. Yes, sir.

Q. I will ask you if this question was asked you, and if you didn't make this answer. "Q. Do you know what kind of a car it was that you attempted to board?

A. "No, sir.

Q. "What portion of the train was it in?"  
A. Well, the fourth or fifth from the caboose—the fourth or fifth car.

"Q. Four or five cars from the caboose?

A. "Yes, sir; I think so.

Q. On the left-hand side of the train in the direction it was going?

A. "Yes, sir; that is right."

Q. That is what you said?

A. No sir; I didn't say caboose; I said the engine; it couldn't have been the caboose.

Q. Weren't those questions asked you, and didn't you make those answers?

A. I didn't say caboose; if he got it caboose, I said engine. He misunderstood me; I am positive it was the engine.

He was shown a written statement signed by him a few months after the accident, in which he said, in describing how the accident happened: "I caught ahold of the hand hold and missed the foot stirrup, and my foot slipped over the rail, and the wheels passed over my foot."

The witness admitted signing this statement, but said he did not write it or read it himself, and that he was very busy at the time with his duties as telegraph operator; and the agent of the company who read it to him did not read that part of the statement saying that his foot slipped, causing him to fall under the train, and that he did not know that statement was in there when he signed the paper, but admitted telling the agent that his foot slipped after the hand hold came loose. This was all the evidence for appellee, except that in rebuttal he denied making statements attributed to him by witnesses for the company.

On the part of the company the conductor on the freight train testified that he did not know or hear of any trouble with the hand hold. Several other witnesses, who were employees of the company, were inquired of as to the statements made by appellee after the injury, and all of them said that he told them that his foot slipped, but did not say anything about a defective hand hold. There is also a stipulation showing that regular car inspectors of the company inspected this freight train at a

place where it was customary to inspect trains some two or three hours before the accident; and it was agreed that the inspectors would say on the trial that they inspected the cars in this freight train without finding any defective or unsafe hand holds "that the method of inspection was to examine by inspection all the parts not necessary for the persons using the cars to catch hold of and look at the hand holds and grab irons, and catch hold of those that could be reached from the ground, to ascertain whether any were defective; that, if any defect was found in any of the parts an immediate note of that was made by them in books which were thereafter kept as records of the inspection; that they made the following record of the condition of the cars in the train above referred to at the time in their own handwriting in books from which they were now testifying. They say that there were no defects in any of the cars inspected by them except the defects hereinafter noted as set out in the schedule opposite each numbered car. Where no defect is set out, none was found in the car."

Day, the man who employed appellee, after denying that he had instructed or directed or authorized appellee to get on freight trains and ride from Layton to Lavenia, said that he gave him a pass to ride on passenger trains from Lavenia to Layton, but told him that on returning to his work each day he would have to walk from Layton to Lavenia; that he could ride one way, but would have to walk the other. On the evidence the contention of the appellee is that he had a right, under the instructions given him by his superior officer, to board the freight train at the time and place and manner he did, and that his injury was caused by a defective and unsafe hand hold, the condition of which could have been discovered by ordinary care on the part of the company.

On the other hand, the defense for the company was rested on the ground that appellee was not authorized or instructed to ride on the freight trains, and hence, in attempting to get on the train, was a trespasser, and assumed the risk of defective appliances. It is further contended that the handhold was not defective or unsafe, and, even if it was, the inspection made by the company showed that it exercised ordinary care to maintain it in safe condition, and so there should have been a directed verdict in its favor.

It will be seen from the evidence that the appellee is the only witness who testified as to the cause that produced the injuries received by him; and it is urged that the evidence contradicts appellee as to the

cause that produced the accident to such an extent as to make the verdict upon this issue so flagrantly against the evidence as to justify a reversal of the case. The evidence thus relied on consists of the statements of employees of the company that appellee did not mention a defective hand hold in relating how the accident happened, but attributed it to the fact that his foot slipped, and in the evidence of the car inspectors who said they did not discover any defective hand hold, supplemented by the paper signed by appellee detailing the circumstances of the accident, in which no mention is made of defective hand holds.

In this, as in almost all cases of this character, the evidence on several issues is very contradictory, although there is no evidence as to the immediate cause of the accident, except the testimony of appellee. nor is there any contradiction of the evidence of the inspectors, except such as may be found in its insufficiency and in the circumstances attending the accident as related by appellee. In view, therefore, of the fact that there is no evidence showing that the car inspectors did not make the inspection testified to by them, it is said that their evidence showed that they exercised ordinary care in making the inspection; and, this being so, there was no evidence that the company failed to exercise ordinary care in its effort to maintain this hand hold in reasonably safe condition.

Passing for the present a more detailed examination of the sufficiency of the inspection made, we cannot agree that the mere inspection of cars by employees who are charged with the duty of inspection is conclusive evidence of the exercise of ordinary care on the part of the company to keep its cars and appliances in reasonably safe condition, or that the inspection made in this case is conclusive evidence of the fact that the hand hold was not in a defective and unsafe condition at the time the inspection was made or at the time the accident happened. The evidence of these inspectors is entitled to the same weight as would be the evidence of any other witnesses who testified that an appliance was in good condition, and no more. It was subject to be put in issue to the same extent as any other disputed fact in the case; and, if the evidence of appellee is to be believed, it is plain that the hand hold was in a defective and unsafe condition, and that it had not been sufficiently inspected.

It is very true that, when a railroad company exercises that degree of care that the conditions of the service demand, and care corresponding to the dangers of the employment, to keep its cars and appliances in reasonably safe condition for the use of



its servants, it has discharged its whole duty. But whether it has performed its duty in this respect is an issuable fact, and when it is put in issue, if there is evidence, direct or circumstantial, showing that the accident would not have happened except for a defective appliance, the jury have the same right to weigh and consider the evidence supporting and opposing the proposition that the company exercised due care that they have to weigh and consider any other issuable fact in the case.

In *Huddleston v. Straight Creek Coal & Coke Co.* 138 Ky. 506, 128 S. W. 589, the coal company proved by its mine boss that he inspected, shortly before the accident to Huddleston, the roof of the entry at the place the slate fell; and in the argument of the case the contention was made by counsel for the coal company that, as the uncontradicted evidence showed that the company, through its employees, exercised ordinary care to put the mine at the place Huddleston was killed in a reasonably safe condition, and as there was no known cause that interfered with or changed that condition between the time it was thus inspected and the time Huddleston was killed, the court properly directed a verdict in its favor. But, rejecting this view, the court said: "Must the statements of Elswick be accepted as conclusive of the fact that the company fully discharged its duty to keep the mine in a reasonably safe condition, or was the question whether or not it performed this duty one for the jury to determine from all the facts and circumstances in the case? It can readily be seen that this is a most important question, not only as it affects the case before us, but as it will affect other similar cases in which a recovery is sought against the master for the destruction of the life of the servant based on the failure of the master to furnish the servant reasonably safe places or appliances. If the principle contended for by counsel for the company is correct law, then in every case involving a question like this the master will be absolved from liability if he can prove that the place or appliance was examined and inspected shortly before the injury, and found to be reasonably safe for the use of the servant, and there is no evidence to disprove that the inspection was made, or to contradict the evidence of those who say that in making it they exercised ordinary care. If this is the law, then, when a servant is killed by a defective appliance or unsafe place, all the master need to do to compel a verdict and judgment in his favor is to show by uncontradicted evidence that such an inspection as we have pointed out was made, and that no change had taken place or been

made in or about the thing inspected between the time of inspection and the death, although the jury might be authorized to believe from the physical facts shown in evidence that the appliance or place where the servant was killed was not in a reasonably safe condition at the time of the accident. Thus the law would place almost certainly in the power of the master the means by which he could defeat an action and deprive the complaining party of the right to rely for his recovery upon facts and circumstances that in the opinion of the triers of the facts might be amply sufficient to show that the degree of care required was not exercised. We cannot give our approval to a doctrine like this. The jury have the right to hear and consider not only the evidence from the mouths of witnesses as to what they did and what was done, but they have also the right to hear and consider other evidence from witnesses who are qualified to testify as to the physical condition of the place or appliance before, at the time, and immediately after the accident; and the jury may from the facts and circumstances thus proven be warranted in concluding that they are entitled to more weight than the personal evidence of the witnesses whose testimony was in contradiction of these facts and circumstances."

Nor is the later case of *Lile v. Louisville R. Co.* 161 Ky. 347, 170 S. W. 936, Ann. Cas. 1916B, 750, in conflict with the *Huddleston Case*. On the contrary, the *Lile Case* was clearly distinguished from the *Huddleston Case* on the facts.

The evidence of the witnesses who testified that appellee said his foot slipped, without mentioning the hand hold, is entitled to weight. But the jury had the right to accept the evidence of appellee in preference to that of the witnesses for the railroad company; and, although the weight of the evidence, as well as some of the circumstances developed in the case, conduces to show that the accident happened on account of appellee's foot slipping in the stirrup on the side of the car when he attempted to get on, rather than on account of the defective hand hold, we are not prepared to say that the finding of the jury on this issue is so flagrantly against the evidence as that the verdict should be set aside. In *Howard v. Louisville R. Co.* 32 Ky. L. Rep. 309, 105 S. W. 932, it was said, and is pertinent here: "The number of witnesses who testify to a fact is not necessarily a controlling feature in determining its truth; neither does the fact that their evidence may not be contradicted by word of mouth compel its acceptance as true. The jury have the right to disregard the whole or any part of the testimony of any

witness, and it is their province to give such weight to the evidence as in their judgment and discretion it is entitled to. In considering the weight to which evidence is entitled, and the credibility that shall be attached to the words of the witness, the jury may, and often do, take into consideration the demeanor, the appearance, and the manner of the witness, and from these and other circumstances that come under their observation during the trial may conclude that the witness is not worthy of credit, or is not testifying to the truth, and disregard his entire testimony. . . . A stronger impression may be made on the juror's mind by what he sees than by what he hears. A juror can see as well as hear, and has the right to use his eyes as well as his ears in making up his mind as to what weight if any shall be given the evidence of a witness."

It is further insisted that when appellee, in going to his work, attempted to board a moving freight train, not at the caboose, he assumed the risk of defective appliances such as an unsafe hand hold. Whether he assumed this risk or not depends on the question whether he had, under his employment, the right and authority to get on this moving train at the time and place and in the manner described in his evidence. He was an employee of the company, and, if he was directed by his superior officer to board this train and other freight trains at the time and in the manner in which he was attempting to board this train, the company owed him the same duty to keep its appliances in safe condition that it would owe to any other employee; for example, a brakeman, whose duties might require him to board cars as appellee was attempting to do when he was injured.

Looking now to the evidence of appellee to learn whether he was acting within the line of his instructions, we find that he testifies very positively—although his evidence is contradicted by Day—that Day, who had authority so to do, instructed him at the time he was employed that he would have to live at Layton, as there was no place at which he could find board and lodging at Lavenia, the place at which he was employed to work; that Day gave him a pass on which he could ride on a passenger train from Lavenia to Layton early in the morning when his night's work was over, and that in returning to his work at night he could get on a freight train that passed Layton about 10:30 and ride on it to Lavenia; that he further told him that he could get on the passing freight, which ran slowly at Layton, as best he could, and at any place he could; that in obedience to these instructions he had gotten on this

10:30 freight train at Layton every night, except one during the thirty days he worked preceding the accident; that sometimes he rode on the engine, sometimes in the caboose, and sometimes on the freight cars, getting on the train as it passed as best he could.

Assuming, as found by the jury, that the directions and instructions testified to by appellee were given to him by Day, we think that he had the right, in the exercise of care for his own safety, to attempt to get on this freight train at the time and place and in the manner he did. He would not, of course, under the instructions have had the right to attempt to get on a fast-moving train, or at a place at which it would not have been reasonably safe to have attempted to board the train; but, according to his evidence, the train was running at a speed of only 4 or 5 miles an hour, and, except for the fact that the hand hold gave way, he could and would have boarded the train with safety. In other words, the sole cause of the accident, according to appellee's version of the affair, was the defective hand hold. And if this hand hold was defective, as the jury must have found, the railroad company was remiss in the duty that it owed appellee, because he had the right, under the circumstances stated, to assume that an appliance like a hand hold, which is attached to the side of a car for the purpose of assisting those who wish to board the car, was in reasonably safe condition for the use for which it was intended.

Upon the issues in the case the right of appellee to recover depended upon his establishing by sufficient evidence three propositions: First, that his instructions from a superior officer authorized him to get on this train at the place he made the attempt; second, that in his effort to board the train he was exercising ordinary care for his own safety; and, third, that his injury was caused by a defective hand hold, the condition of which could have been discovered by the company if it had exercised the required care.

As to the first of these questions we think, as stated, that the instructions of Day were broad enough to authorize appellee to attempt to get on this train at the time he did; and as to the second one there is really no dispute that the train was running at such a slow rate of speed as that he could have boarded it with safety if the appliance furnished for his assistance had been in reasonably safe condition. As to the third there was much conflict in the evidence, and we will now look into this feature of the case.

In *Patton v. Texas & P. R. Co.* 179 U.

S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275, the court, in speaking of the duty of the master in respect to furnishing safe appliances for the use of the servant, used this language: "Neither individuals nor corporations are bound, as employers, to insure the absolute safety of machinery or mechanical appliances which they provide for the use of their employees. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been known to him, and was unknown to the employee or servant."

In *New Galt House Co. v. Chapman*, 124 Ky. 527, 97 S. W. 632; *Lancaster v. Central City Light & P. Co.* (*Dean v. Central City Light & P. Co.*) 137 Ky. 355, 27 L.R.A.(N.S.) 181, 125 S. W. 739; *Truesdell v. Chesapeake & O. R. Co.* 159 Ky. 718, 160 S. W. 471, and in many other cases, this court has announced substantially, although in different forms of expression, the same rule.

Tested now by this rule, and assuming that the hand hold gave way in the manner described by appellee, the question is: Did the evidence for the appellee show with sufficient certainty to take the case to the jury and support the verdict the failure of the railroad company to use reasonable care in equipping and maintaining the car which appellee attempted to board, with hand holds reasonably safe for the purposes for which they were intended? It is true that the mere fact that the hand hold gave way, independent of any other circumstances showing its defective and unsafe condition, would not be sufficient to convict the railroad company of negligence, as it seems to be generally held that the doctrine of *res ipsa loquitur* does not apply with the same fullness and weight in cases where the servant is injured by a defective appliance as it does in cases where, for example, a passenger or other person not occupying the relation of servant is injured by an unsafe appliance. The rule announced by this court in *Lile v. Louisville R. Co.* 161 Ky. 347, 170 S. W. 936, Ann. Cas. 1916B, 750, and followed in *Thomas v. National Concrete Constr. Co.* 166 Ky. 512, 179 S. W. 439, is in harmony with the weight of authority on this subject, and is thus stated:

"While some courts take the position that the doctrine of *res ipsa loquitur* never applies in a case of master and servant, yet it is generally held that the doctrine does apply in such a case, but in a more restricted sense than in a case of carrier and passenger, because of the difference in the degree of care imposed, and in the character of defenses that may be made. . . . A master is not required to furnish the servant absolutely safe appliances with which to work. He discharges the full measure of his duty when he exercises ordinary care to furnish appliances which are reasonably safe. When, therefore, the servant seeks to recover for an injury growing out of defective appliances, the mere fact that a piece of machinery breaks is not of itself sufficient to make out a *prima facie* case. It must therefore appear that the master knew of the defective condition of the machinery, or could have known of it by the exercise of ordinary care. Therefore it is generally held in a case of master and servant that the inference of negligence is deducible, not from the mere happening of the accident, but from the attending circumstances. . . . In *Shearman & Redfield on Negligence*, § 59, the rule, which has frequently been quoted by courts with approval, is stated as follows: 'It is not that in any case negligence can be assumed from the mere fact of an accident and an injury; but in these cases the surrounding circumstances which are necessarily brought into view by showing how the accident occurred contain, without further proof, sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof of negligence that the injured person is able to offer, or that it is necessary to offer.'

"The rule has also been stated in the following language: 'There must be reasonable evidence of negligence; but, when the thing causing the injury is shown to be under the control of the defendant, and the accident is such that, in the ordinary course of business does not happen if reasonable care used, it does, in the absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care on its part.'"

This does not mean, however, that in suits by the servant against the master the doctrine of *res ipsa loquitur* cannot be invoked in aid of the servant's cause of action. It only means that in cases of this sort its effectiveness is more restricted than in other cases. Or, as said by the New York court of appeals in *Marceau v. Rutland R. Co.* 211 N. Y. 203, 51 L.R.A.(N.S.) 1221, 105 N. E. 206, Ann. Cas. 1915C, 511, a

case presenting a question very much like the one here involved:

"While it is therefore the settled law that the maxim is applicable to any case where the facts warrant its application, it is apparent that the employee who invokes it against his employer encounters difficulties that do not hamper the wayfarer in a public place or the passenger in a common carrier's conveyance. . . . In the nature of things the injured employee who sues his employer must present a much higher degree of proof than is necessary in the case of a wayfarer or passenger. It is to be emphasized, however, that the difference is one of degree, and not of kind.

"The employer is bound merely to the exercise of reasonable care in providing his employee with a safe place in which to work, with proper and adequate tools, appliances, and machinery, and with fellow employees competent for the tasks to which they are assigned. If the injured employee sues at common law and seeks to invoke the maxim, he must necessarily make proof of facts and circumstances which, under the common law, exclude every inference except that of the employer's negligence.

"The same rule applies, in a modified degree, where the employee sues under the Employers' Liability Act, as the plaintiff in this case has done. In such a case the plaintiff must establish facts and circumstances which, under the statute, would entitle him to recover in the absence of a sufficient explanation by the defendant absolving him from the imputation of negligence."

Nor do we find anything in the leading Federal case of *Patton v. Texas & P. R. Co.*, supra, in conflict with the views expressed in the *Lile* and *Marceau* Cases.

When the company equipped the car with a hand hold, the duty of maintaining it in reasonably safe condition for use imposed on the company the duty of inspection; but at the same time the mere fact that the hand hold pulled loose, standing alone and unsupported by other facts or circumstances, would not be sufficient to show negligence on the part of the company because the company did not insure its safety. It merely agreed that it would exercise ordinary care to keep it in safe condition. And so it was essential that the plaintiff, in making out his case, should show by facts or circumstances the failure of the company to exercise this degree of care. This link in the chain of evidence that was necessary to show negligence on the part of the company is, we think, supplied by the manner of inspection and the cir-

cumstances attending the transaction. The exposed location and use of the hand hold was such that a reasonably careful inspection could not well have failed to discover its defective or unsafe condition.

If it pulled loose when appellee took hold of it, it is reasonable to assume that it would have given way if the inspectors had taken hold of it with a view of testing its security. The outward appearance of the hand hold might not have disclosed its unsafeness; but an inspection that merely consists in looking at hand holds as the inspector walks by the cars does not satisfy the duty the company was under to exercise ordinary care to see that they were safe; and this it appears is the character of inspection that was made.

An instructive and pertinent case upon the point under consideration is *Felton v. Bullard*, 37 C. C. A. 1, 94 Fed. 781. In that case a brakeman in the service of the railroad was killed while descending from the top of a moving car by reason of the defective character of a grab iron which broke off and threw him beneath the wheels. The defense of the company was that it had fulfilled its duty of inspection, and therefore was not liable for the accident. In support of this theory it asked the court to charge the jury that: "If the defect was latent—that is, one not visible—the defendant is not liable, if the injury occurred by reason of such latent or invisible defects."

The trial court refused to so instruct the jury, and the Federal court of appeals, Judge Lurton writing the opinion in commenting on this ruling of the trial court, said:

"The refusal to instruct in the words of the request is now assigned as error. There was evidence tending to show that neither the broken and rusted condition of one of the screws by which the grab iron was held to the wood of the car nor the decayed condition of the wood surrounding this broken screw was visible from the surface. Indeed, the evidence strongly indicated that no mere visual inspection would have disclosed the dangerous condition of this grab iron. But would a mere visual inspection of such an attachment be due and reasonable inspection of such an instrumentality? Was no other inspection reasonable and possible, under the circumstances under which such cars are received and forwarded? Would a mere visual inspection of a car wheel be regarded as ordinary and reasonable? If the tapping of the wheel with a hammer would disclose by sound the presence or absence of a fracture which might not be disclosed to the eye, could it be said that so ready and

accessible a test should not be applied? As much may be said touching the firmness and security with which the grab iron was fastened to the end of this car. This grab iron was one of the rounds in a ladder provided for the use of brakemen, whose duty called them more or less often to the top of such cars. The life of the brakeman may often depend upon the firmness with which such an iron is attached to the end or side of the car. Was there no other ready means of ascertaining whether it was properly and safely attached than a visual inspection? If the application of some force would disclose a dangerous weakness, ought not such a test to be applied? The plaintiff in error did not regard a visual test as alone sufficient; for the inspector says that his habit was to go up such ladders at one end of a car and down the ladder at the other end. Did he do that in this instance? If he did, did he do so in such a way as to throw his weight upon this particular iron, or upon that end of the grab iron supported by the broken screw? If not, would such a test be feasible and calculated to disclose a broken screw or rotten wood? These were proper questions for the jury to consider, and it was not error to modify this request as was done.

"Neither was it error to refuse the request for an instruction to find for the defendant. This request was based upon the insistence that there was no evidence upon which the jury could reasonably find that the railroad company had been guilty of negligence. The inspector testified that he did inspect this car upon the day it was received, being the day before the happening of the accident. He says he did so by going up one ladder and down the other. He also testified that neither the condition of the broken screw nor of the wood into which it had been driven could be discovered by the eye. . . . Did he in truth and in fact test this particular grab iron by any means likely to disclose its weakness? . . . Did the inspection made involve any strain upon the weak end of this grab iron? Did the inspector use this ladder at all? If so, did he use it in such way as to really afford a test of the firmness of its attachment? If the inspection made did not involve such a physical test as was feasible, and calculated to disclose just such an infirmity as existed, would not a jury be warranted in finding either that no physical test at all was made, or that, if made, it was so carelessly made as to be useless? The circumstances were such as that it was not error to take the opinion of the jury."

We do not undertake to say how an in-

spection should be made; but, clearly as we think, appliances like hand holds, that can easily be subjected by inspection to some test corresponding to the test to which they are put in practical use, should be subjected to such a test before the company can claim that it has fulfilled its duty of exercising ordinary care to maintain appliances like this in reasonably safe condition for the use for which they are intended. A hand hold that for any reason is so insecure that it will pull loose when subjected to the use for which it was intended is manifestly a very dangerous appliance, and it would be farcical to rule as a matter of law that such an inspection as was made by these inspectors satisfied the requirements of ordinary care.

The only reasonable inference from the evidence is that the hand hold was unsafe and defective when the inspection was made, and that this condition could have been discovered by a proper inspection is plain. What caused the defect, or when it first existed, are not material inquiries, as we need not go beyond the time of inspection to speculate as to the cause that produced the unsafe condition. It is as much the duty of the master to exercise ordinary care in inspecting appliances used by servants in order that they may be maintained in reasonably safe condition as it is to exercise ordinary care to ascertain the sufficiency and safety of these appliances when they are first installed. What will answer the requirements of ordinary care either in equipment or in inspection depends on such a variety of circumstances and conditions that it must be left to be determined by the facts of each particular case. But, generally speaking, it is a question for the jury to say whether the required care has been exercised when there are any facts or circumstances showing that it has not.

Our conclusion, therefore, is that there was sufficient evidence and reasonable inference therefrom to show negligence in the inspection; and this, in connection with the fact that the hand hold pulled loose, was enough to take the case to the jury on the issue that the appliance was unsafe, and its condition could have been discovered by the company if it had exercised ordinary care.

The remaining question is the sufficiency of the plea of limitation to bar a recovery. The accident resulting in the injury complained of occurred in 1900, and in March, 1911, within two years thereafter, the appellee brought this suit to recover damages. In his petition he alleged that the defendant company operated passenger and freight trains over its line of road in the states of Maryland, Virginia, Pennsylvania, and

elsewhere, and that at the time he received the injury complained of he was employed by it as a telegraph operator. He further set up the identical state of facts upon which the case went to trial when the judgment was recovered from which this appeal was prosecuted. The plea of limitation authorized by the state law was interposed to this petition and sustained by the lower court; but on appeal to this court the judgment of the lower court was reversed, and the case remanded for trial. *Smith v. Baltimore & O. R. Co.* 157 Ky. 113, 162 S. W. 564.

On return of the case to the trial court the plaintiff filed an amended petition increasing the sum asked in damages, but not changing in any material way the nature of his cause of action as stated in his original petition. Thereupon the railroad company filed an answer setting up that at the time of the accident it was engaged in interstate commerce, and the appellee was employed by it in such commerce, and pleaded and relied on the Two-Year Statute of Limitation fixed in the Federal statute for the commencement of actions under the Employers' Liability Act.

There is some confusion as to the pleadings in the case after it went back from this court for trial, but there is no dispute that issues were made and tendered sufficient to bring the case under the Federal Employers' Liability Act, and the contention now is that, as the amended pleading that first expressly set up the interstate nature of the employment and the right of recovery under the Federal act was filed more than two years after the accident occurred, the right of recovery was barred by the Federal statute fixing the time in which action of this character must be brought at two years.

The original petition, which was filed within two years from the date of the accident, although it did not show specifically that the suit was brought under the Fed-

eral act, set up, as we think, facts showing that the railroad company was engaged in interstate commerce, and that the appellee was employed by it in such commerce; and so we think that the original petition stated sufficiently a cause of action under the Federal Act. But, if we should be mistaken about this, and it should be held that the amended petition showing in terms that the cause of action arose under and was prosecuted under the Federal Act, and was not filed until two years after the accident, the plea of limitation was not available. In *Cincinnati, N. O. & T. P. R. Co. v. Goode*, 163 Ky. 60, 173 S. W. 329, we had before us the question that is here presented; and, after referring to the cases of *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; and *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156, we said: "On the authority of these cases we think it is clear that, when the cause of action arises under the Federal statute, but suit is brought under the state law, or by some person not authorized to maintain an action under the Federal statute, defects in the original petition may be cured by an amendment that does not set up a new and distinct cause of action filed after the expiration of two years from the accrual of the cause of action, as the amendment will relate back to the filing of the original petition."

And the cases of *Seaboard Air Line R. Co. v. Koennecke*, 239 U. S. 352, 60 L. ed. 324, 36 Sup. Ct. Rep. 126, 11 N. C. C. A. 165; and *Kansas City Western R. Co. v. McAdow*, 240 U. S. 51, 60 L. ed. 520, 36 Sup. Ct. Rep. 252, 11 N. C. C. A. 857, support this ruling.

Wherefore the judgment is affirmed.

Affirmed by the Supreme Court of the United States, March 25, 1918, 246 U. S. 653, 62 L. ed. 922, 38 Sup. Ct. Rep. 335.

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